ALASKA WORKERS' COMPENSATION BOARD

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

JOHNNY NIE, Employee, Claimant, v. PETER PAN SEAFOOD CO., LLC, Employer, and TOKIO MARINE AMERICA INSURANCE CO., Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202301076 AWCB Decision No. 24-0053 Filed with AWCB Anchorage, Alaska on September 27, 2024

Peter Pan Seafood Co., LLC's (Employer) April 25, 2024 petition to dismiss Johnny Nie's (Employee) claim for twice failing to attend its employer's medical evaluation (EME) was heard on September 26, 2024, in Anchorage, Alaska, a date selected on August 21, 2024. A July 15, 2024 hearing request gave rise to this hearing. Employee represented himself and testified. Attorney Jeffrey Holloway represented Employer. All participants attended by Zoom. The record closed at the hearing's conclusion on September 26, 2024.

ISSUE

Employer contends it has been trying for over a year to have Employee examined by its EME physician. It contends he has refused to provide this form of discovery volitionally, repeatedly and willfully. Employer contends Employee's behavior has prejudiced it because it has incurred significant "no-show" fees and expended extensive attorney fees litigating this issue. It contends

there is no lesser sanction than claim dismissal that will protect Employer's rights, and it requests an order dismissing his claims.

Employee admits that he intentionally did not attend the two scheduled EMEs. He contends he was not aware that his attendance was mandatory, and he distrusted his adjuster and Holloway following his Internet research. Employee testified he now understands and will attend a properly noticed EME. He seeks an order denying Employer's petitions to dismiss his claims.

Shall Employee's claim be dismissed for his failure to attend an EME, or shall some other sanction be applied?

FINDINGS OF FACT

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

1) On October 30, 2022, Employee was reportedly working on the Black Cod gutting line for Employer when he heard a "pop" in his left wrist. (First Report of Injury, January 25, 2023).

2) On September 21, 2023, Employer's adjusting company Sedgwick sent Employee "forms" to review, sign and return within 14 days. (Letter, September 21, 2023).

3) On September 27, 2023, Employee emailed adjuster Jacqueline Salas and said he had "received [her] documentation, and shall be reviewing and signing it." He asked why she had not authorized his physician-recommended physical therapy appointments. (Email, September 27, 2023).

4) A string of September 27, 2023 emails between Employee and Salas voiced his belief that the adjuster and her company were not treating him fairly and in accordance with Alaska law. Ultimately, Salas resolved the issue Employee had with a physical therapy prescription and authorized it. (Email string, September 27, 2023).

5) On October 2, 2023, Employee emailed Salas with the "documents [she] sent for signature. I have reviewed, and signed." (Email, October 2, 2023).

6) On October 2, 2023, Salas emailed Employee the following:

> Thank you for signing those and sending them to me. Unfortunately, the writing next to the date of injury makes the releases invalid and cannot be used.
>
> I have attached new releases needing your signature.

> Please note that under AS 23.30.107 – AS 23.30.108, a denial can be issued on your claim for failure to sign and return releases timely. Please return them, unaltered by 10/5/23 or a denial will be considered on your claim. . . .

7) Although there was discussion about a different injury date between the parties, the Workers' Compensation Division (Division) has only one file for Employee, and the injury date for that file is October 30, 2022. (Agency file).

8) On October 10, 2023, Employee's California surgeon rated him for permanent partial impairment (PPI) pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment*, "5th edition" (*Guides*). (James Fait, MD, report, October 10, 2023).

9) On October 13, 2023, Employee's adjuster sent him a letter by regular and certified mail:

> . . . An Independent Medical Evaluation (IME) has been scheduled for you with Dr. Scott Kitchel. Your appointment is scheduled for 11/01/2023 at 10:00 AM. This appointment is mandatory under Alaska Workers' Compensation Statute Section 23.30.095(e). Failure to attend this evaluation could result in a suspension of all benefits in the above referenced claim. You are encouraged to contact the Alaska Workers' Compensation Board if you have any questions regarding your obligation to attend this examination.

The letter provided the physician's address, appointment date and time, and provided instructions for Employee to bring certain films with him, and Employer would reimburse him for any expenses. The letter also stated Employer was responsible to provide transportation to and from the appointment, and gave related details. It invited Employee to contact his claims examiner if he had any questions. (Letter, October 13, 2023).

10) On October 2, 2023, Employer suspended Employee's right to all benefits after October 2, 2023, alleging he refused to sign unaltered releases and had not filed a petition for a protective order. (Controversion Notice, October 2, 2023).

11) On October 13, 2023, Employee called the Division and told staff he thought his injury date needed to be changed. He also said he had received releases from his adjuster and was "going to sign them and get them in the mail." (Agency file: Judicial, Communications, Phone Call tab, October 13, 2023).

12) On October 13, 2023, Salas also sent Employee the following email regarding the EME:

> Please see attached independent medical examination details for your mandatory appointment on 11/1/23. Transportation has been arranged for you.

> This appointment is mandatory under Alaska Workers' Compensation Statute Section 23.30.095(e).
>
> Failure to attend this evaluation could result in a suspension of all benefits in the above referenced claim. You are encouraged to contact the Alaska Workers' Compensation Board if you have any questions regarding your obligation to attend this examination. (Email, October 13, 2023).

13) On October 13, 2023, Employee responded to Salas' email about the EME:

> Is this company this deceitful and corrupt? This claim is no longer in your authority, and did we agree together to see this independent doctor?
>
> You already controverted me and sent me my denial. You no longer have the authority to choose my provider, I do, and I will remain with Dr. Fait, with whom I'm within my rights to choose. This is getting ridiculous, the violations, penalties and lengths your [sic] willing to go to try to cover your HARD Workers Comp. Fraud in this case. . . . (Email, October 13, 2023).

14) On October 13, 2023, in response to Employee's email Salas explained in part:

> An IME is not a treating physician. They do not provide treatment. The IME will review the records, do a physical exam and then provide their opinions and recommendations.
>
> The Alaska Workers' Compensation Statute Section 23.30.095(e):
>
> > The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination. Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter. If an employee refuses to submit

> to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited. . . . (Email, October 13, 2023).

15) On October 13, 2023, Employee responded, "Within Alaska Insurance Law, my next duty is to present my case to the board, and appeal your unreasonable claim denial after receiving my controversion (denial) notice on 10/02/2023, not to go to the [EME] while the claim is denied. . . ." (Email, October 13, 2023).

16) Between October 13, 2023, and the present, Employee called the Division and spoke with staff nine times. None of these calls were related to an EME. (Agency file).

17) On November 2, 2023, Employer denied and suspended Employee's benefits after October 31, 2023, alleging he provided written refusal to attend an employer's medical evaluation (EME) and failed to attend a properly noticed EME. (Controversion Notice, November 2, 2023).

18) On November 2, 2023, Employee again called the Division stating he was going to file a petition for a protective order and a medical summary. The note for the call does not mention an EME issue. (Agency file: Judicial, Communications, Phone Call tabs, November 2, 2023).

19) On November 3, 2023, Employee called the Division stating he was submitting documentation for a fraud case against the insurer. He stated he had signed medical releases in January 2023 and was "going to ask why he is having to sign them again." (Agency file: Judicial, Communications, Phone Call tabs, November 3, 2023).

20) On November 7, 2023, Employee petitioned for a protective order. He stated:

> In respect to my injury, I have revoked both signed medical record release, and employment records release. I've sent the ins[]. Insurer has knowingly with intent damaged, deceived, and defrauded me through theft by deception. [] that I no longer required her services at my appointments after this day. On 9/12 a random NCM [nurse case manager] appeared. (Petition, November 2, 2023).

21) On November 7, 2023, Employee claimed temporary total and permanent total disability (TTD and PTD) benefits, a compensation rate adjustment, a penalty for late-paid compensation, interest, and "other." The "other" was:

> In respect to my injury, the date of injury needs to be corrected, releases were signed on th[]. Insurer sent a fraudulent release of medical information request on September 21, 2023 and with any correct date of injury of []. Unlawfully and recklessly performing on my case while its controverted, deceptively compelling, and coursing to go see IME. Penalties for fraudulent or misleading acts; damages in civil action AS 23.30.250. Insurer made false or misleading su[].

Employee attached the following to his claim: the October 2, 2023 Controversion Notice; an October 2, 2023 Sedgwick letter; Employee's November 2, 2023 type-written statement explaining how his injury occurred; a June 1, 2023 Sedgwick letter; a January 23, 2023 First Report of Injury; and Employee's 2021 1099G and 2022 W-2 tax forms. (Claim for Workers' Compensation Benefits, November 2, 2023, and attachments).

22) On November 6, 2023, the adjuster issued a check to ExamWorks for $1,450 for Employee's missed November 1, 2023 EME with Dr. Kitchel. (Notice of Intent to Rely, September 6, 2024).

23) On November 7, 2023, Employee filed with the Division but did not serve on Employer or its representatives an email and attached signed and dated "Medical Information Release" form. The form sought medical records for an "11/30/2022" injury to Employee and described the injury as a "LEFT WRIST TENDON STRAIN." He signed the release on January 20, 2023. The copy Employee filed with the Division on November 7, 2023, has hand-written across the top "Written Authority." It is not clear if Employee added this language after he signed the release or if it appeared on the original release that he presumably returned to Employer. Also attached was another medical record release with a "01/20/2023" injury date; this date is circled with purple-colored ink with a line leading to the hand-written words "Notice of Violation." Hand-underlined on this release are the printed words "all physicians and medical providers are authorized to engage in ex parte written or oral communication which disclosed the nature of the examination, care, and treatment of [Employee]." This release bears the date "10/02/23" in purple ink. In a different colored ink, Employee printed his name and added his signature; following his signature appears "A.R.R. Without Prejudice." It cannot be determined from this release if all the words and markings on this document were made at the same time, or even at the time Employee signed it. (Email, November 7, 2023, with attachment; observations).

24) On November 10, 2023, ExamWorks notified the adjuster that Employee failed to show for his November 1, 2023 appointment. (NO SHOW NOTICE, November 10, 2023).

25) On November 24, 2023, after discovering some wording was inadvertently cut off on his original claim, Employee filed an amended claim seeking the same benefits but including an attached page stating in relevant part:

> In respect to my injury, the date of injury needs to be corrected. Releases were signed on the date and sent to Sedgwick.
>
> I have revoked both signed Medical Record Release, and Employment Records Release. I've sent the insurer my letter of revocation.
>
> Insurer sent a fraudulent Release of Medical Information request on September 21st, 2023 with an incorrect date of injury of 01/20/2023. The original Written Authority was signed on January 20th, 2023 by me with my employer at King Cove and sent to Sedgwick, even then, there is an incorrect date of injury of 11/30/22. Insurer filed false and misleading information on my claim, and violated their clients Bill of Rights, my rights after I've sent my written instructions. . . .
>
> Unlawfully and recklessly performing on my case while it is controverted, deceptively compelling, and coursing me to go see IME, which I'm not obligated to fulfill while controverted. Engaged in deceptive leasing practices, made a false and misleading submission. Coerced me to file fraudulent date of injury. . . .
>
> Breached the limitations of medical release by producing information that is outside of the limits designated in the release, insurer was engaging in unauthorized oral communication and ex parte written information with provider disclosing nature of our examination, care, and treatment. . . . (Amended Claim for Workers Compensation Benefits, November 24, 2023, with attachment).

26) On December 11, 2023, Employer denied all benefits from October 2, 2023, and continuing, including TTD and PTD benefits, a compensation rate adjustment, a frivolous or unfair controversion, a penalty, interest, transportation expenses for health care, which was not reasonable, necessary, related to the work injury or otherwise not supported by appropriate documentation, and "other" as described in employee's two previous claims. The relevant reason for the denial included:

> The employee has refused to properly return releases to the employer under AS 23.30.107 – AS 23.30.108, and all benefits from October 2, 2023, continuing are suspended. The employee has also refused to attend an independent medical examination scheduled for November 1, 2023, and all benefits are suspended under AS 23.30.095. . . . (Controversion Notice, December 11, 2023).

27) On December 12, 2023, Employer sent Employee "a set of standard release forms" for his signature and return. The letter informed Employee that he had to either sign and return the releases or file a petition for a protective order with the Division within 14 days from the letter's date. The releases included: a "Release of Medical Information," "State of Alaska Division of Workers' Compensation Request for Release of Information" form, "Educational Records Release," "Employment Records Release," "Insurance Records Release," "Request to Access Protected Health Information by Parent, Guardian or Personal Representative (DH CS 6237)," and "Request for Social Security Earning Information." (Letter, December 12, 2023).

28) On December 15, 2023, Holloway sent a letter to Employee stating he was scheduled to attend an EME on February 12, 2024, at 11:30 AM with Dr. Kitchel. "Your attendance at this appointment is mandatory." The letter provided the physician's address and referred to AS 23.30.095 for legal authority requiring him to attend. "Failure to attend may result in a termination of future benefits." (Letter, December 15, 2023).

29) On December 28, 2023, Employer denied all benefits "due to employee's failure to provide written authority to release medical and rehabilitation information related to the subject injury." It further contended it requested the releases on December 12, 2023, and upon information and belief, Employee had not filed a petition seeking a protective order within 14 days from the service date. (Controversion Notice, December 28, 2023).

30) On January 5, 2024, the parties attended a prehearing conference regarding Employee's November 7, 2023 petition requesting a protective order on releases. However, since Employee failed to attach the objectionable releases to his petition, the designee advised him to refile another petition with the releases attached so the designee could review them. The designee advised that upon receiving another petition, he would schedule a prehearing conference so the designee could rule on it. (Prehearing Conference Summary, January 5, 2024).

31) On January 17, 2024, Employer petitioned to compel discovery from Employee. It wanted responses to its December 12, 2023 Special Interrogatories and Requests for Production of Documents. (Petition, January 17, 2024).

32) On January 18, 2024, Holloway's office sent Employee a notice for his deposition. (Email, January 18, 2024).

33) On January 19, 2024, Employee filed and served a petition for a protective order. Attached was a typed document stating:

Reason for Petition

> In Respect to my injury, releases were signed on the date and sent to Sedgwick, with a notice of violation. Insurer sent a fraudulent Release of Medical Information request on September 21, 2023 with an incorrect date of injury of 01/20/2023. The original Written Authority was signed on January 20th, 2023 by me with my employer at King Cove and sent to Sedgwick, even then, there is an incorrect date of the injury of 11/30/2022. Furthermore[,] against discovery releases which are unnecessary pertaining to my injury as an employee [sic]. I've also attached the (PR-4) form pertaining to my permanent injury for my provider listed on the Panel, Dr. Fait. The form designed to be used by the primary treating physician to report the initial evaluation of permanent disability to the claims administrator [sic]. I request this petition in good faith and equity.

Employee attached the releases he previously filed with the Division on November 7, 2023. He also attached Dr. Fait's October 10, 2023 medical report, which provided a 10 percent whole-person permanent partial impairment rating for Employee's hand injury according to the *Guides* 5th Edition. (Petition, January 19, 2024).

34) On February 9, 2024, Employer answered Employee's January 19, 2024 petition for a protective order stating the petition was untimely as he had only until December 26, 2023, to file his petition and he filed it late. Moreover, it contended that it had served interrogatories and requests for production and Employee failed to seek protection on those within 30 days. Employer noted Employee's reason for objection appeared to be his injury date, which it contended was corrected in the Division's system to October 30, 2022. It sought an order denying Employee's petition. (Answer to Employee's Petition for Protective Order, February 9, 2024).

35) On February 12, 2024, Employee emailed Holloway's office stating, "I will not be available for deposition on the date you have required, for the sake of my clarity. I will be available for deposition beginning of March. Furthermore[,] I will not be available through Zoom, only telephonically." (Email, February 12, 2024).

36) On February 13, 2024, Holloway emailed Employee stating:

> Mr. Nie: your deposition will remain as scheduled for 2/20/24 at 10:00 AM Pacific Time to be conducted by ZOOM. You present an insufficient basis to reschedule your deposition until March. Further, you are required to participate by Zoom as per the Notice of Deposition. (Email, February 13, 2024).

37) In response to Holloway's February 13, 2024 email, Employee responded:

> Most states, as well as the worker's compensation system have no *specific* rules governing the procedure for cancelling/postponing depositions. In general, expectation is you are to be reasonable. I understand also attorneys who failed to be respectful of others[‘] schedules regarding depositions may be subject to appropriate sanctions, including frustrating the fair examination of the deponent. As I've stated in my prior notice, for the sake of my clarity, and to be capable of providing accurate testimony [sic]. For if there is any problem with my clarity as injured worker the deposition can be rescheduled. I am notifying you of the postponement, and rescheduling seven days prior to the date. I have notified you the date and time I will be available for deposition. Any day on March, at 10:00 AM. . . . (Email, February 13, 2024).

38) On February 13, 2024, Holloway responded to Employee's email:

> Mr. Nie - The deposition will not be rescheduled and you are required to participate by ZOOM. If you do not attend we will be required to file a petition to dismiss your case for failure to comply. Thank you. (Email, February 13, 2024).

39) On February 13, 2024, Employee asked for an order requiring Employer to reschedule his deposition. He contended Holloway was "unreasonable" and failed to respect his schedule. Employee said he needed the deposition rescheduled so he could have "clarity" and provide accurate testimony. Although Employee said he would be available in March 2024, he stated Holloway was refusing to reschedule his deposition. (Petition, February 13, 2024).

40) On February 13, 2024, ExamWorks notified the adjuster that Employee failed to appear for his February 12, 2024 EME. (NO SHOW NOTICE, February 13, 2024).

41) On February 15, 2024, the parties appeared before a Board designee for a prehearing conference. While discussing his February 13, 2024 petition to reschedule his February 20, 2024 Zoom deposition, Employee stated he was unavailable that date due to "undue hardship, a move, and family issues" and asked that his deposition be rescheduled to "any day" in March 2024. Employer refused to reschedule the deposition citing Employee's excuse as "inadequate, non-specific." It contended Employee had a "pattern on non-cooperation with the discovery process." Finding Employee's "move" as a reason for postponing the deposition "legitimate," the designee granted his February 13, 2024 petition. The designee ordered the parties to reschedule Employee's deposition for any available date in March 2024 "in any format deemed applicable." (Prehearing Conference Summary, February 15, 2024).

42) The designee next discussed Employee's January 19, 2024 petition for a protective order and Employer's January 17, 2024 petition to compel. Employee said he already signed discovery releases, and they should be sufficient. He further stated he would not fulfill "any obligation to the insurer in this matter while his benefits are controverted." Employer contended the signed releases provided previously were not specific to Holloway's law firm and did not provide access to all discovery necessary to adjudicate Employee's claims. It added that Employee has been noncooperative with the discovery process. The designee explained that it was normal and necessary for Employee to sign and return updated releases for numerous reasons. He also reviewed Employer's eight discovery releases and found them all "standard, relevant, and likely to lead to discoverable information." The designee found the medical release appropriately limited by date and body part. Thus, the designee granted Employer's January 17, 2024 petition to compel and denied Employee's January 19, 2024 petition for a protective order. The designee ordered Employee to sign, date and return the unaltered discovery releases to Holloway "as soon as possible." He also ordered Employee to respond to the Interrogatories and Requests for Production. The designee advised Employee of his right to appeal his decision to the Board within 10 days. There was no further discussion about an EME, and the designee did not order Employee to attend an EME. (Prehearing Conference Summary, February 15, 2024).

43) On March 13, 2024, Employer's adjuster sent a check to ExamWorks for $1,450 for Employee's second missed EME. (Notice of Intent to Rely, September 6, 2024).

44) On March 27, 2024, Employer denied Employee's claim from February 12, 2024, and continuing due to his "failure to attend a properly noticed independent medical evaluation with Dr. Scott Kitchel on February 12, 2024." (Controversion Notice, March 27, 2024).

45) On April 25, 2024, Employer denied Employee's right to all benefits from April 13, 2024, and continuing, "due to employee's failure to provide written authority to release medical and rehabilitation information related to the subject injury." It contended that on March 29, 2024, it sent Employee a request for written authority and to Employer's knowledge, he did not file a petition seeking a protective order within 14 days from service of the request. (Controversion Notice, April 25, 2024).

46) On April 25, 2024, Employer also petitioned to dismiss Employee's claim:

> The employer petitions for an order dismissing the employee's claim. The employee refuses to comply with the 2/15/2024 prehearing conference order to

> return discovery to the employer, despite warnings of the consequences of noncooperation. He further refuses to attend an IME. Dismissal of the claim is warranted. (Petition, April 25, 2024).

47) On May 14, 2024, Employee filed and served a petition responding to Employer's petition stating, "Written authority, and releases were signed on the date, and sent to the parties' attorney, through email, and certified mailing. A certificate of mailing shall be attached." He attached a United States Postal Service (USPS) Certified Mail Receipt postmarked April 30, 2024, to his petition. (Petition, May 14, 2024).

48) On August 21, 2024, the parties attended a telephonic prehearing conference before a Board designee. The designee summarized the discussions:

> **Issues Identified for 9/26/2024 Hearing**:
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> Employer's 4/25/2024 Petition to Dismiss
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> Employer representative confirmed that Employer's 7/15/2024 Affidavit of Readiness for Hearing (ARH) was filed regarding Employer's 4/25/2024 Petition to Dismiss which was filed due to Employee's refusal to attend an Employer Medical Evaluation (EME). Employee questioned the validity of EME(s) and stated that he would continue to refuse to attend the same while Employer refuses to compensate him appropriately for his permanent injury. . . . (Prehearing Conference Summary, August 21, 2024).

The resulting summary does not record any discussion regarding Employee's doctor's use of the incorrect edition of the *Guides* to rate his PPI, or discuss Employee's legal obligation to cooperate with the EME process. (Prehearing Conference Summary, August 21, 2024).

49) Employer contended Employee "volitionally and repeatedly" refused to cooperate with the EME process under the Act, "resulting in considerable prejudice" to Employer and delay in case progression. On October 13, 2023, it served on Employee a notice to attend an EME with Dr. Kitchel on November 1, 2023. Employee did not attend. Employer controverted his case on November 2, 2023. Thereafter, Employee filed two claims seeking benefits. Employer sent him notice for another EME with Dr. Kitchel to occur on February 12, 2024. Again, Employee did not attend. Consequently, Employer controverted again on March 27, 2024, for failure to attend the second EME. Employer also contended Employee repeatedly refused to cooperate in basic discovery by not signing releases and returning them timely or providing other discovery. It controverted numerous times due to this behavior. Employer contended it not incurred defense

litigation and expense costs, and expenses from two EME no-shows. It relied on its right to send Employee to a physician pursuant to AS 23.30.095(e), which states in part that he "shall . . . submit to an examination by a physician or surgeon of the employer's choice . . . without further request or order. . . ." (Hearing Brief of Peter Pan Seafood Co., LLC, September 18, 2024).

50) Employer contended Employee twice missed conveniently arranged EMEs less than 25 miles from his residence. It pointed to Employee's prehearing conference statement refusing to attend an EME unless Employer paid him compensation. Employer contended Employee does not have a legal right to condition his attendance at an EME on receiving benefit payments. It contended Employee denied its right to investigate his case through medical examinations, which are presumed reasonable under the Act. It further noted Employee's attending physician used the wrong edition of the *Guides* to assess permanent impairment, which was one reason why it wanted to send him to an EME. (Hearing Brief of Peter Pan Seafood Co., LLC, September 18, 2024).

51) Given the above, Employer contended the only appropriate action to cure Employee's deliberate refusal to participate in an EME is claim dismissal, "with prejudice." (Hearing Brief of Peter Pan Seafood Co., LLC, September 18, 2024).

52) On September 19, 2024, the Division received Employee's "Declaration," which the panel will treat as his hearing brief. This seven-page typed document does not address any issue relevant to Employer's petition to dismiss Employee's claims. (Declaration, September 19, 2024).

53) At hearing on September 26, 2024, Employer reiterated its hearing brief arguments. It also clarified that the only remaining discovery issue before the panel at hearing was the EME issue, and that it had received signed releases and had deposed Employee. Employer contended Employee was not credible because at hearing he stated he was not aware that his need to attend an EME was mandatory or had associated negative ramifications for him if he failed to attend. It noted that the adjuster's emails and letters as well as Holloway's notice to Employee about his EMEs specifically either cited the pertinent statute or otherwise advised him that the EMEs were mandatory and that failure to attend could have adverse consequences to him. (Record).

54) At hearing, Employee testified that he deliberately did not attend the two previously scheduled EMEs because (1) he did not understand that they were mandatory, and closely related to that testimony, (2) he thought the adjuster and its attorney had treated him unfairly in respect

to other discovery issues, he had done Internet research, and he did not trust either the adjuster or Holloway. His testimony showed that Employee through his Internet research developed a preconceived notion about EME physicians. Based on this preconceived notion, Employee determined it would be a waste of his time to attend the EME because he believed the EME physicians opinions were predetermined. (Record).

55) The designated chair explained in some detail how the workers' compensation system functions, and disabused Employee of some of his preconceived notions. The chair explained many of the parties' relevant rights and responsibilities in a workers' compensation case under the applicable statutes and regulations. Notably, the chair explained that Employer's right to controvert was not "mutually exclusive" with its right to require him to attend an EME. Following these explanations, Employee disavowed his statement from the August 21, 2024 prehearing conference and testified that he would attend a properly noticed EME. (Record).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > (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 . . . employers. . . .
> > (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute; . . .

Richard v. Fireman's Fund, 384 P.2d 445, 449 (Alaska 1963) said:

> 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.

Richard cited with approval from other cases, in which courts 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."

Bohlmann v. Alaska Construction & Engineering, 205 P.2d 316, 319-21 (Alaska 2009) 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. . . .
> . . . .
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> . . . In evaluating the accuracy of notice of procedural rights by an opposing party, we have noted that pro se litigants are not always able to distinguish between 'what is indeed correct and what is merely wishful advocacy dressed in robes of certitude' (footnote omitted). The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants (footnote omitted).
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> 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). . . .

Seybert v. Cominco Alaska Exploration,182 P.3d 1079, 1090 (Alaska 2008) stated:

> The board correctly determined here that because the Alaska Workers' Compensation Act creates an adversarial system . . . [Regulatory requirements] do not impose duties of loyalty and the disavowal of self-interest that are hallmarks of a fiduciary's role (footnote omitted). The workers' compensation system is still an adversarial system, and a fiduciary relationship does not usually exist between opposing parties in an adversarial system.

AS 23.30.095. Medical treatments, services, and examinations. . . .

(e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. . . . An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the

> discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited.

In discovery dismissal cases, *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." *McKenzie* further found the Board had rendered adequate factual findings and did a "reasonable exploration of possible and meaningful alternatives to dismissal." By contrast, a "conclusory rejection" of other sanctions less than dismissal "does not suffice as a reasonable exploration of meaningful alternatives."

> **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 . . . 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 23.30.190. Compensation for permanent partial impairment; rating guides**. . . . .
>
> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. . . .

Alaska Workers' Compensation Division Bulletin No. 24-02 (February 1, 2024) states, in respect to PPI ratings under the *Guides*:

> Effective Jan. 1, 2023, the American Medical Association (AMA) will consider the updated AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition, 2023, to be the most recent edition of AMA Guides Sixth and the most current version of the AMA Guides.

> As required by AS 23.30.190(d), the Alaska Workers' Compensation Board held an open meeting to accept the new AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition 2023. Effective March 04, 2024, all permanent partial impairment determinations and ratings under AS 23.30.190(b) must be carried out using the American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition.
>
> **8 AAC 45.060. Service**. . . .
>
> (b) A party may file a document with the board . . . personally, by mail, or by electronic filing through facsimile transmission or electronic mail in compliance with 8 AAC 45.020(d). Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. 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. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.
>
> (c) A party shall file proof of service with the board. Proof of service may be made by
>
> (1) affidavit of service; if service was electronic or by facsimile, the affidavit must verify successfully sending the document to the party;
> (2) written statement, signed by the person making the statement upon the document served, together with proof of successfully sending the document to the party if served by facsimile or electronically; or
> (3) letter of transmittal if served by mail.
>
> (d) A proof of service must set out the names of the persons served, method and date of service, place of personal service or the address to which it was mailed or sent by facsimile or electronically, and verification of successful sending if required. The board will, in its discretion, refuse to consider a document when proof of its service does not conform to the requirements of this subsection. . . .

Prince v. LeVan, 486 P.2d 959, 961-62 (Alaska 1971) states, "Alaska Statutes, title 45, Trade and Commerce, adopts Article 2 of the Uniform Commercial Code (footnote omitted) as the applicable law of sales in Alaska (footnote omitted). It is this article which concerns us here. AS 45.05.038 provides that the sales article shall 'apply to transactions in goods.'"

The Federal Claims Court in *Gravatt v. US*, 100 Fed. Cl. 279, 286 (2011), stated:

> Birth certificates are legal documents issued by the state in which a birth occurs, and social security numbers are a form of identification issued by the Social Security Administration, an agency of the federal government. Neither birth certificates nor social security numbers recognize or impose contractual rights, obligations, or duties.

ANALYSIS

Shall Employee's claim be dismissed for his failure to attend an EME, or shall some other sanction be applied?

Employer's petition pertains to Employee's admitted, deliberate refusal to attend two previously scheduled EME visits with the same physician. Previous discovery issues recited in Employer's brief, and included above, were already resolved. Employer cited these incidences to demonstrate its view that Employee has been reluctant and resistant to providing required discovery. Though not particularly relevant to the instant petition, which deals exclusively with Employee's refusal to attend two EMEs, these findings are included in this decision to demonstrate that the parties have had a difficult relationship for some time.

Employer correctly noted that on numerous occasions its representatives correctly advised Employee that the EME appointments were "mandatory," and if he failed to attend them consequences would result in benefit suspension at best, and benefit forfeiture at worst. It contends Employee's hearing testimony that he was not aware the EMEs were mandatory therefore lacked credibility. AS 23.30.122; *Smith*. It is understandable why Employer would so conclude, given its correct advice to Employee. But taken in context with his other testimony that, based on prior experience with the adjuster regarding, for example, physical therapy appointments and releases, and his Internet research, which resulted in his perception of insurance companies and EME physicians in general, it is clear Employee did not trust the adjuster or Holloway. Given the obvious animosity between the parties, it is understandable why Employee might not trust the advice given by the adjuster and Holloway regarding the EMEs. The workers' compensation system is, after all, an "adversarial" system -- Employer and its

insurer look after their best interest, and Employee looks after his. *Seybert*. Even though Salas and Holloway gave Employee correct EME information, his hearing testimony conveying his lack of understanding, coupled with his mistrust, does not necessarily reflect negatively on his credibility overall. AS 23.30.122; *Smith*. In other words, Employee was not merely saying he was never advised that the EMEs were mandatory or had consequences if missed; in context, he was simply saying he did not believe the advice he had been given from his adversaries.

Nevertheless, Employee admittedly refused to attend two EMEs, and although he now assents to attending, Employer seeks a remedy for his past failures. Employer contends the only remedy is to dismiss Employee's claim in its entirety "with prejudice." To decide this issue, the panel must consider several factors including (1) the nature of Employee's discovery violation, (2) prejudice to Employer, and (3) whether a lesser sanction would protect Employer and deter other discovery violations. *McKenzie*. (1) The preceding paragraph discussed the nature of Employee's discovery violation -- it was admittedly willful, albeit based on mistrust and misconceived notions Employee derived from Internet research. (2) Employer suffered tangible prejudice by paying $2,900 in "no-show" fees to the EME physician because Employee missed two appointments. In reality, Employee's failure to attend the EMEs caused more prejudice to his case than it did to Employer's. Had Employee attended the EME appointment, he probably would have received a PPI rating made pursuant to the *Guides* 6th Edition, and been paid PPI benefits. (3) Is there a lesser sanction to protect Employer and deter Employee from future missed EME appointments?

The short answer to this question is "yes." The legislature required fact-finders in workers' compensation cases to interpret the Act to ensure quick, efficient, and fair delivery of benefits to Employee at a "reasonable cost" to Employer. AS 23.30.001(1). This mandate applies well to this issue. Employee called the Division nine times from October 13, 2023, to the present, to discuss various issues not including EMEs. Since he did not trust the adjuster or Holloway, he could have called the Division one more time to ask an impartial staff person about his obligation to attend an EME even though Employer had controverted his claim. But he did not.

On the other hand, the Division's designee at the August 21, 2024 prehearing conference, knowing Employee "questioned the validity of EME(s)" and refused to attend one while Employer failed to compensate him, could have explained Employee's rights and obligations in respect to EMEs, notwithstanding the controversions. *Richard*; *Bohlmann*. The designee may have, but the prehearing conference summary does not indicate that he did. At hearing, once the chair explained that Employer's controversion and, current requirement that he attend an EME were "not mutually exclusive" actions during litigation, Employee immediately said he understood and would attend the EME. The legislature intended that these cases be decided on their merits except as otherwise provided by statute, which cuts against claim dismissal. AS 23.30.001(2). While AS 23.30.095(e) provides for automatic suspension, and possible forfeiture in the panel's "discretion" if Employee refuses to submit to an EME, neither forfeiture nor case dismissal under the circumstances is mandatory. Suspension and forfeiture from other statutes are inapplicable because the EME statute has its own remedies and because the designee never ordered Employee to attend an EME.

Given the above, it would be unreasonable for this decision to dismiss Employee's claim. *McKenzie*. Rather, interpreting the Act as the legislature intended, and making Employee's attendance at an EME a "reasonable cost" to Employer, this decision will order a $2,900 "forfeiture" against Employee's future benefits, including any eventual PPI rating. If Employee receives a PPI rating under the proper *Guides* edition from his own physician or from an EME, Employer may withhold $2,900 from that rating. This makes Employer whole and will hopefully deter Employee from missing any future, properly noticed, EME appointments. If there is no valid PPI rating presented in this case, Employer will retain a $2,900 offset against any future benefits to which Employee may be entitled in this case, excluding medical care.

Lastly, in accord with the panel's duty under *Richard* and *Bohlmann* to assist Employee by "advising [him] of the important facts of [his] case and instructing [him] how to pursue [his] right to compensation," and to help him "preserve his claim," the panel addresses the following points to avoid potential disputes:

Employee has filed numerous documents with the Division without serving copies on Holloway. His "Declaration" document, which this decision treated as his hearing brief, is an example. Employee is advised that he must serve on Holloway any document he files with the Division, and provide proof of service pursuant to 8 AAC 45.060(b), (c) and (d). This is critical, because if he fails to provide service on Holloway, with proof of service, Employee's documents may be returned, or they may not be considered as evidence at a prehearing conference or hearing.

Alaska law at AS 23.30.190(b) requires physicians to use the *Guides* 6th Edition to rate permanent impairment. His California physician used the 5th Edition, which though standard in California, is not acceptable as evidence in this Alaska case. Employee should contact his physician and request a re-rating for his work injury, pursuant to the 6th Edition. If his physician declines or is unable to rate using the 6th Edition, Employee should request a written referral from his physician to another specialist familiar with rating his type of injury using the 6th Edition. Employee is directed to Division Bulletin 24-02 for specific information regarding the *Guides* "Sixth Edition 2023" version that must be used to rate any PPI. The Bulletin is cited in this decision and is available on the Division's website, workerscomp@alaska.gov, under "Bulletins" on the "Quick Links." Employee is reminded he can always consult with an attorney or ask Division staff for additional information should he have any questions.

References in Employee's filings suggest he may lean toward pseudo-legal concepts that are not accepted in American jurisprudence at any level. This decision encourages Employee to follow the statutes set forth in the Act applicable to his case, and the associated regulations. For example, the Alaska Supreme Court has already stated that the few sections from the Uniform Commercial Code that the Alaska Legislature adopted apply only "to transactions in goods." Consequently, they do not apply to claims arising under the Act. *Prince*. Likewise, federal and state courts have uniformly rejected pseudo-legal concepts. For example, the Federal Claims Court has ruled, "Neither birth certificates nor social security numbers recognize or impose contractual rights, obligations, or duties." *Gravatt.* The panel hopes this additional information will assist Employee in pursuing his "right to compensation" and "preserving his claim." *Richard*; *Bohlmann*.

CONCLUSION OF LAW

Employee's claim will not be dismissed for his failure to attend an EME, but another sanction will be applied.

ORDER

1) Employer's April 25, 2024 petition to dismiss is denied in part and granted in part.
2) Employer's petition to dismiss Employee's claim with prejudice is denied.
3) Employee forfeits $2,900 from any additional compensation benefits to which he may be entitled in this case, excluding medical care, and Employer may withhold that amount from future indemnity payments until it is recovered in full.
4) Employee is ordered to attend a properly noticed EME in accordance with the Act and applicable regulations.

Dated in Anchorage, Alaska on September 27, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Brian Zematis, 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 Johnny Nie, employee / claimant v. Peter Pan Seafood Co., LLC, employer; Tokio Marine America Insurance Co., insurer / defendants; Case No. 202301076; 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 September 27, 2024.

/s/
Pamela Hardy, Workers Compensation Technician