ALASKA WORKERS' COMPENSATION BOARD

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

KENNETH R. BAPTISTE Employee, Claimant, v. COOK INLET TRIBAL COUNCIL, INC. Employer, and SEABRIGHT INSURANCE CO. Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201020103 AWCB Decision No. 13-0128 Filed with AWCB Anchorage, Alaska on October 15, 2013

Cook Inlet Tribal Council, Inc.'s (Employer) May 8, 2013 petition to dismiss Kenneth R. Baptiste's February 28, 2011 workers' compensation claim was heard on September 3, 2013, in Anchorage, Alaska, a date selected on June 6, 2013. The panel consisted of two members, a quorum under AS 23.30.005(f). Kenneth Baptiste (Employee) appeared, testified and represented himself. Attorney Joseph Cooper appeared and represented Cook Inlet Tribal Council, Inc. and its workers' compensation carrier. There were no other witnesses. The record closed at the hearing's conclusion on September 3, 2013.

ISSUES

Employer contends Employee's February 28, 2011 workers' compensation claim should be dismissed because Employer controverted the claim on board-prescribed forms, and Employee failed to take any action to request a hearing within two years of the date Employer controverted. Employer contends Employee provided no justification for not timely requesting a hearing, and his claim should be dismissed.

Employee admits he failed to timely file an Affidavit of Readiness for Hearing (ARH) or request additional time to prepare for hearing. However he contends his stroke caused complete memory loss, which he only started to regain after the filing deadline. He contends his claim should not be dismissed.

1) Should Employee's March 10, 2011 claim be dismissed under AS 23.30.110(c)?

FINDINGS OF FACT

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

1) On February 28, 2011, Employee reported he suffered a stroke on Employer's premises on October 2, 2010, due to lack of sleep plus stress. He also filed a Workers' Compensation Claim (claim) in which he stated he experienced blurred vision at work, then went home, went to sleep, and could not move when he woke up. He sought temporary total disability from October 2, 2010 through present, plus medical and transportation costs incurred (Report of Occupational Injury or Illness and claim, February 28, 2011).

2) Medical records indicate the stroke occurred on October 24, 2010 (Scot D. Hines, M.D., Neurology consultation note, October 25, 2010).

3) On March 21, 2011, Employer filed a board-prescribed controversion notice denying all benefits, stating there was no evidence linking Employee's condition to his employment, or indication employment was the substantial cause of Employee's stroke (Controversion, March 18, 2011).

4) On April 6, 2011, Employer filed another board-prescribed controversion of all benefits, adding the defense Employee did not timely give notice of his injury under AS 23.30.100 (Controversion, April 4, 2011).

5) On May 5, 2011, Employer filed a third board-prescribed controversion of all benefits, adding the defense Employee had not returned signed releases or filed a petition requesting a protective order under AS 23.30.108 (Controversion, May 2, 2011).

6) At prehearing on May 11, 2011, Employee, who was not represented by counsel, signed Employer's releases. The prehearing conference summary did not advise Employee he needed to request a hearing within two years of controversion or face possible dismissal of his claim under AS 23.30.110(c) (Prehearing conference summary, May 12, 2011).

7) At prehearing on August 10, 2011, Employee was accompanied by Emil Remus, a non-attorney representative. Employee filed a notarized letter authorizing Lisa Routh, M.D., Betty Baptiste, and Emil Remus "to assist me in my personnel [sic] and financial affairs." The prehearing conference summary included the following boilerplate language:

> **Employee is advised**, AS 23.30.110(c) provides: '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.' In other words, when Employee files a workers' compensation claim and Employer controverts the claim, to avoid a possible dismissal of Employee's claim, Employee must file with the board and serve on all opposing parties an affidavit of readiness for hearing form Employee can complete and file. 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.

The prehearing conference summary was served on both Employee and Mr. Remus (Prehearing conference summary, August 10, 2011; emphasis in original).

8) On August 24, 2011, Employer's Medical Evaluation (EME) physician Alan J. Goldman, M.D., examined Employee and reported: (1) On October 24, 2010, Employee suffered a stroke at home and "seemed confused" when his son found him; (2) "For the last several months, Mr. Baptiste has resided in an assisted living facility but claims total independence in reference to his personal activities of daily living"; (3) "Mr. Baptiste also claims that his memory is continuing to improve. . ."; and (4) "At the time of today's examination. . . he is completely independent in his activities of daily living" (EME report, September 7, 2011).

9) Dr. Goldman described Employee's mental status as "normal cognition to bedside conversation. There was no aphasia[1]. . . Mr. Baptiste was surprisingly spry and loquacious for his stated age and multiple prior medical problems. He did claim some memory deficits of a minor nature, which he thought were improving" (*id.*).

10) Dr. Goldman opined the substantial cause of Employee's stroke was "atrial fibrillation, his longstanding, underlying cardiac arrhythmia" (*id.*).

11) On September 23, 2011, Employee called and informed the board designee he would be participating telephonically in his October 6, 2011 prehearing. He reported a new address and phone numbers. He stated "Professor Emil Remus may be selected" as a non-attorney representative (agency record, events screen).

12) On September 29, 2011, Employer filed a fourth board-prescribed controversion of all benefits, based on Dr. Goldman's EME opinion Employee's cerebral condition "occurred for reasons other than work" (Controversion, September 28, 2011).

13) On the reverse side of all four controversion notices was the following:

TIME LIMITS

> . . .
> 2. 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, March 18, 2011; April 4, 2011; May 2, 2011; and September 28, 2011; emphasis in originals).

14) At prehearing on October 6, 2011, Mr. Remus represented Employee. With Employee's permission, the board designee gave Mr. Remus a copy of a settlement offer returned to Employer as undeliverable because it was not sent to Employee's current address. Employee updated his address and phone number of record. The prehearing conference summary was

[1] "Aphasia" is "partial or total inability to understand or create speech, writing, or language due to damage to the brain's speech centers; loss of a previously possessed facility of language comprehension or production unexplained by sensory or motor defects or diffuse cerebral dysfunction" (*McGraw-Hill Concise Dictionary of Modern Medicine*, 2002).

served on both Employee and Mr. Remus, and contained the same boilerplate AS 23.30.110(c) advice as the August 10, 2011 summary (Prehearing conference summary, October 7, 2011; record).

15) On September 7, 2012, Employee complained to the outpatient anticoagulation clinic at Chickasaw Nation Medical Center he was very forgetful and had ongoing memory problems since his stroke (Nicholas Chung, PharmD, medical report, September 7, 2012).

16) On September 11, 2012, Employee called to indicate he was going to try to reinitiate settlement discussions. The board designee discussed with him the process for settlement agreements, submitting a change of address, and the statute of limitations. Employee was specifically notified he must file an ARH by March 21, 2013 (agency record, events screen).

17) On September 17, 2012, Employee called the board designee to report a new address and request new copies of misplaced forms (*id.*).

18) On October 25, 2012, Employee underwent an MRI ordered by internist Jin Kong, M.D., due to a history of stroke, confusion, and forgetfulness (MRI report, radiologist Anna Stidham, M.D., October 25, 2012).

19) On December 14, 2012, Employee called the board designee to indicate he was not accepting Employer's settlement offer and planned to make a counteroffer. Employee updated his mailing address and stated Mr. Remus was no longer his non-attorney representative (agency record, events screen).

20) On January 9, 2013, Employee called to indicate Employer did not return his calls about the settlement offer, which Employee believed was unfair. The board designee advised Employee to send Employer a letter by certified mail, with a copy to the board (*id.*).

21) On January 24, 2013, Employee called to state again he did not agree to the settlement offer. The board designee advised him to petition for a second independent medical exam (SIME) and suggested he ask Employer for mediation (agency record, events screen).

22) On January 29, 2013, Employee called for assistance in filling out the SIME petition. Employee stated none of his medical care providers would put in writing his stroke was work-related. The board designee explained it was unlikely an SIME would be ordered without showing a medical dispute, but sent him an ARH and medical summary form, plus examples of both (*id.*).

23) On January 31, 2013, Dr. Kong noted Employee still complained of forgetful, poor memory and was sometimes confused (medical record, January 31, 2013).

24) On March 19, 2013, Employee left a voicemail message with the board stating he lost the forms sent to him. The board designee resent him ARH and medical summary forms on March 20, 2013 (agency record, events screen).

25) On March 29, 2013, Employee faxed the board an undated SIME petition and his settlement counteroffer (petition and counteroffer, March 29, 2013).

26) On April 9, 2013, Employee called the board with questions about the hearing process. The board designee told him it was "critical" to file an ARH as soon as possible because the two-year deadline was March 21, 2013 (agency record, events screen).

27) On April 10, 2013, Employee called the board designee for assistance in filling out the ARH form (*id.*).

28) On April 15, 2013, the board received Employee's ARH requesting an unspecified type of hearing (ARH, April 10, 2013).

29) On April 17, 2013, Employee called the board designee and verbally requested an oral hearing (agency record, events screen).

30) On April 22, 2013, Employer opposed the ARH based on an AS 23.30.110(c) statute of limitations defense (Affidavit of Opposition, April 22, 2013).

31) On May 8, 2013, Employer petitioned to dismiss the claim in accord with AS 23.30.110(c) (petition, May 8, 2013).

32) On May 31, 2013, Employer filed an ARH (ARH, May 30, 2013).

33) At prehearing on June 6, 2013, a hearing was set for September 3, 2013, on the sole issue whether Employee's claim should be dismissed under AS 23.30.110(c) (prehearing conference summary, June 6, 2013).

34) At hearing on September 3, 2013, Employee identified Mr. Remus as a "UAA professor and overseer for retirees from the university." Employee testified when his mind started coming back, he realized Mr. Remus was taking money from Employee's checking account. Employee testified Mr. Remus made him realize he needed to handle his own affairs, "nobody else," and he let Mr. Remus go (Baptiste).

35) Employee twice testified the board designee kept him informed about the two-year deadline, but "it's just me not remembering" (*id.*).

36) At hearing Employee's testimony about his mental state was inconsistent. He said after the stroke he did not agree with a doctor who said he was incompetent, but he "did not know what that meant at the time." He then testified he thought he had been incompetent, but he became competent "about maybe January 2012." In a follow-up question, when asked if in January 2012 he started to feel his brain was coming back slowly, Employee said "yes," but then added "about a year and a half, sometime this summer" he believed he got his memory back. When later asked when he thought he became incompetent, he testified the word "incompetent" didn't mean anything to him, because it is an English word, and his native language is Choctaw. "To me I never lost my sense of intelligence, but yeah I'm incompetent to other people, and that part I don't understand." Employee confirmed "for a long period of time [he has] been able to run [his] own life." When asked if he agreed with anyone who labeled him incompetent, Employee responded, "I don't believe I am," but then testified since the stroke, "that is a different thing. . . I have complete loss of memory caused by the stroke." He also testified, "I am just now getting my memory back"; three weeks before hearing "all of a sudden my mind and memory started coming back" (*id.*).

37) Employee fluently speaks and comprehends English (observation, judgment).

38) At hearing Employee needed no assistance capably presenting his argument (*id.*).

39) Employee testified based upon faulty recollection, and his testimony was inconsistent. He displayed no guile. However, based upon the inconsistencies in Employee's testimony, his testimony was not credible (*id.*).

40) Employee's agency file contains no psychiatric or mental health records. His pharmacy records since the stroke do not indicate Employee was prescribed any psychiatric medications, and Employee testified he regularly took only an anticoagulant and aspirin (record; Baptiste).

41) No prehearing conference summaries were returned to the board as undeliverable (record).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to . . . employers. . . .

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, 533-534 (Alaska 1987).

> **AS 23.30.005. Alaska Workers' Compensation Board.** . . .
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> (f) Two members of a panel constitute a quorum for hearing claims . . .
> . . .
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> (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.
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> **AS 23.30.110. Procedure on claims.** . . .
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> (c) Before a hearing is scheduled, a party seeking a hearing shall file a request for 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 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 Alaska Supreme Court (Supreme 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). The 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 of the claim. *Tipton* at 913. 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 Supreme Court noted the Alaska Workers' Compensation Appeals Commission (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 193, 197-198 (Alaska 2008), citing *Tonoian* and *Omar v. Unisea, Inc.,* AWCAC Decision No. 053 (August 27, 2007). 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.

Certain events relieve an employee from strict compliance with the requirements of §110(c). The Supreme 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). In *Bohlmann v. Alaska Construction & Engineering,* 205 P.2d 316 (Alaska 2009), the Supreme Court held the board's failure to correct an employer's erroneous assertion to a self-represented claimant his claim was already time-barred rendered the claimant's ARH timely. Applying *Richard*, *Bohlmann* stated the board has a specific duty to inform a self-represented claimant how to preserve his claim under §110(c). Noncompliance has been excused when the board failed to do so. See, e.g., *Dennis v. Champion Builders,* AWCB Decision No. 08-0151 (August 22, 2008) and *Austin v. Norquest Seafoods, Inc.*, AWCB Decision 08-0114 (June 18, 2008), where employees with limited reading abilities were excused when the only timely §110(c) notice they received was on controversion notices, and the board designees provided no instruction or guidance about ARH filing deadlines.

Technical noncompliance with §110(c) may be excused in cases where a claimant has substantially complied with the statute. In *Omar,* the commission remanded the case to the board to consider whether, among other things, "circumstances as a whole" constituted

compliance with the requirements of §110(c) sufficient to excuse the employee's failure to meet the statutory deadline. In *Kim*, the Supreme Court held 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. *Kim* at 196. 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. Though substantial compliance does not require a formal affidavit be filed, it still requires a claimant to file, within two years of a controversion, a request for either a hearing or additional time to prepare for one. *Denny's of Alaska v. Colrud,* AWCAC Decision No. 148 at 11 (March 10, 2011).

Certain legal grounds may excuse a self-represented claimant's noncompliance with §110(c), including lack of mental capacity, or incompetence. *Tonoian* at 11. In *Tonoian*, the employee contended her noncompliance should be excused because it was caused by depression, stress, and possibly forgetfulness. She provided a physician's letter supporting her depression diagnosis, but did not claim her mental problems were so severe as to require appointment of a guardian or conservator, she was incompetent, or she lacked the capacity to conduct her own affairs. The record showed she "exercised her judgment" by retaining and dismissing attorneys, seeking alternate legal advice, and negotiating and withdrawing from a settlement. In light of the whole record, the commission concluded the employee did not establish grounds to excuse her delay due to mental incompetence. *Tonoian* at 11-12.

In *Pruitt v. Providence Extended Care*, 297 P.3d 891 (Alaska 2013), a self-represented employee requested the appointment of a guardian at hearing, contending her mental health problems, including depression, interfered with her ability to understand what was required of her to comply with the statute. However her testimony was found not credible. The Supreme Court affirmed the board's sole power to determine credibility, and found the standard §110(c) language in the prehearing conference summary sufficient to advise the employee of the deadline. *Pruitt* at 895-896.

In *Colrud*, the self-represented employee testified she suffered from a condition that affected her memory, but the commission found her forgetfulness did not rise to the level of mental

incapacity or incompetence. Substantial evidence showed she was capable of conducting her daily affairs, including driving a newspaper route seven days a week and remembering to attend doctor's appointments, and therefore she did not lack the mental capacity to mail an ARH form or request more preparation time before the statutory deadline. *Colrud* at 12.

In *Alaska Mechanical, Inc. v. Harkness*, AWCAC Decision No. 176 (February 12, 2013), the commission concluded the panel majority erred as a matter of law when it excused an employee's failure to timely request a hearing based on its finding he lacked the mental capacity to do so. Representation by an attorney familiar with the Alaska Workers' Compensation Act alleviated any concern the employee might have been mentally incapable of filing a timely hearing request on his own. *Harkness* at 20.

In *Limas-Lozano v. Icicle Seafoods, Inc.* AWCB Decision No. 12-0045 (March 7, 2012), the employee claimed a multitude of mental issues as a result of a work injury. He petitioned for a hearing continuance, stating he was attempting to obtain representation and mentally incapable of adequately representing himself, and opposed the employer's petition for dismissal of two claims under AS 23.30.110(c). Because the agency file contained no medical evidence demonstrating mental issues existed, the continuance was denied but the employee was instructed he had a year to seek modification of the decision by filing a petition and medical evidence of mental issues. The decision then dismissed the earlier claim due to failure to comply with the §110(c) deadline.

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative . . . on the ground of a change in conditions . . . 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. . . .

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. Section 130 confers continuing jurisdiction over

workers' compensation matters. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005).

The Supreme Court discussed AS 23.30.130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 164, 168 (Alaska 1974). Quoting *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *Rodgers* stated: "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."

AS 23.30.130(a) was never intended to be a vehicle by which a party could raise errors of law or introduce new evidence the party, exercising due diligence, could have introduced while the case was first before the board. *Lindekugel* at 743. "The concept of 'mistake' requires careful interpretation. It is clear 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." *Rodgers* at 169.

> **8 AAC 45.060. Service.** . . .
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> (b) . . . Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail. . . .

> **8 AAC 45.063. Computation of time.**
> (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.
> . . .

> **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.

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

(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 change of conditions or 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.

ANALYSIS

1) Should Employee's March 10, 2011 claim be dismissed under AS 23.30.110(c)?

Employee filed a claim related to his October 24, 2010 stroke, and Employer filed a controversion of all benefits on a board-prescribed form on March 21, 2011. Employee concededly failed to file an ARH or otherwise ask for a hearing within two years of the controversion. Dismissal due to noncompliance with the clear language of AS 23.30.110(c) is usually automatic and non-discretionary. *Tipton; Hornbeck; Beaman.* Certain events relieve an employee from strict compliance with the requirements of §110(c), but the facts do not place this case within any exception category.

First, Employee cannot be excused due to the board's failure to advise and instruct him how to pursue his legal rights. *Richard; Bohlmann.* Within the two-year period at issue, March 21, 2011 to March 21, 2013, Employee received four controversions and two prehearing conference summaries alerting him his claim faced dismissal if he did not timely file an ARH. He initiated eight phone calls seeking assistance from the board, and was given the specific deadline at least once. As he testified, the board designee kept him informed, the problem was he just didn't remember.

Second, Employee did not substantially comply with the statute of limitations. He filed no formal or informal request for hearing or additional preparation time until April 15, 2013, more than three weeks after the deadline. *Kim; Hessel; Colrud.* Employee was, however, provided adequate notice if not all discovery was completed and he could not file an ARH within two years of Employer's controversion, but still wanted a hearing, he must provide written notice to the board and all opposing parties.

Third, though substantial evidence showed Employee suffered memory loss and forgetfulness during the two years after controversion, these ailments did not rise to the level of mental incapacity or incompetence needed to warrant a legal excuse. Evidence indicated Employee was confused about, for example, the date of his stroke. His treating physicians and the EME physician reported he complained of memory loss. His testimony was inconsistent as to if and

when he was incompetent, and when he got his memory back. However, the record is devoid of any medical evidence indicating he received psychiatric treatment at any point since his stroke. It is therefore unknown precisely what, if any, mental health issues beset Employee. Without medical records, it is unknown what effect Employee's mental state had on his ability to function, or the time frames when he may not have been able to pursue his claim due to incompetency, mental illness or psychiatric medications.

Moreover, Employee's actions in the two years after controversion demonstrated significant cognitive abilities. At hearing Employee spoke fluent English and capably made his argument without assistance of a representative. He testified he had been able to "run [his] own life" for a long period of time. Employee engaged a non-attorney representative in August, 2011, then let him go in December, 2012, when Employee realized the representative was taking Employee's money, and Employee decided he needed to handle his affairs by himself. In September, 2012, Employee told the board he was going to reinitiate settlement discussions, and in March, 2013, he submitted a written counteroffer. Employee clearly exercised judgment and control of his own affairs in the two years after controversion, and his noncompliance will not be legally excused due to his forgetfulness or memory loss. *Tonoian; Colrud; Limas-Lozano.* The law requires his March 10, 2011 claim be dismissed under AS 23.30.110(c).

Pursuant to *Richard*, claimants are entitled to be fully advised of "all the real facts" bearing upon their rights to compensation, and instructed how to pursue those rights under law. Employee is therefore advised: if he obtains information showing this decision made a mistake in determination of fact, and decides to seek modification, Employee has one year to do so. In other words, Employee has until October 15, 2014 (or October 20, 2014 if he is filing and serving by mail), to seek modification of this decision by filing a petition and evidence, including medical records regarding his mental health from March 21, 2011 through March 21, 2013, supporting his belief an error was made. AS 23.30.130; 8 AAC 45.060(b); 8 AAC 45.063(a); 8 AAC 45.150. Employee may seek modification of this decision by contacting a Workers' Compensation Technician at 907-269-4980, who will assist him in preparing the necessary paperwork.

CONCLUSIONS OF LAW

1) Employee's February 28, 2010 claim will be dismissed under AS 23.30.110(c).

ORDER

1) Employee's February 28, 2010 claim is dismissed under AS 23.30.110(c).

Dated in Anchorage, Alaska on October 15, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
Margaret Scott, Designated Chair

_____
David Kester, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filling a petition for reconsideration under AS 44.62.540 and in accord 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 accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of KENNETH R. BAPTISTE, employee / claimant; v. COOK INLET TRIBAL COUNCIL, INC., employer; and SEABRIGHT INSURANCE CO., insurer / defendants; Case No. 201020103; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, on October 15, 2013.

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Pamela Murray, Office Assistant