

## Alaska Workers' Compensation Appeals Commission

Gary M. Waite,  
Appellant,

vs.

Holland America-Princess/Princess Tours  
and Travelers Insurance Company,  
Appellees.

### Final Decision

Decision No. 234                      March 15, 2017

AWCAC Appeal No. 16-010  
AWCB Decision No. 16-0066  
AWCB Case No. 201412006

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 16-0066, issued at Anchorage, Alaska, on August 3, 2016, by southcentral panel members Ronald P. Ringel, Chair, Rick Traini, Member for Labor, and Amy Steele, Member for Industry.

Appearances: Gary M. Waite, self-represented appellant; Robert L. Griffin, Griffin & Smith, for appellees, Holland America-Princess/Princess Tours and Travelers Insurance Company.

Commission proceedings: Appeal filed September 29, 2016; briefing completed February 21, 2017; oral argument held on March 7, 2017.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

### *1. Introduction.*

Gary M. Waite sustained an injury on July 12, 2014, while working for Holland America-Princess/Princess Tours (Holland-America) when a co-worker fell, hitting Mr. Waite's left knee. Initially, Mr. Waite received workers' compensation benefits, including medical care and temporary total disability (TTD) benefits. A dispute arose over medical releases sent to Mr. Waite. The Alaska Workers' Compensation Board (Board) issued an interlocutory decision and order on October 23, 2014, ordering Mr. Waite to sign releases for Holland-America and advising him failure to do so could result in

dismissal of his claim.<sup>1</sup> The Board issued a second interlocutory decision and order on May 7, 2015, again ordering Mr. Waite to sign medical releases and to attend Holland America's Employer Medical Evaluation (EME).<sup>2</sup> The Board this time advised Mr. Waite that if he did not sign the required releases, his claim would be dismissed.<sup>3</sup>

Mr. Waite then proposed a settlement of his claim which was accepted by Holland America. All parties signed a Compromise and Release (C&R) in June 2014,<sup>4</sup> which the Board approved following a hearing on July 21, 2015.<sup>5</sup> Mr. Waite subsequently petitioned the Board to set aside this C&R, which was denied by the Board on August 3, 2016, for failure to comply with discovery.<sup>6</sup> Mr. Waite appealed this decision to the Alaska Workers' Compensation Appeals Commission (Commission). Oral argument was heard on March 7, 2017. Because the Board did not abuse its discretion in dismissing Mr. Waite's petition for failure to cooperate with discovery, the Commission affirms the Board's decision.

2. *Factual background and proceedings.*<sup>7</sup>

On July 12, 2014, Mr. Waite was at work when a coworker fell, hitting Mr. Waite's left knee and causing severe pain.<sup>8</sup> On July 15, 2014, Mr. Waite went to the emergency room where X-rays revealed a lateral dislocation of his left patella. Mr. Waite was given

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<sup>1</sup> *Waite v. Holland America/Princess*, Interlocutory Decision and Order, Alaska Workers' Comp. Bd. Dec. No. 14-0141 (Oct. 23, 2014) (*Waite I*).

<sup>2</sup> *Waite v. Princess Tours*, Interlocutory Decision and Order, Alaska Workers' Comp. Bd. Dec. No. 15-0053 (May 7, 2015) at 32 (*Waite II*).

<sup>3</sup> *Id.*

<sup>4</sup> *Waite v. Holland America-Princess/Princess Tours*, Final Decision and Order, Alaska Workers' Comp. Bd. Dec. No. 16-0066 (Aug. 3, 2016) at 7 (Nos. 36-39) (*Waite III*).

<sup>5</sup> *Id.* at 8 (No. 41)

<sup>6</sup> *Id.* at 18.

<sup>7</sup> We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

<sup>8</sup> *Waite I* at 2 (No. 1).

an off-work slip and referred to an orthopedist.<sup>9</sup> On July 18, 2014, Mr. Waite was seen by Bradley Sparks, M.D., who ordered an MRI.<sup>10</sup>

On July 21, 2014, Mr. Waite executed a "Prima Facie Affidavit" setting out the facts of the injury and his medical treatment to date.<sup>11</sup> The affidavit includes the statement:

You have "7" days from receipt of this letter to provide the rebuttal to this affidavit. If for some reason you choose to remain silent or not respond to my affidavit, it will be considered that this document stands as truth in commerce. A judgment will then be issued in my favor. 'Silence Equates Agreement."

Mr. Waite's affidavit concluded with three "Maxims of Law:"

- 1.) An un-rebutted affidavit stands as truth in commerce. Claims made in the affidavit if not rebutted, emerge as the truth of the matter.
- 2.) An Un-rebutted affidavit becomes the judgment in commerce.
- 3.) No Court or judge can overturn or disregard or abrogate somebody's affidavit.

On July 22, 2014, the MRI ordered by Dr. Sparks revealed a patellar dislocation with tearing of the medial patellofemoral ligament.<sup>12</sup> On July 22, 2014, Holland America's adjuster sent a letter to Mr. Waite by email, asking that he list all the physicians who had treated him for the work injury and sign releases for medical records, employment records, and workers' compensation records.<sup>13</sup> Also on July 22, 2014, Mr. Waite executed a "Prima Facie Affidavit re: Residency."<sup>14</sup> In the affidavit, Mr. Waite provided four addresses where he had resided since 2011, and indicated he had received no medical treatment other than the treatment after the work injury. He stated he was only authorizing checks of the listed places for records, and any medical records received were to be shredded and destroyed after being reviewed. The affidavit included the same

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<sup>9</sup> *Waite I* at 2 (No. 3).

<sup>10</sup> *Id.* (No. 4).

<sup>11</sup> *Id.* (No. 5).

<sup>12</sup> *Id.* at 3 (No. 6).

<sup>13</sup> *Id.* (No. 7).

<sup>14</sup> *Id.* (No. 8).

provision as the July 21, 2014, Prima Facie Affidavit requiring rebuttal within seven days as well as the same “Maxims of Law.”<sup>15</sup>

On July 22, 2014, Mr. Waite signed the medical release requested by the adjuster, but included the statement “I only authorized medical records from places listed on the affidavit signed 7-22-2014,” but did not identify the places.<sup>16</sup> Dr. Sparks, on July 25, 2014, restricted Mr. Waite from work pending surgery on his left knee.<sup>17</sup>

On August 5, 2014, Mr. Waite executed a “Notice of Default of Prima Facie Affidavit” stating Holland America had not rebutted the allegations in his July 21, 2014, and July 22, 2014, affidavits.<sup>18</sup> On August 6, 2014, Holland America’s attorney sent Mr. Waite two sets of releases.<sup>19</sup> Both sets included releases for medical records related to Mr. Waite’s left lower extremity, but one set also included records related to depression, high blood pressure, and psychological, psychiatric, and mental health records. The letter explained that if Mr. Waite was claiming treatment for depression or high blood pressure was due to the work injury, he should sign and return those releases. In addition to the medical releases, Holland America requested releases for health insurance records, pharmacy records, employment records, Social Security records, and both general workers’ compensation records, and Alaska worker’s compensation records.<sup>20</sup>

On August 20, 2014, Mr. Waite filed a claim for TTD beginning July 12, 2014, and a compensation rate adjustment.<sup>21</sup> Mr. Waite also filed a petition for a protective order regarding the releases requested by Holland America.<sup>22</sup> Mr. Waite stated he had given

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15 *Waite I* at 3 (No. 8).

16 *Id.* (No. 9).

17 *Id.* (No. 10).

18 *Id.* (No. 11).

19 *Id.* (No. 12).

20 *Id.*

21 *Id.* at 4 (No. 13).

22 *Id.* (No. 14).

the adjuster a medical release, his affidavits “covered all that needed to be covered,” and, as Holland America had not rebutted his affidavits within seven days, further releases were unnecessary. According to Mr. Waite, Holland America and its attorney thus were seeking information to which they were not entitled and which was irrelevant to the case. Because he had given Holland America a release, he did not believe he had a duty to release his private medical information to Holland America’s attorney, and objected to having to pay to have any releases notarized.<sup>23</sup>

At the prehearing conference on September 3, 2014, Mr. Waite’s petition for a protective order was addressed.<sup>24</sup> The Board designee explained the need for and use of releases in workers’ compensation cases. Mr. Waite expressed his concern that the medical records might be seen by unauthorized parties and voiced his concern about the cost of having the releases notarized. Holland America agreed to reimburse him for the notary costs. The Board designee then reviewed Holland America’s requested releases, discussed them extensively with the parties, found them to be reasonably calculated to lead to evidence relevant to material issues, appropriately limited in time and scope, and denied Mr. Waite’s petition. Mr. Waite refused to sign the releases and stated he would appeal the designee’s decision.<sup>25</sup>

On September 10, 2014, Mr. Waite filed an appeal of the Board designee’s discovery decision.<sup>26</sup> Mr. Waite contended the designee abused his discretion by failing to consider all the facts and making a decision without a hearing. He asserted his un rebutted affidavits “emerge as the truth” and cannot be overturned. He maintained Holland America and Holland America’s attorney exceeded the dictates of the statute and other federal and state laws, and were seeking irrelevant information, but he provided no explanation other than that Holland America failed to respond to his affidavits within seven days. He agreed the Board designee explained he “was not for or against” Mr.

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<sup>23</sup> *Waite I* at 4

<sup>24</sup> *Id.* (No. 15).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (No. 16).

Waite in the prehearing, but he accused the Board designee of not being neutral and abusing his discretion by failing to analyze thoroughly the facts before making a decision.<sup>27</sup> In October 2014, the Board issued *Waite I* denying Mr. Waite's petition and ordering him to sign new releases.<sup>28</sup> The Board also advised Mr. Waite that failure to sign the new releases could result in suspension of benefits or dismissal of his claim.<sup>29</sup>

On December 12, 2014, Mr. Waite filed a petition asking to be excused from attending the EME.<sup>30</sup> Since it was too late for Holland America to cancel the EME without a charge, Holland America asked the EME physician, Marilyn Yodlowski, M.D., to conduct a records review, which she did.<sup>31</sup> Although Dr. Yodlowski could not physically examine Mr. Waite since he did not attend the EME, she did review his medical records, including records predating the work injury.<sup>32</sup> She found Mr. Waite had a history of chronic knee pain and disruptions of his medial patellofemoral ligament, preexisting patellar subluxation, and avulsion fracture prior to the July 2014 work injury.<sup>33</sup> She stated the substantial cause of his disability and need for medical treatment was his knee pathology predating the work injury because the pathology in the July 2014 MRI, after the work injury, was the same as shown in the March 2014 MRI, prior to the work injury.<sup>34</sup>

On January 17, 2015, Mr. Waite filed a notice of intent to sue Holland America on the basis of gross negligence.<sup>35</sup> Holland America controverted all benefits on January 20, 2015, based on Dr. Yodlowski's report.<sup>36</sup> Holland America answered Mr. Waite's notice

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27 *Waite I* at 4-5 (No. 16)

28 *Waite I; Waite II* at 6 (No. 17).

29 *Waite I* at 11.

30 *Waite II* at 8 (No. 26).

31 *Id.* at 8 (No. 27).

32 *Id.* at 9-10 (No. 34).

33 *Id.*

34 *Id.*

35 *Id.* at 10 (No. 35).

36 *Waite II* at 10 (No. 36).

to sue and asserted, among other things, that workers' compensation was his exclusive remedy against his employer.<sup>37</sup> Holland America then filed an affidavit of readiness for hearing on January 30, 2015, based on Mr. Waite's petition not to attend the EME.<sup>38</sup>

On February 6, 2015, Mr. Waite sent an email to Holland America's attorney rescinding his signatures. He also asked that his claim be closed:

I will ask politely that you close my claim with Travelers Insurance as I am no longer participating in the workers compensation program at this time. As I have advised per law I am in the process of suing the insurance company and its client and do not wish to seek any more services from either. . . . I am formally requesting that all claims with Travelers be closed as I am no longer a willing participant in this program. Failure to close this claim as requested can result in further action against your client Travelers Insurance. I Herby [sic] revoke all signatures nunc pro tunc void ab ignitio.<sup>39</sup>

Mr. Waite revoked the releases he had been ordered to sign in *Waite I*.<sup>40</sup>

On February 13, 2015, Holland America filed a petition seeking an order directing Mr. Waite to withdraw his revocation of the releases and to compel him to re-execute the releases. If Mr. Waite was ordered to sign the releases and failed to comply, Holland America sought the dismissal of his claim.<sup>41</sup>

On March 13, 2015, Mr. Waite was served a notice of a written record hearing set for April 15, 2015,<sup>42</sup> on Holland America's February 13, 2015, petition to compel signing of valid releases.<sup>43</sup> The Board heard the matter on the written record and issued its Interlocutory Decision and Order on May 7, 2015.<sup>44</sup> The Board adopted the Findings of

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<sup>37</sup> *Id.* (No. 37).

<sup>38</sup> *Id.* (No. 38).

<sup>39</sup> *Id.* at 10-11 (No. 40).

<sup>40</sup> *Id.* at 11 (No. 41).

<sup>41</sup> *Id.* (No. 43).

<sup>42</sup> *Id.* at 12 (No. 47).

<sup>43</sup> *Id.* at 2, 26.

<sup>44</sup> *Waite II* at 1.

Fact, Conclusions of Law, and Orders from *Waite I*.<sup>45</sup> The Board detailed Mr. Waite's numerous changes of addresses and attempts by Holland America to provide Mr. Waite with funds for attending, and notice of, the pending EME in Portland, Oregon.<sup>46</sup> Although Mr. Waite provided no evidence that travel or flying placed him at further risk of knee damage or blood clots, the distance Mr. Waite was required to travel from his then current residences (in South Carolina and Maryland) to the EME in Portland, Oregon was unreasonable.<sup>47</sup> However, since Mr. Waite then moved to Chicago, the distance to Portland was not unreasonable and he was ordered to attend an EME in Portland, Oregon.<sup>48</sup> The Board explained to Mr. Waite that he was barred from bringing a civil action against Holland America for the work injury and that his sole remedy was through workers' compensation.<sup>49</sup> Mr. Waite was ordered to withdraw his rescission of the releases and re-execute the releases within 14 days.<sup>50</sup> The Board informed Mr. Waite his claim would be dismissed with prejudice if he willfully refused to comply with discovery orders.<sup>51</sup> The Board, because of Mr. Waite's numerous changes in address, ordered Mr. Waite to inform the Board immediately of any change of address.<sup>52</sup>

On May 12, 2015, Holland America sent copies of the releases to Mr. Waite for signature.<sup>53</sup> On May 18, 2015, Mr. Waite filed another claim seeking TTD from July 16, 2014, and alleging Holland America's January 20, 2015, controversion was unfair or frivolous.<sup>54</sup> On May 20, 2015, Mr. Waite returned the signed releases to Holland America,

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<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.* at 6-7 (Nos. 18-21), 8-9 (Nos. 30-33).

<sup>47</sup> *Id.* at 8 (Nos. 26-28).

<sup>48</sup> *Id.* at 27, 32.

<sup>49</sup> *Id.* at 30.

<sup>50</sup> *Id.* at 32.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 12-14 (Nos. 50-51), 32.

<sup>53</sup> *Waite III* at 6 (No. 31).

<sup>54</sup> *Waite III* at 7 (No. 32).

but explained they were not notarized because he did not have sufficient funds to pay a notary.<sup>55</sup> He offered to have the releases notarized if Holland America sent him a check for \$15.00.<sup>56</sup>

On June 1, 2015, Holland America filed a Notice of Controversion, denying all benefits on the basis of the EME report.<sup>57</sup> Also on June 1, 2015, Holland America sent Mr. Waite copies of the releases that needed to be notarized and a check for \$15.00.<sup>58</sup> The Board found no evidence Mr. Waite ever signed and returned these releases to Holland America.<sup>59</sup>

However, on June 1, 2015, Mr. Waite emailed a proposed settlement agreement, which he had signed, to Holland America.<sup>60</sup> On June 5, 2015, Holland America responded to Mr. Waite's June 1, 2015, email stating it was willing to settle his claim, informing Mr. Waite the agreement would have to be reviewed and approved by the Board, and offering to re-draft the agreement into a format that complied with the Board's regulations.<sup>61</sup> On June 8, 2015, Mr. Waite signed an "Acknowledgment" setting out his understanding of the settlement agreement. He stated that he, not Holland America, put forth the offer to settle. He acknowledged that Holland America would not be responsible for further payments after the agreement was signed and that he was forfeiting his right to sue.<sup>62</sup>

On July 2, 2015, the parties filed a C&R which complied with the Board's requirements,<sup>63</sup> setting forth the same terms as Mr. Waite's June 1, 2015, agreement, which was attached to the C&R. Both the C&R and Mr. Waite's agreement were signed

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55 *Id.* at 7 (No. 33).

56 *Id.*

57 *Id.* (No. 34).

58 *Id.* (No. 35).

59 *Id.*

60 *Id.* (No. 36).

61 *Id.* (No. 37).

62 *Id.* (No. 38).

63 *Waite III* at 7 (No. 39).

by the parties.<sup>64</sup> On July 7, 2015, the Board denied the C&R because there was not a preponderance of the evidence that the agreement was in Mr. Waite's best interest, and the Board wished to speak with Mr. Waite to ensure his understanding of possible benefits he was waiving and the consequences of the agreement.<sup>65</sup> At the hearing on the C&R on July 21, 2015, Holland America's counsel explained the facts of the case and the terms of the agreement. Mr. Waite concurred with the explanation.<sup>66</sup> Mr. Waite stated that his rights and the consequences of the agreement had been "well explained," and he said the agreement was in his best interest as his knee had healed, no surgery was needed, and he could obtain some physical therapy with the proceeds if needed.<sup>67</sup> Mr. Waite responded

Yeah, I felt that that – this settlement was in the best interest at the time of – of me and, of course, the employer in this case, and, like I said, I didn't want to pursue any further because it's just – it was really time-consuming and it's taking a big chunk of time out of my life and I'm ready to move on with – with future employment and just get this behind me.<sup>68</sup>

In response to a question from the designated chair, Mr. Waite confirmed he understood the agreement was final, and it was virtually impossible to undo the agreement.<sup>69</sup> "That is correct, I'm ready to make this final decision."<sup>70</sup> The Board found Mr. Waite to be articulate, that he understood the terms of the agreement along with the risks and benefits, and that the agreement was in his best interest.<sup>71</sup> The Board approved the C&R at the hearing on July 21, 2015.<sup>72</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (No. 40).

<sup>66</sup> *Id.* at 8 (No. 41).

<sup>67</sup> *Id.*

<sup>68</sup> Hr'g Tr. at 13:20 – 14:1, July 21, 2015.

<sup>69</sup> *Waite III* at 8 (No. 41).

<sup>70</sup> Hr'g Tr. at 14:10-11, July 21, 2015.

<sup>71</sup> Hr'g Tr. at 15:7-13, July 21, 2015.

<sup>72</sup> *Id.*

On December 9, 2015, Mr. Waite filed a petition seeking to set aside the C&R contending he had been misled when he was told workers' compensation was his exclusive remedy.<sup>73</sup> Attached to his petition were a revocation of signatures and a notice of rescission of the C&R.<sup>74</sup> Mr. Waite provided an address in Pineville, South Carolina.<sup>75</sup>

On December 11, 2015, Mr. Waite notified the Board his address was now in Daytona Beach, Florida.<sup>76</sup> At the December 30, 2015, prehearing conference, Holland America asked Mr. Waite if he intended his revocation to apply to the previously signed releases.<sup>77</sup> Mr. Waite contended the releases were inoperable.<sup>78</sup> Mr. Waite agreed to attend his deposition on either January 25 or 26, 2016.<sup>79</sup> Both parties stipulated to a hearing on whether Mr. Waite's claim should be dismissed for failure to comply with discovery.<sup>80</sup>

On January 8, 2016, Mr. Waite filed a petition to join Alaska Railroad alleging it was liable because the incident occurred on its property.<sup>81</sup> Also on January 8, 2016, Mr. Waite filed a petition seeking a protective order against a deposition until the C&R was revoked.<sup>82</sup> Then, on January 13, 2016, Mr. Waite withdrew his December 9, 2015, petition to set aside the C&R, stating the order approving the agreement was "still as it stands."<sup>83</sup>

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73 *Waite III* at 8 (No. 42).

74 *Id.*

75 *Id.*

76 *Id.* (No. 43).

77 *Id.* (No. 44).

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.* (No. 45).

82 *Waite III* at 8 (No. 46).

83 *Id.* (No. 47).

At the prehearing on January 20, 2016, the Board designee noted Mr. Waite may have been given incomplete or unclear legal advice.<sup>84</sup> The designee explained that under the Act, Mr. Waite's sole remedy against Holland America was limited to workers' compensation, but to the extent Mr. Waite might have a claim against a third party, that claim could be pursued in civil court.<sup>85</sup> Mr. Waite stated he had talked with an attorney and understood. Because Mr. Waite withdrew his petition to set aside the C&R, Holland America cancelled the January 25, 2016, deposition.<sup>86</sup> The Board also cancelled the hearing on Holland America's petition to dismiss for failure to comply with discovery.<sup>87</sup>

Slightly more than a month later, on March 1, 2016, Mr. Waite filed another petition to set aside the C&R, and he now listed his address as General Delivery, San Francisco, California.<sup>88</sup> On March 23, 2016, Holland America filed petitions to dismiss Mr. Waite's petition to set aside the C&R, or to order Mr. Waite to withdraw the revocation of the releases and to participate in a deposition as previously ordered.<sup>89</sup> A prehearing was also held on March 23, 2016, at which Mr. Waite agreed to sign the releases requested by Holland America and to attend his deposition. Holland America's representative agreed to send Mr. Waite new copies of the releases and to reschedule the deposition.<sup>90</sup>

On April 11, 2016, Holland America sent Mr. Waite a check for \$15.00 for the cost of notarizing the releases. The Board found Mr. Waite endorsed and cashed the check.<sup>91</sup> At the prehearing on April 18, 2016, a hearing was set for May 26, 2016, on Mr. Waite's petition to join Alaska Railroad.<sup>92</sup> Holland America's representative stated a check had

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84 *Id.* at 8-9 (No. 48).

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 9 (No. 49).

89 *Id.* (No. 50).

90 *Waite III* at 9 (No. 51).

91 *Id.* (No. 52).

92 *Id.* (No. 53).

been sent to Mr. Waite for notary fees, and Mr. Waite agreed to June 6, 2016, for his deposition.<sup>93</sup>

On May 5, 2016, Holland America filed a notice of controversion denying all benefits because Mr. Waite had not signed and returned the releases sent to him on March 25, 2016.<sup>94</sup> On May 18, 2016, Holland America provided the Board with an email from Mr. Waite informing them of a new mailing address in San Francisco, California.<sup>95</sup>

On May 25, 2016, Matthew Harrison filed an entry of appearance as Mr. Waite's attorney, signed by both Mr. Harrison and Mr. Waite, along with a letter asking for a continuance of the May 26, 2016, hearing. Mr. Harrison stated that he had not had time to prepare and had a prior engagement at the time of the hearing.<sup>96</sup> Mr. Harrison's mailing address was the same as the address provided by Mr. Waite on May 9, 2016.<sup>97</sup> He did not provide a telephone number, but asked that communication be via email.<sup>98</sup> The May 26, 2016, hearing was continued to June 9, 2016, to allow Mr. Harrison opportunity to prepare.<sup>99</sup>

On June 2, 2016, Mr. Harrison asked Holland America to postpone the June 6, 2016, deposition as he had not had sufficient time to prepare.<sup>100</sup> Holland America agreed to postpone the deposition, but asked that Mr. Harrison provide alternative dates at a prehearing conference scheduled for June 9, 2016.<sup>101</sup> On June 6, 2016, Mr. Harrison filed with the Board a copy of his June 6, 2016, letter to Holland America in which he

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93 *Id.* (No. 53).

94 *Id.* (No. 54).

95 *Id.* (No. 55).

96 *Id.* (No. 56); Appellee's Exc. at 129-131.

97 *Waite III* at 9 (No. 56).

98 *Waite III* at 10 (No. 56).

99 *Id.* (No. 57).

100 *Id.* (No. 58).

101 *Id.*

proposed further settlement discussions.<sup>102</sup> He stated: “It is not the intent of myself or my client to engage in lengthy depositions and have pointless hearings with the AWCB.”<sup>103</sup>

On June 8, 2016, the parties filed a stipulation dismissing Alaska Railroad, and the June 9, 2016, hearing was cancelled.<sup>104</sup> On June 9, 2016, neither Mr. Waite nor Mr. Harrison appeared for the prehearing. The Board designee was unable to reach Mr. Waite by telephone, and had no telephone number for Mr. Harrison.<sup>105</sup> Because Holland America had filed an Affidavit of Readiness for Hearing which was unopposed, the Board designee set a hearing for July 20, 2016, on Holland America’s March 23, 2016, petitions to dismiss or to compel Mr. Waite to return releases and attend a deposition.<sup>106</sup> The prehearing conference summary was served on Mr. Harrison at his address of record.<sup>107</sup>

On June 10, 2016, Notice of the June 9, 2016, hearing which had been sent to Mr. Harrison by certified mail, return receipt requested, at his address of record was returned marked “Attempted – not known – unable to forward.”<sup>108</sup> On June 20, 2016, notice of the July 20, 2016, hearing was sent to Mr. Harrison at his address of record certified mail, return receipt requested.<sup>109</sup> Notice was sent to Mr. Waite at the same address, which was also his address of record, by first class mail.<sup>110</sup>

On June 30, 2016, Holland America filed an notice of intent to rely that included a printout from the State Bar of California showing that four attorneys named Matthew

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102 *Id.* (No. 59).

103 *Id.*

104 *Id.* (No. 60).

105 *Id.* (No. 61).

106 *Id.*; 8 AAC 45.070(c).

107 *Waite III* at 10 (No. 61).

108 *Waite III* at 10 (No. 62).

109 *Id.* (No. 63).

110 *Id.*

Harrison are admitted to practice in California.<sup>111</sup> In response to inquiries from Holland America, all of the attorneys confirmed, either by email or voice message, that they did not represent Mr. Waite.<sup>112</sup> The report of a private investigator who had gone to the address provided by Mr. Waite and Mr. Harrison was also included.<sup>113</sup> The report noted the address is for a low-income/homeless housing facility, and has no office space.<sup>114</sup> The property manager confirmed that Mr. Waite resided at the address, and Mr. Harrison neither resided there nor operated his business there.<sup>115</sup>

On July 8, 2016, the notice of the July 20, 2016, hearing sent to Mr. Harrison at his address of record was returned marked “Not deliverable as addressed – unable to forward.”<sup>116</sup> Also, on July 8, 2016, Holland America filed a notice of intent to rely on a VINELink printout showing Mr. Waite was now incarcerated at San Francisco County Jail No. 5.<sup>117</sup> When provided with the appropriate contact information for an incarcerated party, the Board has conducted telephonic hearings.<sup>118</sup> However, the Board’s record does not contain any notification from Mr. Waite about a change of address to the San Francisco County Jail. At oral argument before the Commission, Mr. Waite testified he sent a notice of change of address on July 2 or 4, 2016, but neither the Board nor counsel for Holland America received this notification.<sup>119</sup>

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111 *Id.* at 10-11 (No. 64).

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.* at 11 (No. 65).

117 *Waite III* at 11 (No. 66).

118 *Id.* (No. 67).

119 March 7, 2017, Oral Argument before the Commission; review of Board’s record.

On July 15, 2016, the Board notified Mr. Harrison via email of the July 20, 2016, hearing.<sup>120</sup> Neither Mr. Waite nor Mr. Harrison appeared for the July 20, 2016, hearing.<sup>121</sup> The Board left a voice message for Mr. Waite asking him to call back, but he did not.<sup>122</sup> As Mr. Harrison had not provided a telephone number, the Board was unable to contact him.<sup>123</sup> At this hearing, Holland America argued that Mr. Harrison does not exist, but is merely Mr. Waite acting under a pseudonym.<sup>124</sup> After deliberations, the panel determined the hearing should proceed in Mr. Waite's absence.<sup>125</sup> "We'll continue with the hearing. Under 8 AAC 45.070(f), if a party is served with the notice of the hearing and doesn't appear, the board's first choice on the order of priority is to continue with the hearing."<sup>126</sup> The Board, after reviewing the evidence in the file and testimony at hearing, found (1) the oral ruling to proceed with the hearing in Employee's absence was correct; (2) Employee's petition would be dismissed for failure to comply with discovery; and (3) Employee would not be ordered to sign and return releases or to attend a deposition.<sup>127</sup> The Board then ordered "Employee's March 1, 2016 petition to set aside the July 21, 2015 C&R is dismissed."<sup>128</sup>

Mr. Waite, on September 29, 2016, wrote the Board asserting he did not know about the hearing, he had never authorized Matthew Harrison to represent him, and the Board knew of his change in address.<sup>129</sup> He contended the Board had failed to

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<sup>120</sup> *Waite III* at 11 (No. 68).

<sup>121</sup> *Id.* (No. 69).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (No. 70).

<sup>125</sup> *Id.* (No. 69).

<sup>126</sup> Hr'g Tr. at 5:9-13, July 20, 2016.

<sup>127</sup> *Waite III* at 18.

<sup>128</sup> *Id.*

<sup>129</sup> Mr. Waite's hand-written letter filed with the Board on September 29, 2016. This letter was accepted by the Commission on September 30, 2016, as Mr. Waite's Notice of Appeal and Statement of Grounds.

"adequately notify the plaintiff that a hearing was taking place."<sup>130</sup> He stated he was seeking an appeal.<sup>131</sup> He listed his return address as SF County Jail #5, San Bruno, CA.<sup>132</sup>

Mr. Waite filed his appeal of the August 3, 2016, decision on September 29, 2016, asserting that at the time of the hearing he was incarcerated and had not received the notice of the hearing.<sup>133</sup> He further asserted he had signed and returned releases to Holland America<sup>134</sup> and that he had never been represented by Mr. Harrison.<sup>135</sup> On November 7, 2016, the Commission accepted Mr. Waite's Motion for an extension of time to file his appeal and accepted his Financial Statement as a Motion to Waive Fees.<sup>136</sup> On November 22, 2016, the Commission waived the \$50.00 filing fee and agreed to pay the costs associated with transcription of the Board hearing recordings.<sup>137</sup>

### *3. Standard of review.*

The Alaska Supreme Court applies the abuse of discretion standard of review to discovery matters.<sup>138</sup> "The board's discovery rulings are reviewed for an abuse of discretion. . . . An abuse of discretion exists when we have a definite and firm conviction that a mistake has been made."<sup>139</sup>

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<sup>130</sup> Mr. Waite's hand-written letter filed with the Board on September 29, 2016.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> At Oral Argument on March 7, 2017, Mr. Waite asserted he had returned signed and notarized releases to Holland America in April or May, 2016. Counsel for Holland America stated he had not received any signed or notarized releases in April or May, 2016, and if he had he would not have moved the matter to hearing.

<sup>135</sup> *Id.*

<sup>136</sup> Order on Motion for Extension of Time to File Notice of Appeal and Regarding Financial Statement Affidavit, November 7, 2016.

<sup>137</sup> Order on Motion to Waive Payment of Filing Fee and Transcript Cost, November 22, 2016.

<sup>138</sup> *See, e.g., Dougan v. Aurora Electric, Inc.*, 50 P.3d 789, 793 (Alaska 2002); *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1089 (Alaska 2008).

<sup>139</sup> *Seybert*, 182 P.3d at 1089-1090 (citations omitted).

(b) The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

(c) The commission may hold hearings and receive evidence on applications for (1) stays under AS 23.30.125; (2) attorney fees and costs of appeal; (3) waiver of fees by indigent appellants; or (4) dismissal of appeals for failure to prosecute or upon settlement. The commission may rely on new or additional evidence presented during the hearing in making its decision on the application.<sup>140</sup>

#### 4. Discussion.

Although Mr. Waite raises a number of points in his Notice of appeal, the only issues properly on appeal are whether the Board abused its discretion in going forward with the hearing on July 20, 2016, and whether the Board abused its discretion in dismissing Mr. Waite's petition to set aside the C&R for his failure to comply with ordered discovery. Mr. Waite has contended he does not know a Mr. Harrison and did not authorize Mr. Harrison to enter an appearance on his behalf, and the C&R should be set aside on the basis of gross and egregious conduct towards him by Holland America. However, the Prehearing Conference Summary for June 9, 2016, detailed the issues for hearing. "The issues for hearing are whether Employee should be ordered to participate in his deposition as previously ordered, whether Employee should be ordered to withdraw his revocation of releases and to sign new release (sic) as previously ordered, and that Employee's claim be dismissed should he fail to comply."<sup>141</sup> The prehearing conference summary controls the issues for hearing.<sup>142</sup> The hearing before the Board was held solely

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<sup>140</sup> AS 23.30.128(b) and (c).

<sup>141</sup> Appellee's Exc. at 141.

<sup>142</sup> 8 AAC 45.070(g); *See also, Lajiness v. H.C. Price Const. Co.*, 811 P.2d 1068, 1070, note 2 (Alaska 1991).

on the issues outlined above. The issues of Mr. Harrison and the merits of the C&R signed and approved by the Board were not at issue.

*a. Should the hearing on June 9, 2016, have gone forward in the absence of Mr. Waite?*

Mr. Waite asserts the hearing on June 9, 2016, should have been continued since he was unable to participate either by telephone or in person. The Board decided, based on the regulation at 8 AAC 45.070(f), to proceed in his absence since notice of the hearing had been sent to his last known address.<sup>143</sup> The regulation states

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

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

The Board chose to proceed under priority (1).

Furthermore, the Board's regulations require all parties to keep the Board informed about any changes of address. 8 AAC 45.060 states in pertinent part:

(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.

Under this regulation, Mr. Waite had the burden of keeping the Board apprised of his address and telephone number. Furthermore, Mr. Waite was ordered in *Waite II* to "immediately upon a change of address for service, Employee shall file with the workers' compensation division and serve on Employer written notice of the change."<sup>144</sup>

At the prehearing on April 18, 2016, Mr. Waite appeared by telephone and his address was noted as General Delivery, San Francisco, CA 94142-9999. A telephone

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<sup>143</sup> *Waite III* at 16.

<sup>144</sup> *Waite II* at 32.

number appears on his various pleadings.<sup>145</sup> At this prehearing, a hearing date was set on Mr. Waite's Petition to join Alaska Railroad in which he contends that a contract existed between Alaska Railroad and Holland America making Alaska Railroad liable for workers compensation benefits to him.<sup>146</sup> Mr. Waite picked up certified mail at the General Delivery address on April 11, 2016.<sup>147</sup> Holland America also sent Mr. Waite a check for the cost of notarizing releases to the General Delivery address, which was picked up on April 19, 2016.<sup>148</sup>

On May 9, 2016, Mr. Waite sent email to Christi Niemann at the office of Holland America's counsel stating his new address is 41 Jones Street, Unit 401, San Francisco, CA 94102.<sup>149</sup> On May 20, 2016, a letter from Mr. Harrison was sent to Holland America's counsel providing an address of 525 5<sup>th</sup> Street, San Francisco, indicating that Mr. Harrison was now representing Mr. Waite in his workers' compensation claim.<sup>150</sup> Matthew Harrison and Gary M. Waite both signed this letter.<sup>151</sup> Subsequently, Holland America's counsel received correspondence from Mr. Harrison with an address of 41 Jones Street, Suite 401, San Francisco.<sup>152</sup> This is also Mr. Waite's address.

Another prehearing was held on June 9, 2016, but neither Mr. Waite nor Mr. Harrison participated.<sup>153</sup> The petition to join Alaska Railroad was withdrawn pursuant to a stipulation approved by the Board on June 9, 2016, and Alaska Railroad was dismissed from the case.<sup>154</sup> Also at this prehearing, a hearing date for July 20, 2016,

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<sup>145</sup> Appellee's Exc. at 110-113.

<sup>146</sup> *Id.*

<sup>147</sup> Appellee's Exc. at 124.

<sup>148</sup> *Id.* at 126-128.

<sup>149</sup> Record at 907.

<sup>150</sup> Appellee's Exc. at 129-131.

<sup>151</sup> Appellees' Exc. at 131.

<sup>152</sup> *Id.* at 135.

<sup>153</sup> *Id.* at 140-142.

<sup>154</sup> *Id.*; Record at 932-937.

was set on Holland America's March 23, 2016, petition to compel discovery.<sup>155</sup> Issues for the July hearing were identified as "whether Employee should be ordered to participate in his deposition as previously ordered, whether Employee should be ordered to withdraw his revocation of releases and to sign new releases as previously ordered, and that Employee's claim be dismissed should he fail to comply."<sup>156</sup> The prehearing summary listed Mr. Waite's address as General Delivery, San Francisco, and the prehearing summary was sent to him at this address.<sup>157</sup> It was not returned to the Board.

The Hearing Notice was sent to Mr. Harrison at 41 Jones Street, Unit 401, San Francisco, CA 94102, and to Mr. Waite at the same address on June 21, 2016.<sup>158</sup> At the July 20, 2016, hearing, Hearing Officer Ron Ringel reported he called Mr. Waite at the telephone number in the Board's file, and left a voice mail.<sup>159</sup> He noted the Board sent the notice for the June 9, 2016, prehearing to Mr. Waite at his address of record and the notice was not returned.<sup>160</sup> Mr. Waite had requested the June 9, 2016, prehearing.<sup>161</sup> He also reported the Hearing Notice was sent to Mr. Harrison at his address of record on June 20, 2016, which was returned marked "not deliverable as addressed."<sup>162</sup> Another Hearing Notice was sent the same day to Mr. Waite by regular mail and not returned.<sup>163</sup> Mr. Harrison was notified by email on July 15, 2016, of the hearing but no response had been received by the Board.<sup>164</sup> Although Mr. Waite asserts he sent a letter to the Board

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155 Appellee's Exc. at 141.

156 *Id.*

157 *Id.* at 142.

158 *Id.* at 144, 147.

159 Hr'g Tr. at 4:2-4, July 20, 2016.

160 Hr'g Tr. at 4:5-9, July 20, 2016.

161 *Id.*

162 Hr'g Tr. at 4:17-21, July 20, 2016.

163 Hr'g Tr. at 4:21-22, July 20, 2016.

164 Hr'g Tr. at 4:23-25, July 20, 2016.

and to Holland America's counsel on July 2 or 4, 2016, advising of his incarceration, neither the Board nor Holland America received this letter.<sup>165</sup>

At the hearing, counsel for Holland America reported he had learned Mr. Waite had been arrested on June 28, 2016, and was being held at the San Francisco County Jail.<sup>166</sup> He further provided an address at the San Francisco County Jail which had been provided by Nicholas Gregoratos who is counsel for San Francisco County Jails and is the attorney for prisoners' rights.<sup>167</sup> Counsel also stated he sent Holland America's hearing brief and notice of intent to rely to Mr. Waite at the jail address.<sup>168</sup> The Board did not attempt to contact Mr. Gregoratos at the jail about the ongoing hearing and Holland America objected to a continuance.<sup>169</sup>

After reviewing the attempts to contact Mr. Waite, the Board decided to proceed with the hearing following the priorities set in 8 AAC 45.070(f).<sup>170</sup> Both the prehearing conference summary with the date of the hearing and the hearing notice were sent to Mr. Waite at his last known address. The record shows that Mr. Waite understands the process, utilizes the process, and has appeared at prehearings and hearings when it suits his purpose.

The Board followed the priorities set forth in 8 AAC 45.070 in reaching its decision to proceed to hearing without the presence of Mr. Waite. There is no evidence that the Board abused its discretion in this regard. Notices of the hearing date were sent to both Mr. Waite at his address of record and to his representative as is documented in the record. The Board did not receive a letter from Mr. Waite notifying it of his change of address. The Board properly sent notice of the hearing to Mr. Waite at his address of

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<sup>165</sup> Testimony at Oral Argument, March 7, 2017, and review of Board's file on appeal.

<sup>166</sup> Hr'g Tr. at 6:14 – 7:9, July 20, 2016.

<sup>167</sup> Hr'g Tr. at 7:10-21, July 20, 2016.

<sup>168</sup> Hr'g Tr. at 8:9-12, July 20, 2016.

<sup>169</sup> Hr'g Tr. at 14:19 – 15:6, July 20, 2016.

<sup>170</sup> Hr'g Tr., July 20, 2016

record and to the person (Mr. Harrison) who had entered an appearance on his behalf. Therefore, Mr. Waite knew, or should have known, about the date for the hearing, and even though incarcerated, he could have made arrangements to participate. It was not an abuse of discretion for the Board to follow its regulation and to proceed to hearing on Holland America's petition without Mr. Waite's presence.

*b. Did Mr. Harrison represent Mr. Waite?*

This is not properly an issue on appeal. While Mr. Waite claims that representation by "attorney Matthew Harrison" was false and the entry of appearance was also false, this issue was not raised to the Board and the evidence in the record is to the contrary. The entry of appearance is signed both by Matthew Harrison and by Gary M Waite. Both Mr. Harrison and Mr. Waite signed the Stipulation to Dismiss Alaska Railroad. Both counsel for Holland America and the Board relied on the entry of appearance by Mr. Harrison as signed by Mr. Waite. Whether Mr. Harrison exists is not relevant to the issues of the case at hearing and did not have a bearing on the Board's decision. His existence is not an issue on appeal.

*c. Dismissal for failure to comply with discovery.*

AS 23.30.107 provides in part:

(a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury.

AS 23.30.108 further provides:

(a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.03.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.

(b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. 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) 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. (Emphasis added).

The Act further provides at 8 AAC 45.095

(a) An employee who, having been properly served with a request for release of information, feels that the information requested is not relevant to the injury must, within 14 days after service of the request, petition for a prehearing under 8 AAC 45.065. . . .

(c) If after a prehearing an order to release information is issued and an employee refuses to sign a release, the board will, in its discretion, limit the issues at the hearing on the claim to the propriety of the employee's refusal. If after the hearing the board finds that the employee's refusal to sign the requested release was unreasonable, the board will, in its discretion, refuse to order or award compensation until the employee has signed the release.

In *Waite I*, the Board ordered Mr. Waite to sign releases and advised him "that failure to sign and return the releases as ordered may result in the suspension of benefits

or the dismissal of his claim.”<sup>171</sup> In *Waite II*, the Board again ordered Mr. Waite to sign releases and withdraw his release revocation.<sup>172</sup> He was advised if he did not “re-execute releases and withdraw revocation of the releases, dismissal with prejudice is an available sanction.”<sup>173</sup> The Board reiterated in its Order “Employee is advised his claim will be dismissed if, within 14 days of Employer’s service of the releases upon Employee, he has not provided Employer with signed releases.”<sup>174</sup> These decisions preceded the C&R by which Mr. Waite resolved his workers’ compensation claim. Nonetheless they demonstrate that from the beginning Mr. Waite was aware of the need to provide releases and other discovery and yet failed to comply, even when ordered to do so by the Board.

*Waite II* was issued on May 7, 2015. On June 1, 2015, rather than sign releases, Mr. Waite contacted Holland America with a proposal for settling his claim. Holland America accepted his settlement proposal and drafted the C&R pursuant to Board regulations, and both Mr. Waite and Holland America, through its representatives, signed the C&R. After a hearing on July 21, 2015, at which the Board probed Mr. Waite’s understanding of the settlement and whether the settlement was in his best interests, the Board approved the settlement. The Board found Mr. Waite to be articulate and to have a good understanding of the settlement and the finality of same.

Nonetheless, less than six months later, Mr. Waite filed a petition with the Board, on December 9, 2015, seeking to set aside the C&R claiming that he was misled into believing his sole remedy against Holland America was through the workers’ compensation system. On December 30, 2015, at a prehearing, he contended the prior releases were inoperable, but he agreed to let Holland America take his deposition. Holland America wished to understand Mr. Waite’s reasons for wanting to set aside the C&R. Both Mr. Waite and Holland America agreed to a hearing on his petition.

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<sup>171</sup> *Waite I* at 11.

<sup>172</sup> *Waite II* at 32.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

On January 8, 2016, Mr. Waite filed a petition seeking to join Alaska Railroad and a petition for a protective order, objecting to participating in his deposition until the C&R was set aside. Five days later, on January 13, 2016, Mr. Waite notified the Board he was withdrawing his petition to set aside the C&R. At the prehearing on January 20, 2016, Holland America agreed to cancel Mr. Waite's deposition and the Board cancelled the hearing because Mr. Waite had withdrawn his petition to set aside the C&R.

However, on March 1, 2016, Mr. Waite filed a new petition to set the C&R aside. On March 23, 2016, Holland America petitioned to dismiss Mr. Waite's petition or, in the alternative, to order Mr. Waite to withdraw his revocation of the previously signed releases and to participate in his deposition. At the prehearing on March 23, 2016, Mr. Waite agreed to sign releases and to attend a deposition. On April 11, 2016, Holland America sent Mr. Waite a check to pay for the notarization of the releases. At the prehearing on April 18, 2016, Mr. Waite was ordered to attend his deposition on the agreed date of June 6, 2016.<sup>175</sup> The Chair reminded Mr. Waite that if he did not attend the deposition without good cause, his failure to do so "could result in the denial or (sic) benefits or the dismissal of his case."<sup>176</sup> Following this prehearing, Mr. Harrison, on May 25, 2016, entered his appearance on behalf of Mr. Waite and following this, Mr. Waite's deposition was cancelled at the request of Mr. Harrison.<sup>177</sup>

On May 5, 2016, Holland America filed a Controversion stating Mr. Waite had failed to return signed and notarized releases sent to him on March 25, 2016. On May 25, 2016, Mr. Harrison filed a letter with the Board stating he was now representing Mr. Waite in his workers' compensation claim. The letter was signed by both Mr. Harrison and Mr. Waite. Based on statements in an email from Mr. Harrison, counsel for Holland America agreed to continue the hearing and to postpone Mr. Waite's deposition.

The record is replete with actions taken by Mr. Waite to evade discovery by Holland America, first into the basis of his work injury and needed medical attention, and then

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<sup>175</sup> Appellee's Exc. at 112.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 141.

into the basis of his claim he was misled into signing the settlement agreement and asking the Board to approve it. Mr. Waite was given warnings on numerous occasions that he must sign releases and if he did not his claim could or would be dismissed. The record shows that Mr. Waite signed releases, and then revoked the signatures on the releases he signed. He also cashed checks sent to him to cover the cost of having releases notarized, but did not sign and return the releases. He filed petitions to set aside the C&R; then, when ordered to attend a deposition and sign releases, he withdrew his petitions. Further, when ordered to attend a deposition, he had Mr. Harrison enter an appearance to request a delay in both the hearing and deposition. The record demonstrates no alternative to dismissal of his claim exists as a sanction for continuing evasion of Board orders and discovery requests. Mr. Waite did everything he could to frustrate the attempts of Holland America to obtain discovery in his claim. Dismissal was the only sanction available to Mr. Waite's continuing noncompliance with discovery.

The Board did not abuse its discretion when it dismissed Mr. Waite's final claim to set aside the C&R.

*5. Conclusion.*

The Decision of the Board to dismiss Mr. Waite's petition to set aside the C&R as the only possible sanction for failure to comply with discovery is AFFIRMED.

Date: 15 March 2017 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



*Signed*

\_\_\_\_\_  
Michael J. Notar, Appeals Commissioner

*Signed*

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S. T. Hagedorn, Appeals Commissioner

*Signed*

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Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme

Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

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

#### RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 234 issued in the matter of *Gary M. Waite vs. Holland America-Princess/Princess Tours and Travelers Insurance Company*, AWCAC Appeal No. 16-010, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 15, 2017.

Date: March 17, 2017



*Signed*

K. Morrison, Appeals Commission Clerk