Alaska Workers' Compensation Appeals Commission

Jo Rae McKenzie,
Appellant,

vs.

Assets, Inc., and Commerce & Industry Insurance Co.,
Appellees.

Final Decision
Decision No. 109 May 14, 2009

AWCAC Appeal No. 08-020
AWCB Decision No. 08-0109
AWCB Case No. 200601998

Appeal from Alaska Workers' Compensation Board Decision No. 08-0109, issued at Anchorage, Alaska, on June 11, 2008, by southcentral panel members Darryl Jacquot, Chair, Patricia A. Vollendorf, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: Jo Rae McKenzie, *pro se*, appellant. Colby Smith, Griffin & Smith, for appellees Assets, Inc., and Commerce & Industry Insurance Co.

Commission proceedings: Appeal filed July 7, 2008. Appellant's request to waive fees granted August 19, 2008. Appellant's request for extension of time to file opening brief granted October 1, 2008. Appellees' request for extension of time to file brief granted November 19, 2008. Oral argument on appeal presented February 10, 2009.

Appeals Commissioners: Philip Ulmer, David Richards, Kristin Knudsen.

Appeals Commissioners Philip Ulmer and David Richards affirm the board's dismissal of appellant's claims; Appeals Commissioner Richards also separately concurs. Appeals Commission Chair Kristin Knudsen dissents in part.

This decision has been edited to conform to technical standards for publication.

By: Philip Ulmer, Appeals Commissioner.

This is an appeal of the board's dismissal of Jo Rae McKenzie's workers' compensation claims for her failure to cooperate with discovery. Appellant contends she did not attend a deposition, as ordered by the board, because her doctor advised against it. She argues a biased board treated her unfairly, and denied her equal

protection and substantive due process by failing to give her claims as much weight as a party represented by an attorney. Lastly, she asserts that "turning" of her expert witness Dr. Chang amounted to spoliation of the evidence. If it had not been for the spoliation of her evidence, she argues, she would have had a viable claim that should not have been dismissed.

The appellees, Assets, Inc., and its insurer, contend that sanctioning McKenzie with dismissal of her claims was appropriate because she willfully obstructed discovery and repeatedly failed to comply with the board's orders after being warned by the board that she was risking dismissal. The appellees argue no lesser sanction, such as forfeiture of future workers' compensation benefits, would be appropriate because no future benefits are owed.

The parties' contentions require the commission to decide whether the board abused its discretion when it dismissed McKenzie's workers' compensation claims because she refused to attend a deposition after the board ordered her to do so. The commission also must decide whether McKenzie stated an identifiable constitutional claim on appeal and a claim of board error based on alleged spoliation of evidence, and whether the board treated her in an unfair and biased manner.

The commission concludes the board did not abuse its discretion in dismissing McKenzie's workers' compensation claims. In addition, the commission concludes McKenzie failed to make out her claims of constitutional error or board error based on alleged spoliation of evidence, and the claim of board bias is meritless. Therefore, the commission affirms the board decision.

1. Factual background and board proceedings.

McKenzie injured her knees, hands and right shoulder when she slipped on the ice while assisting a client as a life coach for Assets, Inc., on February 25, 2006.[1] Assets began paying temporary total disability (TTD) compensation.[2]

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[1] R. 0001.

On April 6, 2006, McKenzie requested vocational reemployment benefits.[3] Assets, Inc., sought releases from McKenzie to obtain medical records, employment records, unemployment benefits information and records, if any, showing previous receipt of reemployment benefits under AS 23.30.107. McKenzie objected to the releases by petitioning for protective orders,[4] and when the board designee denied the protective orders,[5] McKenzie appealed to the board. Laura Waldon, who is not an attorney, represented McKenzie.[6] The board concluded its designee had not abused her discretion in denying the protective orders because the information the employer sought was relevant to McKenzie's injuries and workers' compensation claim and, where appropriate, was limited in scope.[7] The board stated:

> The Board is mindful of and agrees with the employee's argument that filing a workers' compensation claim does not justify a wholesale invasion of privacy. However, the Board finds that when the information sought is relevant to the case before us, it is discoverable. Finally, the board warns the employee that non-cooperation with discovery may result in sanctions, up to and including dismissal of her claim.[8]

The board ordered McKenzie to sign the releases and deliver them to the employer within 10 days of receiving the board's decision.[9]

In the meantime, Assets learned of an earlier work-related injury and revised its

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[2] R. 0002. During a period in 2006 when McKenzie was working part time, the employer paid temporary partial disability compensation and resumed TTD when that job ended. R. 0006.

[3] R. 1298.

[4] R. 0055.

[5] R. 1233. The board's designee granted one protective order in part, limiting the scope of the Department of Labor release. R. 1233.

[6] *McKenzie v. Assets, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 07-0026, 1 (February 16, 2007) (K. Schwarting, chair) [hereinafter *McKenzie I*]. Non-attorneys may represent claimants before the board pursuant to AS 23.30.110(d).

[7] *McKenzie I,* Bd. Dec. No. 07-0026 at 6-11.

[8] *Id*. at 11.

[9] *Id*.

medical release to extend to two years before that injury.[10] McKenzie again sought a protective order that the board designee denied.[11] McKenzie appealed to the board, which once again upheld the denial of the protective order because the medical release would provide information relevant to her claim.[12] The board noted that McKenzie had "ignored . . . without explanation" its earlier order to sign the releases.[13] It required McKenzie to sign all the releases and deliver them to the employer on or before April 9, 2007.[14] It also warned:

> [W]e strongly advise the employee to sign the requested medical release as ordered here, and as ordered in *McKenzie I*, or face dismissal of her claim in its entirety. We note, however, Ms. Waldon's advice appears to be heading towards dismissal of the employee's claims.[15]

McKenzie apparently signed the releases sometime before a May 2007 prehearing conference.[16]

But McKenzie resisted Assets' other efforts to obtain discovery. She failed to attend a properly noticed employer medical examination (EME) on May 31, 2007.[17] The same day as the examination, McKenzie's doctor, Dwayne E. Trujillo, advised in a letter that she "was unable to attend her recent independent medical evaluation due to a worsening in her medical condition. Specifically, she continues to have left knee pain and swelling as well as recent progressive right foot pain and swelling that makes it difficult to walk." [18] Assets scheduled another EME for October 5, 2007.[19] McKenzie

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10 R. 1242.

11 R. 1242.

12 *McKenzie v. Assets, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 07-0068, 8 (March 30, 2007) (D. Jacquot, chair) [hereinafter *McKenzie II*].

13 *Id.* at 2.

14 *Id.* at 8.

15 *Id.*

16 R. 1253.

17 R. 0926.

18 R. 0926.

was properly notified. When she did not attend this EME, Assets controverted her benefits.[20] That same month, McKenzie attended a medical evaluation performed to determine if she was eligible for Social Security benefits, and the examiner found her to be "competent to manage her own benefits."[21]

McKenzie also opposed and resisted Assets' efforts to take her deposition. At a July 2007 prehearing conference, Assets requested a date for McKenzie's deposition.[22] Waldon stated that McKenzie was on bed rest and could not leave her home but never provided medical documentation of McKenzie's condition requiring bed rest.[23] Assets' attorney offered to depose McKenzie at her home if that was necessary.[24] Two months later, on September 18, 2007, Assets sought to compel McKenzie to attend a deposition.[25] McKenzie requested a protective order to postpone the deposition based on an October 2, 2007, letter from Dr. Trujillo.[26] He recommended that McKenzie "defer her participation in an upcoming deposition . . . until her depression is under better control," possibly in two to three months.[27]

Around this same time, McKenzie also sought medical benefits for pain and swelling in her right foot.[28] Assets controverted these benefits, asserting that her right foot condition was not work-related.[29] It quoted Dr. Trujillo who opined in a May 31, 2007, report that her "foot pain and swelling appeared to be a exacerbation of a non-work related underlying medical condition that started after a recent physical medicine

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19 R. 0456.

20 R. 0012.

21 R. 0947.

22 R. 1256-57.

23 R. 1257.

24 R. 1257.

25 R. 0440-41.

26 R. 0449-50.

27 R. 0451.

28 R. 0468-69.

29 R. 0014.

and rehabilitation foot exam."[30] McKenzie relied on the November 2007 opinion of Dr. Eugene Chang who stated that the right foot condition was related to the original knee injury.[31] However, after evaluating her medical records, Dr. Chang changed his opinion and concluded that her right foot problems were not related to the 2006 work injury.[32]

Meanwhile, Dr. Trujillo renewed his recommendations that McKenzie was not capable of participating in a deposition or an EME when he reevaluated McKenzie on November 30, 2007.[33] He opined that she still had "significant symptomatic depression which impairs her global cognitive abilities."[34] Nevertheless, an EME was scheduled for December 8, 2007. Assets' attorney asked Dr. Trujillo in a November 30, 2007, letter to explain why McKenzie's mental condition permitted her to be seen by her treating physicians but precluded an evaluation by the employer's doctors.[35] The letter also asked if there were any accommodations that would allow her to participate in either a deposition or an EME.[36] The letter was faxed to Dr. Trujillo on three separate dates,[37] but there apparently was no response.

On December 6, 2007, the board held a hearing addressing whether to order McKenzie to attend the EME scheduled for December 8, 2007, and to attend a deposition; and considering McKenzie's requests for a compensation rate adjustment and a penalty.[38] Waldon argued that the Board could not compel the attendance of a

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30 R. 0461-62.

31 R. 0448.

32 R. 0617-19.

33 R. 0950.

34 R. 0950.

35 R. 0948.

36 R. 0949.

37 R. 0948; 1265-68. However, in a Dec. 5, 2007, letter, Dr. Trujillo did object to the failure to pay for McKenzie's antidepressant medications. R. 0957.

38 *McKenzie v. Assets, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 07-0368, 1-2 (Dec. 7, 2007) (R. Foster, chair) [hereinafter *McKenzie III*].

mentally incompetent employee who had been denied medications for her depression and accommodations under the Americans with Disabilities Act (ADA).[39] However, Assets agreed to resume paying medical benefits related to her depression and TTD if McKenzie would attend the December 8, 2007 EME.[40] The Board ordered McKenzie to attend the scheduled EME and a deposition to be held no later than December 17, 2007.[41] It stated:

> Pursuant to [Alaska Rule of Civil Procedure] 37, the employee's actions in avoiding the deposition and EME have been willful. The information sought by the employer through its EME and depositions is material to the employee's claims and the employer's defenses. The Board further finds that the delay in attending EME's and depositions has been prejudicial to the employer and has cost the employer additional time and money in its discovery efforts.[42]

In a decision issued later, the board denied McKenzie's request for a compensation rate adjustment and penalty because it concluded her rate had been properly calculated.[43] In this decision, the board also rejected McKenzie's argument that she had been denied ADA accommodations because neither she nor her doctors had specified a needed accommodation.[44] Lastly, the board warned McKenzie to comply with discovery or face dismissal of her case:

> The Board is compelled to advise the employee that, in our opinion, her non-attorney representative is not providing her with adequate advice to protect her claims before the Board. We find Ms. Waldon has consistently provided the employee with advice that will lead to dismissal of the employee's claim. . . . We find that, in the instant matter, the advice Ms. Waldon is providing the employee has interfered with the progression of

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39 *Id.* at 7.

40 *Id*.

41 *Id*. at 11.

42 *Id*.

43 *McKenzie v. Assets, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 08-0044, 17-18 (March 5, 2008) (R. Foster, chair) [hereinafter *McKenzie IV*].

44 *Id*. at 16-17.

> the claim, and impedes the quick, efficient, fair, and predictable delivery of benefits to the injured worker at a reasonable cost to the employer. Specifically, the Board is unable to make a determination on the merits of this case until the employee complies with her obligation to attend a deposition and with discovery to which the employer is entitled. The Board is unable to require the employer to provide the employee with medical and indemnity benefits, as those are lawfully suspended based upon the employee's failure to comply with the employer's rights to conduct discovery. As such, the case comes to a grinding halt and the Board is left with no option but to dismiss the employee's claims. We hereby provide the employee with notice that if she does not comply with the Board's orders . . . her case shall be dismissed.[45]

McKenzie attended the December 8, 2007, EME as ordered by the board,[46] but she continued to resist attending a deposition.[47] In district court on December 14, 2007, she petitioned for stalking orders against the board, the insurance adjuster and the employer's attorney, asking the court to protect her from the listed parties trying to force her to attend a deposition and to stop the employer's attorney from sending process servers to her apartment.[48] McKenzie appeared and testified before the district court.[49] These orders were denied.[50] She then filed a complaint for an injunction and protective order in superior court against the board, the insurer and its heirs, the employer, and the employer's attorney and his heirs, to avoid being deposed.[51] This order also was denied.[52]

The employer medical examiners determined that McKenzie was medically

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45 *Id.* at 17.

46 R. 0691.

47 R. 1284.

48 R. 0533-37; 0539-43; 0545-49.

49 R. 0591.

50 R. 0538; 0544; 0550.

51 R. 0573-76.

52 R. 0563.

stable, so Assets controverted and stopped paying TTD.[53] In February 2008, McKenzie chose to receive a job dislocation benefit, instead of pursuing reemployment benefits,[54] and Assets paid this benefit.[55] In March 2008, Dr. Susan Klimow rated McKenzie's permanent partial impairment (PPI) as four percent of the whole person.[56] Assets paid the PPI compensation.[57]

At the end of March 2008, Assets' attorney sent Waldon another letter asking her to contact him to schedule McKenzie's deposition and advising her to tell McKenzie that her claim could be dismissed if she would not participate.[58] McKenzie did not respond. In May 2008, Waldon stated at a prehearing conference that McKenzie could not have her deposition taken because McKenzie was mentally incompetent but again provided no medical documentation.[59]

A few days later, the board heard Assets' petition to dismiss McKenzie's claims for a failure to cooperate with discovery.[60] Throughout the hearing, Waldon repeatedly accused the board of being biased against McKenzie and of already having reached a decision.[61] In addition, Waldon interrupted board chair Darryl Jacquot repeatedly,[62] called him arrogant[63] and attempted to distract the board during Assets' arguments.[64]

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53 R. 0696, 0708.

54 R. 1363.

55 R. 0687; 1295.

56 R. 1151.

57 R. 0687.

58 R. 0747.

59 R. 1294.

60 *McKenzie v. Assets, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 08-0109, 1 (June 11, 2008) (D. Jacquot, chair) [hereinafter *McKenzie V*].

61 Tr. 6:5-6; 7:10-11; 7:21-24; 11:21–12:8; 18:24–19:1; 20:23-24; 31:11-12.

62 Tr. 6:10-12; 14:14-17.

63 Tr. 6:11; 7:10.

64 Tr. 23:7-16. The following exchange occurred:

The chair repeatedly told her the board had not reached a decision and he did not understand where she was coming from.[65] He eventually gave up in apparent exasperation, telling Waldon, "Well, I appreciate your psychic abilities. . . . You're predicting what I'm going to do, ma'am."[66]

In its decision, the board relied on AS 23.30.108(c) and AS 23.30.135 and concluded that it could dismiss claims if an employee willfully obstructs discovery, although such a sanction "is disfavored in all but the most egregious circumstances."[67] Although the civil rules did not strictly apply to the board's proceedings, the board considered the standards for imposing sanctions in courts under Alaska Rule of Civil Procedure 37(b)(3), which are:

> (A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;
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> (B) the prejudice to the opposing party;
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> (C) the relationship between the information the party failed to disclose and the proposed sanction;
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> (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and
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> (E) other factors deemed appropriate by the court or required by law.
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> The court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a

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> HEARING OFFICER: Ms. Waldon, could you please pay attention to Mr. Smith's arguments? Your theatrics are a little bit distracting to the Board. Okay?
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> MS. WALDON: Well, you . . . . .
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> HEARING OFFICER: You can keep - - you can do anything theatrical you'd like in your opening statements but please give him the respect that he has given you in your statements. Okay?
>
> MS. WALDON: You haven't give me no respect and you either.

65 Tr. 6:7-8; 7:12-13, 7:25–8:3; 11:10; 12:2-7.

66 Tr. 12:2-7.

67 *McKenzie V*, Bd. Dec. No. 08-0109 at 11-12.

> central issue in the litigation unless the court finds that the party acted willfully.

The board concluded that McKenzie's repeated refusal to cooperate with discovery and its orders rose to the level of willfulness. The board found:

> [T]he employee's tactics were unreasonable and were intended to hinder the employer's ability to move these claims forward. . . . The Board finds that the employee's actions, by her representative, throughout the discovery process to be dilatory, burdensome, egregious, and abusive (*see*, District and Superior Court Petitions).[68]

The board decided that outright dismissal was the only effective sanction for three reasons:

> First, the employee has ignored or staunchly resisted our prior four orders. Second, she, through her representative, Ms. Waldon, have shown disrespect to the Board and its Designees in hearings and prehearings. Third, and most important, there are no other benefits from which the employer may suspend or forfeit from the employee. As she is medically stable, no further timeloss is due; as she had been paid her 4% PPI rating, no further PPI is due; as she has been paid her $5,000.00 job dislocation benefit, no further .041(k) stipend is due.[69]

McKenzie appeals.

2. Standard of review.

Although the commission cannot rule on the constitutionality of statutes and regulations,[70] it does have the power to correct board errors of law arising from application of the Workers' Compensation Act. The commission exercises its independent judgment concerning questions of law and procedure within the scope of the Act,[71] and reviews the board's findings of fact to ensure substantial evidence

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[68] *Id*. at 13.

[69] *Id*.

[70] *Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

[71] AS 23.30.128(b).

supports them in light of the whole record.[72] The commission reviews the board's imposition of discovery sanctions for an abuse of discretion.[73]

3. Discussion.

a. The board did not abuse its discretion in dismissing McKenzie's claims for her failure to comply with its order to attend a deposition.

"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."[74] In McKenzie's case, the board made adequate findings of fact to support the dismissal of her workers' compensation claim, sometimes referred to as administering the "death knell" to the claim because it brings all proceedings to an end. The board considered relevant factors that the courts use under Civil Procedure Rule 37(b)(3), including the nature of McKenzie's violation, the prejudice to employer and whether a lesser sanction would protect the employer and deter other discovery violations.

First, the evidence in the record is compelling that McKenzie willfully violated the board's discovery order. "Willfulness" in the context of Civil Procedure Rule 37(b) is the "conscious intent to impede discovery, and not mere delay, inability or good faith resistance."[75] Under this definition, McKenzie bears the burden to demonstrate her failure to comply was not willful.[76] McKenzie argues that the board did not understand that she was only seeking to protect her rights in the way provided by statute when she fought discovery before the board by filing petitions, went to court to seeking a stalking

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[72] *Id.*

[73] *See Cameron v. TAB Elec.*, Alaska Workers' Comp. App. Comm'n Dec No. 089 at 17-19, 2008 WL 4427218 (Sept. 23, 2008) (holding board did not abuse its discretion in sanctioning employee who sought admission of late-filed medical records).

[74] AS 23.30.108(c).

[75] *DeNardo v. ABC Inc. RVs Motorhomes*, 51 P.3d 919, 923 (Alaska 2002) (citation omitted).

[76] *Id.*

order and injunction and did not attend a deposition under her doctor's orders.

But McKenzie's actions went beyond good-faith resistance. McKenzie was obstructive and resistant to fulfilling her responsibilities as a claimant. Assets had a right to take McKenzie's deposition,[77] but McKenzie disregarded a clear order of the board to attend a deposition no later than December 17, 2007.[78] She did not seek to come into compliance during the five months between the board's order to attend a deposition and the hearing on the petition to dismiss. Instead, she resisted attending a deposition by seeking stalking orders in district court and an injunction in superior court.[79] Her actions were outrageous and egregious in seeking these orders not only against the board, the insurer, the employer and the employer's attorney but also against the insurer's and attorney's heirs. Even at oral argument before the commission, McKenzie was unwilling to say that she would attend a deposition; she stated that she would have to consult her doctor.[80]

In ordering McKenzie to attend a deposition, the board implicitly found her claims that she was mentally incompetent not credible.[81] Substantial evidence in the record

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[77] AS 23.30.115 (providing "the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure."); 8 Alaska Admin. Code 45.054(a) (providing that "[t]he testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure.").

[78] *McKenzie III*, Bd. Dec. No. 07-0368 at 11.

[79] R. 0533-0550; 0573-76.

[80] *See Lee v. State of Alaska*, 141 P.3d 342, 349 (Alaska 2006) (rejecting businessman's arguments that his discovery noncompliance was not willful because he was not merely seeking invocation of "the protections provided to him by law" but rather repeatedly arguing the state had no right to the discovery it requested); *DeNardo*, 51 P.3d at 923-24 (rejecting argument that discovery violation was not willful where a former worker repeatedly claimed the employer had no right to the materials it sought). *But see Otis Elevator Co. v. Garber*, 820 P.2d 1072, 1074 (Alaska 1991) (reversing liability-establishing sanction because failure to comply with discovery was not willful but rather "trivial" since defendant timely responded but may have too narrowly interpreted the meaning of "similar" elevator).

[81] In a related argument, McKenzie asserts the board failed to accommodate her under the American with Disabilities Act. As the Board stated in *McKenzie IV*, Bd.

supports a finding that McKenzie was mentally competent. In this same period, McKenzie was able to attend appointments with her own doctors,[82] testify in court about the stalking petitions she filed[83] and be evaluated for Social Security benefits by a doctor who found she was "competent to manage her own benefits."[84] In addition, McKenzie did not seek to have a conservator appointed to help her manage her workers' compensation benefits due to mental incompetence.[85] Because the board rejected McKenzie's argument that she was mentally incompetent, McKenzie was obligated to comply with its order and go to a deposition.

The commission also concludes that the board adequately considered whether lesser sanctions would protect the employer and deter other discovery violations. The Supreme Court has held:

> "While we have recognized that the trial court need not make detailed findings or examine every alternative remedy, we have held that litigation ending sanctions will not be upheld unless 'the record clearly indicate[s] a reasonable exploration of possible and meaningful alternatives to dismissal.'" A conclusory rejection of all sanctions short of dismissing an action does not suffice as a reasonable exploration of meaningful alternatives.[86]

Dec. No. 08-0044 at 16-17, this argument lacks merit because neither she nor her doctor specified an accommodation. Because McKenzie bears the burden of establishing an ADA violation, she must establish the existence of specific reasonable accommodations that the board failed to provide. *See Memmer v. Marin County Courts*, 169 F.3d 630, 633-34 (9th Cir. 1999) (holding municipal court did not fail to accommodate litigant's visual impairment when court provided her with a Spanish interpreter as her reader; even though he did not have specific training in aiding blind people, he could observe, read and communicate verbally with her).

82 R. 0448-50; 0950.

83 R. 0591.

84 R. 0947.

85 *See* AS 23.30.140 (providing that "[t]he director may require the appointment of a guardian or other representative by a competent court for any person who is mentally incompetent . . . to receive compensation payable to the person under this chapter and to exercise the powers granted to or perform the duties required of the person under this chapter.").

86 *DeNardo*, 51 P.3d at 926 (citations omitted).

The board did not reject all sanctions short of a dismissal without considering the facts. It noted that there were no outstanding workers' compensation benefits that McKenzie could forfeit as a sanction.[87] Although the board did not explicitly consider other sanctions, such as not allowing McKenzie to testify at hearing unless she attended a deposition, the board "need not . . . examine every alternative remedy."[88]

In any event, a sanction such as excluding McKenzie's testimony may not have been severe enough to deter future discovery violations, especially given McKenzie's history of obstruction. The board could properly rely on McKenzie's history of obstruction in deciding on the appropriate sanction, even though the only remaining unsatisfied order was its order to attend a deposition. The Court has stated:

> [T]he scope and duration of prior misconduct should be considered in determining whether sanctions should be imposed and how severe they should be. But the ultimate sanction of dismissal with prejudice should be reserved for cases in which lesser sanctions are not reasonably available or the misconduct of the party being sanctioned is so egregious that a lesser sanction would be inappropriate.[89]

The board concluded that McKenzie's misconduct was so "egregious" that "no lesser sanctions would be effective."[90] The board had warned McKenzie in three prior

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[87] *McKenzie V*, Bd. Dec. No. 08-0109 at 13. *See Lee,* 141 P.3d at 351 (holding trial court properly determined no sanctions other than imposing liability were viable because it gave the businessman "numerous opportunities to comply," and it considered imposing fees or delaying trial but rejected those sanctions since they would not deter future discovery violations or would prejudice the state); *DeNardo*, 51 P.3d at 927 (holding judge need not consider lesser sanctions when record showed employee's violations were egregious and lesser sanctions, a monetary fine and a stay on proceedings, had been attempted unsuccessfully).

[88] *DeNardo*, 51 P.3d at 926.

[89] *Arbelovsky v. Ebasco Services, Inc.*, 922 P.2d 225, 229 n.7 (Alaska 1996) (finding abuse of discretion where court dismissed case as a sanction after plaintiffs were non-willfully late in complying with its order to pay monetary sanctions, where court considered earlier history of noncompliance when it had already adequately sanctioned the parties for that conduct and where court could have imposed lesser sanctions).

[90] *McKenzie V*, Bd. Dec. No. 08-0109 at 13.

decisions that she was risking the dismissal of her claims by failing to comply with discovery requests and its orders.[91] McKenzie's obstructive behavior prejudiced the employer, who had to spend more money to enforce its rights, including scheduling three EMEs, preparing for and attending multiple prehearing conferences and four hearings, and defending actions in district and superior court, all to obtain little in the way of evidence. Even at the final hearing on Assets' petition to dismiss, McKenzie's representative Waldon sought to undermine the adjudication process by baiting the board members. Waldon interrupted the chair repeatedly, called him arrogant, engaged in theatrics during Assets' opening statement and interfered with the process of the hearing.[92]

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[91] *McKenzie I*, Bd. Dec. No. 07-0026 at 11; *McKenzie II*, Bd. Dec. No. 07-0068 at 8; *McKenzie IV*, Bd. Dec. No. 08-0044 at 17.

[92] Tr. 6:10-12; 7:10; 9:13–10:7; 14:14-17; 23:7-16. Regarding Waldon's participation in McKenzie's appeal before this commission, we note that we do not recognize non-attorney representatives. *Augustyniak v. Carr Gottstein Foods*, Alaska Workers' Comp. App. Cmm'n Dec. No. 064, 12, 2007 WL 4548295, at *6 (Nov. 20, 2007). We permit non-attorneys to assist in appeals subject to certain limitations to ensure an appellant "remains an active controlling participant in her appeal and is responsible for her written and oral representations to the commission." *Id*. at 13, *7. These limitations include:

> [The non-attorney assistant] may inform [the appellant] of the rules, procedures, regulations, statutes and decisions respecting workers' compensation that may be applicable to her appeal and provide copies of them to her. She may help [the appellant] complete forms and prepare pleadings and correspondence, but all pleadings, correspondence, and forms must be signed and dated by [the appellant]. Pleadings must include a verification that [the appellant] read and understood what she signed. [The assistant] may help [the appellant] assemble records, make copies, and type documents for her. [The assistant] may help [the appellant] prepare for oral argument, sit at the counsel table with her and provide support, but she may not address the commission at oral argument. . . . [The assistant] may not correspond with other parties or the commission on her behalf respecting the appeal, or represent, speak for, communicate, or act on behalf of [the appellant] in regard to the appeal. If [the assistant] ceases to assist [the appellant], she must promptly

Ultimately, the commission need not determine the board *should* have dismissed the case if the board *could* have done so because dismissal was within the range of its discretion. Therefore, the commission concludes the board did not abuse its discretion because McKenzie willfully and repeatedly failed to comply with its orders and her misconduct was so egregious that no lesser sanction would be effective. The commission affirms the board's dismissal of McKenzie's claims.

b. McKenzie fails to state a claim of board error based on spoliation of evidence.

McKenzie argues that Assets intentionally altered evidence that she needed to pursue her claim, and that the board erred by dismissing her claim because, with this evidence, she had a viable claim for compensation. She contends "turning" her expert witness, Dr. Chang, amounted to spoliation of evidence. The commission concludes that she has not alleged spoliation of evidence.

Spoliation of evidence is "the destruction or alteration of evidence" or its "intentional concealment . . . until it is destroyed by natural causes."[93] In addition to other requirements,[94] the evidence destroyed or altered must have existed in physical

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> notify [the appellant], the opposing party and the commission in writing. If it appears to the commission that [the assistant's] assistance is (1) not in the interests of justice, (2) given in a manner inconsistent with the rights of all parties and the orderly and prompt resolution of [the appellant's] appeal, or, (3) contrary to the above stated minimum limits, the commission will withdraw its permission for [the non-attorney's] recognized status as an assistant in [the appellant's] appeal.

Id. at 14-15, *7. McKenzie did not sign or verify that she read her brief in this appeal, which Waldon submitted to the commission. The commission questioned McKenzie in oral argument, and McKenzie answered that she did read the brief and she believed she had signed a copy.

[93] *State v. Carpenter*, 171 P.3d 41, 64 (Alaska 2007) (citations omitted).

[94] The intentional tort of spoliation requires a viable underlying cause of action, a showing that the spoliation occurred with the intent to disrupt the plaintiff's prospective civil action, and a showing that the spoliation prejudiced the prosecution of that action. *Carpenter*, 171 P.3d at 64. Negligent spoliation creates a rebuttable presumption that the missing evidence would establish facts unfavorable to the party who destroyed the evidence as long as the plaintiff shows a duty existed between the

form, such as a document, letter, audiotape or other record.[95] The *allegation* or *contention* of spoliation of evidence does not automatically elevate it to the status of a *claim* in the workers compensation system. The evidence that McKenzie points to is the opinion of Dr. Chang that her right foot condition was related to her work injury. McKenzie does not allege that the documentation of his original opinion, the November 2007 note,[96] was destroyed or altered. Instead, Dr. Chang himself changed his opinion, concluding the right foot condition and work injury were not connected after reviewing more of McKenzie's medical records provided by her employer.[97] Assets had the right to question McKenzie's expert witnesses,[98] and if additional information would change their opinions, then they are obligated to respond truthfully.[99] Assets had no duty to guard Dr. Chang's original opinion against change. If so, every cross-examination of witnesses that results in a change of opinion would amount to "spoliation" and cross-examination would be meaningless. Therefore, the commission concludes no spoliation of evidence occurred in McKenzie's case.[100]

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plaintiff and a third party to keep the evidence or shows that the evidence was in the hands of the opposing party; and the missing evidence sufficiently hinders the plaintiff's ability to proceed. *Sweet v. Sisters of Providence in Washington*, 895 P.2d 484, 491 (Alaska 1995).

[95] *Carpenter*, 171 P.3d at 64 (evidence destroyed was a tape of the radio show that was basis of plaintiff's claims, including intentional infliction of emotional distress); *Sweet*, 895 P.2d at 487 (missing evidence in medical malpractice claim was certain medical records, including narrative nursing notes and a sheet detailing medications); *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986) (evidence allegedly altered was an arrest tape).

[96] R. 0448.

[97] R. 0617-19.

[98] *See* 8 Alaska Admin. Code 45.120(c) (providing that each party has the right at hearing to cross-examine opposing witnesses on matters relevant to the issues and to impeach any witness).

[99] *See* 8 Alaska Admin. Code 45.120(a) (requiring witnesses at a hearing to "testify under oath or affirmation").

[100] McKenzie was not permitted to raise her spoliation of evidence claim at the last board hearing because the issues at that hearing were limited to the employer's petition to dismiss for a failure to comply with discovery. Tr. 3:23–4:6. This issue was

c. McKenzie's claim that the board was biased lacks merit.

McKenzie (through her representative) repeatedly accused Chair Jacquot of bias throughout the board hearing.[101] She also argued the board was not fair and impartial because of its close relationship to insurers and because she has less access than attorneys do to the board's staff. The commission concludes the claim of bias has no merit.

The Alaska Supreme Court has adopted this standard for judicial bias:

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible . . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction,

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not claimed or asserted in the pre-hearing summary, and therefore not before the board for hearing. McKenzie addresses the spoliation of evidence issue in her brief as a source of board error in its dismissal of her claim. McKenzie appears to believe that this was indicative of a prejudicial bias on the part of the board or shows that she would have had a viable claim that could not be dismissed. As stated elsewhere in this decision, the commission does not allow pro se litigants to have assistance in hearing from non-attorneys, except within conservative boundaries (see footnote 92, above). It is not unusual for pro se litigants before the commission to bring out issues they may not have presented fully in the hearing below – or raise new arguments not heard below. The commission will at times, in its discretion, allow limited argument on such an issue in order to clarify a pro se litigant's claims of errors of law. In this case, McKenzie's brief poorly described her reasons why she believed evidence was tampered with or otherwise "spoiled." Although it was apparent to the commission that McKenzie believed she was being treated unfairly, questioning at oral argument made her argument clear. If she had been represented by legal counsel, it is unlikely that the issue would have been raised, because counsel would have known that spoliation did not apply to this case. In limited instances, the commission will take the opportunity presented by an argument on appeal that was not raised below to correct a misunderstanding by a pro se litigant, so that the misunderstanding is not perpetuated. In this case, the appellee did not object to the limited discussion of this issue at oral argument.

[101] Tr. 6:5-6; 7:21-24; 11:21–12:8; 20:23-24.

> annoyance and even anger, that are within the bounds of what imperfect men and women . . . sometimes display.[102]

Applying this standard, none of Chair Jacquot's statements demonstrated an opinion originating from a source outside the hearing evidence nor displayed an inability to render fair judgment. At most, the Chair expressed annoyance with McKenzie's representative Waldon when he told her he "appreciate[d] her psychic abilities" as Waldon continued to insist he had already made his decision.[103]

Moreover, McKenzie's general allegations of closeness between insurers and the board and the perceived greater access of attorneys to the board's staff are insufficient to establish bias in her case. Hearings in workers' compensation cases must be fair and impartial to all parties.[104] But review of the record fails to reveal unfairness by the board in the conduct of the hearing.[105]

McKenzie also argues an *ex parte* communication occurred between Joireen Cohen, a board staff member, and Steven Nelson, a legal assistant for the employer's attorney. An *ex parte* communication[106] is generally prohibited because it provides one

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[102] *Hanson v. Hanson*, 36 P.3d 1181, 1184 (Alaska 2001) (quoting *Liteky v. United States*, 510 U.S. 540, 555-56 (1994)) (emphasis in original).

[103] Tr. 12:2-3.

[104] AS 23.30.001(4).

[105] *See Alaska Trams Corp. v. Alaska Elec. Light & Power*, 743 P.2d 350, 353 (Alaska 1987) (stating "[a] review of the record as a whole fails to reveal any unfairness in the conduct of the trial and the alleged instances of bias, considered either collectively or individually, fail to demonstrate any specific bias or generalized pattern of bias."). *See also DeNardo v. Corneloup*, 163 P.3d 956, 966-67 (Alaska 2007) (declining to reverse trial judge's refusal to recuse herself where the record as a whole revealed she was fair to the appellant, in spite of the appellant's inappropriate personal attacks and the appellant's filing of two suits against the judge alleging abuses); *Lacher v. Lacher,* 993 P.2d 413, 421 (Alaska 1999) (not reversing a trial judge's refusal to recuse himself where the claim of bias was "little more than an expression of . . . dissatisfaction with the superior court's ruling").

[106] *See* Black's Law Dictionary 296 (8th ed. 2004). Avoidance of improper *ex parte* communication preserves the integrity and reputation of the tribunal for impartiality. *See* 2 Alaska Admin. Code 64.030(b), which provides:

party with an opportunity to try to influence the decision-maker outside the presence of the opposing party.[107] *Ex parte* communications to tribunal staff related to scheduling and similar administrative, non-substantive matters are not prohibited.[108] Because Cohen was a staff member, not a participant in the decision appealed, any scheduling or administrative discussion that may have occurred between her and Nelson would not have amounted to a prohibited communication. McKenzie failed to produce evidence that Cohen's contact with Nelson, observed by Waldon at a distance, concerned prohibited matter.

d. McKenzie failed to state an identifiable constitutional claim.

Although the commission could not rule on constitutional claims if it identified one,[109] the commission does not discern a claim that implicates either equal protection

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> To comply with the requirement
>
> (1) to uphold the integrity and independence of the office and of the hearing function, a hearing officer or administrative law judge shall establish and personally observe high standards of conduct, *and avoid improper ex parte communications with private and agency parties about the subject of a hearing request*, so that the integrity and independence of the office and the hearing function will be preserved;

(emphasis added).

[107] *See, e.g., Turinsky v. Long*, 910 P.2d 590 (Alaska 1996); *Municipality of Anchorage v. Carter*, 818 P.2d 661 (Alaska 1991); *Frontier Companies of Alaska, Inc. v. Jack White Co.*, 818 P.2d 645 (Alaska 1991); *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379 (Alaska 1991).

[108] The commentary to Canon 3(B)(7) states the Code of Judicial Conduct permits a judge's secretary or law clerk to engage in *ex parte* communications to discuss scheduling or other administrative matters. Such communications are permitted as long as the communications do not deal with the substance or merits of the litigation and no party gains an advantage as a result of the *ex parte* contact. Thus, if an attorney asks about the status of a pending motion, the judge's secretary may provide this information without notifying the other parties of the communication or including them in a conference call. 2 Alaska Admin. Code 64.030(c) provides that "commentary on and decisions applying the Alaska Code of Judicial Conduct may be used as guidance in interpreting and applying 2 AAC 64.010 - 2 AAC 64.050."

[109] *Alaska Pub. Interest Research Group*, 167 P.3d at 36.

or substantive due process in McKenzie's case, despite her use of the terms "equal protection" and "due process" in her oral argument. McKenzie contends her claims and arguments were not given as much weight as a party represented by an attorney. She also argues that poor people cannot afford lawyers and that the whole system is tilted in favor of insurance companies who are represented by attorneys.

McKenzie is not asserting a challenge to the Act's attorney fee payment system under AS 23.30.145 nor, following commission questioning at oral argument, has she identified any other statute or regulation that is the source of the discrimination against her.[110] Both substantive due process and equal protection may be implicated in challenges to statutes or regulations.[111] If the commission had discerned a

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[110] A claimant who challenges a statute or regulation on equal protection or substantive due process may file a declaratory judgment action in superior court, seeking to have it declared invalid, rather than raising the challenge in an appeal to the commission. *See Wilson v. Eastside Carpet*, Alaska Workers' Comp. App. Comm'n Dec. No. 098 at 5 (Feb. 2, 2009) (citing *Standard Alaska Prod. Co. v. State Dep't of Revenue*, 773 P.2d 201, 205-07 (Alaska 1989)).

[111] Substantive due process applies when a challenged "legislative enactment has no reasonable relationship to a legitimate governmental purpose." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1244 (Alaska 1992) (quoting *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974)). Under substantive due process, the Court has repeatedly upheld the legislature's explicit goal of ensuring "the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers" as a legitimate governmental purpose, and often concluded the challenged legislative enactment bears a reasonable relationship to that goal. *See, e.g., Meek v. Unocal Corp.*, 914 P.2d 1276, 1281 (Alaska 1996) (upholding remunerative wage calculation in AS 23.30.041); *Chiropractors for Justice v. State, Workers' Comp. Bd.*, 895 P.2d 962, 966 (Alaska 1995) (upholding treatment frequency standards in AS 23.30.095(c)); *Williams v. State, Dep't of Revenue*, 895 P.2d 99, 103 (Alaska 1995) (upholding removal of presumption of compensability for mental injuries in AS 23.30.120(c)); *Leigh*, 823 P. 2d at 1244-47 (upholding definition, presumption and burden of proof requirements for medical stability).

Equal protection claims may overlap with substantive due process. Equal protection may be denied when a statute or regulation treats similarly situated people differently. *Meek*, 914 P.2d at 1281. Rational basis review usually applies to challenges to workers' compensation statutes. *See, e.g., Chiropractors for Justice*, 895 P.2d at 969; *Williams*, 895 P.2d at 104; *McCarter v. Alaska Nat'l Ins. Co.*, 883 P.2d 986, 991 n.8

constitutional challenge to the workers' compensation statutes in McKenzie's argument, the commission may describe it, but not rule on it. The commission need not elucidate a pro se litigant's constitutional challenge where none can be identified.

McKenzie argues that she could not afford a lawyer, not that one was denied to her when she had a constitutional right to one. However, in workers' compensation cases, not being able to afford an attorney is generally not a barrier to obtaining one. Claimants' attorneys take cases on a contingent fee basis, being paid by the employers when compensation is awarded.[112] The maximum a workers' compensation attorney can charge a claimant without a board order is a one-time fee of $300.[113] In *Wise Mechanical Contractors v. Bignell*,[114] the Court observed that the goal of the fee system in workers' compensation cases "is to make attorney fee awards both fully compensatory and reasonable so that competent counsel will be available to furnish legal services to injured workers." A greater barrier to obtaining an attorney may be convincing an attorney that a case is worth pursuing on a contingent fee basis when there are more claimants needing attorneys than attorneys able to represent them.

(Alaska 1994); *Gilmore*, 882 P.2d at 927. Under rational basis review, a statute or regulation "pass[es] constitutional muster if the classifications [they create] bear a fair and substantial relationship" to a legitimate governmental objective. *See, e.g., Williams*, 895 P.2d at 103-04 (quoting *Gilmore v. Alaska Workers' Comp. Bd.*, 882 P.2d 922, 927 (Alaska 1994)). The Court has frequently upheld classifications in challenged workers' compensation statutes as bearing a fair and substantial relationship to the legitimate goal of ensuring "the quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to the employers." *See, e.g., Chiropractors for Justice*, 895 P.2d at 968-70 (Alaska 1995); *Williams*, 895 P.2d at 103-04; *McCarter*, 883 P.2d at 991. *See also Leigh*, 823 P.2d at 1247 n.15. *But see Gilmore*, 882 P.2d at 928 (striking down statute prescribing wage base on which an injured worker's benefits are calculated because method did not bear a fair and substantial relation to goal of "fair" delivery of benefits).

[112] AS 23.30.145.

[113] AS 23.30.260(b).

[114] 718 P.2d 971, 973 (Alaska 1986). *See also State, Dep't of Revenue v. Cowgill,* 115 P.3d 522, 524-25 (Alaska 2005); *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108-09 (Alaska 1990).

Attorneys whose services are in high demand may choose to refuse to represent claimants whose cases present a greater risk than possible reward.

Lastly, McKenzie does not allege that the board dismissed her claims because of discrimination on the basis of her race or gender, which would require strict or heightened scrutiny under the Alaska Supreme Court's sliding-scale equal protection analysis.[115] The Court has repeatedly held the right to workers' compensation benefits is an economic interest or right that warrants the lowest level of scrutiny, which is rational basis review.[116] The courts have not established a right to a state-supplied lawyer to enforce economic rights.[117]

4. Conclusion.

The commission concludes that the board did not abuse its discretion in dismissing McKenzie's claims for a failure to comply with its discovery order. The commission concludes McKenzie has not stated a claim of board error based on equal protection, substantive due process, or spoliation of evidence and her claim of bias is meritless. For the reasons set out above, the commission AFFIRMS the board's decision.

Date: *05/14/09* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
David Richards, Appeals Commissioner

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[115] *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 289 (Alaska 1994).

[116] *E.g., Chiropractors for Justice*, 895 P.2d at 969; *Williams*, 895 P.2d at 104; *McCarter*, 883 P.2d at 991 n.8; *Gilmore*, 882 P.2d at 927. *See also Leigh*, 823 P.2d at 1247 n.15.

[117] *See Khan v. Adams & Assoc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 057, 4 (Sept. 27, 2007) (holding no right to commission-appointed counsel to assert right to workers' compensation); *but see In Matter of K.L.J.*, 813 P.2d 276, 279 (Alaska 1991) (holding denial of biological father's request for court-appointed counsel violated procedural due process because "[t]he private interest of parent whose parental rights may be terminated via an adoption petition is of highest magnitude").

David Richards, Appeals Commissioner, concurring.

I agree that the board's decision should be affirmed because the board properly exercised its discretion within the bounds of its statutory authority when it dismissed Jo Rae McKenzie's claims for a failure to comply with its order to attend a deposition. I also agree that McKenzie's claims alleging spoliation of evidence, bias and constitutional violations are without merit. I write separately to address McKenzie's arguments that she was treated unfairly because she did not have an attorney. McKenzie argued that the board discredited her claims and arguments more easily because she lacked attorney representation, that she had less access than attorneys do to the board's staff, and that the system favors insurers.

However, McKenzie has the right to choose a representative, even a person not licensed to practice law in Alaska, to present her case to the board. The commission has pointed out

> This rule has its roots in the early days of workers' compensation in this state, when labor union business agents represented claimants and insurance adjusters represented employers. Members of this commission, in the course of their service on the board, have heard cases in which claimants and employers are represented by persons who are not attorneys, including union agents, law student interns, adjusters, spouses, friends, employees, and representatives of community organizations.[118]

I believe that this right to a chosen representative and having lay representatives at the board are important ways of balancing the unequal resources between employees and insurance companies. Not enough attorneys are available to take the cases of every claimant who may have a meritorious claim, even though AS 23.30.145 may require an employer to pay the claimant's attorney fees. In my experience, a lay representative is often very helpful in sorting out the relevant records from the mountain of evidence that may be in a claimant's file and advocating for a claimant at the board's informal hearings. A lay representative, like an attorney, sometimes may be aggressive in an effort to advocate for the claimant and to preserve grounds for a possible appeal.

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[118] *Augustyniak*, App. Comm'n Dec. No. 064 at 7.

In my view, McKenzie exercised her right to a representative of her choosing before the board. McKenzie defended her chosen representative, Laura Waldon, vigorously at the commission's oral argument. Therefore, I believe that McKenzie cannot now claim that the lack of an attorney led to the premature dismissal of her claims.

In any event, McKenzie's case is not one where the presence or absence of a lawyer made any difference. The board warned McKenzie in three separate written decisions that it would dismiss her claims if she did not comply with its discovery orders. Despite these repeated warnings, McKenzie decided not to comply with the board's order to attend a deposition. Thus, the decision that led to dismissal was McKenzie's own choice, not a result of poor strategy or omissions by Waldon. McKenzie should be ready to bear the consequences of her refusal.

For these reasons, and the reasons stated in Commissioner Ulmer's opinion, I join in the decision to affirm the board's dismissal of McKenzie's claims.

Signed

David W. Richards, Appeals Commissioner

Kristin Knudsen, Chair, dissenting in part.

I join my fellow appeals commissioners in concluding that McKenzie's claim of board bias lacks merit, and that she failed to articulate claims of board error based on equal protection, substantive due process, or spoliation of evidence. However, I dissent from the commission's decision to affirm dismissal of McKenzie's claims as a sanction for failure to appear at deposition for two reasons.

First, I believe that the board had lesser sanctions available and that the claim "death knell" should not sound until the board has attempted a lesser sanction for the specific conduct resulting in dismissal. I disagree with my fellow appeals commissioners on the availability of lesser sanctions to the board in this case. The board found that

> there are no other benefits from which the employer may suspend or forfeit from the employee. As she is medically stable, no further timeloss is due; as she had been paid her 4% PPI

> rating, no further PPI is due; as she has been paid her $5,000.00 job dislocation benefit, no further .041(k) stipend is due.[119]

Appellees had controverted further compensation and medical benefits, and paid other benefits, so that the board's determination that no ongoing payments were being made, or future entitlement to benefits acknowledged, that could be suspended or forfeited by the employer is correct. However, the question is not whether the *employer* could suspend or forfeit benefits, but whether the *board* could do so. Even if the board could not order the suspension or forfeiture of benefits or compensation, the board had lesser sanctions available that should have been imposed in an incremental fashion, so that dismissal of the claim is not the only sanction imposed after a series of orders directing compliance and warning of possible claim dismissal.

McKenzie's claim included requests for temporary total disability compensation, temporary partial compensation, interest, medical benefits, penalty and a compensation rate adjustment. In *McKenzie III*, the board noted that the employer offered to "lift the controversion which will allow the employee to obtain benefits including payment for medical expenses, TTD and medications for her depression"[120] if she would cooperate with discovery. The board said that this result would "have the effect of directly addressing many of the issues raised by the employee's representative including providing payment for medical expenses, including antidepressant medications, and TTD."[121] Thus, the board recognized that McKenzie was alleging a relationship between the depression and her employment injury.

Later, the board denied McKenzie's claims for a compensation rate adjustment and penalty, and found she had been overpaid temporary partial disability compensation.[122] Although the board outlined the employee's assertions that she required medical treatment, a prosthesis, and temporary total disability compensation

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119 Bd. Dec. No. 08-0109 at 13.

120 *McKenzie III*, Bd. Dec. No. 07-0368 at 7.

121 *Id.* at 11.

122 *McKenzie IV,* Bd. Dec. No. 08-0044 at 16-17.

for a foot injury, the board did not rule on these claims.[123] Thus, McKenzie clearly had multiple claims, based on different theories of injury, that had not been heard by the board. Dismissal of just one of these claims, or injury theories, would have been an incremental sanction. For example, because McKenzie refused to attend a deposition and alleged her inability to do so was caused by her mental condition, if the board found that was not so, the board may have dismissed a claim based on mental illness.

It was also possible for the board to fashion other tailored, but appropriately serious sanctions. McKenzie refused to make herself available for a deposition; so, the board might have barred admission of her testimony at hearing to the extent it concerned events that would have been the subject of the deposition. The statute permits the board to fashion "appropriate sanctions." In my view, tailored sanctions of increasing severity, directed toward correcting the effect of the sanctioned conduct, are most appropriate.

Second, the board was not assured that McKenzie fully understood the effect of Waldron's conduct and consented to it before her claims were dismissed. The employee's only recourse against an employer for injuries arising out of and in the course of employment is a workers' compensation claim. No regulations require non-attorney representatives to meet basic ethical and performance standards before the board. McKenzie may have no recourse against Waldon for her contribution to this litigation-ending sanction.

In *Bohlmann v. Alaska Constr. & Engineering, Inc.*,[124] the Supreme Court emphasized the board's obligation to inform an unrepresented party of the facts bearing upon the person's case. "The board," it said, "as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants."[125] McKenzie is not an *unrepresented* litigant, but her representative's conduct appears to

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123 *Id.* at 6.

124 ____ P.3d ___, Slip Op. 6362 (Alaska 2009).

125 *Id.* at 10.

be wholly unregulated.[126] There does not appear to be a firm legal basis to impose a duty on the representative to inform the litigant of her options and allow the litigant to control the litigation. Here, the board assumed that McKenzie was fully aware of the meaning and possible outcome of Waldon's actions in McKenzie's absence because the prior decisions were mailed directly to McKenzie. However, the transcript reveals no direct inquiry from the board to McKenzie to establish that McKenzie understood what Waldon did in the hearing that led to claim dismissal, and consented to it.[127]

In addition, I question whether the board's choice to avoid interfering between an employee and the employee's chosen representative was proper given that the board had already determined that Waldon gave the employee "questionable advice" that "interfered with the progression of the claim, and impedes the quick, efficient, fair, and predictable delivery of benefits to the injured worker at a reasonable cost."[128] The hearing transcript reveals examples of that advice. Here, after Waldon's error cost

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[126] 8 Alaska Admin. Code 45.178(a) requires a person representing an employee to file a notice of appearance disclosing if the representative is not an attorney admitted in Alaska. If the representative is not an attorney admitted in Alaska, the notice of appearance must be accompanied by "the employee's written authorization."

[127] Waldon's statements may be considered provoking and disrespectful of the board, and the board's annoyance may have been reinforced by McKenzie's apparently uncritical acceptance of Waldon's statements. Prof. Engler's comments on judicial responses to unrepresented litigants come to mind:

> One can almost predict the outcome, and the choice of articulated principles, from the annoyance level of the court. The more annoyed the court is with an unrepresented litigant, the more likely the invocation of precedent requiring impartiality, the application of similar rules, and a prohibition of playing advocate for the litigant. The more sympathetic the litigant, and the more the absence of counsel seems beyond the litigant's control, the more likely the court will be to articulate a need to provide additional assistance to avoid a miscarriage of justice.

Russell Engler, *And Justice For All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 2015 (1999).

[128] *McKenzie IV*, Bd. Dec. 08-0044 at 17.

McKenzie the opportunity to rely on certain medical records, Waldon is heard assuring McKenzie that someone is a real liar and the insurance company is too, but it is "nothing else big:"

> HEARING OFFICER: All right. We're back on record. We've had a opportunity to discuss this briefly. For purposes of today's hearing, we won't be considering Dr. Trujillo's reports. There was a timely request for cross examination that wasn't complied with so for purpose of today's hearing, it's not admissible. Any other preliminary matters?
>
> (Whispered conversation)
>
> MS. WALDON: Yeah, he's a liar, real liar.
>
> MS. MCKENZIE: Mm-hmm.
>
> MS. WALDON: And insurance company is and so that's nothing else big.
>
> MS. MCKENZIE: Mm-hmm.
>
> Ms. Waldon: Discussing . . .
>
> HEARING OFFICER: Are there any other preliminary matters that we need to discuss on record?
>
> MR. SMITH: I have none.
>
> HEARING OFFICER: Ms. Waldon?
>
> MS WALDON: I think you've done all the preliminary decisions.[129]

After opening arguments, the hearing officer asked Mr. Smith if he was going to call any witnesses, and Mr. Smith replied, "Oh, I said no witnesses."[130] Then the hearing officer asked Waldon, "Did you want to call the employee as a witness?"[131] Waldon replied affirmatively and continued:

> MS. WALDON: I don't really need Smith but I want Nancy Aries, I want Nelson, I want . . .
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> HEARING OFFICER: She's not on your list.

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129 Tr. 21:1-19.

130 Tr. 30:22-24.

131 Tr. 30:25-31:1.

> MS. WALDON: Okay. Well, we are just not going to have no witnesses, are we, Mr. Smith?
>
> HEARING OFFICER: So you're saying you don't intend to call anyone?
>
> MS. WALDON: No, this is – it's no point in it, decision's already been made.[132]

Waldon had not included Aries or McKenzie on her witness list.[133] But, in response to the chair's statement, she did not make an argument that a party need not list herself as a witness. She did not call Nelson. She did not explain to McKenzie that the reason McKenzie would not be heard was that Waldon omitted her from the witness list.

In our decision in *Augustyniak,* we said

> If the appellant's representative makes erroneous or careless decisions for an appellant, or an appellant makes them in reliance on a representative's uninformed advice, the appellant's rights may be lost beyond recovery. These are sound reasons why, at the commission level, the specific legislative allowance for nonattorney representation before the board was not extended to the commission.[134]

This case illustrates why the board, which must accept nonattorney representation,[135] should undertake to regulate it, or, failing regulations, to inquire directly of the litigant in the hearing to ascertain if the litigant understands that a right is being waived by the nonattorney representative or that a failure to follow procedural regulations has occurred that may impact the case. If a litigant is represented by a person who is not an attorney and the board finds the representative's conduct is questionable, interferes with progression of the claim, and impedes resolution in the employee's interests, then I believe that the board must ask the litigant if the litigant understands and consents to, or adopts, sanctionable conduct by the representative, before the board imputes the conduct to the litigant and dismisses the claim. Because no such inquiry was made

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[132] Tr. 31:2-12.

[133] R. 0656-7.

[134] *Augustyniak*, App. Comm'n Dec. No. 064 at 12.

[135] AS 23.30.110(d) gives the claimant and the employer the right to "be represented by any person authorized in writing for that purpose."

here, and lesser sanctions were available, I would reverse the board's decision dismissing McKenzie's claim and remand for imposition of lesser sanctions.[136]

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is the final decision on this appeal. The appeals commission AFFIRMED the board's decision granting the petition to dismiss the appellant's workers' compensation claims for failure to follow board discovery orders. The effect of this decision is that the board's order dismissing the workers' compensation claims in AWCB Case No. 200601998 remains in effect. This decision ends all administrative proceedings. This decision is effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date this decision is distributed, look at the Certificate of Distribution box on the last page.

This is the final administrative decision in this claim. You have the right to appeal. Proceedings to appeal this decision must be instituted in the **Alaska Supreme Court within 30 days of the date this final decision is mailed** or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. If you believe grounds for review exist under the Appellate Rules, you should file your petition within 10 days after the date of this decision is distributed.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

If you wish to appeal this decision to the Alaska Supreme Court, or petition the Supreme Court for other review, you should contact the Alaska Appellate Courts **immediately:**

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

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[136] The record is clear that McKenzie knew of, and consented to, the court proceedings against the appellee's attorney. The record is also clear that board decisions repeatedly warned that failure to follow board orders could result in claim dismissal. However, repeated warnings without incremental sanctions may lead a litigant to believe that less than full compliance, or less than even substantial compliance, will not result in sanctions.

RECONSIDERATION

A party may ask the appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

If a request for reconsideration of this final decision is timely filed with the commission, proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier.

CLERK'S CERTIFICATION

I certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission Decision No.109, the final decision in the appeal of *Jo Rae McKenzie v. Assets, Inc. and Commerce & Industry Insurance Co.*, AWCAC Appeal No. 08-020, dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this *14th* day of *May*, 20*09*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on *5-14-09* a copy of this Final Decision No. 109, entered in Appeal No. 08-020, was mailed to: J. McKenzie (certified), L. Waldron (assistant's copy) & C. Smith at their addresses on record and faxed to: L. Waldron, C. Smith, AWCB Appeals Clerk, & the Director WCD.

Signed
B. Ward, Deputy Appeals Commission Clerk