ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

STEPHAN CRAIG MITCHELL, Employee, Claimant, v. UNITED PARCEL SERVICE, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 199523875 AWCB Decision No. 13-0123 Filed with AWCB Anchorage, Alaska on October 07, 2013

United Parcel Service's November 19, 2012 petition to dismiss Employee's July 28, 2006, July 30, 2008, and June 11, 2010 workers' compensation claims, and Stephan Craig Mitchell's January 9, 2013 petition appealing the Alaska Workers' Compensation Board designee's December 19, 2012 order denying his petition to compel discovery, were heard on June 13, 2013 in Anchorage, Alaska, a date selected on February 5, 2013. Non-attorney representative Jeanne Mitchell represents Stephan Craig Mitchell (Employee). Ms. Mitchell was sworn and testified. Employee attended. Attorney Constance Livsey represents United Parcel Service and its insurer, Liberty Mutual Insurance Company (collectively, Employer). The record closed at the hearing's conclusion on June 13, 2013.

ISSUES

Employer contends Employee's July 28, 2006, July 30, 2008, and June 11, 2010 workers' compensation claims seek to re-litigate issues previously heard and decided, and should be

dismissed under the doctrine of *res judicata* (claim preclusion). Employer also asserts Employee's claims are time-barred under AS 23.30.110(c) due to his failure to timely proceed to hearing. Employer contends the claims should be dismissed with prejudice, permanently barring any further action on the issues therein.

Employee contends his claim has been open since the date of injury, October 31, 1995, and there is substantial evidence documenting a "mistake in multiple facts used to deny medical care and disability." He states he filed claims as events progressed, including spinal surgery and social security disability determination; all claims filed were "done to amend the claim" and "done with the assistance of [workers' compensation] personnel to protect his claim." Employee believes his "continued and unending attempts to advance to hearing on outstanding issues" have been repeatedly thwarted by Employer's unfair and frivolous controversions, intentional bad faith conduct, "slow-walking and no-walking." Employee further asserts he has advanced the case as best he can, but cannot proceed to hearing due to incomplete discovery.

1. Should Employee's July 28, 2006, July 30, 2008, and June 11, 2010 workers' compensation claims be denied and dismissed under the doctrine of res judicata?

2. Should Employee's July 28, 2006, July 30, 2008, and June 11, 2010 workers' compensation claims be dismissed as time-barred under AS 23.30.110(c)?

Employee contends the board designee abused his discretion when he denied Employee's September 11, 2012 petition to compel discovery. Employee seeks a date-stamped copy of everything in Employer's case file. He asserts he needs a complete copy of all documents pertaining to his case in Employer's possession or control in order to prepare for hearings on unresolved issues, including alleged bad faith actions, and unfair or frivolous controversions.

Employer contends the board designee appropriately denied Employee's petition to compel because the discovery request pertains to disputes previously heard and decided, and is also overbroad and not reasonably calculated to lead to discovery of relevant evidence. Employer asserts it has provided all required discovery, and production of additional information would be unduly burdensome and expensive. Employer opposes releasing information Employee has or could obtain from other sources; has no relevance to Employee's claims; or is protected by attorney-client privilege.

3. Did the board designee abuse his discretion when he denied Employee's September 11, 2012 petition to compel discovery?

4. If so, to what extent should Employee's petition to compel be granted?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) Employee injured his back during the course and scope of employment on October 31, 1995. Employer accepted compensability of Employee's injury. A factual and procedural history of this case is recorded in eight prior decisions:

(a) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 02–0182 (September 12, 2002) (*Mitchell I*), granting Employer's request for bifurcation;

(b) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 02-0195 (September 27, 2002) (*Mitchell II*), ordering an SIME and finding there was not excessive change of physicians;

(c) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 02–0239 (November 21, 2002) (*Mitchell III*), granting in part Employee's request for interest and penalties, and denying his rehabilitation expenses;

(d) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 03–0060 (March 18, 2003) (*Mitchell IV*), clarifying and affirming *Mitchell III*;

(e) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision No. 05-0224 (September 1, 2005) (*Mitchell V*), denying Employee's petition for a hearing on the validity of an SIME report;

(f) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order 05-0333 (December 20, 2005) (*Mitchell VI*), establishing medical stability and awarding TTD; awarding medical benefits; denying Employee's frivolous or unfair controversion claim; and retaining jurisdiction to resolve disputes regarding future medical treatment;

(g) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order 06-0024 (January 30, 2006) (*Mitchell VII*), granting in part Employee's request for unpaid medical expenses, and denying his request for penalties; and

(h) *Mitchell v. United Parcel Service, Inc.*, AWCB Decision and Order 06-045 (February

27, 2006) (*Mitchell VIII*), denying Employer's petition for reconsideration/clarification of *Mitchell VII.*

This factual recitation incorporates the relevant findings of all prior decisions and addresses only the issues currently in dispute.

2) Since his 1995 injury, Employee has had multiple back surgeries, including an L5-S1 anterior interbody fusion in 1999 and an L5-S1 posteriorolateral fusion in 2001. (*Mitchell VI* at 2-3).

3) On September 26, 2003, based on the opinion of Employer's medical evaluator (EME), Douglas Smith, M.D., Employer controverted further medical benefits beyond oral pain management medications, and TTD after July 31, 2003. (Controversion Notice, September 25, 2003).

4) On September 28, 2005, Employee's April 22, 2005 claim for further medical benefits and additional TTD came on for hearing. The record closed on November 5, 2005. (Record).

5) On December 20, 2005, *Mitchell VI* issued. *Mitchell VI* concluded Employee was entitled to medical benefits for reasonable and necessary conservative medical treatment associated with his low back; and temporary total disability (TTD) benefits from December 16, 2002 through January 30, 2003. Employer was held not to have frivolously or unfairly controverted benefits. (*Mitchell VI* at 13-14). The Board retained jurisdiction to resolve any future disputes regarding whether future treatments are reasonable necessary and within the realm of acceptable medical practice. (*Id.* at 21). The parties were given until January 6, 2006 to file additional documentation in order for the board to determine which medical expenses were payable, and whether a penalty should be awarded. (*Id.*). *Mitchell VII* followed, with an award of medical expenses plus interest reimbursable to Employee, and payable to two of Employee's providers: Rick Delamarter, M.D., and Advanced Pain Centers. The claim for unfair or frivolous controversion and penalty was denied. (*Id.* at 9).

6) *Mitchell VI* included the following specific findings:

(a) "[E]mployee continues to suffer from chronic low back pain." (*Mitchell VI* at 15);

(b) "[W]e give less weight to [EME] Dr. Smith's report than [treating] Drs. Stinson, Peterson and Delamater" (sic, Delamarter) . . . We find the observations of Drs. Peterson, Stinson, Roth and Delamater (sic) that fused vertebrae put stress on surrounding vertebrae that would not otherwise be present persuasive." (*Id.* at 14-15);

(c) "[E]mployee's back pain at L4-L5 is a consequence of the prior treatment for the work related injury . . . the need for medical treatment at L4-L5 is work related, and

hence compensable." (*Id*.);

(d) "[I]t is reasonable for [treating physician] Dr. Peterson to develop a treatment plan consisting of conservative treatment first and then, if necessary, more aggressive treatment." (*Mitchell VI* at 14);

(e) "[D]isc replacement surgery is contraindicated for the employee . . . disc replacement surgery [is] neither reasonable nor necessary under the facts presented." (*Id*. at 15);

(f) "[T]he only reasonable and necessary treatment presented in the record at this time is for conservative care." (*Id*.)

(g) "[W]e retain jurisdiction to resolve any future disputes regarding whether future treatments are reasonable, necessary and within the realm of acceptable medical practice." (*Id*.);

(h) "[T]he employee must establish that he suffered a decrease in earning capacity due to the work related injury . . . We find the record establishes that the employee underwent a fusion in March 2003. There is nothing in the file indicating that the employee was removed from the work force due to his fusion . . . We further note that based upon our experience with back fusions that there is typically a period of time when an employee is removed from the work force. If the employee was removed from the work force, he may be entitled to TTD from the date of fusion until he is released to return to work." (*Id*. at 18, and fn 76).

7) *Mitchell VI* instructed the parties:

MODIFICATION

> Within one year after the rejection of a claim or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200 or 23.30.215 a party may ask the Board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

(*Mitchell VI* at 23).

8) The events giving rise to the issues currently before the board arose following issuance of *Mitchell VI*. (Record).

9) On January 20, 2006, counsel entered an appearance on Employee's behalf; before which he acted *in propia persona*, also known as "*pro per*" or "*pro se*," with his wife Jeanne Mitchell serving as his non-attorney representative. (Entry of Appearance, January 20, 2006; Board case file, observation).

10) Also on January 20, 2006, Employee filed a claim requesting authorization for Dynesys®

spinal surgery on the L4-L5 vertebrae, TTD, and attorney's fees and costs. The reported injury was "herniated discs with degeneration and facet degeneration, instability and sever [sic] pain" (Workers' compensation claim, January 20, 2006).

11) Employer controverted and opposed, arguing the benefits sought in Employee's new claim had previously been claimed, heard and denied in *Mitchell VI*, and under the doctrine of *res judicata*, the matters could not be re-tried. Specifically, Employer asserted "The Board heard the employee's claim for additional treatment and specifically for lumbar surgery (including traditional, disc replacement and Dynesys spinal system) and found the treatment sought is not medically reasonable or necessary." (Employer's Answer, Controversion Notice, February 14, 2006).

12) Employee never filed an Affidavit of Readiness for Hearing (ARH) on the controverted January 20, 2006 claim. (Record).

13) On March 7, 2006, Employee filed a "Petition for Modification" of *Mitchell VI*, alleging a mistake of fact. Employee contended *Mitchell VI* made no reference to the Dynesys® procedure, and Employer's assertion the Board considered and ruled out the Dynesys® procedure was erroneous. Alternatively, Employee argued "if, on the other hand, the Board did intend to deny the Dynesys® procedure, it was mistaken," and the Board should reconsider its order and allow the procedure under AS 23.30.095. (Petition for Modification if There has been a Mistake of Fact, March 3, 2006).

14) Employee's petition for modification was timely under AS 23.30.130(a) and complied with 8 AAC 45.150. (Judgment, observation, facts of the case).

15) To the extent Employee's petition sought reconsideration, by operation of law, the time within which the board retained jurisdiction to reconsider *Mitchell VI* expired 30 days after its issuance, or on January 19, 2006. (AS 44.62.540).

16) At an April 18, 2006 prehearing conference, scheduled to consider Employee's January 19, 2006 claim and his March, 2006 Petition for Modification, the action taken is described as "Parties will consider mediation. EE will proceed with petition and claim as he believes to be appropriate." Neither a hearing on the claim nor on the petition for modification was scheduled. The issue of time-barring under AS 23.30.110(c) was not addressed. (Prehearing conference summary, April 18, 2006).

17) On May 1, 2006, Dr. Stinson examined Employee and noted, "the work injury has directly

lead [sic] to his current clinical situation. . . Unfortunately, in Mr. Mitchell's case, without some kind of stabilization, he will likely be permanently disabled. . . It is unlikely that he will improve with any more conservative measures. He has exhausted all conservative measures at his point and cannot be considered medically stable as this is a chronic progressive condition and there is a treatment option that could improve it." (Stinson progress note, May 5, 2006).

18) Mediation took place on May 9 and May 19-20, 2006. (Employee letter to board, July 20, 2006; Mitchell partial chronological history of events at 4, filed May 24, 2013).

19) On June 28, 2006, Dr. Delamarter examined Employee and opined: "We as of a year ago had recommended a non-fusion procedure, which in his case would be the Dynesys stabilization and decompression . . . Unfortunately, the insurance company did not allow this saying that it is experimental. Clearly it is not experimental. It has been FDA approved, even as a fusion device. There are dynamic stabilization protocols and clinical trials ongoing as well." Dr. Delmarter concluded, "The appropriate surgical procedure would be a dynamic stabilization non-fusion with the Dynesys system and this could help alleviate future adjacent-level issues as well . . . [The procedure] is medically necessary and medically appropriate." (Delamarter progress note, June 29, 2006).

20) On July 19, 2006, counsel for Employee withdrew, and filed an attorney's lien for $12,500.00. Employee was again *pro se*, and has remained so, again represented by his wife as his non-attorney representative. (Withdrawal of Attorney, Claim of Lien, July 18, 2006; Record).

21) On July 20, 2006, Employee informed the board he declined Employer's mediation settlement offer because of a "significant change" in medical condition: his treating physicians now opined that advancing spinal degeneration rendered him totally and permanently disabled without surgical intervention; "[B]ased on this current information we think it is premature, not medically sensible and not in [Employee's] best interest to finalize and accept the settlement offer which would waive his medical and disability benefit." (Employee letter to board, July 20, 2006).

22) On July 25, 2006, Dr. Stinson examined Employee and opined, "He is not medically stable and is not released to work. In his present condition, he needs stabilization surgery. I am recommending that he follow through with Dr. Delamarter to, hopefully, achieve internal stabilization so that his ongoing progressive symptomatology can come under control." (Stinson progress note, July 26, 2006).

23) On July 28, 2006, in response to Employee's correspondence, Employer controverted the same benefits as it had previously, along with PPI in excess of 20% previously paid, and further retraining benefits. (Controversion, dated July 27, 2006).

24) On July 28, 2006, Employee filed another claim pertaining to the October 31, 1995 work injury, alleging "continuing/advancing spinal degeneration," "medical instability, progression to 3rd spinal level, surgical intervention is necessary," and seeking "TTD from July 31, 2003 through current," medical costs of "$5278.92 and continuing," and attorney fees and costs of "$12,000 and continuing." Attending physicians listed were Lawrence Stinson, M.D., of Advanced Pain Center of Alaska, and Rick Delamarter, M.D., Spine Institute at St. John's Health Center. (Claim, July 28, 2006).

25) On August 10, 2006, Employee underwent the Dynesys® spinal procedure with Dr. Delamarter. How this was ultimately financed is unknown. It was not paid for by Employer. (Delamarter medical summary, August 31, 2006; judgment, observation, facts of the case and inferences therefrom).

26) On August 25, 2006, Employer controverted TTD/TPD benefits after January 30, 2003; medical and transportation costs for any evaluation or care other than conservative, noninvasive, non-surgical treatment of Employee's low back; PPI in excess of 20% previously paid; further retraining benefits; and attorney fees and costs (Controversion, August 25, 2006).

27) On August 31, 2006, a prehearing conference was held to address the issues raised by Employee's January 19, 2006 and July 28, 2006 claims, and his March 6, 2006 Petition for Modification. The conference summary indicates Employee was advised to file an affidavit of readiness for hearing (ARH) on both claims and the petition, and included language that pursuant to AS 23.30.110(c), "If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied." (Prehearing conference summary, August 31, 2006).

28) On July 28, 2008, Employee timely filed an ARH on the July 28, 2006 claim, asking that it be scheduled for oral hearing in Anchorage. (ARH, July 28, 2008; Employer concession at hearing).

29) On July 31, 2008, Employee filed a further workers' compensation claim form 07-6106. Page one of this claim was a photocopy of page one from his July 28, 2006 claim. As on the July 28, 2006 claim, the reason given for filing was "medical instability, progression to 3rd spinal level, surgical intervention necessary" and "continuing/advancing spinal degeneration." The relief sought,

indicated on a revised page two of the claim form, was medical and transportation costs now "in excess $81,481.64," TTD from July 13, 2003 to date, attorney's fees and costs, penalty and interest, and unfair or frivolous controversion. (*Compare* Workers' compensation claim, July 28, 2006 *with* July 31, 2008; observation).

30) On August 8, 2008, Employer filed an Affidavit of Opposition to the July 28, 2008 ARH. (Affidavit of opposition, August 8, 2008).

31) Upon the filing of an Affidavit of Opposition to an ARH, the law requires a prehearing conference be scheduled within 30 days and a hearing date set. A prehearing conference was scheduled for August 19, 2008. (AS 23.30.110(c); record).

32) At the August 19, 2008 prehearing conference, although Employee's ARH was noted as an issue, the hearing was not scheduled. The summary provides no explanation why the hearing Employee requested on his July 28, 2006 claim was not scheduled. (Prehearing conference summary, August 19, 2008; observation).

33) The summary states Employee was "relying on" his Petition for Modification filed March 6, 2006, but had not requested a hearing on it. The designee did not advise Employee how to proceed with the petition. (*Id*.; observation).

34) The summary noted Employer's position was *Mitchell VI* barred TTD benefits before January 30, 2006. A follow-up prehearing was scheduled for September 25, 2008. (Prehearing conference summary, August 19, 2008; observation).

35) On August 21, 2008, Employer controverted TTD/TPD after January 30, 2003, medical costs in excess of $81,481.64 and continuing non-conservative care, transportation, penalty, interest, attorney fees and costs. (Controversion Notice, August 21, 2008).

36) Employee never filed an ARH on the controverted July 31, 2008 claim. (Record).

37) The September 25, 2008 prehearing conference summary states the parties agree "this case history is convoluted and confusing at best." It noted Employee's July 28, 2008 ARH was based on his July 28, 2006 claim. It recorded Employer's concession Employee's ARH was timely filed. Again, however, a hearing was not scheduled on Employee's timely ARH. (*Id*.).

38) The September 25, 2008 prehearing summary also notes Employee planned to pursue the March 3, 2006 Petition for Modification, and Employer's response that asking for a hearing on the petition to modify "now is untimely." The designee did not correct this misstatement by informing Employee time-barring under section §110(c) of the Act applies to claims only, and not to petitions

for modification, the timeliness of which is based on the filing date of the petition, not on the filing date of an ARH. (*Id.*; observation, judgment).

39) Employee was never told of any time-barring provisions with respect to petitions for modification. (*See* all prehearing conference summaries).

40) The September 2008 prehearing summary noted the timely July 28, 2008 ARH was based on the July 28, 2006 claim, yet again, no hearing date was offered or scheduled. The summary noted the issues on that claim "were not amended"; instead, a new claim "with the current issues" was filed on July 31, 2008. No instruction on amending a claim under 8 AAC 45.050(e) was provided. Rather, an ARH form was given to Employee to file on the 2008 claim, but no advice regarding time-barring under AS 23.30.110(c) was provided. (*Id.*).

41) There is no distinct form for filing an amendment to a claim; however Question 18 on the Workers' Compensation Claim form reads, "This claim amends a prior claim dated ___." (Workers' compensation claim form 07-6106; observation).

42) On March 17, 2009, the Social Security Administration (SSA) found Employee disabled and awarded him social security disability benefits retroactively, from April 1, 2004 through the date of the SSA decision. (SSA decision, March 17, 2009).

43) On June 14, 2010, Employee filed another claim form, with the word "AMENDED" prominently handwritten above the case number. As with the claims filed on July 28, 2006 and July 31, 2008, it sought TTD from July 31, 2003, but now carried an ending date of March 31, 2004 for TTD, and sought permanent total disability (PTD) from April 1, 2004 to "current," medical costs, and unfair or frivolous controversion. Question 18, "This claim amends a prior claim dated___", was again left blank. The reason for filing was "found eligible for SSDI; copy of SSA decision attached." (Workers' compensation claim, June 14, 2010).

44) On July 9, 2010, Employer controverted TTD after January 30, 2003 and through September 20, 2005, arguing *res judicata* based on *Mitchell VI*; permanent and total disability benefits, based on lack of evidence of disability and time barring under AS 23.30.105; and medical costs, based on unspecified nature of the claim, and limits on compensable medical expenses set in *Mitchell VI, Mitchell VII* and *Mitchell VIII*. (Controversion, July 9, 2010).

45) All seven controversion notices Employer filed and served on Employee since *Mitchell VI* utilized an obsolete version of the form from October, 1994, and included the following language:

When must you file a written claim?

> . . .
>
> c. Medical Benefits
>
> There is no time limit for filing a claim for medical benefits. If the insurer/employer stops medical payments, and if you belief you need more treatment, you must make a written claim to request additional medical payments. . .
>
> **When must you request a hearing?**
>
> Within two years after the date the insurer / employer filed this controversion notice, you must request a hearing before the AWC Board. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within the two years. Before requesting a hearing, you should file a written claim.
>
> **IF YOU ARE UNSURE WHETHER IT IS TOO LATE TO FILE A CLAIM OR REQUEST A HEARING, CONTACT THE NEAREST AWC BOARD OFFICE.**

(Controversions filed February 16, 2006; July 28, 2006; August 25, 2006; August 22, 2008; May 1, 2009; July 9, 2010; and August 24, 2010; emphasis in original).

46) The Controversion Notice form was revised in August 1997 to remove ambiguity from the instruction. Since August 1997, the instruction has read:

> **When must you file a written claim (Workers' Compensation Claim form)?**
> . . .
>
> c. Medical Benefits
>
> There is no time limit for filing a claim for medical benefits. If the insurer/employer stops medical payments, and if you belief you need more treatment, you must make a written claim to request additional medical payments. . .

. . .

> **When must you request a hearing (Affidavit of Readiness Hearing form)?**
>
> If the insurer/employer filed this controversion notice after you filed a claim, you must request a hearing before the AWCB within two years after the date of this controversion notice. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within two years.

(*Compare* October 1994 Controversion Notice, *with* all Controversion Notices since August 1997).

47) Employee never filed an ARH on the controverted June 14, 2010 amended claim. (Record).

48) On July 2, 2012, one week before the AS 23.30.110(c) deadline of July 9, 2012 on the June,

2010 claim, Employee filed a request for conference to discuss "status records release, medical expense & PTD." Where the form asked what date the controversion notice was filed, Employee wrote "Do not understand status." (Request for conference, July 2, 2012).

49) Claims have also been filed by Employee's providers, Advanced Pain Centers of Alaska and Pioneer Peak Surgery Center. (Claims).

50) On August 16, 2012, a prehearing conference was held to clarify the status of Employee's case. The conference summary stated "there is outstanding discovery going on between Employer and Employee, and provider claims from Advanced Pain Centers of Alaska (Advanced Pain) and Pioneer Peak Surgery Center." Without waiving any defenses, Employer agreed to provide copies of all medical bills with accompanying medical reports since 2001 containing the date stamp Employer received it, as well as transcripts of the August 10, 2005 and September 28, 2005 hearings.[1] Employer asserted a §110(c) defense against Employee's PTD claim. The summary advised Employee of the need, under AS 23.30.110(c), to file an ARH within two years of controversion, and included the following statement: "If Employee has not completed all discovery and cannot file the affidavit of readiness for hearing within two years of Employer's controversion, but still wants a hearing, Employee should provide written notice to the board and serve the notice upon all opposing parties." (Prehearing conference summary, August 16, 2012).

51) On August 24, 2010, in response to an August 2, 2010 claim filed by Advanced Pain for medical expenses incurred by Employee in 2010, Employer controverted medical costs for other than conservative care, stating:

> [*Mitchell VI*] limits employee's compensable medical expenses to conservative medical treatment. The Board retained jurisdiction but employee did not request a hearing on his March and April 2010 non conservative care invasive procedures. Controversions were filed. Employee disregarded the Board's determination and obtained a surgery which the Board specifically found was not reasonable or necessary. Employee never appealed the order and thus he must obtain a ruling from the Alaska Workers' Compensation Board regarding the reasonable and necessity of further non conservative care.

(Controversion, August 24, 2010).

52) On September 11, 2012, Employee filed two versions of the same petition to compel discovery. On the second version, "AMENDED 9-10-12" was handwritten prominently above the

[1] Transcripts of the August 10, 2005 and September 28, 2005 hearings were produced and filed on August 20, 2012. (Notice of Intent to Rely, August 20, 2012). The bills were produced on September 14, 2012, and filed with the board on October 31, 2012. (Notice of Filing, October 31, 2012).

case number, and "9-10-12 Amended to correct typographical date error" was added at the signature line. (Petition and attachments, September 11, 2012).

53) The September 11, 2012 petition sought to compel "non-compliant [Insurer] to provide copy of case file contents obtained since 09-17-2001. . . Prior [Employee] written, oral and prehearing requests for copies have been ignored or denied, including verbally on record during 09-28-2005 hearing when [Employee's] request was emphatically refused. . . " Attached was a letter responding to the August 16, 2012 prehearing conference summary. Employee stated:

> I am requesting date stamped discovery, not just copies of EE medical records from LNW. I need a date stamped copy of everything in his case file including all records, reports, correspondence, medical records, phone records, physician bills, invoices, payment records, surveillance records, police contact regarding my neighbors' complaints of LNW activity, police reports for the misplaced LNW computer putting EE at identity theft risk, and anything else in his case file. All of it. With proper discovery I can fairly respond to LNW claims. Without proper discovery I can not [sic] agree to the issue limitation for future hearing in this summary. . . As confirmed by you [board designee], we can not [sic] proceed with an affidavit of readiness for hearing without discovery (*Id.*).

54) At a prehearing conference held on October 16, 2012, Employee stated there "should be" no active ARH form on file. Employee asserted he was unable to file a current ARH because discovery was incomplete. Employee's petition to compel was set for hearing on November 27, 2012. The summary noted "Once the AWCB has ruled on the noted discovery issue parties will look to file an ARH and move this case towards a hearing on the remaining merits." Employer maintained *res judicata* and §110(c) precluded and foreclosed all claims. The summary included the same AS 23.30.110(c) advisory language as the August 16, 2012 summary. (Prehearing conference summary, October 16, 2012; record; experience, observation).

55) On October 31, 2012, Employer opposed the petition to compel, asserting the requested discovery was not tailored to materials relevant to claims. Employer noted it had filed the majority of requested medical bills, though some of the pharmaceutical bills were missing, and had filed all medical records in its possession. (Opposition to petition to compel, October 31, 2012).

56) Also on October 31, 2012, Employer filed 315 pages of medical bills, noting bills prior to June 4, 2008, had been destroyed per standard office procedure, and bills after August 9, 2012 were not yet in the computer system but would be provided within two to three weeks. (Employer filing, October 31, 2012). Employer has not updated its filing of medical and pharmaceutical bills since its October 31, 2012 filing. (Record; observation).

57) On November 20, 2012, Employer petitioned to dismiss Employee's "January 19, 2006, July 30, 2008, and June 11, 2010" claims as untimely under AS 23.30.110(c). (Employer's petition, November 19, 2012).

58) The November 27, 2012 hearing on Employee's petition to compel was cancelled due a death in Employer's counsel's family. The matter was rescheduled for decision by the board designee at a prehearing conference pursuant to AS 23.30.108(c). (Petition to Continue; Affidavit of Nora Barlow; Record).

59) At the December 19, 2012 prehearing conference, Employer was instructed to file an ARH on its petition to dismiss, and Employee's September 11, 2012 petition to compel was denied. The conference summary stated Employee "admitted" he did not know what he expected to find in Insurer's "entire claim file," but he did not believe Insurer had fully cooperated in the discovery process. The designee included the following "review":

> Information is discoverable if it is "relative" to the employee's injury or claim according to AS 23.30.107. "We have reached the conclusion that 'relative to the employee's injury' needs only have some relationship or connection to the injury." Relevancy describes a logical relationship between a fact and a question that must be decided in a case. Thus, the relevancy (and discoverability) of a fact is its tendency to establish a material proposition. The Designee utilized a two-step process to determine the relevance of the information sought. The first step is to identify those matters, which are "at issue" or in dispute. In the second step, the Designee must decide whether the information sought is relevant because it is "reasonably calculated" to lead to facts that will have a tendency to make a disputed issue, identified in step one, more or less likely.

Without analysis, the designee summarily concluded "the petition to compel is denied." The preconference hearing summary included the same AS 23.30.110(c) language as the August 16, 2012 and October 16, 2012 summaries. (Prehearing conference summary, December 19, 2012).

60) On January 9, 2013, Employee timely appealed the December 19, 2012 discovery determination and filed an ARH to address the issue. Attached was a letter responding to the December 19, 2012 prehearing conference summary, stating "We do not understand Mr. Pullen's decision. The summary discussion does not explain why he has denied the petition to compel discovery." (Petition, ARH and attachments, January 9, 2013).

61) Employee's January 9, 2013 letter continued:

> There also seems to be some issue regarding the specificity of what Mitchell is requesting. By definition of discovery I don't know specifically what the contents of the case file might be or how I have been expected to answer that question . . . Apparently any and all contents is not valid legal speak. I will try to be clearer.

I am requesting a complete copy of documents in LNW [Liberty Northwest Insurance Company] possession or control pertaining to S. Craig Mitchell's Alaska Workers' Compensation Case number 199523875. I have referred to this as his case file.

The term documents should be broadly interpreted to include letters, records, reports, memos, statements, interviews, notes, ledgers and/or logs whether in written, recorded and/or electronic form.

My request includes but is not limited to:

- A complete copy of the adjuster's file including but not limited to, all payments made to me or on my behalf; letters and releases utilized to obtain information regarding my work injury, my employment history and medical history; investigative requests including those made to witnesses and employers and copies of the documents, records or statements made in response to the requests.

- A complete copy of all medical documents and records pertaining to my work injury, including those received from my medical care providers; prepared and/or provided by nurse case managers, independent medical examiners, and/or second independent medical examiners. This should also include any medical records and/or information in your file regarding any previous medical care, treatment or opinions, which may be relevant to my current workers' compensation case.

- A complete copy of documents and records relating to the LNW loss of a computer that put Mitchell at risk of identity theft. Records to include, but not limited to, the police and incident reports, circumstances involved, who lost it, where it was lost, and when. Was it ever recovered?

- A complete copy of any surveillance undertaken in regard to my workers' compensation case and the contact information for the company or individual retained to perform the surveillance. Please provide complete copies in the same format as provided to you whether in video, digital, audio or any other format.

- A complete copy of my personnel file to include but not limited to, job descriptions, job duties, application for employment, pre-hire or post-hire questionnaires, performance evaluations, grievances, reprimands and/or disciplinary actions and UPS driver truck logs.

> • Other documents not previously or specifically named above that may pertain to my workers' compensation case in your possession or control (*Id.*).

62) Employee's January 9, 2013 letter asserted:

> The LNW case file contains date validated documentation of frivolous, unfair, uncooperative, hostile, and bad faith conduct by LNW. It also contains evidence of intentional disregard of professional and medical opinion from treating physicians that has caused harm to Mitchell because LNW created care delays and denials. The clarity of that evidence exists nowhere else. Mitchell is not only entitled to discovery; it is absolutely necessary to substantiate bad faith. The record already reflects that it is LNW who consistently and repeatedly attempts to suppress evidence and time out this case by slow-walking and no-walking its progress since 2005. I want to present all of the evidence. It is LNW who wants to hide the evidence through non-disclosure (*Id.*, emphasis original).

63) Referring to the March 3, 2006 Petition for Modification, Employee's January 9, 2013 letter noted, "the request for reconsideration and the merits of this petition have never been heard." The letter continued: "The mistake in fact deals directly with the incorrect board opinion; 'We further find that the only reasonable and necessary treatment presented in the record at this time is for conservative care.' That opinion was incorrect in 2005 and it is still incorrect today." (*Id.*, emphasis original).

64) At a February 5, 2013 prehearing conference, Employer's November 19, 2012 Petition to Dismiss and Employee's appeal of the designee's December 19, 2012 discovery order, were scheduled for hearing on June 13, 2013. The summary stated the dates of claims Employer sought to dismiss were "July 28, 2006;" July 30, 2008; and June 11, 2010. (Prehearing conference summary, February 5, 2013).

65) No party filed a written objection to the disparity between the dates of claims Employer's November 20, 2012 petition sought dismissed (January 19, 2006; July 30, 2008; and June 11, 2010) and the dates of claims the February 5, 2013 prehearing conference set as those for consideration for dismissal at the June 13, 2013 hearing (July 28, 2006; July 30, 2008; and June 11, 2010). (Record; observation).

66) Employee's evidence for hearing included a January 13, 2012 letter from the billing department at Advanced Pain Centers of Alaska, stating Insurer indicated Employee's workers' compensation claim was not in the appeals process. Employee wrote an undated annotation to the

letter: "Not true statement from [Insurer]. Open claim waiting for denied discovery so [Employee] can proceed to ARH." (Employee's Notice of Evidence for Hearing, May 24, 2013).

67) At the June 13, 2013 hearing, the parties agreed the disputed claims were the three listed in the February 5, 2013 prehearing conference summary (July 28, 2006; July 30, 2008; and June 11, 2010). (Record).

68) At hearing Employee introduced a "7-page partial chronological history to substantiate [Employee's] continued and unending attempts to advance to hearing on outstanding issues and progression of events." Its admission was not opposed. (Employee's evidence, June 13, 2013; record).

69) At hearing Employee provided an annotated copy of *Bohlmann v. Alaska Const. & Engineering*, 205 P.3d 316 (Alaska 2009). Next to the statement "We have held that a trial court has a duty to inform a *pro se* litigant of the necessity of opposing a summary judgment motion with affidavits or by amending the complaint" was handwritten, "we did that – mistake in fact." The text of AS 23.30.110(c) was annotated with "cannot proceed without discovery." (*Id.*)

70) Ms. Mitchell credibly testified all claims were filed as events progressed, were "done to amend the claim" and were "done with the assistance of [workers' compensation] personnel to protect [Employee's] claim." (Hearing record).

71) Ms. Mitchell credibly testified: "In order to advance an ARH (Form 07-6707) the employee must, in box 12, swear that discovery is complete, that evidence is obtained, and that he is fully prepared for hearing. If Craig Mitchell had done so without discovery he would have committed perjury." (*Id.*).

72) Ms. Mitchell further credibly testified she was given general instructions regarding AS 23.30.110(c) time-barring, but was never notified of a specific date or time-out deadline to file an ARH. (*Id.*). Prehearing conference summaries containing a §110(c) advisory corroborate Ms. Mitchell's testimony. (Observation).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that

> 1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> 2) worker's compensation cases shall be decided on their merits except where otherwise provided by statute;
>
> 3) this chapter may not be construed by the courts in favor of a party;
> 4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . .
>
> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
> . . .
> (h) . . . all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

Under the Act, an injured worker is entitled to medical treatment "which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee." AS 23.30.095(a). "If continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board." *Id*.

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.**
> . . .
> (c) . . . 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 board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

An abuse of discretion occurs where a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive, or where an agency fails to properly apply controlling law or regulation, or to exercise sound legal discretion. *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Manthey v. Collier* 367 P.2d 884, 889 (Alaska 1962); *Black's Law Dictionary* 25 (4th ed. 1968).

> **AS 23.30.110. Procedure on Claims.**
> . . .
> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

AS 23.30.110(c) requires an employee to prosecute a claim in a timely manner. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). The only act required of the employee to "prosecute the claim" is to file a request for hearing within two years of

controversion; the board "may require no more of the employee." *Tonoian v. Pinkerton Security,* AWCAC Decision No. 029 (January 30, 2007) at 9, citing *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 913 (Alaska 1996) and *Huston v. Coho Electric,* 923 P.2d 818, 820 (Alaska 1996). The statute's object is to bring a claim to the board for a decision quickly so the goals of speed and efficiency in board proceedings are met. *Providence Health System v. Hessel,* AWCAC Decision No. 131 (March 24, 2010).

The Supreme Court found the language of AS 23.30.110(c) clear, requiring an employee to request a hearing within two years of the controversion date or face claim dismissal. *Tipton* at 913. Citing *Doyon Drilling, Tipton* also noted dismissal under AS 23.30.110(c) does not prevent the employee from applying for different benefits, or raising other claims, based upon a given injury. *Tipton* at 913 n.4. The Court rejected the employer's assertion an employee must request a hearing every time a hearing is cancelled; the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Tipton* at 912-13.

The Court compared AS 23.30.110(c) to a statute of limitations for the particular claim at issue. *Suh v. Pingo Corp*., 736 P.2d 342, 346 (Alaska 1987). Statutes with language similar to AS 23.30.110(c) were referred to by the late Professor Arthur Larson as "no progress" or "failure to prosecute" rules. "[A] claim may be dismissed for failure to prosecute it or set it down for hearing in a specified or reasonable time." 7 Arthur Larson & Lex K. Larson, *Workers' Compensation Law*, Sec. 126.13 [4], at 126-81 (2002). The Court distinguished dismissal of a specific claim from dismissal of the entire case, stating §110(c) is not a comprehensive "no progress rule." *Wagner v. Stuckagain Heights,* 926 P.2d 456, 459 n.7 (Alaska 1996). AS 23.30.110(c) is like a statute of limitations in its effect on the claim dismissed by its operation, but it does not terminate all rights based on a given injury. *University of Alaska Fairbanks v. Hogenson,* AWCAC Decision No. 074 at 16 (February 28, 2008), citing *Tipton*.

Once a hearing has been requested on a claim, it is mandatory**,** not discretionary, that a hearing be scheduled and held. The board may not decline to hear disputes concerning a validly filed

claim. *Summers v. Korobkin Construction,* 814 P.2d 1369, 1371 (Alaska 1991). The Court held that filing an ARH "permanently" tolls §110(c); the board may require no more than timely filing. *Huston* at 819, citing *Tipton*.

Dismissal for failure to timely file an ARH is usually automatic and non-discretionary. *See, e.g., Hornbeck v. Interior Fuels,* AWCB Dec. No. 08-0072 (Apr. 17, 2008); *Beaman v. Kiewit Construction,* AWCB Decision No. 06-0101 (April 27, 2006). On the other hand, the Court noted "the Commission and the Board already exercise some discretion and do not always strictly apply the statutory requirements." *Kim v. Alyeska Seafoods, Inc.* 197 P.3d 196 (Alaska 2008) at 197-198, citing *Tonoian v. Pinkerton Security,* AWCAC Decision No. 029 (January 30, 2007, and *Omar v. Unisea, Inc.,* AWCAC Decision No. 053 (August 27, 2007).

Certain events relieve an employee from strict compliance with the requirements of §110(c). The Court held the board owes a duty to every claimant to fully advise him of "all the real facts" bearing upon his right to compensation, and to instruct him on how to pursue that right under law. *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska 1963). The board's failure to correct an employer's erroneous assertion to a *pro se* claimant that his claim was already time-barred rendered the claimant's ARH timely. *Bohlmann v. Alaska Const. & Engineering,* 205 P.3d 316 (Alaska 2009). Applying *Richard, Bohlmann* held the board has a specific duty to inform a *pro se* claimant how to preserve his claim under §110(c). *Richard* is applied to excuse noncompliance with §110(c) when the board failed to adequately inform a claimant of the two-year time limitation. *See, e.g., Dennis v. Champion Builders,* AWCB Decision No. 08-0151 (August 22, 2008).

More generally, the Supreme Court holds the pleadings of *pro se* litigants should be held to less strict standards than those of lawyers. In *Gilbert v. Nina Plaza Condo Ass'n,* 64 P.3d 126, 129 (Alaska 2003), a case involving civil court discovery difficulties, the Court stated:

> It is well settled that in cases involving a pro se litigant the superior court must relax procedural requirements to a reasonable extent. We have indicated, for example, that courts should generally hold the pleadings of pro se litigants to less

> stringent standards than those of lawyers. This is particularly true when 'lack of familiarity with the rules rather than gross neglect or lack of good faith underlies litigants' errors.' We have further indicated that a court 'should inform a *pro se* litigant of the proper procedure for the action he or she is obviously attempting to accomplish' and should also 'inform pro se litigants of defects in their pleadings'.

Additionally, the Court expressed its agreement with Professor Larson's statement "the compensation process is not a game of 'say the magic word' in which the rights of injured workers depends on the use of specific terms, rather than substance." *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007).

Certain legal grounds may excuse a *pro per* claimant's noncompliance with §110(c), including lack of mental capacity, or incompetence; lack of notice of the time-bar; and equitable estoppel against a governmental agency. *Tonoian* at 11. General elements required for application of the doctrine of equitable estoppel are assertion of position by conduct or word, reasonable reliance thereon by another party, and resulting prejudice. *Wausau Insurance Co. v. Van Biene*, 847 P.2d 584, 588 (Alaska 1993), citing *Jamison v. Consolidated Utilities*, 576 P.2d 97, 102 (Alaska 1978). *Tonoian* held a material misleading or incorrect instruction as to filing a specific form or a regulation-based procedure may be grounds for application of equitable estoppel against the board, but an error regarding statutory requirements, including the requirement an ARH must be filed within two years of controversion, may not. *Id.* at 15.

"Rare situations" may also toll the statute, for example when a claimant is unable to comply with §110(c) because the parties are awaiting receipt of necessary evidence in an SIME report. *Aune v. Eastwood, Inc.*, AWCB Decision No. 01-0259 (December 19, 2009). The Commission recognizes that in certain circumstances expediting, rather than hindering a claim would "exalt form over substance." *Alaska Mechanical, Inc. v. Harkness*, AWCAC Decision No. 176 (February 12, 2013).

Finally, technical noncompliance with §110(c) may be excused in cases where a claimant has substantially complied with the statute. In *Omar v. Unisea, Inc.*, AWCAC Decision No. 053 (August 27, 2007), the Commission remanded the case to the board to consider whether, among

other things, "circumstances as a whole constitute compliance with the requirements of 23.30.110(c) sufficient to excuse any failures by [Employee] to comply with the statute." In *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 196 (Alaska 2008), the Supreme Court stated because §110(c) is a procedural statute, its application is directory rather than mandatory, and substantial compliance is acceptable absent significant prejudice to the other party. However, substantial compliance does not mean noncompliance (failing to file anything), *Id.* at 198, or late compliance (filing after the deadline), *Hessel* at 11-12. Although substantial compliance does not require the filing of a formal affidavit, it still requires a claimant to file, within two years of a controversion, either a request for hearing or a request for additional time to prepare for a hearing. *Denny's of Alaska v. Colrud,* AWCAC Decision No. 148 at 11 (March 10, 2011).

Dismissal under §110(c) can create a later issue. In *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 779 (Alaska 2002), the Court held *res judicata*, or claim preclusion, applies to workers' compensation cases; however it is not always applied as rigidly in administrative proceedings as in judicial proceedings. *Id.* at 779-780. When applicable, *res judicata* precludes a subsequent suit between the same parties asserting the same claim for relief when the matter raised was, or could have been, decided in the first suit. *Id*. at 780. Application of the principle requires the issue to be decided to be identical to that already litigated, and a final judgment on the merits. *Id.*

Over the lifetime of a workers' compensation case, many claims may be filed as new disablements or medical treatments occur. *Egemo v. Egemo Construction Company*, 998 P.2d 434, 440 (Alaska 2000). In *Egemo* the Court held, "new medical treatment entitles a worker to restart the statute of limitations for medical benefits," and in *Bailey v. Texas Instruments*, 111 P.3d 321 (Alaska 2005), the Court held dismissal of a claim does not necessarily preclude an employee from filing a later claim for medical costs incurred subsequent to that dismissal.

In *Hogenson* the Commission concluded when a claim is dismissed under AS 23.30.110(c), "a later-filed claim for the same benefits for the same injury may not revive the expired claim." However, "a later-filed claim for the same benefits on a *different nature of injury previously*

unknown to the employee, or *for a different benefit* from the same injury, is not extinguished with the earlier claim. *Hogenson* at 10 (emphasis original). A post-dismissal claim is also not barred by *res judicata* when it stems from a "temporary (albeit recurring) condition." *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 612 (Alaska 1999).

> **AS 23.30.130. Modification of awards.**
>
> (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
>
> . . .

The filing date of a petition for modification under AS 23.30.130 is the date that controls timeliness under this statute. *Hodges v. Alaska Constructors, Inc*., 957 P.2d 957 (Alaska 1998).

In the case of a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). Section 23.30.130 confers continuing jurisdiction over workers' compensation matters. (*Id*.). In *Noelle L. McCullough v. Job Ready, Inc*., AWCB Decision No. 12-0110 (June 26, 2012), on remand from the Supreme Court to consider employee's request for rehearing, the board held it had authority to rehear and modify an award where the employee's modification request was timely filed within one year of a 2008 decision, she was not advised to file an ARH on her petition, and was misadvised by the board designee.

The Alaska Supreme Court discussed AS 23.30.130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 164, 168 (Alaska 1974) stating: "The plain import of this amendment [adding 'mistake in a

determination of fact' as a ground for review] was to vest a deputy commissioner with broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted" (*quoting O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971)). An examination of all previous evidence is not mandatory whenever there is an allegation of mistake in determination of fact under AS 23.30.130(a). "The concept of 'mistake' requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a back-door route to retrying a case because one party thinks he can make a better showing on the second attempt" (*id*. at 169; *citing* 3 Larson, *The Law of Workmen's Compensation* §81.52, at 354.8 (1971)).

In the case of a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). Section 23.30.130 confers continuing jurisdiction over workers' compensation matters. (*Id*.).

Nothing in AS 23.30.130(a)'s language limits the "mistakes in determination of fact" basis for review to issues relating solely to disability. "We hold that under Alaska's . . . compensation provisions there is no limitation as to the type of fact coming within the ambit of the statutory 'mistake in its determination of a fact' review criterion. More particularly, under AS 23.30.130(a), the Board has the authority to review an order in which a claim has been rejected because of a mistake in its determination of a fact even if the fact relates to the question of liability or causation." *Fischback & Moore of Alaska, Inc. v. Lynn*, 453 P.2d 478, 484 (Alaska 1969).

The doctrine of *res judicata* does not apply when considering a petition for modification. *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158 (Alaska 1996). *Sulkosky* reached back pre-statehood and said:

> [A]lthough the question of *res judicata* may lurk in the background, it is not involved in this proceeding, because if the power to rehear exists, the doctrine of

> *res judicata* is inapplicable and likewise, if the power does not exist, no occasion arises for invoking it. The case turns, therefore, on the question whether the Alaska Industrial Board has the power to grant a rehearing and set aside or modify its awards (*id*. at 163; *citing Suryan v. Alaska Indust. Bd*., 12 Alaska 571, 573 (1950)).

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties.

An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (2009).

In *Richard v. Fireman's Fund*, 384 P.2d 445 (Alaska 1963), the court said:

> We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

In *Dwight v. Humana Hospital Alaska*, 876 P.2d 1114 (Alaska 1994), the injured worker was never advised she had a right to request an SIME. The court said this was reversible error because it affected the case's possible outcome:

> Nonetheless, we agree with Dwight's alternative 'record waiver' argument. We hold that (1) in every case the Board is required to give the parties notice of their right to request and obtain a SIME under AS 23.30.095(k) in the event of a medical dispute [footnote omitted]. . . . (*Id*. at 1119-20).

In *Bohlmann v. Alaska Construction & Engineering, Inc*., 205 P.2d 316 (Alaska 2009), the court addressed the board's duty to inform *pro se* injured workers and said:

> A central issue [in] Bohlmann's appeal is the extent to which the board must inform a *pro se* claimant of the steps he must follow to preserve his claim. . . . (*Id*. at 319).
>
> In *Richard v. Fireman's Fund Insurance Co.* we held that the board must assist claimants by advising them of the important facts of their case and instructing

them how to pursue their right to compensation [footnote omitted]. We have not considered the extent of the board's duty to advise claimants. The appeals commission emphasized that division staff have a duty to be impartial and stated that '[a]cting on behalf of one party against another or pursuing a claim on behalf of one party in a matter before the board would violate the duty of the adjudicators.' The appeals commission determined that the prehearing conference officer fulfilled the requirements of *Richard* by informing Bohlmann in general terms of the two-year time bar. . . . (*Id.*).

. . .

But we do not need to consider the full extent of the duty here. The board designee or the board should have corrected the erroneous assertion made by AC&E at the July 20, 2005 prehearing conference . . . but did not do so. . . . (*Id.* 319-20).

. . .

Given AC&E's incorrect statement . . . the prehearing officer should have told Bohlmann in more than general terms how he might still preserve the claim, or at least specifically how Bohlmann could determine whether AC & E was correct in contending that the claim was already barred. This requirement is similar to our holdings about the duty a court owes to a *pro se* litigant [footnote omitted]. (*Id*. at 320).

We have held that a trial court has a duty to inform a *pro se* litigant of the 'necessity of opposing a summary judgment motion with affidavits or by amending the complaint' [footnote omitted]. We likewise have held that a trial court must tell a *pro se* litigant that he needs an expert affidavit in a medical malpractice case [footnote omitted] and must inform him of deficiencies in his appellate paperwork, giving him an opportunity to correct them [footnote omitted]. When a *pro se* litigant alerted a trial court that the opposing party had not complied with her discovery requests, we held that the court should have informed her of the basic steps she could take, including the option of filing a motion to compel discovery [footnote omitted]. In evaluating the accuracy of notice of procedural rights by an opposing party, we have noted that *pro se* litigants are not always able to distinguish between 'what is indeed correct and what is merely wishful advocacy dressed in robes of certitude' [footnote omitted]. The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants. (*Id*.).

Here, the board at a minimum should have informed Bohlmann how to preserve his claim. . . . Its failure to recognize that it had to do so in this case was an abuse of discretion [footnote omitted]. Its failure to do so is inconsistent with the appeals commission's conclusion that division staff did all that *Richard* required. (*Id*. at 320-21).

. . .

> Correcting AC&E's misstatement or telling Bohlmann the actual date by which he needed to file an affidavit of readiness for hearing to preserve his claim would not have been advocacy for one party or the other [footnote omitted]. . . . Because there is no indication in the appellate record that the board or its designee informed Bohlmann of the correct deadline or at least how to determine what the correct deadline was, the board should deem his affidavit of readiness for hearing timely filed [footnote omitted]. This is the appropriate remedy because the board's finding that Bohlmann 'had proved himself capable of filing claims and petitions even absent having counsel' [footnote omitted] is consistent with a presumption that Bohlmann would have filed a timely affidavit of readiness had the board or staff satisfied its duty to him. (*Id*. at 321).

Courts look to the Administrative Procedure Act (APA) for guidance in considering appeals from administrative agency decisions. The APA contains terms similar to those in AS 23.30.108 and expressly includes reference to a "substantial evidence" standard:

> **AS 44.62.570. Scope of review.**
> . . .
>
> (b) . . . Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
>
> (c) . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence in the light of the whole record.
>
> **8 AAC 45.050. Pleadings.**
> . . .
>
> (e) Amendments. A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading.
>
> . . .

Parties may freely amend claims in the course of prehearing conferences. *Hogenson* at 15.

> **8 AAC 45.065. Prehearings**. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a

> prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on
>
> (1) identifying and simplifying the issues . . . .
>
> (2) amending the papers filed or the filing of additional papers;
>
> . . .
>
> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

> **8 AAC 45.070. Hearings**. . . .
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> . . .
>
> (b) . . . a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed . . .

> **8 AAC 45.120. Evidence**.
>
> . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. . . The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

To be admissible at hearing, evidence must be relevant. Information is relevant for discovery purposes if it is reasonably calculated to lead to facts that will have any tendency to make a question at issue in the case more or less likely. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999) at 14. *Granus* at 10-11 provided guidance in determining admissibility:

> Information which would be inadmissible at trial, may nonetheless be discoverable if it is reasonably calculated to lead to admissible evidence. Under our relaxed rules of evidence, discovery should be at least as liberal as in a civil action and the relevancy standards should be at least as broad.

> To be admissible at hearing, evidence must be 'relevant.' However, we find a party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence admissible at hearing. *Smart v. Aleutian Constructors*, AWCB Decision No. 98-0289 (November 23, 1998).

The Alaska Workers' Compensation Appeals Commission in *Guys with Tools v. Thurston*, AWCAC Decision No. 062 (November 8, 2007), stressed the importance of making decisions based on a complete record:

> The exclusion of evidence, whether offered by the employee or the employer, does not serve the interest of the board in obtaining the best and most thorough record on which to base its decision . . . .
>
> Proceedings before the board are to be "as summary and simple as possible." AS 23.30.005(h). The board is not bound by "common law or statutory rules of evidence or by technical or formal rules of procedure." AS 23.30.135(a). The fundamental rule is that "any relevant evidence is admissible." 8 AAC 45.120(e). The result of an exclusionary rule is inherently contrary to the open access to all relevant information regarding the claimant's injury that the workers' compensation statutes are designed to promote. . .

> **8 AAC 45.150. Rehearings and modification of board orders.** (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
>
> (b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.
> . . .
>
> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
>
> (1) the facts upon which the original award was based;
>
> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
>
> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

> (e) A bare allegation of . . . mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.
>
> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

Alaska Rule of Civil Procedure 26. General Provisions Governing Discovery; Duty of Disclosure.

> . . .
>
> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> > (1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> . . .
>
> > (3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

Although the Alaska Rules of Civil Procedure do not apply in workers' compensation cases (AS 23.30.135), the board has looked to them for guidance. In particular, the board has looked

to Civil Rule 26(b)(1) for guidance on the general scope of discovery. *See, e.g., Granus.* Discovery that will not assist in ascertaining the rights of the parties, or in resolving the claim, will not be ordered. *See, e.g., Adkins v. Alaska Job Corps Center*, AWCB Decision No. 07-0128 (May 16, 2007); *Austin v. Tatonduk Outfitters*, AWCB Decision No. 98-0201 (August 5, 1998).

In a personal injury action, the Supreme Court held an insurance adjuster's investigative reports and files were protected as attorney work product, compiled in the ordinary course of business and therefore not discoverable, if they were prepared in anticipation of litigation, at the request of or under the supervision of the insured's attorney. *Langdon v. Champion*, 752 P.2d 999 (Alaska 1988). In workers' compensation proceedings, however, video and photographic surveillance, and related investigative reports, have long been considered relevant to an employee's physical capacities, and thus clearly within the scope of discoverable evidence. *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158 (Alaska 1996).

ANALYSIS

1. Should Employee's July 28, 2006, July 30, 2008, and June 11, 2010 claims be denied and dismissed under the doctrine of res judicata?

"*Res judicata*" bars re-litigation of issues that have been finally decided; the doctrine precludes a subsequent suit between the same parties asserting the same claim for relief when the matter raised was or could have been decided in the first suit. *Robertson* at 780. Here a full analysis requires an examination not just of Employee's claims and of prior Decisions and Orders, but also of Employee's March 6, 2006 Petition for Modification of *Mitchell VI.* The petition alleged *Mitchell VI* failed to address the Dynesys® non-fusion stabilization procedure, or, if *Mitchell VI* intended to deny the Dynesys® procedure, the denial was based on a mistake of fact. The filing date of a petition for modification under AS 23.30.130 is the date that controls timeliness under this statute. *Hodges*. Employee's petition for modification was timely under AS 23.30.130(a) and complied with 8 AAC 45.150.

Although Employee never filed an ARH on his petition for modification of *Mitchell VI*, he also has never abandoned it, and has consistently maintained his intent that the petition be addressed. (*See* Prehearing conference summaries, April 18, 2006, August 31, 2006, August 19, 2008, September 25, 2008, August 16, 2012, October 16, 2012, December 19, 2012, February 5, 2013; January 9, 2013 letter from Employee, February 5, 2013; Mitchell). An employee's petition for modification remains viable where it is timely filed. This is particularly the case where the employee is not properly advised, as occurred here, or is misadvised by the board designee. *Noelle L. McCullough v. Job Ready, Inc.*, AWCB Decision No. 12-0110 (June 26, 2012).

At the September 25, 2008 prehearing conference, the designee and parties acknowledged the "convoluted and confusing at best" nature of this case's procedural history. But rather than unscrambling the muddle, the summary reflects the designee contributed to it. When Employer asserted "asking for a hearing [on the March 6, 2006 Petition for Modification] now is untimely," the board designee failed to correct Employer's flawed contention by informing Employee the Act does not set a deadline, comparable to that found in AS 23.30.110(c) with respect to claims, to request a hearing on a Petition for Modification. Nor did the designee assure Employee he had in fact fulfilled the only timeliness requirement for a petition for modification: timely filing a conforming petition. *Hodges.* Noting that a *pro se* litigant is not always able to distinguish between "what is indeed correct and what is merely wishful advocacy dressed in robes of certitude," the Alaska Supreme Court in *Bohlmann* held the board has a duty to correct erroneous assertions made to a *pro se* claimant. In *Bohlmann*, where the board designee failed to correct an employer's misrepresentation that an employee's time to request a hearing had already expired, the employee's claim, and in this case Employee's petition for modification, may not be time-barred. *Id*.

Since Employee's petition for modification of *Mitchell VI* remains viable, *Mitchell VI* cannot be construed as finally resolving all claims to date. Given Employee's pending petition for modification, the scope of medical care, specifically the compensability of the August 10, 2006 Dynesys® procedure Employee ultimately underwent, has not been fully established.

Moreover, even if no Petition for Modification had been filed, *Mitchell VI* would have only resolved issues through December 20, 2005, the date *Mitchell VI* issued. Citing *Hibdon, Mitchell VI* authorized conservative medical treatment "through the date of this decision and order," and explicitly retained jurisdiction "to resolve any future disputes regarding whether future treatments are reasonable, necessary and within the realm of acceptable medical practice." Analogous to *Bailey*, there is no evidence the Dynesys® surgery, any surgery, or any non-conservative medical treatment, was deemed categorically or indefinitely inappropriate, especially given the recognized progressive nature of Employee's work-related injury.

Under AS 23.30.095(a), the board may authorize new treatment and care as the recovery process may require. Medical conditions and recommended treatments often change. *Bailey, Egemo.* Future medical needs cannot be precluded by a final Decision and Order, and new recommendations and treatment can entitle an employee to new benefits. *Id.* Employee's right to claim, and Employer's to controvert, compensation for medical care subsequent to *Mitchell VI* are preserved. Medical treatment and costs incurred since *Mitchell VI* issued are not subject to *res judicata* dismissal, and remain open, viable issues, unless subject to §110(c) dismissal.

The same analysis applies to periods of disability. A claimant may fluctuate between medical stability and instability. *Bailey, Egemo.* Indeed, while *Mitchell VI* found Employee medically stable as of January 30, 2003, and awarded TTD from December 16, 2002 through January 30, 2003, it further found Employee had undergone a spinal fusion in March 2003, noted back fusions "typically result in a period of time when the employee is removed from the workforce," and while noting there was "nothing in the file indicating . . . employee was removed from the work force due to his fusion, stated "if [Employee] was removed from the workforce [as a result of his 2003 spinal fusion], he may be entitled to TTD from the date of fusion until he is released to return to work." These findings and conclusions were not appealed, nor the subject of a petition for reconsideration or modification, and are thus final orders to which the doctrine of *res judicata* applies. Employee's right to claim, and Employer's to controvert TTD resulting from Employee's March 2003 spinal fusion, or periods thereafter, remain open, viable issues, unless subject to §110(c) dismissal.

With respect to other benefits, *Mitchell VI* found Employer did not frivolously or unfairly controvert benefits from date of injury to *Mitchell VI's* December 20, 2005 issuance. This holding was not appealed, nor was it the subject of Employee's petition for modification. It is thus a final order to which the doctrine of *res judicata* applies. This does not, however, preclude a claim or claims of unfair or frivolous controversion if those claims emanate from events post-dating *Mitchell VI,* unless subject to §110(c) dismissal.

Employee is advised this decision does not mean *Mitchell VI* will be modified. This decision determines only that Employee's petition for modification remains viable, and that the doctrine of *res judicata* does not preclude Employee's July 28, 2006; July 30, 2008; and June 11, 2010 claims for benefits incurred and sought after *Mitchell VI,* or disability benefits sought after March, 2003.

2. Should Employee's July 28, 2006, July 30, 2008, and June 11, 2010 claims be denied as time-barred pursuant to AS 23.30.110(c)?

Under AS 23.30.110(c), if an employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years from the controversion notice's filing, the claim is denied. Here four claims were filed subsequent to *Mitchell VI*'s issuance: on January 20, 2006, July 28, 2006, July 31, 2008, and June 14, 2010. All were controverted. The February 5, 2013 prehearing conference summary did not include the January 20, 2006 claim as a disputed issue, and at hearing the parties agreed the claims under consideration for dismissal were the latter three only. Employer concedes Employee's ARH on the July 28, 2006 claim was timely filed within two years of controversion. It is undisputed no ARHs were filed for the latter two claims. Employer contends the latter three claims should be dismissed, including the July 28, 2006 claim, due to a failure by Employee to advance the issues to hearing.

However, when Employee timely filed the ARH on his July 28, 2006 claim, he fulfilled his sole obligation to further his case, complying with the Act's intent to ensure quick and efficient resolution of disputes. AS 23.30.001; *Tonoian; Hessel.* Employer timely opposed the ARH. Where a party opposes an ARH, a prehearing conference to set a hearing date must be held

within 30 days of filing. AS 23.110(c). Where a hearing is requested, it is mandatory, not discretionary, that the hearing be scheduled and held. *Summers* at 1371.

Here, Employer's opposition was filed on August 8, 2008, and a prehearing timely held on August 19, 2008, but the designee failed to set a hearing on the July 28, 2008 ARH. The failure to proceed in the manner required by law was an abuse of discretion by the designee, and Employee cannot be held responsible or penalized for the fact a hearing was never scheduled. *Manthey* 890 n.12. Employee's timely request for hearing permanently tolled the §110(c) statute of limitations for his July 28, 2006 claim, which remains open and ripe for hearing. *Huston* at 819, citing *Tipton*.

To establish whether the July 31, 2008 claim and the June 14, 2010 amended claim remain viable or should be dismissed requires consideration of three intertwined issues: (a) what a *pro se* claimant must do to keep a claim alive; (b) whether a "no progress" rule bars Employee's claims from current consideration; and (c) whether the July 31, 2008 and June 14, 2010 claims are express or implied amendments to the viable July 28, 2006 claim.

(a) What a pro per claimant must do to keep a claim alive.

In most cases, the plain language of AS 23.30.110 calls for automatic and non-discretionary claim dismissal where a party fails to timely file an ARH. *Tipton; Hornbeck; Beaman*. Employee did not file an ARH on either the July 31, 2008 claim or the June 14, 2010 amended claim, although repeatedly advised by prehearing summaries and controversion notices that failure to file within the two-year time limitation under §110(c) could result in claim dismissal. Even though he was never given a "specific date or time-out deadline," the *Richard* and *Bohlmann* duty to inform was fulfilled with regard to §110(c) dismissal of the July 31, 2008 and June 14, 2010 claims.

Nor did Employee establish any grounds for legal excuse from filing a timely ARH on the July 31, 2008 and June 14, 2010 claims. Neither Employee nor his non-attorney representative exhibit limited reading and comprehension abilities. *Dennis* at 31. An erroneous belief filing a claim would satisfy the §110(c) requirement to file an ARH does not constitute substantial

compliance. *Kim, Hessel.* Nor does the fact Employee did not understand the exact date by which he had to file an ARH establish legal incompetence. *Hessel.*

At hearing on June 13, 2013, Ms. Mitchell credibly reiterated Employee could not truthfully file an ARH attesting discovery was complete, evidence obtained, and he was fully prepared for hearing. The Court in *Kim* recognized the absence of a board regulation dealing with exceptional circumstances and AS 23.30.110(c) dismissal, as well as the "tension" between the statutory time bar and signing an affidavit of readiness despite not actually being ready: a party "should not be in a position of having to choose between perjury and relinquishing a valid claim." *Kim* at 198. Nonetheless, the Court held a claimant who is unable, within two-years after controversion, to file a truthful affidavit stating he is ready for an immediate hearing "must inform the Board of the reasons for the inability to do so and request additional time to prepare for the hearing." *Id.* Employee was made aware of this requirement on August 16, 2012, eight days before the §110(c) deadline on his June 14, 2010 claim, but failed to request a time extension in lieu of filing an ARH. With respect to Employee's July 30, 2008 and June 14, 2012 "claims," Employee did not meet the substantial compliance standard set out in *Kim.*

(b) Whether a "no progress" rule bars Employee's claims from current consideration.

Employer's assertion Employee's claims should be dismissed due to his lack of progress or pursuit of a hearing date is misguided. Ms. Mitchell's credible testimony and the record amply establish Employee never had the intent or even a logical reason to slow progress toward case resolution. On the contrary, Ms. Mitchell credibly testified she believes Employee's claim is open and he has made "continued and unending attempts to advance to hearing on outstanding issues." Moreover, as events progressed, board personnel, though well intentioned in their efforts to aid him in protecting and amending his claim, given the "convoluted and confusing" nature of the case, erroneously aided his filing new claims, rather than advising him on the proper procedure to amend his pending claim. Employee's credible belief he was taking appropriate measures to update and keep his claim alive is further supported by the objective fact the July 28, 2006, July 31, 2008, and June 14, 2010 claims were all filed within two years of the prior claim's controversion.

Employee's non-attorney representative is articulate and organized, but she does not, and should not be expected to possess an attorney's comprehensive grasp of legal concepts and procedures, particularly in a complex case going back 18 years. Employee's tenacity in actively pursuing the claim is demonstrated by the volume and variety of paperwork submitted. Since *Mitchell VI*, Employee has filed workers' compensation claims, requests for conference, objections to prehearing conference summaries, a petition to compel, a petition to appeal a prehearing discovery determination, an ARH, and numerous supporting documents. As the Court noted in *Bohlmann*, where a *pro per* claimant "has proved himself capable of filing claims and petitions, [it is reasonable to] presume[e] he would have filed a timely affidavit of readiness had the board or staff satisfied its duty to him [to advise of proper procedures]. *Id*. at 321.

It is clear Employee had nothing to gain and everything to lose by contravening speedy and efficient dispute resolution. Employee is clearly frustrated by, not the cause of, the lack of case progress since 2006, and was and remains committed to advancing to a hearing on his Petition for Modification and his post-*Mitchell VI* claim for medical benefits, disability, attorney fees, etc.

In the alternative, even if Employer is correct that a "no progress" or "failure to prosecute" rule should be enforced against Employee, the July 28, 2006 claim would be exempt. As established above, Employee's timely request for hearing fulfilled his sole obligation to further his case and permanently tolled the §110(c) statute of limitations for that claim. The Supreme Court holds that AS 23.30.110(c) is not a comprehensive no progress rule; dismissal of a specific claim does not equate to dismissal of the entire case. *Wagner* 459 n.7. Therefore, under 8 AAC 45.050(e) Employee is permitted to amend his July 28, 2006 claim any time before award upon such terms as the board or its designee directs.

(c) Whether the July 31, 2008 and June 14, 2010 claims are express or implied amendments to the viable July 28, 2006 claim.

Employee's June 14, 2010 claim is clearly labeled an amendment. The July 31, 2008 claim is not labeled an amendment in writing, and therefore is not an express amendment. However, there is a large body of evidence in the form of known facts, statements and conduct, discussed *supra*, from which it can be deduced the July 31, 2008 claim was intended to be and functions as an amendment. As Ms. Mitchell credibly and succinctly testified at hearing, all claims were filed as events progressed, "done to amend the claim" and "done with the assistance of [workers' compensation] personnel to protect his claim."

There is no standardized form for filing an amended pleading; there is only a place on the bottom of the first page of the regular workers' compensation claim form to indicate if the current claim is amending a prior one. Employee should not be faulted or penalized for filing an updated claim, reflecting changed circumstances, without specifically labeling it an amendment. The pleadings of *pro se* claimants are held to less stringent standards than those of attorneys, particularly when Employee's clerical error stemmed from lack of familiarity with the rules, not gross neglect or bad faith. *Gilbert* at 129. Indeed, if an injured worker's fate cannot depend on the use of "magic words" by a witness (*Smith* at 791), the same standard should hold for filings by a *pro se* claimant.

Moreover, from their content, it is obvious Employee's succeeding claims were attempts to amend his July 28, 2006 claim, and Employee should have been so advised. In *Richard v. Fireman's Fund*, 384 P.2d 445 (Alaska 1963), the Court admonished the Board for failing its duty to fully advise a *pro se* claimant "as to all the real facts which bear upon his condition and his right to compensation . . . and instruct[] him on how to pursue that right under the law." The Court has re-emphasized that duty over the years, most recently in *Bohlmann*, which specifically noted a duty to advise a *pro se* litigant with respect to amending a claim. *Id*. at 320.

Here, the designee, on multiple occasions, had an opportunity to advise Employee in this regard but failed to do so. The August 31, 2006 prehearing conference addressed three pleadings: Employee's March 6, 2006 petition for modification, and his January 20, 2006 and July 28, 2006 claims. Both claims requested the same categories of benefits for the same injury: TTD, medical

costs incurred or anticipated, and attorney's fees and costs. The language Employee chose for his July 28, 2006 *pro per* claim plainly indicated he viewed the July claim as an amended version of the earlier January claim: he requested TTD "from 7-31-03 through current"; medical costs of "$5278.92 and continuing"; and attorney's fees and costs of "$12,000.00 and continuing." Since Employee's counsel had withdrawn and he was now acting *pro per* and incurring no additional attorney fees, that this claim merely amended the previous one should have been obvious. Employee's reason for filing a second claim in July, 2006 is also phrased in language reflecting an updated, rather than a new claim: "progression to 3rd spinal level" and "continuing/advancing spinal degeneration."

At the August 19, 2008 prehearing conference, Employee was directed to pursue a third post-*Mitchell VI* "claim," filed on July 31, 2008 and seeking essentially the same benefits as the July 28, 2006 claim, with the exception the medical costs had now increased to over $81,000, rather than recognize the new "claim" as the amendment that it was. The board designee further abused discretion by again failing to set a hearing on the July 28, 2006 claim for which a timely ARH had been filed.

Employer's August 22, 2008 controversion of the July 31, 2008 claim indicated that Employer too, for all intents and purposes, regarded the July 31, 2008 claim as an amendment, rather than a new claim. The July 31, 2008 claim sought two additional benefits (penalty, interest and unfair or frivolous controversion), but all relief sought related back to the original 1995 injury. As in every controversion since *Mitchell VI,* Employer invoked *res judicata* and denied any disability or medical benefits past, present or future, not awarded in the 2005 Decision and Order.

At the September 25, 2008 prehearing conference, the designee again failed to advise Employee what he was attempting to do was amend his viable claim, not pursue a new one. The designee again failed to set a hearing on the timely ARH, and failed to correct Employer's misstatement that Employee's time to request a hearing on his Petition for Modification had expired.

At the August 16, 2012 prehearing conference, the July 30, 2008 ARH, still awaiting hearing, was not discussed. Instead Employee was given an ARH form to file on his expressly "AMENDED" June 14, 2010 claim (for TTD from January 30, 2003 through September 20 2005, PTD, medical costs other than conservative care), despite the fact as an amended claim it would date back to the original claim and timely ARH. He was not told the §110(c) deadline stemming from the July 9, 2010 controversion (for TTD after January 30, 2003 and through September 20, 2005; PTD; and unspecified medical costs) had arguably passed, nor that the deadline following the August 24, 2010 controversion (for medical costs other than conservative care) was eight days away.

Because the July 31, 2008 and June 14, 2010 claims both function as amendments (one implied, one express) to the July 28, 2006 claim, the fact an ARH was not filed on the subsequent claims is of no legal significance. As established *supra*, the July 28, 2008 ARH is viable and may incorporate amendments arising out of the "occurrence set out or attempted to be set out in the original pleading." 8 AAC 45.050(e).

Alternatively, even if the July 31, 2008 and June 14, 2010 claims were dismissed due to failure to timely file an ARH, Employee could still amend the open July 28, 2008 ARH. Under 8 AAC 45.050(e), a pleading may be amended at any time before award upon such terms as the board or its designee directs.

In summary, Employee is not legally excused from his obligation to file an ARH on his July 31, 2008 and June 14, 2010 amended claims. However, the issue is rendered moot because of the existence of a viable ARH from July 28, 2008, which he is still free to amend. Employee has not failed his duty to prosecute his claim, nor has he violated any no progress rule.

Finally, dismissal with prejudice is harsh and final. Dismissal here would be manifestly unfair to a *pro se* claimant who logically and credibly believed he was doing what was necessary to advance to hearing, especially in light of workers' compensation staff's repeated failures to

adequately advise and assist Employee to pursue his claim. The statute of limitations defense is "generally disfavored" and neither "the law [n]or the facts should be strained in aid of it." *Tipton*.

3. Did the board designee abuse his discretion when, on December 19, 2012, he denied Employee's September 11, 2012 petition to compel discovery?

The existence of a viable Petition for Modification and a viable ARH renders the discovery dispute viable as well. When reviewing a board designee's decision under the abuse of discretion standard, the question is not whether the designee reached the best decision or whether the board would have reached the same decision. The designee's decision must be upheld unless it is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive. Here, neither party has argued, nor is there any evidence, the designee's decision stemmed from improper motive.

The duty to ensure the "quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to . . . employers" under the Act requires a speedy discovery process. Prompt execution of reasonable releases plays a critical role in facilitating the fulfillment of the Act's intent. On the other hand, demanding overly broad releases is destructive to the cooperative spirit on which informal discovery depends, delays the delivery of benefits, and results in needless administrative and litigation costs.

The parties differ as to whether the information sought is reasonably calculated to lead to admissible evidence. Employee asserts Employer has been noncompliant in releasing information, and has engaged in unfair and frivolous controversions and intentional bad faith since at least 2005. To substantiate these allegations, Employee asserts he needs a complete, date-stamped copy of everything in Employer's file on him back to September 17, 2001.

Employer contends it has complied with discovery requests involving information relevant to the benefits being sought. Employer views the current request as overbroad, needlessly burdensome,

and not reasonably calculated to lead to discovery of evidence relevant to any matter before the board.

The review of a designee's determination in a discovery dispute may not consider evidence or arguments not presented to the designee. Here the written record as of December 19, 2012 was first examined.

On September 11, 2012, Employee petitioned to compel Insurer to provide a copy of Employee's entire case file since September 17, 2001, alleging prior written, oral and prehearing requests were ignored or denied. Attached to the petition was a letter responding to the August 16, 2012 prehearing conference summary. Employee stated:

> I am requesting date stamped discovery, not just copies of [Employee] medical records from [Insurer]. I need a date stamped copy of everything in his case file including all records, reports, correspondence, medical records, phone records, physician bills, invoices, payment records, surveillance records, police contact regarding my neighbors' complaints of [Insurer] activity, police reports for the misplaced [Insurer] computer putting EE at identity theft risk, and anything else in his case file. All of it. With proper discovery I can fairly respond to [Insurer] claims. Without proper discovery I can not [sic] agree to the issue limitation for future hearing in this summary. . . As confirmed by [board designee], we can not [sic] proceed with an affidavit of readiness for hearing without discovery.

The December 19, 2012 prehearing conference summary indicated Employee stated he didn't know what he expected this discovery request to yield. The petition to produce "all of it" was denied with the following "review":

> Information is discoverable if it is "relative" to the employee's injury or claim according to AS 23.30.107. "We have reached the conclusion that 'relative to the employee's injury' needs only have some relationship or connection to the injury." Relevancy describes a logical relationship between a fact and a question that must be decided in a case. Thus, the relevancy (and discoverability) of a fact is its tendency to establish a material proposition. The Designee utilized a two-step process to determine the relevance of the information sought. The first step is to identify those matters, which are "at issue" or in dispute. In the second step, the Designee must decide whether the information sought is relevant because it is "reasonably calculated" to lead to facts that will have a tendency to make a disputed issue, identified in step one, more or less likely.

This boilerplate review language states the law, but does not explain how the designee applied it to the facts of this case. As Employee correctly observed, "the summary discussion does not explain why he has denied the petition to compel discovery." Due to the designee's conclusory result and the absence of any analysis, there is no way to determine with certainty whether or not the discovery order was arbitrary, capricious or manifestly unreasonable, and consequently no way to establish if the designee abused his discretion. Logic dictates that with no way to rule out an arbitrary, capricious or unreasonable result, an abuse of discretion must be found. As a result, the hearing panel was required to consider the parties' underlying positions and arguments.

The hearing officer began by explaining the discovery process to Employee. Employee was advised only information relevant to his claims was discoverable, and a request for "everything in his file" was overbroad, would cause Employer undue burden and expense, and encompassed documents immune from discovery such as those protected by attorney/client privilege and attorney work product.

Employee's specific discovery requests were then analyzed sequentially, and Employee asked to explain why each was relevant to a pending issue, with the following results:

> - A complete copy of the adjuster's file including but not limited to, all payments made to me or on my behalf; letters and releases utilized to obtain information regarding my work injury, my employment history and medical history; investigative requests including those made to witnesses and employers and copies of the documents, records or statements made in response to the requests.

Employee's purpose with this request is to verify whether he has a complete set of medical records, and a record of unpaid bills, in order to support his allegation Employer engaged in unfair or frivolous controversion. Employer responded all medical records have been filed with the board on medical summaries. Employer will not be compelled to produce information Employee can obtain from board files. However, any information on denied medical bills since December 20, 2005, is relevant to an issue for hearing and therefore discoverable. Employer will be ordered to produce documentation pertaining to all medical expenses denied since December 20, 2005.

On compensation reports, Employee already possesses documentation of payments made to him, as well as copies of releases he has signed, so there is no need for Employer to reproduce this evidence. Letters between Employer, insurer, and their attorney, including requests for investigation and other information regarding Employee which were compiled in the ordinary course of business, not necessarily in preparation for litigation, are protected as attorney work product, and also not discoverable.

> - A complete copy of all medical documents and records pertaining to my work injury, including those received from my medical care providers; prepared and/or provided by nurse case managers, independent medical examiners, and/or second independent medical examiners. This should also include any medical records and/or information in your file regarding any previous medical care, treatment or opinions, which may be relevant to my current workers' compensation case.

Employer is required to file any medical records and summaries in its possession with the board and serve copies on Employee. AS 23.30.095(h); 8 AAC 45.052. At the hearing, Employee modified his request for a copy of all medical records requested, to a list of all medical summaries filed, in order to verify his records are complete. Employer agreed to provide copies of all medical summaries filed, and provide Employee and the board with any that were overlooked, and Employer will be ordered to do so.

> - A complete copy of documents and records relating to the LNW loss of a computer that put Mitchell at risk of identity theft. Records to include, but not limited to, the police and incident reports, circumstances involved, who lost it, where it was lost, and when. Was it ever recovered?

Ms. Mitchell testified she would need the "event documents" pertaining to Employer's lost computer as evidence in case Employee had his identity stolen. This information is not relevant to the issues in dispute here, and discovery is denied.

> - A complete copy of any surveillance undertaken in regard to my workers' compensation case and the contact information for the company or individual retained to perform the surveillance. Please provide complete copies in the same format as provided to you whether in video, digital, audio or any other format.

Employer confirmed it possesses written surveillance reports, prepared in anticipation of litigation. These reports, along with any other video, photographic or recorded surveillance in Employer's possession, are clearly relevant to the disputed disability issue, are admissible as evidence, and therefore discoverable. Pursuant to *Sulkosky*, they are not, as Employer contends, privileged as attorney work product. Employer will be ordered to produce any and all unedited surveillance videos, photographs and investigative reports regarding Employee.

> • A complete copy of my personnel file to include but not limited to, job descriptions, job duties, application for employment, pre-hire or post-hire questionnaires, performance evaluations, grievances, reprimands and/or disciplinary actions and UPS driver truck logs.

Employee withdrew this request at hearing.

> • Other documents not previously or specifically named above that may pertain to my workers' compensation case in your possession or control.

This request is vague and overbroad, and Employer will not be ordered to produce it.

In summary, Employee is entitled to receive some, but not all, the discovery requested in his September 11, 2012 petition to compel.

CONCLUSIONS OF LAW

1. Employee timely filed a Petition for Modification of *Mitchell VI.* It is viable and ripe for hearing.

2. Employee timely filed an ARH on his July 28, 2006 claim. The claim will not be dismissed as time-barred under §110(c).

3. In *Mitchell VI* the board found compensable "reasonable and necessary conservative medical treatment associated with [Employee's] low back through the date of this decision and order." The board retained jurisdiction to resolve "future disputes regarding . . . future treatments." The medical benefits sought in Employee's July 28, 2006 claim pertain to treatment sought or incurred after *Mitchell VI*'s issuance. Employee's July 28, 2006 claim for medical treatment after *Mitchell VI*'s issuance will not be dismissed under the doctrine of res judicata.

4. In *Mitchell VI* the board found Employee medically stable as of January 30, 2003, and awarded TTD from December 16, 2002 through January 30, 2003. It noted, however, Employee thereafter underwent a spinal fusion in March 2003, which typically requires an employee be removed from the workforce for a period of time. *Mitchell VI* held Employee "may be entitled to TTD from the date of fusion until he is released to return to work." Accordingly, any effort to re-litigate TTD prior to the date of Employee's fusion surgery in March, 2003, is barred by the doctrine of *res judicata*. Employee's viable July 28, 2006 claim seeking TTD from July 31, 2003 forward is not barred by the doctrine of *res judicata.*

5. In *Mitchell VI* the board held Employer did not frivolously or unfairly controvert benefits. Any effort to re-litigate this issue for actions or events occurring prior to November 2, 2005 is barred by the doctrine of *res judicata*.

6. Because Employee was not represented by counsel until after *Mitchell VI* issued, *Mitchell VI* did not address the issue of attorney fees. Employee's viable July 28, 2006 claim seeking attorney fees of "$12,000+" is thus not barred by the doctrine of *res judicata*.

7. Employee's July 30, 2008 and June 11, 2010 claims will not be dismissed as time-barred as they were clearly efforts by Employee to amend his viable July 28, 2006 claim, and by operation of law relate back to the date of the original pleading, for which a timely ARH was filed.

8. The board designee abused his discretion by failing to supply an analysis for his summary decision denying the petition to compel.

ORDER

1. Employer's November 19, 2012 petition to dismiss Employee's July 28, 2006; July 30, 2008; and June 11, 2010 workers' compensation claims under the doctrine of *res judicata*, and as time-barred under 110(c), is granted in part and denied in part.

2. Employee's March 6, 2006 Petition for Modification and July 28, 2006 claim, as amended, are viable and ripe for hearing.

3. Employee's appeal of the designee's December 19, 2012 denial of the petition to compel is granted in part and denied in part.

4. No later than **October 31, 2013**, Employer shall produce copies of (1) any and all medical bills denied since December 20, 2005; (2) any and all medical summary forms previously filed with the board, without the attached medical records; (3) on a medical summary, any and all relevant medical records not previously filed; (4) any and all written investigative reports, with any and all supportive materials including, but not limited to, video, photographic and recorded surveillance. Employer shall file an affidavit of compliance with this discovery order.

5. Parties will attend a prehearing conference with Hearing Officer Linda M. Cerro on **November 25, 2013** to frame issues and set a hearing date on Employee's March 6, 2006 Petition for Modification, and July 30, 2006, claim, as amended.

Dated at Anchorage, Alaska on October 07, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Linda M. Cerro
Designated Chair

Mark Talbert, Member

Robert Weel, Member

RECONSIDERATION

A party may ask the Board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the Board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the Board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

PETITION FOR REVIEW

A party may seek review of an interlocutory or other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of STEPHAN CRAIG MITCHELL employee / applicant; v. UNITED PARCEL SERVICE, employer; and LIBERTY MUTUAL INSURANCE CO., insurer / defendants; Case No. 199523875; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties this 07th day of October, 2013.

Anna Subeldia