ALASKA WORKERS' COMPENSATION BOARD

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

CRAIG L. RANG, Employee, Claimant, v. MARATHON OIL CO., Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201105830 AWCB Decision No. 14-0090 Filed with AWCB Anchorage, Alaska, On June 27, 2014

Marathon Oil Co.'s (Employer) February 24, 2014 petition to dismiss was heard on June 4, 2014, in Anchorage, Alaska, a date selected on May 1, 2014. Attorney Chris Beltzer appeared and represented Craig L. Rang (Employee), who appeared by telephone and testified. Attorney Krista Schwarting appeared and represented Employer and Old Republic Insurance Company. As a preliminary issue, Employee asked to include as an issue for decision at the hearing his request for a second independent medical evaluation (SIME). Employer initially objected on grounds the SIME was not properly raised as a hearing issue, then agreed the panel could decide the SIME request, in the interest of administrative economy. Employer objected to Employee calling witnesses as this was a "procedural hearing." The panel issued an oral order overruling Employer's objection and allowing Employee's testimony. This decision examines the order

allowing Employee's testimony and decides the other issues presented on their merits. The record closed at the hearing's conclusion on June 4, 2014.

ISSUES

Employer objected to Employee calling any witnesses at hearing. Employer contended the hearing was scheduled as a "procedural hearing" only, and witness lists were not provided for in the relevant May 1, 2014 prehearing conference summary.

Employee contended he had a legal right to testify. He further contended his testimony might shed light on relevant issues necessary to help the fact-finders make a decision.

1) Was the oral order allowing Employee to testify correct?

Employer contends Employee's November 3, 2011 claim should be dismissed. It contends Employee filed his claim, Employer controverted it, and Employee did not timely request a hearing on his controverted claim within two years under AS 23.30.110(c). Employer further contends Employee did not ask for additional time to prepare to file a hearing request, and contends there is no reason to excuse Employee's failure to timely request a hearing on his claim.

Employee contends he substantially complied with the no-progress rule. Employee contends he actively prosecuted his claim and did everything necessary to obtain an SIME except file the SIME form. He contends Employer resisted filing the SIME form, and failed to timely file relevant medical records in its possession and thus resisted the SIME. He contends Employer dragged its feet and delayed his ability to file the SIME form. Employee contends the hearing request deadline is tolled by the parties' SIME stipulation, and resulting, ongoing SIME process.

2) Should Employee's November 3, 2011 claim be dismissed for failure to progress?

Employer contends the designee erred at the February 18, 2014 prehearing conference by ruling Employee did not have to respond to interrogatories and requests for production with respect to his business licenses and income from other sources. Employer contends since Employee

requests temporary total disability (TTD) for various periods his income received from other sources is relevant. As Employee admitted in his deposition he and his wife operate a bed-and-breakfast from their home, Employer contends it is entitled to discover information concerning income from this business as it may affect Employee's right to benefits and its defenses.

Employee's brief did not address this issue and he ran out of oral argument time at hearing. Therefore, Employee's position on this issue is unknown but presumed to be in opposition.

3) Was the designee's discovery order concerning Employee's business licenses and income an abuse of discretion?

Employee contends this decision should order an SIME. He contends he has repeatedly requested an SIME, Employer stipulated to an SIME but dragged its feet, resulting in the SIME process moving slowly.

Employer contends it did not delay the SIME process. It contends Employee did not vigorously pursue the SIME. Employer contends the SIME issue is moot as Employee's claim should be dismissed.

4) Should an SIME proceed?

Lastly, Employee contends he is entitled to interim attorney's fees and costs if he prevails on Employer's petition to dismiss, on its discovery ruling appeal or on the SIME.

Employer contends Employee's attorney's fees relate to the entire case, rather than only to the procedural issues decided here. It further contends many attorney fee entries are block-billed and vague or so cursory as to be meaningless. Employer contends Employee should obtain no attorney's fees but certainly only those related to the relevant issues on which he prevails.

5) Is Employee entitled to interim attorney's fees or costs?

FINDINGS OF FACT

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

1) On January 24, 2011, Employee slipped on steps while at work for Employer, fell and hurt himself (Report of Occupational Injury or Illness, April 28, 2011).

2) On November 7, 2011, Employee filed a claim requesting TTD from February 24, 2011 through May 31, 2011, and a compensation rate adjustment (Workers' Compensation Claim, November 3, 2011).

3) On December 8, 2011, Employee filed a petition, requested a protective order for releases Employer propounded, and requested an SIME because he disputed findings from an employer's medical evaluator (EME) (Petition, December 6, 2011).

4) On December 23, 2011, Employer filed an answer to Employee's December 6, 2011 petition. However, Employer only responded to the request for a protective order and its answer did not address Employee's SIME request (Answer, December 22, 2011).

5) On December 29, 2011, Employer filed a notice denying Employee's claim for TTD benefits, and denied his rights to medical, reemployment and permanent partial impairment benefits (Controversion Notice, December 27, 2011).

6) On February 2, 2012, Employee and Employer's attorney attended a prehearing conference. Included in the issues raised was Employee's petition for an SIME. However, the prehearing conference summary addressed only a protective order request, in great detail. Included in the summary was the following, including the original emphasis:

> **STATUTE OF LIMITATIONS**: MR. RANG was told that, if a controversion notice is served and filed, after the date of filing of his workers' compensation claim, he must serve and file an Affidavit of Readiness requesting a hearing, in accordance with 8 AAC 45.070, within two years of the controversion to avoid possible dismissal of his claim. 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.' The parties have confirmed that in this matter the relevant post-claim controversion was received by the board on 12/29/11, and that a hearing must be requested by 12/29/13. Some events in the case may toll (extend) this deadline as to some claims, however, MR. RANG is urged to remain aware of this earliest deadline and the possibility of his claim being barred if a hearing is not timely requested. An affidavit of readiness form is attached for that purpose.
>
> . . .

> **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 possible dismissal of Employee's claim, Employee must file with the board and serve on all opposing parties an affidavit of readiness for hearing within two years of the controversion. The board has 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 (Prehearing Conference Summary, February 2, 2012).

7) On June 5, 2012, Employee and Employer's attorney attended another prehearing conference. The summary did not include the SIME petition as an issue discussed. However, the summary included the above-referenced "**Employee is advised**" language (Prehearing Conference Summary, June 5, 2012).

8) On September 20, 2012, Employee filed another claim seeking TTD for specific periods, PPI and a finding Employer made an unfair or frivolous controversion. The claim does not state it amended a prior claim (Workers' Compensation Claim, September 13, 2012).

9) On September 21, 2012, Employer filed a petition seeking sanctions against Employee for allegedly failing to comply with the board designee's order concerning releases (Petition, September 20, 2012).

10) On March 7, 2013, Employer filed a hearing request on its September 20, 2012 petition (Affidavit of Readiness for Hearing, March 6, 2013).

11) On March 20, 2013, Employee and Employer's attorney attended a prehearing conference at which they agreed to a hearing on Employer's September 20, 2012 petition for June 6, 2013. Notably, the summary from this prehearing conference states:

> The Board is enclosing a Petition for an SIME form [sic] which may be filed after more discovery has taken place. In the interim, if EE believes that there is a dispute between the EIME and treating physician's reports, EE should contact ER and show where that conflict is; hopefully allowing the parties to stipulate to an SIME. In addition, and ARH form is enclosed in case EE wants to request a hearing or mediation. . . . (Prehearing Conference Summary, March 20, 2013).

12) The March 20, 2013 prehearing conference summary again included the "**Employee is advised**" language (*id.*).

13) On March 20, 2013, Employee filed and served on Employer's counsel a letter in response to Employer's March 7, 2013 affidavit requesting a hearing. The "subject" line stated: "Opposition to Hearing." Employee explained:

> I am opposed to the hearing date requested by Krista Schwarting due to lack of readiness in preparing a medical plan forward (sic) by my doctor, Dr. Humphreys. I am also requesting a second independent medical evaluation (SIME) prior to this hearing.
>
> I have an appointment with Dr. Humphreys on April 22, 2013 to prepare the future medical plan, so the SIME could be scheduled after that meeting with Dr. Humphreys.
>
> Once the SIME has been completed, then the hearing could be scheduled incorporating the independent evaluation (Rang letter, March 20, 2013).

14) On May 22, 2013, Employee's wife and Employer's attorney attended a prehearing conference. The listed issues included: "SIME? Cancel Hearing." As Employee had returned all disputed releases to Employer's lawyer, the June 2013 hearing was canceled. The designee stated "he would attach a petition form to request an SIME," and told Employee he should file it prior to the next prehearing conference. The designee also stated that at the next prehearing conference, "the Board will consider ordering an SIME and the deadlines regarding same." The prehearing conference summary included the same "**Employee is advised**" warning set forth above (Prehearing Conference Summary, May 22, 2013).

15) The May 22, 2013 Prehearing Conference Summary did not advise Employee to file an SIME form along with his petition (*id.*).

16) On June 10, 2013, Employee followed the designee's instructions and filed his second petition requesting an SIME. Employee stated his two attending physicians said on February 12, 2012, his work injury with Employer exacerbated symptoms and was a contributing factor to degenerative changes while Employer's physician said on June 3, 2011, there was no injury and said on January 25, 2013, there was an injury, but it was not work-related. Employee unequivocally checked the box requesting an SIME under AS 23.30.095(k) (Petition, June 8, 2013).

17) On June 26, 2013, Employee, his wife and Employer's counsel attended another prehearing conference. The issue was "SIME?" The designee noted employee filed a petition requesting an SIME on June 10, 2013 and employer's time to respond had not yet passed. Employer tentatively objected to setting and SIME until the issues had been determined. The designee enclosed an SIME form with the prehearing conference summary. The designee told employee if he could obtain a letter from his attending physician opining on the issues addressed by the EME physician, and the opinions differed, then such issues "will be the subject of the SIME." The prehearing conference summary again included the "**Employee is advised**" language regarding AS 23.30.110(c) (Prehearing Conference Summary, June 26, 2013).

18) On June 28, 2013, Employer answered Employee's June 8, 2013 SIME petition. Employer stated it "did not object" to Employee's SIME request "on the grounds of causation, as there is a dispute reflected in the medical records." Employer noted Employee did not request an SIME on other issues. Employer further stated: "The employer and adjuster want to ensure that all the appropriate issues are addressed during the SIME process." Therefore, Employer asserted Employee needed to obtain documentation from his physician addressing any additional disputed areas (Answer, June 27, 2013).

19) On July 23, 2013, Employee's wife, attorney Beltzer and Employer's counsel appeared at a prehearing conference to discuss "SIME status." The prehearing conference was adjourned so Employee's new counsel could review the file. The standard "**Employee is advised**" language was also included in the summary (Prehearing Conference Summary, July 23, 2013).

20) On August 1, 2013, attorney Beltzer entered his appearance on Employee's behalf (Entry an Appearance, August 1, 2013).

21) On August 27, 2013, the parties' attorneys attended a prehearing conference. The summary states:

> The parties have stipulated to conducting an SIME. All filings regarding the SIME must be directed to the attention of WC Officer David Grashin. The following process and procedures shall be followed: . . .

The designee then directed Employer to copy Employee's medical records and place them into binders in chronological order. The designee directed Employee to review the binders and follow the normal procedures for supplementing medical records or providing affidavit stating the records were complete. The designee directed the parties to serve and file the binders on or

before September 17, 2013. The designee also explained how the parties should supplement the binders with newly acquired medical records thereafter. Employee was advised he must "hand carry, to the evaluation," his radiographic films related to his work injury. The designee also directed the parties to sign the SIME form and file it along with the medical binders on or before September 17, 2013. The designee encouraged the parties to stipulate to a specific SIME physician and to SIME questions for the physician to answer on or before September 17, 2013. The designee provided "standard board questions" for the parties review. The designee provided explicit instructions for canceling the SIME to avoid physician-imposed cancellation fees. Lastly, the designee ordered: "Parties will proceed in accordance with this prehearing conference Summary (sic)." Again, the summary included the standard "**Employee is advised**" AS 23.30.110(c) warning (Prehearing Conference Summary, August 27, 2013).

22) On August 28 through September 17, 2013, the parties through counsel were discussing possible settlement and stipulating to a specialist for the SIME (Beltzer and Schwarting e-mails, August 28, 2017 through September 17, 2017).

23) On September 5, 2013, Employer served Employee's SIME medical binders on Employee's counsel in accordance with the designee's direction (Affidavit of Service, September 5, 2013).

24) On September 6, 2013, Employer's attorney sent the board's designee a letter concerning the August 27, 2013 prehearing conference summary. Among other things, the letter stated: "The employer and adjuster request that this summary be amended to add a list of issues that the parties agreed on for the SIME: causation/compensability, medical treatment and permanent partial impairment, the last of which will be considered a non-SIME issue" (Schwarting letter, September 6, 2013).

25) On September 17, 2013, Employee's counsel filed an affidavit stating the SIME medical binders were complete and served this on Employer's counsel (Affidavit of Review and Service of Medical Records, September 17, 2013).

26) On September 17, 2013, Employee's attorney filed and served his SIME questions (Beltzer letter, September 17, 2013).

27) On September 17, 2013, the parties filed the SIME medical records binders (SIME Medical Records).

28) On September 18 through September 23, 2013, the parties were discussing settlement (Beltzer and sorting e-mails, September 18, 2013 and September 23, 2013).

29) On September 18, 2013, Employer's filed and served its SIME questions (Schwarting letter, September 17, 2013).

30) As of September 18, 2013, the only document missing for the SIME was the SIME form (observations).

31) On September 30, 2013, the board's designee e-mailed the parties in respect to the SIME and stated: "I do not have an executed SIME form in the file. I will need the form before requesting an SIME appointment" (Grashin e-mail, September 30, 2013).

32) On October 1, 2013, Employer's counsel stated she would work on the SIME form in the event the parties could not settle the case (Schwarting e-mail, October 1, 2013).

33) On October 14, 2013, the board's designee again advised the parties he needed a fully executed SIME form to "schedule the SIME" (Grashin e-mail, October 14, 2013).

34) On November 6, 2013, the board's designee told the parties he had not received the SIME form and nothing further would be done until the board received a fully executed form (Grashin e-mail November 6, 2013).

35) On November 6, 2013, Employee's attorney told the board's designee he and Employer's counsel were trying to get the form "going" and the "holdup is not related to a dispute" (Beltzer e-mail, November 6, 2013).

36) On November 7, 2013, Employer's attorney advised the board's designee that she had "the responsibility of drafting an SIME form, which [she] had held off on doing pending discussions about resolving the claim. In the interest of moving this forward," Employer's counsel sent a draft SIME form to Employee's attorney (Schwarting e-mail, November 7, 2013).

37) On November 7, 2013, Employer's lawyer forwarded the completed but unsigned SIME form electronically to Employee's attorney. The SIME form listed Employee's and Employer's names, the injury date, the board case number, Employee's attending physician's name, Employer's EME physician's name, and identified the following disputed medical issues: Causation; compensability; treatment; medical stability; and permanent partial impairment. The SIME form included quotes from Dr. Humphreys' December 12, 2012 and April 22, 2013 reports and from Dr. Bald's January 25, 2013 EME report. Medical stability and permanent partial impairment were included on the form as "non-SIME" issues. The SIME specialty

required is "orthopedic surgeon. In the space provided on the SIME form for the parties to check applicable boxes, Employer had electronically checked all four boxes including: 1) based upon the above information, an SIME dispute exists under AS 23.30;095(k); 2) the right to have the board determined the need for an SIME is waived and a workers' compensation officer or board designee may decide whether or not to order an SIME; 3) non-SIME issues should be submitted to the board's examiner, the right to have the board require an examination is waived, a workers' compensation officer or board designee may decide whether or not to order an examination, Employer will pay for the examination, an examination by the board's examiner is considered to be an SIME, no subsequent SIME will be ordered on the non-SIME issues noted on the form; and 4) the form amends the issues in an active application or petition previously filed by a party and the requirement to file and serve an answer to an application or petition as amended by the SIME form is waived (Schwarting email, November 7, 2013; attached SIME form, undated).

38) The SIME form was not signed by Employer's attorney because it was transmitted electronically (experience, judgment and inferences drawn from the above).

39) On December 26, 2013, Employer sent Employee formal interrogatories and requests for production, identical to those litigants use in civil court. This included six formal interrogatories and two formal requests for production, and a formal "Verification" for Employee to sign before a notary public (First Set of Discovery Requests to Employee, December 26, 2013; experience, judgment).

40) On December 31, 2013, Employee filed a petition seeking a protective order on Employer's formal discovery requests (Petition, December 18, 2013).

41) By January 2, 2014, two years after Employer had controverted Employee's November 3, 2011 claim, not counting the date of the event or holidays, and adding three days for service by mail, Employee had not filed a formal "affidavit of readiness" requesting a hearing (record).

42) On January 7, 2014, Employee's lawyer returned the completed SIME form to Employer's attorney. In the accompanying letter, Employee's counsel said:

> I have reviewed the SIME form prepared by your office. Sorry for the delay in response. The holidays were not kind when it came to work. I have signed it and am returning it here. If employer is still agreeable, we will look forward to your submittal of the form to the board. If I recall, records have already been submitted. If Employer is not agreeable, please let me know (Beltzer letter, January 7, 2014).

Employee's attorney checked the first block stating based "upon the above information, an SIME dispute exists under AS 23.30.095(k)," and signed and dated the form (SIME form, January 7, 2014).

43) Employee contended his attorney's January 7, 2014 letter was not intended to imply there was some difficulty with the SIME process or that the process had ended (Employee's June 4, 2014 hearing arguments).

44) On January 22, 2014, Employer answered Employee's petition for a protective order contending it was entitled to the names of Employee's medical providers because "he has requested an SIME." Employer further contended Employee owned a bed-and-breakfast and other business licenses appeared for him, which could lead to admissible evidence to defend against Employee's claims. Employer further contended Employee's degenerative disc disease was the substantial cause of Employee's complaints and therefore Employer had a right to discover relevant preexisting injuries or conditions. As Employee sought indemnity benefits for specific periods, Employer argued it was entitled to discover his subsequent work and any earned wages. It also contended Employee admitted having received unemployment benefits and Employer was entitled to discover information to calculate any offsets (Answer, January 21, 2014).

45) On February 18, 2014, the parties attended a prehearing conference to discuss Employee's protective order petition. The designee ordered Employee to answer Employer's interrogatories one through four on or before March 20, 2014, but did not have to respond to interrogatories five through six or Employer's requests for production. The designee did not explain the parties' evidence or arguments or the analysis supporting his ruling. Employer stated it may assert a §110(c) defense on Employee's claims. The summary included the standard "**Notice to Claimant**" language previously called "**Employee is advised**" about §110(c)'s requirements (prehearing conference summary, February 18, 2014).

46) On February 25, 2014, Employer filed a petition to dismiss Employee's November 3, 2011 claim asserting it was time-barred under AS 23.30.110(c) because Employer filed a post-claim controversion and Employee failed to request a hearing within two years (Petition, February 24, 2014).

47) On March 3, 2014, Employer filed a petition "to modify" the designee's February 18, 2014 prehearing conference discovery order. Employer summarized its answer to Employee's petition for protective order on this issue (Petition, February 28, 2014).

48) On March 17, 2014, Employee answered Employer's petition to dismiss his claim contending the claim had been in the SIME process since June 10, 2013 and the §110(c) "deadline has been tolled." Employee also contended he was unable to file an Affidavit of Readiness for Hearing "per Board order dated 08/27/2013," and Employee's petition was barred by "waiver or estoppel" or otherwise contrary to law and equity. Employee also sought attorney's fees for defending against Employer's petition (Employee's Answer to Employer's Petition to Dismiss, March 14, 2014).

49) On March 24, 2014, Employee filed a hearing request on Employer's February 24, 2014 petition to dismiss (Affidavit of Readiness for Hearing, March 22, 2014).

50) On April 7, 2014, Employee filed a petition requesting that Employer's discovery appeal, Employee's SIME petition and request for attorney's fees and costs be included as issues for the May 1, 2014 prehearing conference (Petition, April 4, 2014).

51) On April 23, 2014, Employer answered Employee's April 4, 2014 petition and objected to the SIME issue being added to a hearing on its petition to dismiss but did not oppose its discovery appeal being added as a hearing issue. Employer opposed Employee's request for attorney's fees and costs (Answer, April 21, 2014).

52) On May 1, 2014, the parties attended a prehearing conference and agreed to a June 4, 2014 oral hearing. The issues included Employer's petition to dismiss, Employer's petition appealing the February 18, 2014 discovery ruling, and Employee's request for interim attorney's fees and costs. The parties were not directed to file witness lists. Additionally, the designee reviewed its February 18, 2014 discovery order and noted Employee had not responded as ordered or appealed the designee's ruling. The summary states Employer petitioned "the board for a ruling compelling EE to so respond. ER's request is granted." The designee gave Employee 10 days to comply with the previous order or Employee's failure to comply would be an issue at the June 4, 2014 hearing. The designee stated "the board is awaiting a fully executed SIME form from the parties before it will proceed with obtaining an SIME appointment for EE." Again, the standard "**Notice to Claimant**" §110(c) was included (Prehearing Conference Summary, May 1, 2014).

53) On May 5, 2014, Employee's counsel wrote to the board's designee seeking clarification of the May 1, 2014 prehearing conference summary. Employee contended he asked for his SIME request to be considered at the June 4, 2014 hearing and suggested the parties agreed the SIME would be listed as an issue "unless the parties submitted a signed SIME form prior to hearing" (Beltzer letter, May 5, 2014).

54) On May 12, 2014, Employee responded as directed to Employer's interrogatories (Employee's Responses to Employer Interrogatories, May 12, 2014).

55) On May 28, 2014, the parties filed a stipulation signed by all parties' attorneys to extend briefing deadlines. Among other things, the parties "hereby agree and stipulate as follows:" A hearing was scheduled for June 4, 2014, to "address employer's petition to dismiss and other discovery/SIME disputes" (Stipulation to Extend Briefing Deadlines, May 22, 2014).

56) On June 2, 2014, Employer filed a witness list, which complied with the board's regulation (Witness List, June 2, 2014; judgment).

57) On June 3, 2014, Employee filed a witness list, which did not comply with the board's regulation (Employee's Witness List, June 2, 2014; judgment).

58) On June 3, 2014, Employee filed an affidavit along with an invoice detailing his lawyer's attorney's fees spanning from July 11, 2013 through June 2, 2014. The services provided descriptions were quite brief and were not limited to the issues to be decided in this hearing. (Affidavit of Attorney's Fees and Costs, June 2, 2014).

59) At hearing on June 4, 2014, Employer conceded Employee "vigorously represented himself" before he obtained an attorney in August 2013 (Employer's hearing arguments).

60) Employer contends every prehearing conference summary in this case notified and advised Employee about the need to request a hearing and how to request one to avoid claim dismissal under AS 23.30.110(c). It contends this case is distinguishable from cases in which the injured worker was not represented by a competent attorney. By contrast, Employer contends Employee has been represented by competent counsel since at least August 2013, well before the two-year deadline to request a hearing passed. Employer contends Employee's counsel had the SIME form it prepared since November 2013, but did not return it to Employer's counsel until January 2014, after the two-year deadline had passed. It further contends Employee's lawyer's January 7, 2014 letter which says, in reference to the SIME, "[i]f employer is still agreeable," demonstrates the parties were not "firmly" in the SIME process as there was some question

whether or not the parties were still in agreement to having the SIME. Employer contends Employee failed to file anything requesting a hearing or an extension of time in which to file a hearing request. It contends court, commission and board decisions have held an injured worker must file something to be in substantial compliance with AS 23.30.110(c). Employer contends the SIME form being signed by both parties and filed with the board, or a board order requiring the SIME go forward must be accomplished before the two-year deadline expires or the SIME cannot toll the two-year time limit from running. It contends if Employee was concerned about the SIME form, he could have prepared it and filed it sooner. Employer contends public policy dictates against Employee "stretching" the SIME tolling period by "sitting on" an SIME form. Lastly, Employer contends there is no statutory or case law authority for tolling the "statute of limitations" because parties are engaged in settlement negotiations. "The most coherent" board decisions, in Employer's view, require either a signed SIME form or a board order for an SIME to toll the two-year period from running. The "timing of the SIME form is everything" according to Employer. Employer agreed a later claim requesting different benefits would not be barred even if the November 3, 2011 was denied. In Employer's opinion a "clear" amendment must be made to "amend" a claim and make the claim relate back to an earlier claim. Employer is not arguing for any other claim being denied. Employer conceded "the parties stipulated to an SIME at an August 2013 prehearing conference" and filing deadlines were set, though Employer denied there was a "board order" for an SIME. In Employer's view, a stipulation is not a "board order" as interpreted by board and commission decisions, which require a signed SIME form. It contends the parties cannot stipulate to an SIME and have a binding, board order without also having the signed SIME form. Employer bases this on designee Grashin's emails which state he would not schedule the SIME without the form (Employer's hearing arguments).

61) Employee contends statute of limitations defenses are disfavored. The facts and law should not be strained to support such a defense. Furthermore, he contends the Alaska Supreme Court has repeatedly stated form should not be raised over substance. He contends Employer's case is largely form over substance and the facts must be strained to get to dismissal. Employee contends fairness dictates his claim should not be dismissed. He contends he has vigorously prosecuted his claim from the beginning including the time when he was not represented by counsel. Employee contends the law only requires "substantial compliance" with AS 23.30.110(c). He further contends the Alaska Supreme Court noted the board has some

authority to relax the hearing request rules, though the court has not expressly addressed every situation which this may be used. He further contends "equitable principles" support his claim and these principles include tolling. Employee contends all cases Employer cited support his position. He contends because §110(c) is directory and not mandatory, the board should look at whether Employee did something to prosecute his claim, with "substantial compliance." Employee contends there was "some expression" telling the board he wanted a hearing, was not ready for a hearing, and needed more time to prepare, *i.e.*, complete the SIME process before he could request a hearing. He contends his March 20, 2013 letter satisfies this requirement. In his March 20, 2013 letter, Employee contends he opposed Employer's request for hearing on grounds he was not ready and needed an SIME, and once this had been completed, then the hearing could be scheduled. Furthermore, Employee contends Employer has not been prejudiced in any way by his request for more time. Employee contends Employer deliberately delayed the entire litigation process and intentionally misled the board by stating it had no medical record showing existence of any medical disputes to support an SIME. For example, he contends Employer sought and received from Employee's doctor medical information in May 2011 but did not file this medical report, as required by law, until three years later. Furthermore, Employee contends the parties were discussing settlement during the last few months before the two-year statute arguably expired and this is why Employer took 10 weeks to prepare the SIME form after it agreed to do so. Employee's lawyer contends he did not offer to prepare the SIME form because the parties were in settlement discussions and wanted to keep his attorney's fees low in an effort to encourage a favorable settlement for Employee. In short, Employee contends when compared to what Employer did over the two years in question, it cannot be said Employee did not prosecute his claim. Employer, in his view, frustrated Employee's claim. Employee contends there was a "board order" for an SIME because they stipulated to one and the stipulation became a "board order." Employee distinguished board and commission decisions requiring a signed SIME form from his case, in which the parties had already stipulated to an SIME. Employee contends designee Grashin's emails amply illustrate only that the designee would not schedule the SIME without the signed SIME form, and this has no effect on the previously binding, board-order-stipulation for an SIME. Employee contends his March 20, 2013 letter was his request for more time to prepare for hearing, because he was awaiting the SIME, and was also his request for a hearing once the SIME was completed. For all these

reasons, Employee contends he has substantially complied with AS 23.30.110(c) and his November 3, 2011 claim should not be dismissed (Employee's hearing arguments).

62) Employee was not aware until very recently the insurance adjuster had requested information from his attending physician in 2011. Employee, with his wife's assistance, filed a November 3, 2011 claim. On December 6, 2011, Employee petitioned for an SIME. He had spoken on several occasions to Carol Quam at the Workers' Compensation Board offices, and she assisted him and his wife who was representing him at the time, in preparing and filing documents such as the SIME petition. This is how he was aware there was an SIME process he could request. Employee never withdrew his SIME request. He does not know why the February 2, 2012 prehearing conference summary does not address his SIME request and he was never advised at the prehearing conference why it was not addressed. Employee signed releases on several occasions and fully complied with Employer's discovery rights, though at one point he modified two releases because in his view they contained errors. Employee recalls the March 20, 2013 prehearing conference at which Employer's hearing request was discussed. In response to this request, Employee wrote the March 20, 2013 letter to the board and to Employer's attorneys. Employee thought his letter was self-evident. He opposed Employer's hearing request because he had requested an SIME and had paid several thousand dollars from his own pocket for medical care since Employer had controverted his case. Accordingly, he advised through his March 20, 2013 letter he was not ready for hearing yet and needed more time. Once the SIME was completed, then the hearing could be scheduled to incorporate the evaluation. Employee believed from the very beginning that an SIME was going to be completed and eventually he would go to hearing (Employee).

63) Employee did not recall whether he verbally raised the SIME issue at the February 2, 2012 prehearing conference, though he had petitioned for one and expected it to be discussed. Employee received and read all prehearing conference summaries. Employee admitted reading the §110(c) warning near the end of each prehearing conference summary, though he did not fully understand it as there had been many controversion notices. He did not discuss §110(c) with Carol Quam or anyone else at the Workers' Compensation Board. Employee was aware the SIME form was submitted in November 2013 from Employer's lawyer's to his attorney but not returned until January 2014, and learned this information from his counsel's brief and from

prehearing conference summaries. He was aware of settlement negotiations but was not aware of whether or not a counter-offer was ever made (*id*.).

64) Employee intended his March 20, 2013 letter to be a hearing request and a follow up on his request for an SIME, which he had made by prior petition. The letter was to "move forward to hearing" and to get the SIME done (*id*.).

65) Employee is credible (experience, judgment and inferences drawn from all the above).

66) At hearing on June 4, 2014, Employee's lawyer filed an "Invoice" for his attorney's fees and costs spanning from July 11, 2013 through June 4, 2014. The services provided descriptions were quite brief and were not limited to the issues to be decided in this hearing. No affidavit accompanied the invoice (Beltzer law Office Invoice, June 4, 2014).

67) On June 9, 2014, Employer filed an objection to Employee's attorney's fee request and reiterated its objections made at hearing (Objections to Attorney Fees, June 9, 2014).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, 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).

> **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) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
>
> . . .
>
> (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) . . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .
>
> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
> . . .
>
> (h) upon the filing with the division by a party in interest of the claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of a 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 report 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 dependency of the preceding.
> . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

AS 23.30.095(k) is procedural, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage,* AWCB Decision No. 97-0165 (July 23, 1997) at 3; *see also Harvey v. Cook Inlet Pipe Line Co.,* AWCB Decision No. 98-0076 (March 26, 1998). Wide discretion exists under AS 23.30.095(k) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims.

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp.,* AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under §095(k). The AWCAC referred *Smith v. Anchorage School District,* AWCAC Decision No. 050 (January 25, 2007) at 8, in which it confirmed:

> The statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

The AWCAC further stated in *dicta*, before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME would assist the board in resolving the dispute. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) at 4.

Under either §095(k) the AWCAC noted the purpose of ordering an SIME is to assist the board, and is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physicians' opinion (*id.*). When deciding whether to order an SIME, the board typically considers the following criteria, though the statute does not require it:

1) Is there a medical dispute between Employee's physician and an EME?
2) Is the dispute significant? and
3) Will an SIME physician's opinion assist the board in resolving the disputes? (*id.*).

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance**. . . .
> . . .
>
> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. . . . If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion. . . .

The Alaska Supreme Court encourages "liberal and wide-ranging discovery under the Rules of Civil Procedure." *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 at 4, n. 2 (December 11, 1987); *citing United Services Automobile Ass'n v. Werley,* 526 P.2d 28, 31 (Alaska 1974). If it is shown informal means of developing evidence have failed, "we will consider the relevance of the requested information and the method of discovery to be authorized." *Brinkley v. Kiewit-Groves*, AWCB Decision No. 86-0179 at 5 (July 22, 1986).

Granus v. Fell, AWCB Decision No. 99-0016 (January 20, 1999) defined the term "relevant" in AS 23.30.107(a) as follows:

> We frequently look to the Alaska Rules of Civil Procedure for guidance in interpreting our procedural statutes and regulations. Civil Rule 26(b)(1) governs the general scope of discovery in civil actions and provides in pertinent part, '[p]arties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.'
>
> We find the definition of 'relevant' for discovery purposes in Civil Rule 26(b)(1) is persuasive as to the meaning and legislative intent of the phrases 'relative to employee's injury' and 'that relate to questions in dispute' used in AS 23.30.107(a) and AS 23.30.005(h), respectively. The Civil Rules favor liberal and wide-ranging discovery. We are mindful our jurisdiction is much narrower than that of courts. However, the scope of evidence we may admit and consider in deciding those narrow issues is broader. 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).

Granus utilized a two-step process to determine the relevance of information sought. The first step is to identify matters in dispute. The second step is to decide whether the information sought is relevant; that is, is the information sought "reasonably calculated" to lead to facts that will have a tendency to make a disputed issue more or less likely.

The first step in determining whether information sought to be released is relevant, is to analyze what matters are 'at issue' or in dispute in the case. This is done by primarily looking to the parties' pleadings and the prehearing conference summaries to ascertain the specific benefits Employee is claiming, and defenses Employer has raised. Next, the elements which must be proven to establish Employee's entitlement to each benefit claimed and the elements of any affirmative defense Employer asserts are reviewed, to determine what propositions are properly the subject of proof or refutation in the case. It is also necessary to review the available evidence to determine if there are specific material facts in dispute and whether the information being sought may be relevant to the cross examination of a potential witness.

At the second step a decision is made whether the information Employee seeks is relevant for discovery purposes; that is, whether 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. In other words, information is relevant for discovery purposes, if it is reasonably "calculated" to lead to relevant facts. In interpreting the meaning of "relevant" in the discovery context, prior decisions provide:

> We believe that the use of the word 'relevant' in this context should not be construed as imposing a burden on the party seeking the information to prove beforehand, that the information sought in its investigation of a claim is relevant evidence which meets the test of admissibility in court. In many cases the party seeking information has no way of knowing what the evidence will be, until an opportunity to review it has been provided. *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 (December 11, 1987) (*quoting Green v. Kake Tribal Corp.*, AWCB No. 87-0249 (July 6, 1987)).

Based on the policy favoring liberal discovery, "calculated" to lead to admissible evidence means more than a mere possibility, but not necessarily a probability, the information to be released will lead to admissible evidence. To be "reasonably" calculated to lead to admissible evidence, both the scope of information within the release terms and the time periods it covers must be reasonable. The nature of an employee's injury, the evidence already developed, and the specific disputed issues determine whether the scope of information sought is reasonable. *Cole v. Anchorage School District*, AWCB Decision No. 93-0311 (February 9, 1993).

> **AS 23.30.110. Procedure on claims.** (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board . . . and the board may hear and determine all questions in respect to the claim.
> . . .
>
> (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. . . . 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. . . .

Statutes with language similar to AS 23.30.110(c) are referred to in Professor Arthur Larson's treatise 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*, §126.13[4], at 126-81 (2002). 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).

AS 23.30.110(c) requires an employee to timely prosecute a claim once the employer controverts. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). Only after a claim is filed, can the employer file a controversion to trigger AS 23.30.110(c). *Wilson v. Flying Tiger Line, Inc*. AWCB Decision No. 94-0143 (June 17, 1994). An employee may file subsequent claims for additional benefits, and the employer must file a controversion to start the §110(c) clock against each subsequent claim. *Wicken v. Polar Mining*, AWCB Decision No. 05-0308 (November 22, 2005).

The Alaska Supreme Court compared AS 23.30.110(c) to a "statute of limitations." *Suh v. Pingo Corp*., 736 P.2d 342, 346 (Alaska, 1987). Dismissal under AS 23.30.110(c) is automatic and non-discretionary. *Pool v. City of Wrangell*, AWCB Decision No. 99-0097 (April 29, 1999). In *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912-13 (Alaska 1996), the Alaska Supreme Court said AS 23.30.110(c) requires an employee to request a hearing within two years of the controversion or face claim dismissal. However, *Tipton* said the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it" (*id.*).

Certain events relieve an employee from strict compliance with §110(c). The Alaska Supreme Court held the board owes a duty to every claimant to fully advise him of "all the real facts" that bear 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 Const. & Engineering,* 205 P.3d 316 (Alaska, 2009), the court, applying *Richards,* held the board has a specific duty to inform a *pro se* claimant how to preserve his claim under §110(c). Consequently, *Richards* is applied to excuse noncompliance with §110(c) when the board failed to adequately inform a claimant of the two-year time limitation. *Dennis v. Champion Builders,* AWCB Decision No. 08-0151 (August 22, 2008). Certain "legal" grounds might also excuse noncompliance with §110(c), such as lack of mental capacity or incompetence, and equitable estoppel against a governmental agency by a *pro se* claimant.

Tonoian v. Pinkerton Security, AWCAC Decision No. 029 (January 30, 2007).

"Rare situations" have also been found to toll the limitation statute, for example when a claimant is unable to comply with §110(c) because the parties are awaiting receipt of necessary evidence such as an SIME report. *Aune v. Eastwood, Inc.,* AWCB Decision No. 01-0259 (December 19, 2009). Following *Aune*, decisions began to routinely toll §110(c) in every case where an SIME was performed, regardless of whether the SIME was completed or not. *See Almendarez v. Compass Group USA*, AWCB Decision No. 11-0146 (September 21, 2011) (citations omitted). Difficulties arose determining what events "bracketed" the "SIME process" for tolling purposes. *Dennis v. Champion Builder's*, AWCB Decision No. 08-0151 (August 22, 2008); *see also, Alaska Mechanical v. Harkness*, AWCAC Decision No. 12-0013 at 12 (February 12, 2013) (addressing whether the SIME process was "initiated"). Parties were even requested to advise the board of the tolling period when it could not be readily ascertained. *Dennis*. The AWCAC questioned the SIME tolling practice. *Omar v. Unisea, Inc.,* AWCAC Decision No. 053 (August 27, 2007); *Alaska Airlines v. Nickerson,* AWCAC Decision Nos. 06-0021 (October 19, 2006) and 07-0040 (April 30, 2007).

Technical noncompliance with §110(c) may be excused in cases where a claimant has substantially complied with the statute. *Kim v. Alyeska Seafoods, Inc.,* 197 P.3d 193 (Alaska, 2008), *accord, Omar v. Unisea, Inc.,* AWCAC Decision No. 053 (August 27, 2007) (remanded to the board to determine whether the circumstances as a whole constituted compliance sufficient to excuse failure to comply with the statute). The Alaska 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. *Kim* at 196. However, substantial compliance does not mean noncompliance, (*id.* at 198), or late compliance. *Hessel* at 6. And, although substantial compliance does not require the filing of a formal affidavit, it nevertheless still requires a claimant to file, within two years of a controversion, either a request for hearing, (*id.*), or a request for additional time to prepare for a hearing. *Denny's of Alaska v. Colrud,* AWCAC Decision No. 148 (March 10, 2011). Attending prehearings, an employer's medical evaluation and a third doctor's evaluation does not establish substantial compliance. *Hessel*. In discussing problems presented by SIME tolling, *Almendarez* noted the utility of

Kim's holding.

> The Alaska Supreme Court set forth a very clear and workable rule for §110(c) in *Kim*. . . . Not only did the Court find this rule applicable under the factual circumstances in *Kim*, but it will also serve in the 'rare circumstances' contemplated in *Aune,* and in an indefinite number of other unforeseeable circumstances, as well (*Almendarez* at 9-10).

Kim stated:

> In holding that subsection .110(c) is directory, we do not suggest that a claimant can simply ignore the statutory deadline and fail to file anything. A determination that a statute is directory instead permits substantial compliance with statutory requirements, rather than strict compliance. We construe subsection .110(c) to require filing a request for hearing within two years of the date of the employer's controversion of a claim. If within that two-year period the claimant is unable to file a truthful affidavit stating that he or she actually is ready for an immediate hearing, as was the case here, the claimant must inform the Board of the reasons for the inability to do so and request additional time to prepare for the hearing. Filing the hearing request and the request for additional time to prepare for the hearing constitutes substantial compliance and tolls the time-bar until the Board decides whether to give the claimant more time to pursue the claim. If the Board agrees to give the claimant more time, it must specify the amount of time granted to the claimant. If the Board denies the request for more time, the two-year time limit begins to run again, and the claimant has only the remainder of that time period to file the paperwork necessary to request an immediate hearing (*Kim*, 197 P.3d at 198).

The commission consistently applies *Kim*, which is now well-settled. *Colrud*; *Hessel; Harkness.*

Board decisions generally hold the SIME process tolls the §110(c) deadline for the period the parties are actively in the SIME process. *Snow v. Tyler Rental, Inc.*, AWCB Decision No. 11-0015 (February 16, 2011); *McKitrick v. Municipality of Anchorage*, AWCB Decision No. 10-0081 (May 4, 2010); *Aune v. Eastwood, Inc.*, AWCB Decision No. 01-0259 (December 19, 2009); *Turpin v. Alaska General Seafoods*, AWCB Decision No. 09-0054 (March 18, 2009); *Rollins v. Icicle Seafoods, Inc.*, AWCB Decision No. 07-0071 (April 3, 2007); (*but see*, *Almendarez v. Compass Group USA*, AWCB Decision No. 11-0146 (September 21, 2011), relying on *Kim* for the proposition the SIME process does not toll the §110(c) deadline)). However, identifying the "brackets" defining the SIME timeline is not fully settled. (*See, e.g.*, *Rollins* (holding the board's order for an SIME is the definitive tolling act under *Aune); Turpin*

(holding the deadline began tolling when Employee filed a claim requesting an SIME); *Snow* (holding the tolling commenced when the parties filed the signed SIME form)). In *Harkness*, the commission refused to toll the §110(c) deadline when substantial evidence did not support the board's finding the parties had stipulated to an SIME. The commission noted even if it had accepted the board's finding of a stipulation, the fact that the parties never filed an SIME form or followed through with the SIME process demonstrated the parties were not actively in the SIME process and tolling was not appropriate. *Harkness*, at 21-23. The board has generally held the tolling ceases and the deadline recommences when the parties receive the SIME report. *McKitrick* at 7 (citations omitted).

In *Fishell v. Alaskan Employer's Services*, AWCB Decision No. 14-0070 (May 23, 2014), the board distinguished prior decisions and said:

> The panel is not persuaded that as in *Snow*, *McKitrick*, *Turpin* and *Aune*, the SIME process had progressed to the point where it should be considered to have commenced, thereby tolling the two-year 'statute of limitations' in AS 23.30.110(c). Rather, the SIME process had not begun at all. There were no discussions, no agreements, nor were reasonable efforts made to determine if any cognizable medical disputes even existed prior to the .110(c) deadline expiring on December 27, 2013. Employee merely indicated a desire for an SIME as 'Other' relief sought, apparently without evidence of a medical dispute, by checking Box 17 of the board's claim form 07-6106. An SIME is . . . to be accomplished by either stipulation under 8 AAC 45.050(f), or petition under 8 AAC 45.050(b)(2), after a medical dispute arises. AS 23.30.095(k). To extend the board's practice of tolling .110(c) when a request for SIME simply appears in a claim form renders the .110(c) timeframe meaningless, and contravenes the Act's intent that it be administered quickly, fairly, efficiently, and predictably for both parties. Where, as here, little if anything was done to even initiate the SIME process, the board will not toll the .110(c) deadline. Under the Act, Employee was required to file an ARH, or petition to extend the time to file an ARH, no later than December 27, 2013. She did not do so. Employee's claim will be dismissed under AS 23.30.110(c) (*id*. at 17).

> **AS 23.30.115. Attendance and fees of witnesses**. (a) A person is not required to attend as a witness in a proceeding before the board at a place more than 100 miles from the person's place of residence, unless the person's lawful mileage and fee for one day's attendance is first paid or tendered to the person; but the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure. . . .

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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 in 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. . . .

8 AAC 45.050. Pleadings. (a) A person may start a proceeding before the board by filing a written claim or petition.

(b) **Claims and petitions**.

(1) A claim is a written request for benefits, including compensation, attorney's fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. In this chapter, an application is a written claim.

(2) A request for action by the board other than by a claim must be by a petition that meets the requirements of (8) of this subsection. The board has a form that may be used to file a petition.

. . .

(8) . . . a petition must be signed by the petitioner or representative and state the names and addresses of all parties, the date of injury, and the general nature of the dispute between the parties. The petitioner must provide proof of service of the petition upon all parties. . . .

. . .

(f) **Stipulations**.

. . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause,

> relieves a party from, the terms of the stipulation. . . .

In *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014), the Alaska Supreme Court confirmed stipulations are "board orders." The board's decision, from which the employer appealed, wanted to prevent M-K Rivers from "unilaterally controverting" compensability of Harris' diabetes because "the parties entered into a stipulation about the compensability of the diabetes in 1998 and filed the stipulation with the Board." The stipulation "had the effect of a board order" (*id*. at 522). M-K Rivers preserved defenses such as reasonableness or necessity of a particular diabetes treatment in its stipulation, but agreed the condition was compensable. Yet in June 2007, M-K Rivers claimed Harris' diabetes was not a compensable condition and did not limit its controversion to a specific treatment. *Harris* stated: "We have held that 'the employer or insurer must petition the Board for rehearing or modification of its order on the basis of 'a change in conditions'' if payments are being made pursuant to a Board order" (footnotes omitted). In reaffirming the power of a stipulation, *Harris* said: "Because the compensability of the diabetes was part of a Board order," M-K Rivers had to petition for modification of the order to contest continuing compensability of the condition (*id*.). Accordingly, *Harris* found the board "correctly prohibited M-K Rivers from unilaterally controverting" compensability of Harris' diabetes and use of a non-medical fitness facility, based on the parties' stipulation (*id*.).

> **8 AAC 45.054. Discovery**. (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. . . .
>
> (b) Upon the petition of a party, the board will, in its discretion, order other means of discovery. . . .

The Alaska Rules of Civil Procedure provide for various, formal discovery means in civil court cases, including: depositions upon oral examination; audio and audio-visual depositions; depositions upon written questions; interrogatories; requests for production of documents and things and for entry upon land for inspection or for other purposes; and requests for admissions. Civil Rule 30; 30.1; 31; 33; 34 and 36, respectively. The only formal discovery methods authorized in the Alaska Workers' Compensation Act include "depositions and interrogatories." AS 23.30.115(a). With exception of statutorily authorized depositions and interrogatories, the board has a long history of requiring parties to first use informal discovery means before seeking

other discovery means through Board orders. If these informal means prove inadequate, the board may order other means of discovery. 8 AAC 45.054(b). For example, in *Brinkley v. Kiewit-Groves*, AWCB Decision No. 86-0179 (July 22, 1986), the board said in a discovery dispute case:

> The Board believes . . . to speed discovery and discourage unnecessary formality, petitions under 8 AAC 45.054(b) should not be granted in the absence of evidence that informal means of obtaining relevant evidence have been tried and failed. . . .
> . . .
>
> The Board is directed by the Act to apply the Rules of Civil Procedure as they apply to depositions and interrogatories. The Board declines to adopt these Rules as they apply to other means of discovery. . . . The employee argues generally that current procedures are insufficient and result in a 'discovery vacuum'. . . . However, the Board strongly disagrees with the suggestion of a discovery 'vacuum.'
> . . .
>
> The Board finds that under current procedures nothing like a 'discovery vacuum' exists. The Board finds that numerous opportunities for obtaining admissions and stipulations to streamline hearings exist. Pre-hearing conferences are utilized to limit issues and encourage resolution of issues and claims. . . . The Board will not assume . . . the validity of the employee's sweeping statement that voluntary discovery does not work. . . .
> . . .
>
> The Board believes existing discovery procedures are generally effective. . . . In most cases the procedures function smoothly, are less burdensome to the parties, and serve to speed discovery so substantive claims may be heard and decided. We recognize this system relies on reasonableness and good faith in the parties' dealings with each other. Since in most cases parties are represented by experienced officers of the court, we believe this is a reasonable expectation. In almost every other case, a pre-hearing conference is sufficient to resolve discovery disputes. The Board sees no reason why this should not be the case in every instance. . . . In our view, petitions for discovery must be supported by an explanation of what informal means were first attempted to obtain the information. Only then will the Board consider the relevance of the requested information and the method of discovery to be authorized.
>
> We wish to make clear our interest is in fostering the speedy exchange of relevant information so valid substantive disputes may be resolved. The history of workers' compensation and the Alaska Supreme Court's interest in maintaining the legislature's desire for a speedy remedy for injured workers is well known. . . .

> **8 AAC 45.060. Service**. . . .
> . . .
>
> (b) . . . 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 45.065. Prehearings**. . . .
> . . .
>
> (c) After the 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 between 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 and the course of the hearing.
>
> (d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.

The board's authority to hear and determine questions in respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties." *Simon v. Alaska Wood Product*s, 633 P.2d 252, 256 (Alaska 1981). Absent findings of "unusual and extenuating circumstances," the board is limited to deciding the issues in the prehearing conference summary, and, when such "unusual and extenuating circumstances" require the board to address other issues, sufficient notice must be given to the parties. *Alcan Electric v. Hope*, AWCAC Decision No. 112 at 5 (July 1, 2009).

> **8 AAC 45.070. Hearings**. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e).

. . .

(g) Except when the board or it designee determines that unusual and extenuating circumstances exist, the prehearing summary . . . governs the issues and the course of the hearing.

8 AAC 45.092. Selection of an independent medical examiner. . . .

. . .

g) If there exists a medical dispute under in AS 23.30.095 (k),

(1) the parties may file a

(A) completed second independent medical form, available from the division, listing the dispute together with copies of the medical records reflecting the dispute, and

(B) stipulation signed by all parties agreeing

(i) upon the type of specialty to perform the evaluation or the physician to perform the evaluation; and

(ii) that either the board or the board's designee determine whether a dispute under AS 23.30.095(k) exists, and requesting the board or the board's designee to exercise discretion under AS 23.30.095(k) and require an evaluation;

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

(A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and

(B) copies of the medical records reflecting the dispute; or

(3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if

(A) the parties stipulate, in accordance with (1) of this subsection, to the contrary and the board determines the evaluation is necessary; or

(B) the board on its own motion determines an evaluation is necessary.

(h) If the board requires an evaluation under AS 23.30.095(k), the board will, in its discretion, direct

(1) a party to make two copies of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copies in chronological order by date of treatment with the initial report on top and the most recent report at the end, number the copies consecutively, and put the copies in two separate binders;

(2) the party making the copies to serve the two binders of medical records upon the opposing party together with an affidavit verifying that the binders contain copies of all the medical reports relating to the employee in the party's possession;

(3) the party served with the binders to review the copies of the medical records to determine if the binders contain copies of all the employee's medical records in that party's possession. . . .

(4) the party, who receives additional medical records after the two binders have been prepared and filed with the board, to make three copies of the additional medical records, put the copies in three separate binders in chronological order by date of treatment, and number the copies consecutively. . . .

(5) that, within 10 days after a party's filing of verification that the binders are complete, each party may submit to the board designee up to three questions per medical issue in dispute under AS 23.30.095(k), as identified by the parties, the board designee, or the board, as follows. . . .

8 AAC 45.112. Witness list. A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. If a witness list is required under 8 AAC 45.065, the witness list must be filed with the board and served upon all parties.at least five working days before the hearing. If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing, except that the board will admit and consider

(1) the testimony of a party. . . .

ANALYSIS

1) Was the oral order allowing Employee to testify correct?

Employer objected to Employee testifying at hearing. However, at the May 1, 2014 prehearing conference during which the parties stipulated to the June 4, 2014 hearing, the parties were not directed to file witness lists. 8 AAC 45.112. The May 1, 2014 prehearing conference summary controls the hearing. 8 AAC 45.065(c); 8 AAC 45.070(g). The parties were not directed to file witness lists. Even had they been directed to file witness lists, the applicable regulation allows "the testimony of a party." Employee is a party. Therefore, the oral order allowing him to testify at hearing on June 4, 2014, was correct. 8 AAC 45.112(1).

2) Should Employee's November 3, 2011 claim be dismissed for failure to progress?

The main issue for hearing was Employer's petition to dismiss Employee's November 3, 2011 claim under AS 23.30.110(c). Most relevant facts are not disputed. Employee filed his November 3, 2011 claim on November 7, 2011. Employer controverted the claim on December 29, 2011, when it filed its December 27, 2011 controversion notice. It served the notice on Employee by mail. When computing time periods prescribed by the Act or regulations, the day of the action after which the designated period of time begins to run is not included. Therefore, the two-year "statute of limitations" under AS 23.30.l10(c) began to run on December 30, 2011. 8 AAC 45.063(a). When service is done by mail, as was the case with Employer's controversion notice and a right may be exercised or an act is to be done, like requesting a post-controversion hearing, three days must be added to the prescribed period. Two years from December 30, 2011, is December 30, 2013. Three days from December 30, 2013, is January 2, 2014. Thus, Employee had until January 2, 2014, to file a hearing request or to request more time in which to file his hearing request. AS 23.30.110(c); 8 AAC 45.060(b); *Kim*.

It is undisputed Employee never filed a formal "Affidavit of Readiness for Hearing" on his November 3, 2011 claim. The question, therefore, is whether or not there is a reason to excuse his failure, because, for example: (1) Lack of proper agency advice or warnings; (2) "legal grounds" such as incapacity; (3) something tolled the statute's running; or (4) if he substantially complied with AS 23.30.110(c). These are analyzed separately, as follows:

(1) Lack of proper agency advice or warnings:

This is not a case where Employee claims the designee did not adequately inform him of his rights and duties as a *pro se* litigant to timely request a hearing. *Dennis*. The designee provided a plethora of §110(c) notices; at least eight. Employee conceded he read every §110(c) "warning" printed in each prehearing conference summary even when he represented himself or when his wife assisted him. Though he admitted to being confused by so many controversion notices, Employee does not even contend a lack of proper agency notice or advice should excuse any failure to request a hearing. Furthermore, Employee was represented by experienced counsel beginning August 1, 2013, well before the two-year statute expired. Therefore, lack of §110(c) advice or warnings forms no basis for saving his claim. *Richard*; *Bohlmann*.

(2) "Legal grounds" to excuse:

There is no evidence Employee or his lawyer were minors, incapable of understanding their obligations under the Act, were disabled, incapacitated or had any mental competency issues during the period in question. Employee and his attorney were both fully aware of their right and duty to request a hearing to avoid claim dismissal and were both capable of doing so. *Tonoian*. Though Employee implied Employer dragged its feet by failing to promptly agree to an SIME and prepare the SIME form, hid important medical evidence and led him to believe the case might settle, this decision need not address these implied estoppel or quasi-estoppel arguments for the reasons set forth below. There is no legal basis to excuse any failure to timely request a hearing or to request more time to prepare. *Id*.

(3) Something tolled the statute's running:

The relevant facts for this analysis are also largely undisputed. On December 8, 2011, Employee requested an SIME when he filed his December 6, 2011 petition. *Turpin*. On August 27, 2013, the parties at a prehearing conference orally stipulated to an SIME. 8 AAC 45.050(f)(2); *Rollins*. The relevant, governing August 27, 2013 prehearing conference summary expressly states: "The parties have stipulated to conducting an SIME." 8 AAC 45.065(c). Employer never objected to this statement or asked the designee to modify the summary to say there was no stipulation, or argued the designee's summary was in error. 8 AAC 45.065(d). At hearing, Employer admitted

it had stipulated to an SIME. Once the parties at prehearing stipulated, the stipulation "had the effect of an order." 8 AAC 45.050(f)(3); *Rollins*; *Harris*. Therefore, the parties are bound by their agreement unless this decision relieves Employer from the stipulation's terms for "good cause." *Id*.

Employer argued the stipulation was not an "order" for an SIME. Its argument is not persuasive and is contrary to the regulation's plain language and the Alaska Supreme Court's opinion in *Harris*. If Employer's position were true, the stipulation provisions in 8 AAC 45.050(f) would be meaningless and a nullity. If parties could stipulate and renege on their agreements with impunity, the legislative goals of "quick, efficient, fair and predictable" delivery of benefits to worthy claimants at a reasonable cost to employers would be thwarted. AS 23.30.001(1). A simple SIME request would require a formal hearing and a decision and order in each case to obtain a definitive SIME "order." *Rollins*. Such process is unnecessary. *Harris*. Parties stipulate to facts and procedures to move cases along, promoting quick and efficient resolution. AS 23.30.001(1). Unilaterally broken stipulations would put the parties back to "square one" on the facts or procedure to which they agreed, wasting time. Parties would rely on opponent's broken stipulations to their detriment, creating unfair advantages. Stipulations have the same effect as an order, and are in fact an "order." *Harris*. There is no practical or legal distinction between an oral or written stipulation, and an oral stipulation reduced to writing in a prehearing conference summary. They are all the same order. *Id*.; 8 AAC 45.050(f). Such a result is always "predictable." AS 23.30.001(1). Unless parties are relieved from their terms, stipulations are orders. Employer has not convincingly explained why a *Rollins* decision and order is any more an "order" than the parties' binding stipulation here, or why *Harris* does not control this issue. Therefore, there was a *Rollins* order for an SIME, effective August 27, 2013. 8 AAC 45.050(f)(3). Substantial evidence supports this conclusion. *Harkness*.

This case is distinguished from other decisions because the designee ordered the entire panoply of process associated with the SIME. *Id*. On August 27, 2013, the designee expressly ordered: "The parties will proceed in accordance with this prehearing conference summary." The designee's summary ordered the parties to follow the listed "process and procedures." The designee ordered Employer to make three copies of Employee's medical records and serve them

on Employee by a specific date. He ordered Employee to review the binders and if they were complete, file the binders together with an affidavit verifying their completeness. If the binders were not complete, the designee ordered Employee to supplement the binders and serve a copy on Employer by a certain date. The designee ordered the parties to supplement the binders with additional records they might receive in the future. He further ordered the parties to complete and sign the SIME form and file it along with the medical binders by September 17, 2013. The designee ordered them to submit optional SIME questions for consideration and provided the standard agency questions typically used in SIMEs. The designee explained the cancellation and no-show process and warned Employee he could be charged a fee for failing to make his SIME appointment.

In response to these directives, between August 28, 2013 and September 16, 2013, the parties discussed the SIME and possibly stipulating to a specialist. On September 5, 2013, Employer served Employee with the medical binders. On September 17, 2013, Employer filed and served its SIME questions, and Employee dutifully filed the binders with the appropriate completeness affidavit. From September 17, 2013 through October 1, 2013, the parties discussed possible settlement. On September 30, 2013, and again on November 6, 2013, the designee inquired as to the SIME form's whereabouts. On October 1, 2013, Employer's attorney began working on the SIME form, and on November 7, 2013, Employer e-mailed the draft SIME form to Employee's attorney. To this point, the parties had vigorously pursued and followed through with the designee-ordered SIME protocol and process, with exception of finalizing the SIME form. *Id.*

Employee contends Employer intentionally dragged its feet and failed to promptly prepare and provide the SIME form. Employer denies any such skullduggery and suggests Employee could have prepared the SIME form himself if he thought it was taking Employer too long. On January 7, 2014, Employee sent Employer the completed SIME form. To date, Employer has not filed the SIME form. Employer contends the fully executed SIME form is the penultimate event signifying the parties have an SIME in process. *Snow*. Employee contends the parties had a stipulated, ordered SIME since August 27, 2013, and Employer's emphasis on the SIME form literally places "form over substance."

Decisional law on this issue varies considerably. However, Employee's argument is persuasive. The parties stipulated to an SIME, which stipulation had the effect of an order and was, in fact, an SIME "order." 8 AAC 45.050(f)(3); *Harris*. Historically, an SIME will toll §110(c)'s running at least until the parties receive the SIME report. *McKitrick*; *Aune*. Given prior decisional law and this case's facts, Employee was justified in relying upon the SIME process tolling the two-year "statute of limitations" under AS 23.30.110(c). *Suh*. This statute is a "no progress rule." 7 Larson, *Workers' Compensation Law*, §126.13[4] at 126-81 (2002). The fact Employee did not return the completed SIME form to Employer until January 7, 2014, is an unfair and unpredictable basis upon which to dismiss his November 3, 2011 claim. AS 23.30.001(1). Unlike the facts in other cases, which were dismissed under §110(c), Employee was progressing on his case, and particularly on the ordered SIME. *Fishell*. The only thing delayed in the SIME process was the SIME form. The parties had completed all other SIME preparations. The designee would not make an SIME appointment unless and until he received the form, but he never stated or implied the SIME process had ended or was canceled.

Both parties bear some responsibility for the SIME form's delay. It took Employer awhile to prepare it. It took Employee awhile to return it. Since Employer has yet to file the completed form, it is difficult to understand how it could be prejudiced by Employee's relatively brief delay. Employer has not argued, nor is there evidence Employer was prejudiced in any way by Employee's 30-day delay in returning the form. Furthermore, Employee has a valid point when he notes Employer had in its possession, but withheld for years, Dr. Krull's May 8, 2011 response to its May 3, 2011 letter, which provided clear medical disputes when compared to Dr. Bald's June 3, 2011 EME opinions. Once Employee filed his November 3, 2011 claim, Employer had an affirmative duty to file and serve this report on a medical summary but failed to promptly file it. AS 23.30.095(h). Had Employer follow the law, the SIME process would have moved forward more rapidly and SIME tolling would not be an issue. *Rodgers & Babler*.

As a matter of both fact and law, the designee ordered an SIME on August 27, 2013, and the parties progressed through the process to obtain one, with exception of the SIME form. *Harris*. However, the law does not even specifically require the SIME form and states if a medical dispute exists, the parties "may" file a "completed second independent medical form" and

associated paperwork to obtain an SIME. 8 AAC 45.092(g)(A). Accordingly, Employer's suggestion that Employee's claim should be dismissed because AS 23.30.110(c) was not tolled because there was no SIME in process simply because there was no completed, optional, SIME form truly places "form over substance." Employer's position strains both the law and the facts. *Tipton*. Accordingly, Employee's November 3, 2011 claim will not be dismissed under AS 23.30.110(c) because the pending SIME tolled the statute's two-year period. *Aune*.

(4) Substantial compliance with AS 23.30.110(c):

Employee mainly contends he substantially complied with §110(c). His March 20, 2013 letter, written when he was self-represented, effectively did two things: 1) Asked for more time to request a hearing; and 2) Asked for a hearing to be scheduled after the previously requested SIME was completed. Employee wrote this letter in response to Employer's March 6, 2013 hearing request, apparently believing the request pertained to a hearing on his claim's merits. Though Employee was confused and wrong about the reason for Employer's hearing request -- it was seeking a hearing on Employer's September 20, 2012 discovery petition, not on his November 3, 2011 claim -- the fact remains Employee filed "something" to seek more time to prepare his case for hearing. *Kim*.

It is not surprising the designee did not recognize Employee's March 20, 2013 letter for what it was and take some action on it. Self-represented litigants frequently use letters rather than formal "pleadings" to make their points and to seek relief. Sometimes the format makes the requested relief not so clear. It is also not surprising there was never a formal order granting or denying Employee's March 20, 2013 request and specifying how much time he had to prepare his case before he had to file an affidavit of readiness for hearing or other hearing request. Employee plainly stated he was opposed to a hearing "due to lack of readiness" on his part. He also noted he had requested an SIME, which Employee correctly argued should occur before a hearing on his claim. Employee stated he had an appointment with his attending physician to "prepare a future medical plan" and the SIME could occur after his doctor weighed in. Employee made it very clear "[o]nce the SIME has been completed," then "the hearing could be scheduled" taking into account the SIME doctor's opinions. Employee credibly testified his March 20, 2013 letter was his request for a hearing, but only after the SIME was completed.

AS 23.30.122. In other words, it was his request for more time. The fact there was no ruling granting or denying his request will not be held against Employee to deny his claim. To hold otherwise would not be "fair." AS 23.30.001(1).

Employee's March 20, 2013 letter informed "the Board of the reasons" for his "inability" to file a hearing request, or go to hearing on Employer's request, and it requested "additional time to prepare for the hearing." *Kim*. Employee could not have done much better if he was an attorney. Employer's argument focused on §110(c)'s strict application as a legal matter. Employer did not contend it was prejudiced in any way by Employee's actions. Employer fully expected there would be an SIME and only 30 days elapsed from the time Employer sent the SIME form to Employee and he returned it. Employer has yet to file the SIME form, which is the only reason no SIME appointment has been scheduled. There is no prejudice to Employer, much less "significant prejudice." *Kim* at 196. On the whole record, Employee's primary argument has merit. Employee's March 20, 2013 letter met all *Kim* requirements to substantially comply with AS 23.30.110(c). Therefore, because the SIME order tolled the statute's running and because he substantially complied with AS 23.30.110(c), Employee's November 3, 2011 claim will not be dismissed. *Harris*; *Kim*.

3) Was the designee's discovery order concerning Employee's business licenses and income an abuse of discretion?

The designee ordered Employee to respond to some interrogatories but not others and refused to require him to respond to formal requests for production. He did not provide an analysis. The law contemplates liberal, open discovery in workers' compensation cases. *Granus*; AS 23.30.107; AS 23.30.108. However, the law only specifically provides for depositions and interrogatories done pursuant to Alaska Rules of Civil Procedure. AS 23.30.115. Other than those formal methods, other civil rules and formal procedures do not apply in workers' compensation cases. Decisional law requires parties to attempt "informal" discovery before seeking approval for formal discovery. 8 AAC 45.054; *Brinkley*.

Employer produced no evidence it tried informally to obtain documents from Employee. It simply filed and served "requests for production" as it would file in civil court, and when

Employee objected, seeks an order compelling him to respond. A request for production done pursuant to civil procedure rules is not "informal." It is the formal method used in superior court to obtain discovery. It is inappropriate in an informal, administrative forum unless ordered after unsuccessful, informal attempts. 8 AAC 45.054; *Brinkley*. Accordingly, to the extent Employer seeks an order compelling Employee to respond to its request for production, the designee did not abuse his discretion and Employer's formal request will be denied.

This order does not condone Employer's unauthorized use of requests for production. However, Employer is entitled to the requested discovery as it may lead to admissible evidence. Employee claims disability benefits and a compensation rate adjustment, so Employer has the right to explore his income during the relevant periods to see if this information affects Employee's rights to the requested benefits. It does little good at this point to require Employer to write Employee a letter informally requesting the same information sought in its unauthorized request for production. It would be a waste of time and resources. AS 23.30.001(1). Employee now knows what Employer wants to support its defenses. If he has not already done so, Employee will be directed to provide the requested wage and employment information to Employer within 14 days of this decision's date. If Employee no longer seeks a compensation rate adjustment, the pre-injury documents are not likely to lead to admissible evidence and need not be provided. However, the post-injury records must be produced. *Granus*.

Unlike requests for production, interrogatories are an appropriate discovery method in workers' compensation cases and are specifically provided for in the Alaska Workers' Compensation Act. AS 23.30.115. As stated above, Employee requests disability and a compensation rate adjustment and claims medical costs. Employer's interrogatories number five and six request Employee's post-injury business information and any income, and seek sources for work-related medical payments. Employer has a right to discover information in defending against Employee's claims. If he received earnings, worked during periods he claims disability, or received Social Security benefits, this may affect his claim. The designee did not provide analysis, so it is difficult at best to discern his reasoning to tell if he abused his discretion. Given the above, absent more designee analysis, the designee abused his discretion by failing to require Employee to answer the two unanswered interrogatories. If he has not already done so,

Employee will be ordered to answer Employer's interrogatories five and six within 14 days of this decision's date. If Employee no longer seeks a compensation rate adjustment, he will only be required to produce his post-injury earnings information, which may affect his right claimed benefits. *Granus*.

4) Should an SIME proceed?

As stated above, the parties stipulated to an SIME, which is an order for an SIME and the designee further ordered it. *Harris*; 8 AAC 45.092(g-h). The parties have completed all necessary SIME processes. The only thing preventing the SIME from being scheduled is Employer filing the SIME form. Employer will be directed to file and serve the completed SIME form within seven days of this decision's date. The designee will be directed to schedule the SIME promptly in accordance with the parties' stipulation. AS 23.30.135.

5) Is Employee entitled to interim attorney's fees or costs?

Employer correctly notes Employee's attorney's fee and cost affidavit uses "block-billing," which makes it difficult to ferret out what services relate to issues on which Employee prevailed. His November 3, 2011 claim will not be dismissed, but it remains to be seen if he is entitled to any benefits. He did not prevail on Employer's discovery appeal but he will get his requested and previously ordered SIME. The result in this case is currently unclear and Employee's attorney's fees too difficult to discern. Employee's right to attorney's fees and costs will be denied without prejudice. He is encouraged to provide more detail in his attorney's fee and cost invoice to avoid future disputes.

CONCLUSIONS OF LAW

1) The oral order allowing Employee to testify was correct.
2) Employee's November 3, 2011 claim will not be dismissed for failure to prosecute.
3) The designee's discovery order concerning Employee's business licenses and income was an abuse of discretion.
4) An SIME will proceed.
5) Employee is not entitled to interim attorney's fees or costs.

ORDER

1) Employer's February 24, 2014 petition to dismiss Employee's November 3, 2011 claim under AS 23.30.110(c) is denied.

2) Employee's November 3, 2011 claim is not dismissed for failure to prosecute.

3) If he has not already done so, Employee is ordered to provide the requested wage, medical and employment information to Employer within 14 days of this decision's date. If Employee no longer seeks a compensation rate adjustment, the pre-injury documents need not be provided. However, the post-injury records must be produced.

4) If he has not already done so, Employee is ordered to answer Employer's interrogatories five and six within 14 days of this decision's date. If Employee no longer seeks a compensation rate adjustment, he need only produce his post-injury earnings information.

5) Employer is ordered to file and serve the completed SIME form within seven days of this decision's date.

6) The designee is ordered to schedule the SIME promptly in accordance with the parties' stipulation.

7) Employee's claim for interim attorney's fees and costs is denied without prejudice.

Dated in Anchorage, Alaska, on June 27, 2014.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Amy Steele, Member

_____
Mark Talbert, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of 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.

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.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of CRAIG L. RANG, Employee / claimant v. MARATHON OIL CO., employer; OLD REPUBLIC INSURANCE COMPANY, insurer / defendants; Case No. 201105830; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on June 27, 2014.

_____
Anna Subeldia, Office Assistant