

Alaska Workers' Compensation Appeals Commission

Joseph Butcher,
Appellant,

vs.

Federal Express Corporation,
Appellee.

Final Decision

Decision No. 279

July 13, 2020

AWCAC Appeal No. 19-016
AWCB Decision No. 19-0083
AWCB Case No. 200400422

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 19-0083, issued at Anchorage, Alaska, on August 7, 2019, by southcentral panel members William Soule, Chair, Nancy Shaw, Member for Labor, and Bob Doyle, Member for Industry.

Appearances: Joseph Butcher, self-represented appellant; Rebecca Holdiman Miller, Holmes Weddle & Barcott, PC, for appellee, Federal Express Corporation.

Commission proceedings: Appeal filed September 6, 2019; briefing completed March 4, 2020; oral argument held April 13, 2020.

Commissioners: James N. Rhodes, S. T. Hagedorn, and Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

The Alaska Workers' Compensation Board (Board) heard Federal Express Corporation's (Federal Express) petition to dismiss the claim of Joseph Butcher on two occasions.¹ In *Butcher I*, the Board ordered Mr. Butcher to attend a "properly scheduled and noticed deposition" and explained to him that if he failed or refused to participate in this deposition, his claim would be dismissed.² Federal Express, on May 22, 2019, filed

¹ *Joseph Butcher v. Federal Express Corp.*, Alaska Workers' Comp. Bd. Dec. No. 19-0048 (Apr. 12, 2019)(*Butcher I*); *Joseph Butcher v. Federal Express Corp.*, Alaska Workers' Comp. Bd. Dec. No. 19-0083 (Aug. 7, 2019)(*Butcher II*).

² *Butcher I* at 15.

a petition to dismiss Mr. Butcher's claim for failure to comply with the order in *Butcher I*.³ The Board decided the matter on the written record and noted Mr. Butcher did not file a brief.⁴ The Board dismissed Mr. Butcher's claim and his petition for a Second Independent Medical Evaluation (SIME), and granted the petition by Federal Express to enforce *Butcher I* and to dismiss Mr. Butcher's claim.⁵

Mr. Butcher timely appealed *Butcher II* (and, by implication, *Butcher I*) to the Alaska Workers' Compensation Appeals Commission (Commission). The Commission heard oral argument on April 13, 2020. Mr. Butcher, prior to oral argument, sent an email the Clerk of the Commission on March 24, 2020, stating he did not wish to participate in the oral argument. His email was read into the record at oral argument and oral argument proceeded without his participation.

The Commission, based on the parties' briefs and the oral argument, now affirms the Board's decision in *Butcher II* dismissing Mr. Butcher's claim and his petition for an SIME.

2. *Factual background and proceedings.*⁶

On July 18, 2005, the Board approved a Compromise and Release Agreement (C&R) affecting seven separate injuries Mr. Butcher sustained while working for Federal Express. Mr. Butcher waived all benefits, including medical care, in six of the seven listed cases. However, future medical benefits in AWCB Case No. 200400422 remained open with the exception of his waiver of future chiropractic treatment after six months from the date of Board approval of the C&R. The parties agreed Mr. Butcher's right to claim non-chiropractic medical expenses in AWCB Case No. 200400422 was not waived, and Federal Express retained the right to contest any future medical treatment. "Future entitlement to medical benefits under the 2004 date of injury remains subject to all rights

³ *Butcher II* at 1.

⁴ *Id.*

⁵ *Id.* at 18.

⁶ 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.

and defenses of the Alaska Workers' Compensation Act." In the C&R, Mr. Butcher did not waive his right to claim future non-chiropractic medical care in AWCB Case No. 200400422; however, Federal Express likewise did not waive its right to defend against any future claims for medical care he might make.⁷ The Board explained that the C&R did not expressly nor implicitly guarantee Federal Express would pay Mr. Butcher's "medical benefits for life." The Board further explained that the C&R simply left open Mr. Butcher's right to make medical claims in AWCB Case No. 200400422 for life, subject to Federal Express's defenses.⁸

The Board found that no attorney has entered an appearance for Mr. Butcher in the case before the Board. Likewise, no attorney entered an appearance for Mr. Butcher in the appeal before the Commission.⁹

On October 6, 2016, Mr. Butcher filed a claim with the Board requesting permanent partial impairment (PPI) benefits and medical benefits. He stated "+7 all Filed Med – For Life!"¹⁰ Also, on October 6, 2016, he filed a medical summary with no medical records attached, stating on its face, "+7 Filed Med – For Life!"¹¹

The Board found that between October 6, 2016, and April 4, 2018, Mr. Butcher filed no documents with the Board.¹²

On April 4, 2018, Mr. Butcher filed a petition seeking an SIME.¹³

On June 29, 2018, Federal Express served on Mr. Butcher written questions for him to answer and return.¹⁴

⁷ *Butcher I* at 2, No. 1; *Butcher II* at 2, No. 1.

⁸ R. 99 – 113.

⁹ *Butcher I* at 3, No. 2; Commission record.

¹⁰ R. 52 – 53.

¹¹ R. 54.

¹² *Butcher I* at 3, No. 5.

¹³ R. 635.

¹⁴ Exc. 51 – 64.

The Board held numerous prehearing conferences following Mr. Butcher's filing of his October 6, 2016, claim. Mr. Butcher appeared for the first four prehearing conferences. At the second prehearing conference, the Board designee ordered him to sign and return releases to Federal Express, but the Board designee did not advise Mr. Butcher there could be sanctions for his failure to comply. At the third prehearing conference, the Board designee reconsidered his prior order and required Mr. Butcher to sign additional releases, but again did not tell him he could be sanctioned if he failed to comply. At the fifth prehearing conference, which Mr. Butcher did not attend, the Board designee ordered Mr. Butcher to sign and return releases to Federal Express, but again did not advise Mr. Butcher there could be sanctions for his failure to comply. At the sixth prehearing conference, which Mr. Butcher also did not attend, the Board designee scheduled a hearing for October 9, 2018, on Federal Express's request for an order compelling Mr. Butcher to sign releases. At the seventh prehearing conference, which Mr. Butcher attended, the Board designee added Federal Express's petition to compel interrogatory answers as an issue for hearing. At the eighth prehearing conference, which Mr. Butcher did not attend, the Board designee ordered Mr. Butcher to attend his deposition, but did not advise Mr. Butcher there could be sanctions for his failure to attend. At the ninth prehearing conference, which Mr. Butcher also failed to attend, the Board designee scheduled an April 10, 2019, hearing on Federal Express's petition to dismiss his claim.¹⁵

The Board found that the Division of Workers' Compensation (Division) had properly and timely notified Mr. Butcher at his address of record for each prehearing conference summarized above.¹⁶

On September 21, 2018, Mr. Butcher visited the Anchorage Division office and staff notarized various releases he signed. Mr. Butcher told staff "that he will not answer any

¹⁵ R. 2139 – 2141; Exc. 22 – 23; Exc. 38 – 40; R. 2165 – 2167; Exc. 48 – 50; Exc. 65 – 67; Exc. 69 – 71; Exc. 107 – 109; Exc. 115 – 116; Exc. 151 – 155; Exc. 161 – 164.

¹⁶ *Butcher I* at 4, No. 9.

of the interrogatories unless he has an attorney and at this time he was not planning on getting one." Board staff told Mr. Butcher he needed to mail the notarized documents to Federal Express. He declined and asked staff to do it. Staff sent the releases and the signed interrogatories to Federal Express.¹⁷ On September 24, 2018, the Board returned the June 29, 2018, interrogatories to Federal Express which had not been answered, but included the notation "Added Dr.'s should be updated from releases" handwritten on the first page.¹⁸

On September 28, 2018, Federal Express notified Mr. Butcher of his obligation to attend his deposition scheduled for October 12, 2018.¹⁹ Mr. Butcher did not appear at the October 12, 2018, deposition.²⁰ On October 22, 2018, Federal Express requested an order compelling Mr. Butcher to attend his deposition, stating he failed to appear at his last noticed deposition.²¹ On November 1, 2018, Federal Express sent Mr. Butcher its second set of questions for his response.²² On November 21, 2018, the Board designee ordered Mr. Butcher to attend his deposition.²³

On January 21, 2019, Federal Express's counsel appeared for Mr. Butcher's deposition. On that date, the court reporter certified the deposition was to begin at 9:00 a.m., but by 9:20 a.m. Mr. Butcher still had not appeared.²⁴ On January 24, 2019, Federal Express asked for an order dismissing Mr. Butcher's claim for his failure to attend either of the two properly noticed depositions.²⁵

¹⁷ *Butcher I* at 4, No. 10.

¹⁸ *Id.*; R. 677 – 692.

¹⁹ Exc. 88 – 89.

²⁰ Hr'g Tr. at 18:13-19, Apr. 10, 2019.

²¹ Exc. 90.

²² Exc. 91 – 106.

²³ Exc. 107 – 109.

²⁴ R. 816 – 817.

²⁵ R. 724.

On March 8, 2019, the Division served a hearing notice for the April 10, 2019, hearing on all parties, including Mr. Butcher at his correct address.²⁶

On March 22, 2019, Mr. Butcher returned the hearing notice to the Division along with his attached affidavit, which stated:

I, Joseph Butcher, do here by without representation make the claim that both the Board and the Defendant are both using the legal system created by both the Employers and the Board to legally bully the true defendant of this case. . . ."Joseph Butcher." I have provided under oath for the Board and the Employer a true deposition already at witch [sic] time the Employer had promised to "Pay for Life" the need to maintain the agreed upon pain that I was unduly and unfortunately met with during my employment and on record and maintained by the board. I have been both at the office regularly to state that I am not ready nor do I wish to have meetings or proceedings with the employer or it's Defendants. The medical records are both clear and while the ER is requested the Employer and the board both know that my objective is clearly to stay away from such a need all cost. If the bills are not paid because of the Independent medical examiner's decision to be prudent and objective toward the original contravention found in my favor waffling back and forth as the Dr. [sic] in my favor is now dead and as well the original office of holdings in findings of real facts already in record has closed the offices, leaving only the unethical and unreasonable denial of requested and appealed for of a follow up IME by a different other office in which this state is lacking or not made available to me. The legal bullying is true to the most gross negligence by both the board and the employer. I will and must secure private legal help at a private cost to bring this forward and may testify in any other case needing a witness to the same issue brought on by negligence both at unprecedented legal manipulation by offices within the umbrella of public helps and policies under the State of Alaska in the city of Anchorage and my need to find legal help from outside of the local state level of helps.

Thank you for your attention and please refrain from making appointments for the true defendant Joseph Butcher.²⁷

Although, the Division properly served Mr. Butcher with the April 10, 2019, hearing notice, he did not attend either in person or by telephone.²⁸

²⁶ R. 2200.

²⁷ Exc. 117.

²⁸ *Butcher I* at 6, Nos. 24 – 25.

On April 12, 2019, the Board, in *Butcher I*, ordered Mr. Butcher to appear at a properly scheduled and noticed deposition within thirty days from the date of the decision. He was further ordered to participate fully in his deposition and answer all questions to the best of his ability. In addition, the Board specifically advised Mr. Butcher that failure “to participate fully in his deposition” meant his claim would be dismissed in a subsequent Final Decision and Order.²⁹ The Board found this decision was the Board’s first explicit notice to Mr. Butcher that his October 6, 2016, claim and April 4, 2018, petition would be dismissed if he failed or refused to participate in his deposition as ordered.³⁰

On April 16, 2019, in response to *Butcher I*, Federal Express asked Mr. Butcher to provide dates he was available to be deposed within the next thirty days.³¹ On May 8, 2019, Federal Express properly noticed Mr. Butcher’s deposition for May 20, 2019, at 2:00 p.m.³² On May 20, 2019, court reporter Angela Peronto signed a statement attesting Mr. Butcher had not appeared for his deposition thirty minutes past the time it was scheduled to begin. This was his third failure to appear.³³

On May 22, 2019, Federal Express asked the Board to enforce *Butcher I* and dismiss Mr. Butcher’s claim. It contended he failed to comply with *Butcher I* by failing again to attend his properly noticed deposition.³⁴

On May 29, 2019, Mr. Butcher filed medical billing statements with handwritten notes, but without evidence he served these on Federal Express.³⁵

On June 4, 2019, Mr. Butcher stated under oath before a notary public, without evidence he served his statement on Federal Express:

²⁹ *Butcher I* at 15.

³⁰ *Butcher II* at 5, No. 27.

³¹ Exc. 150.

³² Exc. 157 – 158.

³³ Exc. 159.

³⁴ Exc. 160.

³⁵ R. 912 – 922.

The undersigned, JOSEPH BUTCHER, being duly sworn, hereby deposes and says:

(1) I am over the age of 18 and am a resident of the State of Alaska. I have personal knowledge of the facts herein, and, if called as a witness, could testify completely thereto.

~~(2) I suffer no legal disabilities and have personal knowledge of the facts set forth below. JB.~~

(3) I, Joseph Butcher, have been sent, regularly, documents that do not line up with the truth of events and do not in any way represent the truth of this matter. There will be no other deposition than the first that was already given and in record and the agreements were to pay for life for the pain I may endure for the rest of my life for the entire back and anything relating or stemming from or to it by cause. I will not be attending any meetings made by the board or the requesting party as the board has found great favor in not helping me in any of this matter other than to have convoluted it through mitigation[]s that are both and only favorable to itself and it[]s favored findings against me regularly and can be seen in all the drafts and documents submitted within this case form [sic] it[]s beginning to the present date two [sic] items that are very evident witch [sic] are the private and closed meeting for deposition that is already in submission taken during a recorded meeting arranged by the board at the time of promise to pay. [A]s well as the EME[]s are and can be seen convoluted by the independent evaluation as they have waffled and when I requested an EMI [sic] I was denied permission to have my own done in response to the waffling of both the board and the employer on this point[.] I will not submit myself to this wrongful and negligent care by either. It has been presented to both the board and the Employer that I would seek out of state defense and to no longer make contact with the defendant as the legal bulling [sic] is very evident in any light. [T]his is the second letter notarizing the fact of this case and the continued bulling [sic] for depositions and meetings. At the time of my choosing if I so chose [sic] I will serve both the board and the Employer[.] [T]here is no lack of evidence in this matter and injury and pain I must endure for the rest of my life. The apathy by witch [sic] the board and employer make there [sic] dissensions is unresolved and can be addressed at the time of appropriate representation.

I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.³⁶

The Board stated it was not clear what Mr. Butcher meant by his statement that "There will be no other deposition than the first that was already given and in record,"

³⁶ R. 923 – 924.

because there is no deposition in the Board record. The Board added that the hallmark of a party's deposition is the right by an opposing party to cross-examine the other party while that party is under oath. A party cannot cross-examine a written statement. The Board found that there was no deposition from Mr. Butcher in the agency file, including the old digitized file, and no indication he ever appeared under oath before a court reporter or the Board for examination and cross-examination. The Board concluded that Mr. Butcher might have been referring incorrectly to his March 21, 2019, affidavit, his C&R, or a recorded statement an adjuster might have taken in the past, as a "deposition."³⁷

On July 15, 2019, the Division properly served Mr. Butcher with the July 30, 2019, written record hearing notice at his correct address. The hearing notice provided Mr. Butcher an opportunity to be heard on the issue set for hearing and stated:

This case has been set for hearing on the written record. It will be decided based on documents in the board's case file and the parties' written arguments. If filed, written arguments must be filed at the address below and served on all parties no later than five business days prior to the hearing.³⁸ (Emphasis in original.)

Other than filing itemized medical billing statements and his June 4, 2019, affidavit, Mr. Butcher did not provide any briefing for the July 30, 2019, written record hearing.³⁹

The Board noted that on April 29, 2019, both parties attended the tenth prehearing conference held since Mr. Butcher filed his October 6, 2016 claim. The Board designee explained in detail what affect the approved C&R had on Mr. Butcher's right to benefits. She noted he initially failed to attend two Employer's Medical Evaluations (EME) set up by Federal Express. The Board designee cited *Butcher I* and again advised Mr. Butcher that he had been ordered to appear at a properly noticed and scheduled deposition. And she reminded Mr. Butcher that failure to cooperate and participate in the deposition would

³⁷ *Butcher II* at 6, No. 34.

³⁸ *Id.* at 7, No. 35.

³⁹ *Id.*, No. 36.

result in his claim being dismissed. In her "Order" section in the conference summary, the Board designee further advised Mr. Butcher:

. . . .

(3) Mr. Butcher must notify Ms. Holdiman-Miller the date and time on May 17, 20, or 21, 2019 that he is available to attend his deposition.

(4) If Mr. Butcher does not attend his deposition, his claim shall be dismissed pursuant to the order in *Butcher v. Federal Express Corp.*, AWCB Decision No. 19-0048 (April 12, 2019). (Emphasis added.)

Another prehearing conference was held on July 10, 2019, but Mr. Butcher did not attend. The Board designee set Federal Express's May 22, 2019, petition to dismiss on for a hearing on the written record for July 30, 2019, and again reminded Mr. Butcher that

(4) If Employee fails or refuses to participate fully at his deposition in conformance with this decision and order, his claim filed October 6, 2016 and his April 4, 2018 petition will be dismissed in a subsequent Final Decision and Order, issued after Employer files a deposition notice and a court reporter's certificate of Employee's nonappearance at the scheduled deposition. (Emphasis added.)⁴⁰

The Board, in *Butcher II*, found that Mr. Butcher's failure to appear thrice at his properly noticed depositions was willful and intentional.⁴¹ The Board further held that dismissal of claims is generally a sanction of last resort and reviewed the Board notices to Mr. Butcher that his claim would be dismissed if he continued in his failure to attend his deposition. The Board stated that Mr. Butcher had twice stated he had no intention to participate in his deposition. This willful intention directly impedes the right of Federal Express to investigate the claim by Mr. Butcher that he is owed medical benefits. The Board then determined that there was no lesser sanction available that would correct the failure of Mr. Butcher to attend his deposition. Dismissal, the Board held, is the only means to protect adequately Federal Express against Mr. Butcher's claim. The Board

⁴⁰ Exc. 151 – 155, 161 – 164.

⁴¹ *Butcher II* at 10, No. 42.

then dismissed both Mr. Butcher's claim for medical benefits and his petition for an SIME.⁴²

3. *Standard of review.*

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.⁴³ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁴⁴ "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."⁴⁵ On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment.⁴⁶

However, the Board's conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine the credibility of witnesses.⁴⁷ The weight given to the witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.⁴⁸

Review of discovery dispute rulings by the Board, including the imposition of sanctions, is made pursuant to an analysis of whether the Board abused its discretion.⁴⁹

⁴² *Butcher II* at 16 – 17.

⁴³ AS 23.30.128(b).

⁴⁴ *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁴⁵ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-1189 (Alaska 1984)).

⁴⁶ AS 23.30.128(b).

⁴⁷ AS 23.30.128(b); AS 23.30.122; *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013).

⁴⁸ AS 23.30.122.

⁴⁹ *See, e.g., Dougan v. Aurora Elec., Inc.*, 50 P.3d 789, 793 (Alaska 2002); *McKenzie v. Assets, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009).

4. Discussion.

Mr. Butcher contends that the C&R promised him medical benefits for life and, therefore, he should not have to respond to any requests by Federal Express for discovery, including updated medical releases, a deposition, or new medical information beyond that which he has provided already. He asserts the Board erred in dismissing his claim for PPI and medical costs because he had already provided any information Federal Express should need. He further contends the C&R guaranteed him medical benefits for life and believes that he was offered \$2,000.00 a year "for keeping the bills reasonable"50

This latter statement is confusing and conflicts with the clear language of the C&R. However, the Commission takes this statement to be in reference to language in the C&R which stated "[t]he employer will provide treatment over the next 6 months for Mr. Butcher with Dr. Wells for a maximum of \$2000. Any part of that amount which remains after 6 months is to be paid to Mr. Butcher."⁵¹ The Commission notes this was payment for treatment with a specific provider in the first six months following approval of the C&R. It was not a cap on any future medical treatment, other than chiropractic treatment, which Mr. Butcher might necessarily incur related to the 2004 neck injury, nor was it a guarantee to pay up to \$2,000.00 per year for medical treatment.⁵²

In his brief to the Commission, Mr. Butcher also confuses actions by the Board with activities before the Commission, contending the "Commission" was involved in the settlement. The Commission is an appellate body which means its role is to review decisions of the Board. The Commission does not participate in hearings before the Board, and was not involved in the approval of the C&R Mr. Butcher signed on June 2, 2005.⁵³

⁵⁰ Appellant's brief.

⁵¹ Exc. 9.

⁵² R. 99 – 113.

⁵³ Exc. 11; AS 23.30.007; AS 23.30.108.

Federal Express contends it has not improperly denied any medical expenses necessitated by the 2004 injury. It has sought to determine what expenses might be related and, thereby, it has required Mr. Butcher to provide documentation that any medical benefits he is seeking arise out of and are related to the 2004 work injury. Mr. Butcher, it further asserts, has consistently failed to answer interrogatories, to attend two scheduled EMEs, to sign medical releases, or to participate in his deposition. This behavior by Mr. Butcher has meant that Federal Express has been unable to document whether any treatment he has sought in the intervening fifteen years is medically related to the original work injury.

The C&R, as the Board explained, while leaving open the possibility of future medical treatment, also preserved the right of Federal Express to investigate and dispute payment of any treatment sought by Mr. Butcher. The current dispute seems to have arisen because Mr. Butcher failed to attend an EME in 2014 and again in 2015.⁵⁴ EMEs are specifically authorized by AS 23.30.095(e) and the statute further provides that refusal to attend an EME allows the employer to suspend payment of benefits until the refusal ceases.⁵⁵

The Board, in *Butcher I*, explained to Mr. Butcher the right of Federal Express to discovery and then noted the record was not clear that it had been fully explained to Mr. Butcher that if he continued to be uncooperative with discovery, it was possible for the Board to dismiss his claim. It, therefore, denied at that time the petition by Federal Express to dismiss his claim and ordered him to attend a properly noticed and scheduled deposition. In *Butcher II*, the Board found Mr. Butcher's failure to cooperate and to participate in his deposition to be intentional and willful, and decided that the only available sanction to remedy this abuse of the discovery process was to dismiss his claim.

⁵⁴ Appellee's brief at 2.

⁵⁵ AS 23.30.095(e).

- a. *Did the Board abuse its discretion when it dismissed Mr. Butcher's claim and petition as a sanction for his failure to comply with ordered discovery?*

The Alaska Workers' Compensation Act (Act) provides for discovery and sets out the procedure for a party to follow if the party believes the discovery sought is not appropriate.⁵⁶ The Act further provides for sanctions if the party refuses to comply with discovery orders. "If a party refuses to comply with an order by 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."⁵⁷ Furthermore, the Act requires an injured worker to provide written authority (releases) to an employer to allow for the obtaining of medical information relative to the injury.⁵⁸ The Act further requires an injured worker to attend an examination by a physician of the employer's choice (EME) on a periodic basis, and failure to attend such an EME provides the employer with authority to suspend benefits until the employee cooperates.⁵⁹ The Board's regulations specifically permit the taking of the employee's deposition.⁶⁰

Mr. Butcher, following the approval of the C&R, continued to seek medical treatment. In 2014, Federal Express exercised its statutory right to have Mr. Butcher examined by a doctor of its choosing, but he failed to attend the examination.⁶¹ Thereafter, Federal Express controverted Mr. Butcher's right to benefits based on his refusal.⁶² Mr. Butcher filed a claim on October 6, 2016, seeking medical benefits he asserted were owed to him pursuant to the C&R approved by the Board in 2005.⁶³ Federal

⁵⁶ AS 23.30.108(a).

⁵⁷ AS 23.30.108(c).

⁵⁸ AS 23.30.107(a).

⁵⁹ AS 23.30.095(e).

⁶⁰ 8 AAC 45.054(a).

⁶¹ This examination is referred to as the Employer's Medical Evaluation or EME.

⁶² Appellee's brief at 2.

⁶³ *Butcher I* at 3, No. 3.

Express then sent Mr. Butcher releases to sign which he refused to do.⁶⁴ Federal Express scheduled his deposition three times, the third time following the Board order in *Butcher I*.

Mr. Butcher failed to attend any of the scheduled depositions and, in fact, wrote the Board stating he would not do so.⁶⁵ On March 21, 2019, he signed a statement asserting he would not attend any meeting or proceeding with either Federal Express or the Board.⁶⁶ Again, on June 4, 2019, he signed a statement stating that “There will be no other deposition than the first that was already given and in record . . . I will not be attending any meeting made by the board or the requesting party. . . .”⁶⁷

The Board, in *Butcher III*, reviewed the record of noncompliance by Mr. Butcher, including the summary of each of the nine prehearings at which he was required to sign releases or attend his deposition. The Board, however, expressed concern that there was an inconsistency or lack of evidence as to when and how Mr. Butcher was advised that if he continued to fail to cooperate with discovery his claim could be dismissed. The Board, therefore, refused in *Butcher I* to dismiss his claim, but instead provided him with one more opportunity to cooperate and participate in his deposition as scheduled by Federal Express. The Board expressly ordered him to attend and participate appropriately in a deposition and specifically advised him that failure to do so would result in the dismissal of his claim.

Following the decision in *Butcher I*, two more prehearings were held. At the prehearing conference on April 29 2019, which Mr. Butcher attended, he was ordered to attend his deposition, provided with dates from which to choose for the deposition, and instructed that if he failed to participate his claim would be dismissed.⁶⁸ Mr. Butcher did not cooperate and failed to attend the scheduled deposition.

⁶⁴ *Butcher I* at 8.

⁶⁵ Exc. 117; *Butcher II* at 5 – 6, No. 33.

⁶⁶ Exc. 117.

⁶⁷ *Butcher II* at 5-6, No. 33.

⁶⁸ Exc. 151 – 155.

Mr. Butcher has demonstrated his disdain for the Board by, among other things, blatantly refusing to follow its orders. He has provided no coherent explanation for his willful failure to attend his deposition, even when it was scheduled at a time he agreed would be convenient. The Board, in *Butcher II*, found that no alternative sanction would prompt Mr. Butcher to attend his deposition and allow Federal Express to conduct the discovery necessary to determine if additional medical benefits might be owed to Mr. Butcher. The Board went the extra mile in *Butcher I*, explaining the discovery process to Mr. Butcher and giving him the benefit of the doubt that he fully understood his claim could and would be dismissed if he continued to fail to cooperate. Nonetheless, Mr. Butcher stated firmly that he had no intention of cooperating with either the Board or Federal Express and would not attend any deposition. The Board was left with no lesser sanction that could be imposed.

The Alaska Supreme Court (Court), in *DeNardo v. ABC Inc. RVs Motorhomes*, stated that before litigation-ending sanctions are imposed “a reasonable exploration of possible and meaningful alternatives to dismissal” must be made.⁶⁹ The Court held that “[A] party should not be barred from his or her day in court where an alternative remedy would suffice to make the adverse party whole.”⁷⁰ The Commission, in *McKenzie v. Assets, Inc.*, applied the findings in *DeNardo* to uphold dismissal by the Board of an employee’s claims due to her failure to cooperate with discovery.⁷¹ The Commission ruled the Board had not abused its discretion in dismissing her claim. The Board there found that Ms. McKenzie was willfully obstructive and that the Board had considered alternative sanctions.

Here, the Board reviewed the record thoroughly and found that Mr. Butcher followed a deliberate pattern of noncooperation with discovery by his refusal to attend

⁶⁹ *DeNardo v. ABC Inc. RVs Motorhomes*, 51 P.3d 919, 926 (Alaska 2002) (citations omitted).

⁷⁰ *Id.*

⁷¹ *McKenzie v. Assets, Inc.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 109 (May 14, 2009).

the EME, his consistent failure to timely sign and return medical releases, and adamant refusal on three occasions to participate in properly noticed and scheduled depositions. Pursuant to the settlement agreement, the only benefits available to Mr. Butcher were medical benefits and, thus, there were no other benefits to forfeit. Therefore, the only adequate remedy available was the ultimate sanction of dismissing his claim. The Board did not abuse its discretion in doing so.

b. Substantial evidence in the record supports the Board's decision.

The Board detailed in both *Butcher I* and *Butcher II* numerous ways Mr. Butcher obstructed the discovery process. Initially, in 2014, he did not seek a protective order from Federal Express's notice of an EME and he simply did not attend the properly scheduled EME. Thereafter, he filed a claim, but over the course of several prehearings he refused, then agreed, and then ultimately refused to provide proper medical releases to Federal Express which would have allowed it to review and make an objective determination as to whether to pay for medical services to Mr. Butcher. Finally, Mr. Butcher refused to attend his deposition on three separate occasions. He never sought a protection order for any of the depositions even though he knew how to seek one, having filed for a protective order in 2004.⁷²

Mr. Butcher continues to assert he was promised medical care for life and that Federal Express is refusing to honor the agreement. However, the Board, both at prehearings and in its two decisions, explained to Mr. Butcher that the agreement did not promise to pay for any or all medical care. The agreement preserved his right to seek medical care and it equally preserved the right of Federal Express to review and contest any medical treatment sought by Mr. Butcher. When Federal Express exercised its right to evaluate the medical treatment he was seeking, Mr. Butcher refused to allow Federal Express the means to do so. In 2014, he refused to attend the EME scheduled pursuant to AS 23.30.095. He then refused to sign medical releases, even after agreeing to do so at a prehearing, and did not provide Federal Express with information about where he even obtained medical treatment. Finally, he refused to attend two properly scheduled

⁷² R. 599 – 600.

depositions prior to the Board's order in *Butcher I*, and then refused to follow the order in *Butcher I* by failing to appear at the deposition scheduled at a prehearing on a date convenient to him.

This pattern of refusal to cooperate with discovery is substantial evidence to support the Board's decision. This pattern is the kind of evidence which a reasonable mind would find to be adequate to support a conclusion. Moreover, Mr. Butcher has not proffered any evidence or rational basis for his refusal to allow discovery to go forward. The Board's decision is supported by substantial evidence in the record as a whole.

5. Conclusion.

The Board's decision is AFFIRMED.

Date: 13 July 2020 Alaska Workers' Compensation Appeals Commission



Signed

James N. Rhodes, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

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. 279, issued in the matter of *Joseph Butcher v. Federal Express Corporation*, AWCAC Appeal No. 19-016, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 13, 2020.

Date: July 15, 2020



Signed

K. Morrison, Appeals Commission Clerk