Case: *Jo Rae McKenzie vs. Assets, Inc. and Commerce & Industry Insurance Co.,* Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009)

Facts: Jo Rae McKenzie (McKenzie) appealed a board decision dismissing her claims because of a failure to cooperate with discovery. Assets, Inc. (Assets) sought releases to obtain medical records and employment records when McKenzie sought reemployment benefits. McKenzie filed for a protective order that was denied. The board warned McKenzie that non-cooperation with discovery could result in sanctions, including dismissal. McKenzie did not sign the releases. Assets then revised its medical release and McKenzie again sought a protective order that was denied. The board again warned McKenzie that her claims could be dismissed if she did not sign the releases. McKenzie signed the releases, but resisted attending an employer's medical evaluation (EME) and a deposition.

McKenzie failed to attend two properly noticed EMEs. At a prehearing conference, McKenzie's non-attorney representative, Laura Waldon, said that McKenzie could not attend a deposition because she was on bed-rest but provided no medical documentation. Assets sought to compel her to attend a deposition, prompting McKenzie to seek a protective order based on a doctor's letter that her depression needed to be better controlled before she could participate in a deposition. McKenzie also refused to attend a third scheduled EME based on her doctor's recommendation concerning her depression.

The board eventually ordered McKenzie to attend the scheduled EME and a deposition to be held no later than December 17, 2007. Once again, McKenzie was warned to comply with discovery or face dismissal of her claim. McKenzie attended the EME but continued to resist attending a deposition. She petitioned for stalking orders in district court 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. These petitions were denied. 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. This complaint was also was denied.

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. 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. A few days later, the board heard Assets' petition to dismiss McKenzie's claims for a failure to cooperate with discovery. The board decided that outright dismissal of McKenzie's claims was the only effective sanction for three reasons: (1) the employee's history of ignoring or resisting four prior board orders; (2) the employee's representative repeatedly showing disrespect to the board and its designees; and, (3) the fact that there were no outstanding benefits that might be suspended or forfeited.

McKenzie appealed, arguing she was only seeking to protect her rights in resisting discovery, the board was biased against her and denied her equal protection and due process by failing to give her claims as much weight as a party represented by an attorney, and the employer turned her own expert against her, which amounted to spoliation of evidence.

Applicable law: AS 23.30.108(c) provides that "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."

Although the civil rules did not strictly apply, the board and commission 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 central issue in the litigation unless the court finds that the party acted willfully.

"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." Under this definition, the party facing discovery sanctions bears the burden to demonstrate her failure to comply was not willful. *DeNardo v. ABC Inc. RVs Motorhomes*, 51 P.3d 919, 923 (Alaska 2002).

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, annoyance and even anger, that are within the bounds of what imperfect men and women . . . sometimes display. *Hanson v. Hanson*, 36 P.3d 1181, 1184 (Alaska 2001) (quotation omitted).

Issues: Did the board abuse its discretion in dismissing her claims as a discovery sanction? Did McKenzie state a claim for a constitutional error or board error for spoliation of evidence? Did the board treat McKenzie in an unfair and biased way?

Holding/analysis: The majority concluded that the board did not abuse its discretion in dismissing McKenzie's claim as a discovery sanction. The majority concluded that McKenzie's actions went beyond good-faith resistance, when she disregarded a clear order to attend a deposition no later than December 17, 2007, and has not come into compliance since then, indicating before the commission that she would have to consult her doctor before attending a deposition. Moreover, she sought stalking orders in the district and superior courts, extending even to the heirs of employer's attorney and insurer.

Substantial evidence supported the board's implicit finding that she was mentally competent, including that McKenzie attended appointments with her own doctors, testified in court about her stalking petitions, was evaluated for Social Security benefits by a doctor who found she was competent to manage her benefits and did not seek to have a conservator appointed to help her manage her workers' compensation benefits.

Finally, the board was not required to consider every possible sanction and dismissal was in the range of sanctions that the board could take, given the egregiousness of McKenzie's willful and repeated failure to comply with discovery orders. The commission concluded that the board adequately considered lesser sanctions because it observed that there were no outstanding workers' compensation benefits that McKenzie could forfeit as a sanction. In addition, 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." Dec. No. 109 at 15. The board pointed out that McKenzie had ignored or staunchly resisted four prior orders and been repeatedly warned that her claims could be dismissed, and that it believed no lesser sanction would be effective to deter her egregious conduct. Moreover, "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." *Id.* at 16.

The commission also addressed McKenzie's arguments about constitutional violations and spoliation of evidence, even though the board properly did not reach these issues since it only addressed the employer's petition to dismiss. The commission did so because the employer did not object and to help inform the unrepresented party. The commission found no claim for spoliation of evidence because no document was destroyed or hidden. The commission observed that McKenzie's doctor was free to change his opinion based on additional medical records and was, in fact, required to answer truthfully if new evidence altered his opinion and that would not amount to spoliation of evidence. The commission could not discern any claim that would state the elements for a constitutional violation, including McKenzie's argument that she was treated unfairly since she was not represented by an attorney.

Lastly, the commission rejected McKenzie's arguments that the board was biased, observing that, at most, Chair Jacquot expressed some annoyance. "[N]one of Chair Jacquot's statements demonstrated an opinion originating from a source outside the hearing evidence nor displayed an inability to render fair judgment. . . . 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." *Id*. at 20. Lastly McKenzie could not prove her alleged *ex parte* communication between the other party and a board staff member was prohibited because (1) the board staff member was not a decision-maker and (2) McKenzie produced no evidence that the subject was not scheduling or similar administrative, non-substantive matters.

Concurrence: One commissioner wrote separately to address McKenzie's argument of unfair treatment because she did not have an attorney. "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." *Id.* at 26.

Dissent: The dissent concluded that the board abused its discretion because lesser sanctions were available and the board made no inquiry of McKenzie to make sure that McKenzie understood the effect of Waldron's conduct and consented to it. "In my view, tailored sanctions of increasing severity, directed toward correcting the effect of the sanctioned conduct, are most appropriate." *Id.* at 28. The dissent suggested the board could have dismissed some of her claims or theories of injury, rather than all of them, or barred McKenzie's testimony at hearing since she refused to attend a deposition. In addition, the dissent concluded, "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." *Id.* at 31.

Note: This decision was appealed to the Alaska Supreme Court but the appeal was dismissed after the parties settled.