BEFORE THE ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

STATE OF ALASKA, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, DIVISION OF LABOR STANDARDS & SAFETY, OCCUPATIONAL SAFETY & HEALTH SECTION, Complainant,	)	
vs.	)	
JAMES HALLIDAY JR., DMD LLC d/b/a COOK INLET DENTAL Contestant.	)	Docket No. 12-2270 Inspection No. 314288192 OAH No. 12-0063-OSH

DECISION AND ORDER

I. Introduction

The Division of Labor Standards and Safety (division) investigated the employer, James Halliday Jr. doing business as Cook Inlet Dental (Cook Inlet). At the conclusion of its investigation, the division issued one citation for failure to provide testing for an employee who had been exposed to a patient's blood. The proposed fine was for $2,000. Cook Inlet contested that citation, and requested a hearing. An administrative law judge (ALJ) with the Office of Administrative Hearings was assigned to conduct pre-hearing proceedings and to assist the Review Board with any hearing in this matter.

After extensive pre-hearing proceedings, the division filed a Motion to Dismiss as a sanction for failing to comply with pre-hearing orders. For the reasons discussed below, that motion is granted.

II. Background

A. Factual Background

According to the progress notes submitted with Cook Inlet's Answer, on May 12, 2012, a dental assistant was cleaning instruments previously used on a patient. The employee received a "needlestick injury" to her right thumb. The patients' blood was promptly tested but, the employee was not offered the opportunity to have her blood tested until after a citation was issued in this matter.

When an employee has been exposed to a patient's blood,

the employer shall make immediately available to the exposed employee a confidential medical evaluation and follow-up, including at least the following elements;

(i) Documentation of the route(s) of exposure, and the circumstances under which the exposure incident occurred;

(ii) Identification and documentation of the source individual unless the employer can establish that identification is infeasible or prohibited by state or local law;

[sections discussing testing of source individual's blood]

(iii) Collection and testing of blood for HBV and HIV serological status;

(A) The exposed employee's blood shall be collected as soon as feasible and tested after consent is obtained.[1]

Cook Inlet took immediate steps to test the patient's blood, but not the employee's blood. The exposure occurred on May 12, 2011.[2] The patient's blood was tested for HBV (but not HIV)[3] on May 16, 2011.[4] However, there is nothing in the record to show that the employee was offered testing "as soon as feasible" after the May 12 exposure. Instead, the record shows attempts to have the employee's blood tested occurred only after the citation was issued in January.[5] The employee had declined the hepatitis vaccination prior to the exposure incident,[6] but this action does not remove the employer's obligation to offer post exposure testing.[7]

B. Procedural History

A complaint was filed in this matter on March 13, 2012. An order was issued setting a Case Planning Conference for April 18, 2012. This order informed Cook Inlet that its Answer was due by April 16, 2012.[8]

The division filed a request to change the date of the Case Planning Conference and the date for Cook Inlet to file its Answer. Counsel represented that she had consulted with

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1 29 C.F.R. §1910.1030(f)(3) (emphasis added). This regulation was adopted by reference by 8 AAC 61.1010(b).

2 Record at 016.

3 It appears that an HIV test was requested and that the testing lab erred in not performing this test.

4 Record at 017 – 018.

5 *See* Record at 019 – 023. Cook Inlet's Exposure Control Plan does contain a provision to test the exposed employee's blood as soon as feasible. Record at 056.

6 Record at 066.

77 As noted below, the division's requests for admission were deemed admitted. Based on these admissions, the employee requested that she be tested but collection and testing of her blood was not immediately made available to her. Requests for Admission 12 and 13 (Division's Hearing Exhibit 2.).

8 An employer h as 30 days from the date of the complaint in which to file its Answer. 8 AAC 61.175(b).

Cook Inlet, and that this request was unopposed. The Case Planning Conference was rescheduled for May 9, 2012, and Cook Inlet was given until May 7, 2012, to file its Answer.[9] Cook Inlet did file its Answer on May 7, 2012.

The Case Planning Conference was held by telephone, and Cook Inlet's office manager, Tanya Halliday, appeared on behalf of Cook Inlet. A written scheduling order was issued setting the hearing for August 6, 2012. This order stated that absent good cause, requests to postpone the hearing must be submitted at least twenty days before the hearing date. The order also stated "Scheduling difficulties or conflicts should be brought to the attention of the OAH office at 907-269-8170 immediately after their discovery."

The scheduling order also set discovery deadlines and the date for filing witness lists and exhibit lists.

Shortly before the August hearing, Cook Inlet filed a document that stated

> Cook Inlet Dental, previously received a verbal offer from the Hearings Officer for an impartial Hearings Officer to represent Cook Inlet Dental in regard to this case. On June 15th Mrs. Halliday talked to Ms. Pallesen [the division's attorney] after returning her call and Mrs. Halliday advised Ms. Pallesen that Cook Inlet Dental would be requesting the impartial Hearings Officer request as offered. Ms. Pallesen was also advised that Mrs. Halliday would be requesting extensions and/or postponements of deadlines due to the Family Medical Leave Act and pending Medical Procedures.[10]

The division filed a response in which it disputed the assertions made by Cook Inlet, and noted that Cook Inlet had not yet responded to discovery requests served on June 20, and that Cook Inlet had not filed its witness list or exhibit list. The division stated that it was ready to proceed to a hearing, and, in the alternative, requested a status conference.

A status conference was held. As a result of that conference, the hearing was postponed until the Board's first hearing date in 2013.[11] Cook Inlet was also ordered to respond to the outstanding discovery requests by September 17, 2012, and to file and serve its witness and exhibit lists by September 21, 2012.[12]

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9 Order dated April 12, 2012.

10 Pleading filed July 30, 2012. At the Case Planning Conference, both parties were given an opportunity to have a different ALJ assigned to assist with mediation if requested by the parties. ALJs cannot represent either party, and no such offer was made. Cook Inlet may have misunderstood the discussion about assigning an ALJ to conduct mediation. Mediation was not requested.

11 The 2013 dates had not yet been set.

12 Order dated August 1, 2012.

The division filed a motion to dismiss on September 26, 2012. The division asserted that Cook Inlet had still not responded to its discovery requests, and had still not submitted a witness list or exhibit list. The division requested that the appeal be dismissed and the citation upheld as a sanction for failing to comply with prior orders. In the alternative, the division asked that its requests for admission be deemed admitted.

On October 2, 2012, a notice was issued by the administrative law judge, informing Cook Inlet that it was required to file a response by October 11, 2012.

Cook Inlet did not file a response. Even though it was unopposed, the division's motion was not granted.[13] This order also denied the alternative relief that the request for admission be deemed admitted because it did not appear that those requests were in the record. The division moved for reconsideration on all issues. The division pointed out that the requests for admission were in fact previously in the record for the ALJ to review.

After receiving the motion for reconsideration, the ALJ issued an order stating that Cook Inlet should respond to that motion by November 1, 2012. Cook Inlet did not file a response. The order on reconsideration informed Cook Inlet that it must respond to the outstanding discovery requests by November 26, 2012. The order stated "**Failure to provide these responses by this date may result in sanctions up to and including the dismissal of the Notice of Contest and affirming the Citation.**"[14] This order did hold that the requests for admission were deemed admitted, noting that the "division's prior argument in favor of having these deemed admitted is still valid. In addition, Cook Inlet has had another opportunity to address this issue, and has chosen not to submit any response."

On November 30, 2012, the division once again moved to have this case dismissed based on Cook Inlet's failure to comply with discovery orders. Cook Inlet has not filed a response to this motion.[15]

III. Discussion

By regulation, discovery is permitted in hearings before the Review Board, and discovery is conducted in accordance with the rules of civil procedure, except that the

[13] Order dated October 16, 2012.

[14] October 16, 2012, order (emphasis in original).

[15] None of the orders or notices issued by the Office of Administrative Hearings have been returned as undeliverable.

automatic disclosure rules do not apply.[16] The civil rules of procedure allow the imposition of sanctions for a party's failure to comply with a discovery order.[17] This includes the authority to dismiss an entire action or render a judgment by default against the disobedient party.[18] However, an order establishing or dismissing a claim or defense should not be entered unless the party acted willfully.[19]

Litigation ending sanctions are disfavored, and must not be imposed without first exploring whether there are meaningful alternatives to dismissal.[20] It is difficult to explore meaningful alternatives, however, when the disobedient party does not engage in the process. Here, Cook Inlet provided no explanation to the division for not responding to discovery, and did not provide any explanation to the ALJ.

The ALJ has also attempted to obtain compliance with prior orders through a series of warnings and the imposition of less severe sanctions. Cook Inlet was reminded of the need to respond to the first motion to dismiss, and to the motion for reconsideration. Cook Inlet did not file a response to either motion. In the October 16, 2012 order, Cook Inlet was informed that it would not be permitted to call witnesses or introduce exhibits unless it provided witness and exhibit lists by October 31, 2012. Cook Inlet did not file an exhibit or witness list, nor did it provide any explanation for not doing so. The Order on Reconsideration dated November 2, 2012, deemed the requests for admission to be admitted, and gave Cook Inlet another opportunity to respond to the remaining outstanding discovery request. Cook Inlet did not respond.

In addition to the requests for admission, the division submitted several interrogatories.[21] Several of these interrogatories addressed issues that only Cook Inlet would be able to answer. There does not appear to be any alternative method for obtaining answers to these except through the discovery process, and Cook Inlet was not cooperating with that process.

Finally, Cook Inlet's refusal to respond can only be viewed as willful. Not only has Cook Inlet failed to respond to discovery, it has also ignored notices from the ALJ stating

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16 8 AAC 61.200(b).
17 Civil Rule 37(b).
18 Civil Rule 37(b)(2)(C).
19 Civil Rule 37(b).
20 *Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 12 P.3d 1169, 1176 (Alaska 2000).
21 Division's hearing exhibit 2.

deadlines to respond to motions and to provide witness and exhibit lists. The enforcement process depends on the cooperation of employers. When a citation is appealed, the review of that appeal depends on both the division and the employer cooperating to bring the matter to the board in a reasonably efficient manner. When one party flaunts the procedural rules, the process is harmed. Litigation ending sanctions are appropriate because of Cook Inlet's repeated refusal to comply with the ALJ's orders.

IV. Order

The division's Motion to Dismiss is GRANTED. Citation 1, Item 1 is affirmed. This constitutes a serious violation. The proposed penalty of $2,000 is hereby imposed. The hearing date in this matter is vacated.

By: Alaska Occupational Safety and Health Review Board

1/16/13 *Signed*
Date Thomas A. Trosvig, Member

1/16/13 *Signed*
Date James Montgomery, Jr., Member

1/20/13 *Signed*
Date Timothy O. Sharp, Chair

[This document has been modified to conform to the technical standards for publication.]