ALASKA WORKERS' COMPENSATION BOARD

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

MARIE MATEO APONTE, Employee, Claimant, v. COPPER RIVER SEAFOODS INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201717033 AWCB Decision No. 25-0009 Filed with AWCB Anchorage, Alaska on February 13, 2025

Copper River Seafoods Inc.'s and Liberty Northwest Insurance Corp.'s (Employer) February 7, 2024 petition to dismiss was heard in Anchorage, Alaska on January 30, 2025, a date selected on October 8, 2024. An October 4, 2024 hearing gave rise to this hearing. Marie Mateo Aponte (Employee) appeared telephonically, represented herself, and testified. Attorney Adam Sadoski appeared by Zoom and represented Employer. The record closed at the hearing's conclusion on January 30, 2025.

ISSUE

Employer contends Employee willfully refused to comply with several discovery orders, including an order to attend an employer medical evaluation (EME) and another order to sign and return discovery releases. It contends Employee is purposefully impeding discovery and depriving it of its constitutional right and duty to investigate the claim. Employer contends it was prejudiced by

Employee's willful refusal to comply with several discovery orders. It contends it has incurred significant costs for food, lodging, and transportation to arrange two out-of-state EMEs Employee failed to attend without good cause and for litigation costs. Employer requests an order dismissing Employee's claim. Alternatively, it requests lesser sanctions forfeiting Employee's entitlement to benefits from the date of her willful noncompliance with the Board's discovery order to the date she both attends an EME and signs and returns releases. Employer requests an order directing Employee to sign and return the releases no later than five days after the decision and order is issued and for Employee to notify Employer in writing of her willingness to attend an EME no later than 10 days after the decision and order is issued.

Employee contends Employer failed to properly arrange and pay for transportation for out-of-state EMEs. She contends she is homeless and cannot afford to pay for travel costs out-of-pocket. Employee contends she is willing to sign and return releases and to attend a properly scheduled EME. She contends she was not properly served with the releases, Employer's petition, hearing brief, evidence, and the hearing notice as her mailing address changed. Employee contends it is illegal to consider her properly served by mailing documents to her last mailing address on record. She contends Workers' Compensation Division (Division) staff are corrupt and biased in favor of rich, billionaire employers and her claim for a magnetic resonance imaging (MRI) study was illegally denied by the Division. Employee contends Employer has delayed her case by sending her to EMEs. She requests an order denying Employer's petition to dismiss.

Should Employer's petition to dismiss Employee's claim be granted?

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 6, 2018, Employer controverted all benefits from May 21, 2018 forward, for Employee's failure to execute releases or petition for a protective order. (Controversion Notice, June 6, 2018).

7) On June 13, 2018, Employer withdrew its June 6, 2019 controversion notice. (Notice of Withdrawal of June 6, 2018 Controversion, June 13, 2018).

8) On June 26, 2018, Employee filed an "amended" claim for interest and attorney fees and costs. (Claim for Workers' Compensation, June 26, 2018). Her first attorney also entered his appearance on her behalf. (Entry of Appearance, June 26, 2018).

9) 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).

10) On July 24, 2018, Employer controverted all benefits from July 24, 2018 forward, contending Employee failed to attend a properly noticed EME scheduled on July 24, 2018. (Controversion Notice, July 24, 2018).

11) 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).

12) On August 30, 2018, Employee followed up with Hyon J. Joo, DO, regarding lumbar pain:

> Patient was last seen On July 11, 2018 with Dr. Larry Levine. It was noted that the patient has sub ligamentous disc herniation at L4-5 with pars abnormality at L5-S1. Patient describes her symptoms as an aching pain from the base of her neck all the

> way down to her back where turns into pain and needle sensation along the lumbar spine and numbness down the posterior Portion of her bilateral legs down to her feet. . . .
>
> Since her last visit with Dr. Levine patient stated that she had been [controverted] by her worker's compensation company. Patient stated that she was scheduled for an IME in Seattle, but the worker's compensation company did not provide enough finances for the patient to be able to go, stay at a hotel and eat especially since she has a child. Later, patient found out that the worker's compensation company had sent her a check for these expenses, but she thought it was her disability check and she spent it. She found this out from her attorney. . . . (Joo progress note, August 30, 2018).

13) On September 25, 2018, Theresa McFarland, MD, evaluated Employee for an EME. (McFarland EME report, September 25, 2018). This is the last EME Employee attended. (Observations).

14) On October 10, 2018, Employer filed a medical summary with Dr. Joo's August 30, 2018 medical record. (Medical Summary, October 10, 2018).

15) On October 25, 2018, Employee orally amended her claim to add temporary total disability (TTD) benefits. Employer withdrew its July 24, 2018 controversion notice. (Prehearing Conference Summary, October 25, 2018).

16) On November 14, 2018, Employee orally amended her claim to add penalty. (Claim for Workers' Compensation Benefits Amended, November 14, 2018).

17) On December 5, 2018, Employer answered Employee's November 14, 2018 claim, admitting 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 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).

18) On December 19, 2018, Employee orally amended her claim to add TTD benefits. (Prehearing Conference Summary, December 19, 2018).

19) 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. It emailed Employee's attorney a copy. (Controversion Notice, December 21, 2018).

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

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

22) 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 claims were dismissed with prejudice. (Stipulation Regarding Resolution of Provider Claims, April 17, 2019).

23) On August 29, 2019, Employee's second attorney entered his appearance on behalf of Employee. (Entry of Appearance for Employee, August 29, 2019).

24) On January 22, 2020, Employee's second attorney updated her mailing address of record. (Letter, January 22, 2020).

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

26) On March 2, 2020, William Curran, MD, examined Employee for an SIME. (Curran SIME report, March 2, 2020).

27) On March 20, 2020, the Division received Dr. Curran's SIME report along with a March 13, 2020 invoice, which had also been mailed by first-class mail to Employer and Employee. A copy of the envelope was not retained so the mailing date is not known. (SIME Report Entry, March 20, 2020).

28) On April 14, 2020, Employee called the Division to update her mailing address of record. (Phone Call Entry, April 14, 2020).

29) On April 29, 2020, Employee called the Division and spoke with Division staff:

> EE called to find out when her deadline is to file and [sic] ARH. I explained that it is after the denial, after she submitted the claim, so gave her the date of 12/21/2018 and deadline is 12/21/2020. I also explained that she needs to be ready to go to hearing with her evidence and all, I also explained the petition for extension should she not be ready. . . . (Phone Call Entry, April 29, 2020).

30) On July 28, 2020, Employee call the Division and spoke with staff, "EE called to find out what to do next on her case, I explained the ARH next step, EE asked me to please mail her an ARH form." (Phone Call Entry, July 28, 2020).

31) On March 31, 2021, Employee called the Division to update her mailing address of record. (Phone Call Entry, March 21, 2021).

32) On January 28, 2022, Employee called the Division and said she was unhappy with Dr. Curran's SIME opinion and wants a hearing on her case. Division staff emailed her the "Workers' Compensation and You" packet and an affidavit of readiness for hearing (ARH). (Phone Call Entry and Email Entry, January 28, 2022).

33) On June 14, 2022, Employee stated she 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 ARH. (Prehearing Conference Summary, June 14, 2022).

34) 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" box, "I do not agree with his conclusion, due to him using dark MRI and xray [sic] images that don't even show my injury site completely and nerve damage." She included a new mailing address on the petition. Employee requested an oral hearing but did not indicate which claim or petition she wanted to be heard. She provided a new mailing address and telephone number on her petition and ARH, her last mailing address and telephone number of record. (Petition and ARH, March 23, 2023).

35) 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 not identify which pleading she wanted to be heard. (Prehearing Conference Summary, April 25, 2023). The Division served Employee with a copy of the April 25, 2023 prehearing conference summary to her address of record. (Prehearing Conference Summary Served, April 25, 2023; Envelope, April 25, 2023).

36) On May 12, 2023, Employer filed and served a Notice of Scheduling Deposition to depose Dr. Curran on August 17, 2023, which was served upon Employee at her address of record. It also served Employee with its affidavit of opposition to her March 23, 2023 ARH at her last address of record. (Notice of Scheduling Deposition, May 12, 2023).

37) On July 5, 2023, Employer cancelled Dr. Curran's August 17, 2023 deposition and served the cancellation notice to Employee's last known mailing address. (Notice of Cancellation of Deposition, July 5, 2023).

38) On July 5, 2023, Employer sent Employee a letter by certified mail, return receipt requested, to her address of record requesting she sign and return releases them within 14 days. The releases attached included three Authorizations to Release Medical Information, two Pharmacy Records Releases, an Employment Records Release, a Social Security Administration Consent for Release of Information, a Request for Social Security Earnings Information, an Insurance Records Release, and a Division of Workers' Compensation Request for Release of Information. (Letter, July 5, 2023).

39) On July 7, 2023, Employer sent Employee a letter by first-class mail to her address of record:

> 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).

40) 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).

41) 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).

42) On July 13, 2023, 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, 2023; Observations).

43) On July 13, 2023, 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, 2023; Observations).

44) On July 14, 2023, 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, 2023).

45) 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).

46) On July 14, 2023, Employee sought "other" and under the "Reason for filing claim" and 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).

47) 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. It served Employee with the petition by first-class mail to her address of record. (Petition, July 19, 2023). Employer controverted all benefits for her failure to attend the July 19, 2023 EME. It served Employee with the controversion

notice by certified mail, return receipt requested to her address of record. (Controversion Notice, July 19, 2023).

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

49) On July 24, 2023, Employer filed an invoice for no-show costs for the July 19, 2023 EME totaling $597.50; it served Employee with a copy to her address of record by first-class mail. (Affidavit of Service, July 24, 2023).

50) On July 26, 2023, Employer petitioned for an order compelling Employee to return signed releases; it served Employee with the petition by first-class mail to her address of record. (Petition, July 26, 2023). Employer controverted all benefits for Employee's failure to return signed releases or to file a petition for a protective order; it served the controversion notice on Employee by certified mail, return receipt requested, to her address of record. (Controversion Notice, July 26, 2023).

51) 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." It served Employee with the answer by first-class mail to her address of record. (Answer to Employee's Workers' Compensation Claim and Controversion Notice, August 8, 2023). Employer also controverted all benefits for Employee's failure to return signed releases or to file a petition for a protective order. It served Employee with the controversion notice by certified mail, return receipt requested, to her address of record. (Controversion Notice, August 8, 2023).

52) On August 9, 2023, Employer again controverted all benefits for Employee's failure to attend a properly noticed EME. It served Employee with the controversion notice by certified mail, return receipt requested, to her address of record. (Controversion Notice, August 9, 2023).

53) 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 its 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 she refused

to submit to an EME, her right to compensation shall be suspended until the obstruction or refusal ceases, and her compensation during the suspension period may be forfeited at the discretion of the Board. The designee also 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." Employee was also instructed to either request reconsideration or to appeal the orders if she did not agree with them. (Prehearing Conference Summary, August 17, 2023).

54) 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).

55) On August 22, 2023, Employer requested Dr. Curran's report be stricken from the record because he died before he could be deposed, and Employer did cross-examine him. It attached an email dated June 28, 2023, from Dr. Curran's medical office informing Employer Dr. Curran died on June 23, 2023. While Employer included Employee's address of record on the petition, it failed to check the box in the "Proof of Service" section indicating it served Employee with a copy. (Petition, August 22, 2023; Email, June 28, 2023).

56) On November 13, 2023, Employer sent Employee a letter by first-class mail to her address of record 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).

57) 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).

58) 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." It served Employee with a copy of the petition at her address of record by first-class mail. (Petition, February 7, 2024).

59) On February 28, 2024, Employer requested a hearing on its February 7, 2024 petition to dismiss; it served Employee with a copy of the affidavit of readiness for hearing by first-class mail to her address of record. (ARH, February 28, 2024).

60) 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).

61) 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).

62) 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).

63) On May 15, 2024, Employer filed a hearing brief for the May 21, 2024 hearing and served it upon Employee by first-class mail to her address of record. (Employer's Hearing Brief in Support of Petition to Dismiss, May 15, 2024).

64) On May 21, 2024, 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.

(*Mateo Aponte v. Copper River Seafoods, Inc.*, AWCB Dec. No 24-0030 (May 29, 2024) (*Mateo Aponte I*).

65) 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, May 21, 2024; Envelope, May 21, 2024).

66) 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).

67) On May 29, 2024, the Division served Employee by certified mail, return receipt requested with *Mateo Aponte I*. The panel 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).

68) 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).

69) 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).

70) 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. (*Mateo Aponte v. Copper River Seafoods, Inc.*, AWCB Dec. No. 24-0035 (June 18, 2024) (*Mateo Aponte II*)).

71) On June 18, 2024, the Division issued and served Employee by certified mail, return receipt requested, with *Mateo Aponte II* to her address of record. *Mateo Aponte II* concluded the oral order to proceed with the June 5, 2024 hearing in Employee's absence was incorrect due to the Division's failure to properly serve Employee with the hearing notice by certified mail and that her claims should not be dismissed for failure to comply with discovery orders. It continued the

June 5, 2024 hearing and provided dates to reschedule. (*Mateo Aponte II*; D&O Issued and Served, June 18, 2024).

72) O June 24, 2024, Employee's copy of *Mateo Aponte II* was returned by the USPS as "RETURN TO SENDER, ATTEMPTED - NOT KNOWN, UNABLE TO FORWARD." (Returned Mail Envelope, June 24, 2024).

73) On June 26, 2024, the Division served Employer and Employee with a July 11, 2024 hearing notice by certified mail, return receipt requested. (Hearing Notice Served; Envelopes, June 26, 2024).

74) On June 28, 2024, Employer requested a prehearing conference to discuss the July 11, 2024 hearing; it served Employee with a copy of the request by first-class mail to her address of record. (Request for Conference, June 28, 2024).

75) On June 28, 2024, the Division served notice for a July 5, 2024 prehearing conference on Employee and Employer by first-class mail. (Prehearing Notice Served, June 28, 2024). The Division also served a copy to Employee's email address of record. (Email, June 28, 2024).

76) On June 28, 2024, Employee responded to the Division's email:

> I moved. What I don't understand is how you are conducting court hearings without me being present. You guys at workmen's[sic] comp are so corrupt. Now you can't even make sure I'm aware of my case. From how bad you want this billionaire employer to not pay the bill. I've requested countless times a new MRI and New Person to oversee[sic] my case! As Harvey is corrupt!! I'f[sic] you continue to send mail to an old address and claim you are serving me legally. I will sue your office at the federal courthouse of Alaska. I've had enough of the corruption. It's disgusting after 8 years. This is not what any of you should be doing. Its[sic] clear that I will never get a fair chance in your office. (Email, June 28, 2024).

77) On June 28, 2024, the Division responded to Employee's email, and copied Employer's attorney:

> I have received your message regarding service of the hearing notice for the July 5, 2024 prehearing. You mentioned in your email that you have moved from your address that we have on file. Per 8 AAC 45.060(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."

> To ensure in the future that you receive your mail or can be contacted by phone and have open communication, please fill out a Change of Address form. For your convenience, I have attached one for you. If your address changes again in the future, you can find the form on our website under "forms" and there you can also list a new contact number as well. Please email the completed change of address form to workerscomp@alaska.gov and send a copy to Mr. Sadoski and your adjuster.
>
> In the future, any written communication you have with me or any other staff member from the Board, must be sent to workerscomp@alaska.gov and served upon Mr. Sadoski. *Ex parte* is communication attempting to influence the Board process and outcomes that is not shared with the opposing side. Such communication is prohibited by AS 44.62.630. To assure that all communications are on the record, any time you send a letter or email to the Board, you are required to serve a copy on Mr. Sadoski. You are, however, permitted to contact a Board Technician if you have questions about your rights and how to pursue them under the Act.
>
> Finally, you mentioned that you believe Harvey Pullen is corrupt. If you believe Mr. Pullen cannot be fair and impartial, you have a right to request his disqualification. To request disqualification, you must file an affidavit stating with particularity and detail the grounds for claiming that disqualification is warranted. Mr. Pullen will consider your request and make a determination. His determination will set out the facts and reasons for the determination, it will be served upon you and Mr. Sadoski, and become a part of the record.
>
> If you have any questions, please call our office and you will have a chance to speak to a Technician who can advise you of your rights and how to pursue them under the Act.
>
> To access any form you may need, you can utilize this link: Workers' Compensation (alaska.gov). (Email, June 28, 2024).

78) On June 28, 2024, Employer mailed Employee by certified mail, return receipt requested, three authorizations to release medical information, two pharmacy records releases, an employment records release, a Social Security Administration Consent for Release of information, a Request for Social Security Earnings Information, Insurance Records Release, and a Division of Workers' Compensation Request for Release of information along with a letter stating:

> Under Alaska Statute 23.30.107(a) of the Alaska Workers' Compensation Act, you may request a protective order from the Alaska Workers' Compensation Board (Board) if you have an objection to one or more of the releases by filing a petition with the Board. If you choose to seek a protective order from the Board, you must do so within 14 days of the date of this letter. Failure to sign and return the

> release(s) or file a request for a protective order within the 14-day period may result in a suspension of benefits until the release(s) is/are signed. AS 23.30.108(a). If the employer seeks and obtains a Board order, a failure to comply with that order may result in sanctions imposed by the Board, including the dismissal of your claim or petition. AS 23.30.108(a).
>
> If you have questions about the enclosed materials or questions concerning your rights and responsibilities to provide information, please call the Alaska Workers' Compensation Board at (907) 269-4980. They will be happy to help you. (Letter, June 28, 2024).

79) On July 1, 2024, Employer requested reconsideration of *Mateo Aponte II* and to continue the July 11, 2024 hearing. (Petition, July 1, 2024).

80) On July 5, 2024, at a prehearing conference, the Board designee called Employee's telephone number of record and was unable to leave a voicemail. The designee continued the July 11, 2024 hearing. The prehearing conference summary was served upon Employee by first-class mail to her address of record. (Prehearing Conference Summary, July 5, 2024; Prehearing Conference Summary Served, July 5, 2024).

81) On July 5, 2024, Employee's copy of the July 11, 2024 hearing notice was returned by the USPS as "RETURN TO SENDER, ATTEMPTED - NOT KNOWN, UNABLE TO FORWARD." (Returned Mail Envelope, July 5, 2024).

82) On September 13, 2024, Employer petitioned to compel Employee to sign and return releases which were mailed to her on June 28, 2024. It attached the releases and a green card for the certified receipt for its June 28, 2024 letter with releases to Employee and it shows "Alize Aponte" signed for it. Employer served its petition and attachments on Employee by first-class mail. (Petition and attachments, September 13, 2024). Employer also denied all benefits due to Employee's failure to return signed releases or request a protective order as required by AS 23.30.107 and AS 23.30.108; it served Employee with the controversion notice by certified mail, return receipt requested, to her address of record. (Controversion Notice, September 13, 2024).

83) On September 16, 2024, the Division served notice of an October 1, 2024 prehearing conference; Employee was served by first-class mail to her last address of record. (Prehearing Conference Notice Served, September 16, 2024).

84) On September 25, 2024, the Division served notice the October 1, 2024 prehearing conference was cancelled and rescheduled for October 8, 2024; Employee was served by first-class mail to her address of record. (Prehearing Conference Rescheduled Notice Served, September 25, 2024).

85) On October 4, 2024, Employer requested a hearing on its September 23, 2024 petition to compel; it served Employee with a copy of the request to her last address of record by first-class mail. (ARH, October 4, 2024).

86) On October 8, 2024, at the prehearing conference, the Board designee call Employee's telephone number of record and was unable to leave a voicemail. The designee reviewed the ten releases and:

> found all 10 Discovery Releases to be standard, relevant, and likely to lead to discoverable information. Designee also found the Discovery Releases to be appropriately limited by date (6/23/2014) and body part (low back and spine). Employer's 9/13/2024 Petition to Compel is granted. Employee is ordered to sign, date, and return the unaltered Discovery Releases (x10) to Employer representative by 10/25/2024.

The designee advised Employee if she does not agree with the order, she may:

> 1. File a Petition for Reconsideration (8 AAC 45.065) within 10 days of service of this prehearing conference summary, at which time, designee will review the file and respond in writing to the Petition advising parties of whether or not the order has changed.
> 2. File a Petition to Appeal today's discovery order (AS 23.30.108) within 10 days of service of this prehearing conference summary, at which time, the AWCB will review the file at a Written Record Hearing and respond in writing to the Petition advising parties of whether or not the designee abused his discretion by rendering the above order.
> . . . .

The designee included the Alaska statute on discovery matters:

> **AS 23.30.108. Prehearings on discovery matters.** . . .
>
> (b) . . . . If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.
>
> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce

> documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

The designee also scheduled a hearing on Employer's February 7, 2024 petition to dismiss "based on the Affidavit of Readiness for Hearing filed by Employer on 10/4/2024" on January 30, 2025, and ordered parties to serve and file witness lists and hearing briefs by January 23, 2025 and evidence by January 3, 2025. (Prehearing Conference Summary, October 8, 2024).

87) On October 8, 2024, the Division served the hearing notice for the January 23, 2025 hearing on Employer by certified mail, return receipt requested, on Employee by first-class mail, and emailed it to Employee and Employer to their respective email addresses of record. (Hearing Notice Served, October 8, 2024; Email, October 8, 2024).

88) On October 9, 2024, the Division served the October 8, 2024 prehearing conference summary; Employee was served by first-class mail to her address of record. (Prehearing Conference Summary Served, October 9, 2024).

89) On January 15, 2025, the Division served Employee with the January 30, 2025 hearing notice by certified mail, return receipt requested to her address of record. (Hearing Notice Served, January 15, 2025; Envelope January 15, 2025).

90) On January 21, 2024, Employee's copy of the January 30, 2025 hearing notice was returned by the USPS as "RETURN TO SENDER, ATTEMPTED - NOT KNOWN, UNABLE TO FORWARD." (Returned Mail Envelope, January 21, 2024).

91) On January 23, 2025, Employer filed a hearing brief and served it upon Employee by first-class mail to her address of record. It contended Employee willfully failed to attend a properly noticed EME after a designee ordered her to attend and to comply with three discovery orders directing her to sign and return releases, and she failed to attend [number] prehearing conferences and two hearings. Employer contended it has the constitutional right to defend against claims and

a duty to adjust claims properly, fairly, and equitably. It contended Employee's failure to attend a properly noticed EME after a designee ordered her to attend and to comply with three discovery orders directing her to sign and return releases, and her failure to attend prehearing conferences and two hearings demonstrates willful noncompliance and justifies dismissal. Employer contended Employee is purposefully impeding discovery and depriving it of its constitutional right and duty to investigate the claim. It contended it incurred significant costs for food, lodging, and transportation to arrange the EMEs in Washington as Employee lives in Alaska. Alternatively, Employer requested lesser sanctions forfeiting Employee's entitlement to benefits from the date of her willful noncompliance with the Board's discovery order to the date she both attends an EME and signs and returns releases. It requested an order directing Employee to sign and return the releases no later than five days after the decision and order is issued and for Employee to notify Employer in writing of her willingness to attend an EME no later than 10 days after the decision and order is issued. Employer also requested the Board instruct Employee that further noncompliance would result in claim dismissal and contended another hearing should not be required to dismiss Employee's claim should she fail to comply with the orders but that her claim should automatically be dismissed. (Employer's Hearing Brief in Support of Petition to Dismiss, January 23, 2025).

92) At hearing, Employer contended Employee's arguments and testimony at hearing support its contention she is intentionally impeding discovery. It also contended Employee's deposition testimony demonstrates her ongoing tendency to play the victim and not taking responsibility for her actions. (Record).

93) At hearing, Employee contended it is not fair to have a hearing on Employer's petition to dismiss. She contended she was not properly served with the petition, Employer's hearing brief and evidence, and the hearing notice. Employee contended it is illegal to consider her properly served by mailing documents to her last mailing address on record and she will file a suit in federal court against the Division for its failure to properly serve her and for holding hearings without her attendance. She contends her claim for an MRI was illegally denied by the Division. Employee opposed Employer's petition to dismiss and requested an order directing Employer to pay for the MRI she needs for the work injury. She objected to Employer's argument she has the tendency to play the victim, contending it is an inappropriate personal attack, lacks supporting evidence, and is unfair as she is a domestic violence survivor. (Record).

94) At hearing, Employee testified she is homeless and poor and is a survivor of domestic violence. Her last mailing address of record is her sister's address, and her sister and her brother-in-law work and are not always available to pick up mail. Employee had to get a new telephone number because she moved to Florida and her old phone did not work in Florida. Division staff are corrupt and biased in favor of rich, billionaire employers. She intends to be as annoying and difficult as she can be. The Division and Employer are delaying the medical treatment she needs and one of the way Employer has delayed is by sending her to EMEs. Employee never received checks for travel costs and Employer did not set up travel. In the past, her former attorney paid travel costs for her to attend an EME and she would be willing to file evidence proving it. Employee cannot afford to pay to fly to attend an EME, and pay for travel costs out-of-pocket, and be reimbursed. She updated her mailing address and telephone number. Employee is willing to sign and return the releases and to attend an EME. (Record).

95) There is no deposition transcript in the record for any deposition of Employee. (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;
> . . . .
>
> (3) this chapter may not be construed by the courts in favor of a party;
>
> (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 23.30.095. 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. 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. . . . 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. . . .

Forfeiture of benefits and claim dismissal are available sanctions for failure to attend an EME. AS 23.30.095(e); *Tilghman v Newberry Alaska, Inc*., AWCB Dec. No 89-0041 (February 16, 1989). The Board must review the circumstances to determine whether forfeiture would be too harsh a remedy for refusal to attend an EME; if the Employee's refusal to attend an EME were to "persist for an extended period and prejudice the employer's ability to defend the claim" it is possible for a claim to be dismissed based on laches. *Tilghman* at 3 and n.3.

> **AS 23.30.107. Release of information.** (a) Upon written request, an employee shall provide written authority to the employer . . . to obtain . . . information relative to the employee's injury. . . .

Employers have a right to thoroughly investigate workers' compensation claims to verify information provided, properly administer claims, and effectively litigate disputed claims. *Cooper v. Boatel, Inc.,* AWCB Decision No. 87-0108 (May 4, 1987). Release of information forms, as authorized by statute, are an important means by which an employer can investigate workers' compensation claims. *Id*.

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.** . . . .
>
> (b) . . . . At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee

> refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.
>
> (c) . . . . If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense.

The Board has long recognized a thorough investigation of workers' compensation claims allows employers to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect fraud. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). The law has also long favored giving a party his "day in court," *e.g. Sandstrom & Sons, Inc. v. State of Alaska,* 843 P.2d 645 at 647 (Alaska 1992), and unless otherwise provided for by statute, workers' compensation cases will be decided on their merits, AS 23.30.001(2). Dismissal should only be imposed in "extreme circumstances," and even then, only if a party's failure to comply with discovery has been willful and when lesser sanctions are insufficient to protect the adverse party's rights. *Sandstrom* 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 Decision No. 06-0121 (May 15, 2006); *Erpelding v. R & M Consultants, Inc.*, AWCB Decision No. 05-0252 (October 3, 2005), reversed by 3AN-05-12979 CI (Alaska Superior Ct., April 26, 2007) (for failing to explore sanctions lesser than dismissal); *Sullivan v. Casa Valdez Restaurant*, AWCB Decision No. 98-0296 (November 30, 1998); *Maine v. Hoffman/Vranckaert, J.V.*, AWCB Decision No. 97-0241 (November 28, 1997); *McCarroll v. Catholic Community Services*, AWCB Decision No. 97-0001 (January 6, 1997). "Willfulness" is defined as the "conscious intent to impede discovery, and not mere delay, inability, or good faith resistance." *Hughes v. Bobich*, 875 P.2d 749; 752 (Alaska 1994). Once noncompliance has been demonstrated, the noncomplying party bears the burden of proving that the failure to comply was not willful. *Id*. at 753.

Willfulness has been established when a party has been warned of the potential dismissal of his claim and has violated multiple discovery orders. *Erpelding*. It has also been established when a party has been warned of the potential dismissal of her claim and has refused to participate in proceedings and discovery multiple times. *Sullivan*. Offering unsatisfactory excuses to "substantial and continuing violations" of a discovery order demonstrates willfulness. *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 has made no effort to comply with discovery orders is not entitled to any special allowances based on *pro se* status. *DeNardo* at 924.

> **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. . . . Within 30 days after the hearing record closes, the board shall file its decision. If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

Narcisse v. Trident Seafoods Corp., AWCAC Dec. No. 242 (January 11, 2018) stated the two-year period is tolled when "some action" by the employee shows a need for additional time before requesting a hearing, and a request for an SIME is a demonstration that additional time is needed. Since the parties had stipulated to the SIME, and even though it was completed prior to the two-year statutory limitation period running out, the SIME process still tolled the statute's running. *Narcisse* found, "This comports with a long practice by the Board and with the Court's dislike of dismissing a claim for failure to request a hearing timely."

Roberge v. ASRC Construction Holding Co., AWCAC Dec. No. 269 (September 24, 2019) addressed the long-standing debate over how and when the SIME process tolls §110(c). It concluded, "Nonetheless, for purposes of tolling the statute of limitations in .110(c), a bright line

for tolling the limitation period in .110(c) is needed. The Commission finds that a stipulation by all parties at a prehearing is the best demarcation for tolling the .110(c) time limitation."

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, similar to that of courts to assist unrepresented litigants."

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (12) "compensation" means the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter;
> . . . .
>
> **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. 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.
> . . . .
>
> (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.
> . . . .
>
> **8 AAC 45.074. Continuances and cancellations.** (a) A party may request the continuance or cancellation of a hearing by filing a
>
> (1) petition with the board and serving a copy upon the opposing party. . . .
> . . . .
>
> (2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.
>
> (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,
>
> (1) good cause exists only when
>
> (K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
. . . .

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

8 AAC 45.082. Medical treatment. (a) The employer's obligation to furnish medical treatment under AS 23.30.095 extends only to medical and dental services furnished by providers, unless otherwise ordered by the board after a hearing or consented to by the employer. The board will not order the employer to pay expenses incurred by an employee without the approval required by this subsection.
. . . .

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

(2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and
. . . .

8 AAC 45.090. Additional examination. . . . .

(b) Except as provided in (g) of this section, regardless of the date of an employee's injury, the board will require the employer to pay for the cost of an examination under AS 23.30.095(k), AS 23.30.110(g), or this section.
. . . .

(d) Regardless of the date of an employee's injury, the employer must

(1) give the employee and the employee's representative, if any, at least 10 days' notice of the examination scheduled by the employer;

(2) arrange, at least 10 days in advance of the examination date, for the employee's transportation expenses to the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, at no cost to the employee

> if the employee must travel more than 100 road miles for the examination or, if the employee cannot travel on a government-maintained road to attend the examination, arrange for the transportation expenses by the most reasonable means of transportation; and
>
> (3) arrange, at least 10 days in advance of the examination date, for the employee's room and board at no cost to the employee if the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, requires the employee to be away from home overnight.
>
> (e) If the employer fails to give timely notice of the examination date or fails to arrange for room and board or transportation expenses in accordance with (d) of this section, and if the employee objects to attending the examination because the employer failed to comply with (d) of this section, the employer may not suspend benefits under AS 23.30.095(e).
> . . . .
>
> (g) If an employee does not attend an examination scheduled in accordance with AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section,
>
> (1) the employer will pay the physician's fee, if any, for the missed examination; and
>
> (2) upon petition by a party and after a hearing, the board will determine whether good cause existed for the employee not attending the examination; in determining whether good cause existed, the board will consider when notice was given that the employee would not attend, the reason for not attending, the willfulness of the conduct, any extenuating circumstances, and any other relevant facts for missing the examination; if the board finds
>
> (A) good cause for not attending the examination did not exist, the employee's compensation will be reduced in accordance with AS 23.30.155(j) to reimburse the employer the physician's fee and other expenses for the unattended examination; or
>
> (B) good cause for not attending the examination did exist, the physician's fee and other expenses for the unattended examination is the employer's responsibility.

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.

The Alaska Supreme Court in *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316 (Alaska 2009) considered the Board's duty to advise unrepresented claimants in workers' compensation cases: "The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants." *Bohlmann* concluded, "Here, the board at a minimum should have informed Bohlmann how to preserve his claim. . . ." (*Id*. at 320).

ANALYSIS

Should Employer's petition to dismiss Employee's claim be granted?

Employer contended Employee willfully failed to attend the July 19, 2023, EME and the January 4, 2024 EME, which Employee was ordered to attend in the August 17, 2023 prehearing conference summary, and failed to sign and return releases as she was ordered to do in the October 8, 2024 prehearing conference summary. It requests an order dismissing her claim. Employee contends she was not properly served with the releases, Employer's petitions, hearing brief, evidence, and the January 30, 2025 hearing notice as her mailing address changed and she was served at an old address. She contended it is illegal to consider her properly served by mailing documents to her last mailing address on record.

Under 8 AAC 45.060(f), the Board and Employer must serve notices and other documents to Employee's last known address of record and Employee is also required to provide written notice of an address change immediately to the Board and to Employer. Service by mail is considered complete when placed in the mail with sufficient postage and properly addressed to the party's last known address. 8 AAC 45.060(a). Employee will be deemed to have received items sent to her last known address, whether or not she actually receives them; actual receipt is not required, receipt is presumed. *Id*. Employee has updated her mailing address on three occasions herself, twice by telephone on April 14, 2020 and March 31, 2021, and again on March 23, 2023 on a petition form. On June 28, 2024, the Division informed Employee she must file a written address change after she informed them her address had changed, yet she failed to provide her new mailing address until the January 30, 2025 hearing. Employee credibly testified she intends to be as annoying and difficult as she can be, and she provided an new mailing address and telephone number. Based on

her testimony at hearing, her past address changes, and her failure to update her address after being instructed to do so, Employee clearly failed to update her mailing address in an attempt to annoy and be difficult. AS 23.30.122; *Smith*; *Rogers & Babler*. Because Employer served the releases, its February 7, 2024 petition, hearing briefs, and evidence, and the Division served the January 30, 2025 hearing notice to Employee's last known address of record at the time the documents were served, Employee is deemed to have received them. 8 AAC 45.060(a), (f). Employee is advised she will continue to be deemed to have received any document which was placed in the mail with sufficient postage and addressed to her last known address. *Richard*; *Bohlmann*. She is also advised that should she need to change her contact information, including her mailing address, email address, or telephone number, she must provide written notice to the Board and Employer, and there is a change of address form, available on the Division's website, she can use to do so. *Id*.

Employers have a constitutional right to defend against claims, including the right to thoroughly investigate and gather evidence concerning claims for benefits under the Act for which they ultimately may be responsible. *Granus*; AS 23.30.001(1), (3) - (4). Within this bundle of rights is the right to seek an employer's medical evaluation in connection with a claim under AS 23.30.095(e). Concerning selection of EME physicians, the Act is clear: under AS 23.30.095(e), an employee is required to "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." The Act and regulations authorize an employer to send an employee to an EME every 60 days. AS 23.30.095(e). Examinations shall be presumed reasonable, and an employer need not apply for an order requiring an employee to appear for an EME. *Id*. If an employee refuses to attend an otherwise properly scheduled EME, the Act authorizes an employer to suspend payment of benefits until the obstruction or refusal ceases and the employee's compensation during this time may be forfeited at the panel's discretion. *Id*.

The last EME occurred on September 25, 2018. Employer notified Employee of July 19, 2023 EME appointment in a letter sent by first-class mail on July 7, 2023 to address of record, providing twelve days' notice to Employee. Thus, Employee was provided proper notice of the July 19, 2023 EME and it was presumably reasonable as more than 60 days had passed since the last EME

occurred. Employee did as the July 7, 2023 letter instructed and let Employer know she was unable to attend the July 19, 2023 EME on July 13, 2023 by telephone with assistance of Division staff; and the reason she provided for her inability to attend was because she could not afford to pay for her daughter to accompany her and "she is not leaving her daughter." The next day, Employee filed a letter with the Division stating, "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." There was no proof of service indicating the July 14, 2023 letter had been served on Employer and no evidence the Division staff instructed Employee to serve Employer with a copy.

AS 23.30.095(e) requires Employer to pay for the EME evaluation. This controlling statute says nothing about costs for an accompanying child. "Compensation" includes money payable to an injured worker or a qualifying dependent, but only in accordance with the Act. AS 23.30.395(12). Nothing in the Act suggests Employer has to compensate Employee for travel expenses for a non-medically necessary child to accompany her to an EME. Employer is not unreasonably requiring Employee to go to an EME and is not requiring her daughter accompany her. A plane ticket for a child does is not "medical treatment" for an injured worker and does not fall under "medical travel expenses" because the ticket it not for the injured worker. 8 AAC 45.082(a); 8 AAC 45.084(a), (b), (1) - (2). Employee is advised Employer is only required to pay for the cost of an EME and Employee's transportation expenses, not her daughter's travel expenses, and she must make other arrangements for daughter, at her own effort and expense, if she could not afford to pay for her daughter's travel costs. *Richard*; *Bohlmann*.

Employer petitioned for an order compelling Employee to attend an EME and for an order for reimbursement on July 19, 2023. On August 17, 2023, the designee granted Employer's July 19, 2023 and ordered Employee to attend a properly noticed EME "as soon as possible." There is no evidence Division staff informed Employee that Employer is not required to pay for Employee's daughter's travel expenses, and that she would have to make other arrangements for daughter if she could not afford to pay for her daughter's travel costs. The designee properly advised Employee her right to compensation would be suspended for refusing to attend the EME and could potentially be forfeited in the August 17, 2023 prehearing conference summary; however, she was

not advised that she could be ordered to reimburse Employer for the EME's costs if she fails to attend without good cause. The August 17, 2023 prehearing conference summary properly informed Employee of the potential consequences for refusing to comply with a discovery order, including dismissal of her claim.

Employer noticed Employee with the January 4, 2024 EME on November 13, 2023 by first-class mail to her address of record. Thus, Employee was provided proper notice of the January 4, 2024 EME and it was presumably reasonable as more than 60 days had passed since the last EME occurred. AS 23.30.095(e); 8 AAC 45.060(a). The November 13, 2024 letter stated that if Employee did not reach out to Employer's attorney's office, she would be expected to make her own travel arrangements and be reimbursed as multiple attempts to contact her to make the arrangements were not successful. Employee did not attend the January 4, 2024 EME.

Employee contended at hearing Employer did not properly arrange transportation expenses for the EMEs as she did not received any checks or plane tickets. She testified she is homeless and cannot afford to pay for travel expenses out-of-pocket. Regulation 8 AAC 45.090(d)(2) requires an employer to arrange an employee's transportation expenses at least 10 days in advance of the EME date at no cost to the employee if the employee must travel by road more than 100 miles or if the employee cannot travel on a government-maintained road to attend the examination. If the employee objects to attending the EME because the employer failed to arrange transportation expenses at least 10 days in advance of the EME, the employer may not suspend benefits under AS 23.30.095(a). 8 AAC 45.090(e).

Employer did not submit any evidence it arranged any transportation expenses at no cost for Employee for either July 19, 2023 or the January 4, 2024 EMEs. The only expense Employer submitted evidence for was the $597.50 no-show cost for the July 19, 2023 EME and a January 4, 2024 email documenting another unknown amount for a no-show cost was incurred for the January 4, 2024 EME. Employee's compensation should not be suspended for her failure to attend the July 19, 2023 or January 4, 2024 EMEs because there is no evidence Employer properly arranged transportation expenses for either EME pursuant to 8 AAC 45.090(d)(2). Employer's failure to

properly arrange transportation expenses for the January 4, 2024 EME constitutes "good cause" for Employee's failure to attend the January 4, 2024 EME. 8 AAC 45.090(g).

Employer has the right to seek written authority from Employee to obtain information relative to her work injury as part of its constitutional right to defend against claims, including the right to thoroughly investigate and gather evidence concerning claims for benefits under the Act for which they ultimately may be responsible. AS 23.30.107(a); *Granus*. Under AS 23.30.108(b), if an employee refuses to deliver the releases within 10 days after being ordered to do so, the employee's right to benefits are suspended until the signed releases are delivered to the employer. Furthermore, the employee's suspended benefits are forfeited unless the Board determined that good cause existed for the refusal to provide the written authority. A claim may be dismissed if the employee willfully failed to comply with multiple discovery orders after being warned of the potential of dismissal and lesser sanctions are insufficient to protect the employer's rights. AS 23.30.108(c); *Sandstrom*; *Erpelding*; *Sullivan*. Willfulness is defined as "the conscious intent to impede discovery," but "not mere delay, inability, or good faith resistance." *Hughes*. Employer must prove noncompliance; once demonstrated, Employee must prove her failure to comply was not willful. *Id*.

Employee failed to sign and return releases after she was ordered to so do in the October 8, 2024 prehearing conference summary. The October 8, 2024 prehearing conference summary also advised Employee of the potential consequences for refusing to comply with the discovery order, including forfeiture and dismissal of her claim. The only reason Employee provided for not doing so was her failure to update her address immediately after the change. As discussed above, the Act requires her to update her address immediately after a change and requires the Board and Employer to serve Employee with documents at her last known address. Employer properly served Employee to her last address of record with its releases on June 28, 2024 and its September 13, 2024 petition to compel Employee to sign and return the releases. The Division properly served Employee at her last known address with notice of the October 8, 2024 prehearing conference on September 25, 2024 and the October 8, 2024 prehearing conference summary on October 9, 2024 by first-class mail, and with the January 31, 2025 hearing notice on January 25, 2025 by certified mail. Division staff instructed Employee to place her address change in writing and send it to the

Board and Employer on June 28, 2024 when she informed them her address had changed but she did not update her address. Employee's failure to update her address to be annoying and difficult is not good cause for refusing to provide the signed releases. Employer proved Employee did not comply with the October 8, 2024 discovery order; Employee failed to prove her failure to comply was not willful. *Hughes*.

Dismissal of a claim is improper when an employee has not violated a prior discovery order and no previous sanctions have been imposed. *Hughes*. Even though Employee filed signed discovery releases with the Division on July 13, 2023, the designee ordered her to sign and return the same releases to Employer on August 13, 2023, failed to inform Employer the Division had the signed releases, failed to provide them to Employer, and failed to direct Employee to provide Employer with the signed releases in its possession. Employee did not willfully refuse to comply with the August 13, 2023 discovery order to sign and return releases. There was no order to attend the July 19, 2023 EME; the only permissible sanctions under the Act for failing to attend an EME is suspension, forfeiture, and reimbursement of EME fees from reduction of compensation. Employer is seeking dismissal for Employee's failure to attend the EMEs. The only discovery order regarding an EME was the August 13, 2023 order to attend a properly noticed EME "as soon as possible." As discussed above, Employer failed to properly arrange transportation expenses at no cost to Employee for her to attend the January 4, 2024 EME pursuant to 8 AAC 45.090(d)(2). Thus, Employee had good cause to refuse to attend the January 4, 2024 EME and she provided a satisfactory excuse. AS 23.30.108(b); *Hughes*. Employee did not willfully refuse to comply with the August 13, 2023 discovery order to attend a properly noticed EME "as soon as possible." AS 23.30.108(c); *Sandstrom*; *Erpelding*; *Sullivan*.

Employee has willfully failed to comply with one discovery order, the October 8, 2024 order to sign and return releases. While Employee has failed to attend two previous hearings on Employer's February 7, 2024 petition to dismiss, those hearing were continued due to the Division's failure to properly serve her with the hearing notices. Employee has not willfully failed to comply with multiple discovery orders and lesser sanctions have not been considered to protect Employer's rights. Therefore, Employee's June 14, 2023 claim will not be dismissed at this time.

Employer's February 7, 2024 petition to dismiss will be denied. AS 23.30.108(c); *Sandstrom*; *Erpelding*; *Sullivan*.

Because Employee refused to sign and return releases within 10 days after being ordered to do so in the October 8, 2024 prehearing conference summary, which was served on October 9, 2024, without good cause, her right to benefits are forfeited from October 22, 2024 until the signed releases are returned to Employer (October 9, 2024 + 10 days under AS 23.30.108(b) + 3 days under 8 AAC 45.060(b) = October 22, 2024). AS 23.30.108(b). Employee will be ordered to sign and return to Employer the 10 releases mailed to her by Employer on June 28, 2024 within 10 days of service of this decision and to attend a properly noticed and arranged EME. While Employee may be afforded some allowances for being *pro se*, this decision establishes two more discovery orders and she has been found to have violated one discovery order. Employee is advised if she willfully refuses to comply with the orders in this decision, regarding the EME and the releases, her claims could be dismissed with prejudice, which means her claims would be permanently dismissed.

While reviewing the record, the panel found the Division may have failed to fully advise Employee as to all the facts which bear upon her right to compensation and to inform her how to preserve her claims as required under *Richard* and *Bohlmann*. Pursuant to *Richard* and *Bohlmann:*

a) Employee is advised she must serve and file an affidavit of readiness for hearing (ARH) requesting a hearing on her July 14, 2023 claim or request additional time as she has not completed all discovery, within two years of Employer's July 19, 2023 controversion notice to avoid possible dismissal of her July 14, 2023 claim. AS 23.30.110(c). Thus, Employee must request a hearing or additional time by Tuesday, July 22, 2025 on her July 14, 2023 claim (April 16, 2024 + 2 years + 3 days under 8 AAC 45.060(b) = Tuesday, July 22, 2025). *Id*.
b) Employee is also advised the deadline to serve and file an ARH or request additional time for her June 26, 2018 claim, within two years of Employer's December 21, 2018 controversion notice, to avoid possible dismissal of her June 26, 2018 claim was Tuesday, March 1, 2022 (December 21, 2018 (the date the after-claim controversion notice was

emailed to Employee's attorney) to January 10, 2019 (SIME stipulation date) = 20 days; 2 years = 731 days; 731 days - 20 days = 711 days; March 20, 2020 (the SIME report receipt date) + 711 days = Tuesday, March 1, 2022). *Narcisse*; *Roberge*. A copy of the ARH form and a copy of the petition form, which can be used to request an extensions, will be provided with this decision.

c) Based upon Employer's August 8, 2023 controversion notice, Employee is advised to obtain, file with the Board, and serve on Employer a medical opinion regarding issues relating to her claims, including whether her need for a "lumbar spine MRI with contrast" is related to her work injury.

d) Employee is advised medical documents must be filed with the Board and served upon Employer with a medical summary form. She is advised that non-medical documents must be filed and served with a notice of intent to rely form. A copy of the medical summary form and notice of intent to rely form will be provided with this decision. Board forms are also available at http://www.labor.alaska.gov/wc/pdf_list.htm.

CONCLUSION OF LAW

1) Employer's petition to dismiss should not be granted.

ORDER

1) Employer's February 7, 2024 petition to dismiss is denied.

2) Employee is ordered to sign and return to Employer the 10 releases mailed to her by Employer on June 28, 2024 within 10 days of service of this decision.

3) Employee's right to benefits are forfeited from October 22, 2024 until the signed releases are returned to Employer.

4) Employee is ordered to attend a properly noticed and arranged EME.

5) The Division will include a copy of the 10 releases and copies of the ARH, petition, medical summary, and notice of intent to rely forms with a copy of this decision served on Employee.

Dated in Anchorage, Alaska on February 13, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Marc Stemp, Member

/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 Marie Mateo Aponte, employee / claimant v. Copper River Seafoods Inc., employer; Liberty Northwest Insurance Corp., insurer / defendants; Case No. 201717033; 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 February 13, 2025.

/s/
Rochelle Comer, Workers' Compensation Technician