ALASKA WORKERS' COMPENSATION BOARD

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

ASOKA SENEVIRATNE, Employee, Claimant, v. AIRPORT EQUIPMENT RENTALS, INC., Employer, and LIBERTY NORTHWEST INSURANCE CO., Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200503146 AWCB Decision No. 17-0084 Filed with AWCB Fairbanks, Alaska on July 21, 2017

Airport Equipment Rentals Inc.'s (Employer) January 27, 2017 petition to dismiss Asoka Seneviratne's (Employee) December 9, 2005, June 23, 2008 (Amended), September 24, 2014, and November 1, 2016 workers' compensation claims was heard on June 8, 2017 in Fairbanks, Alaska. This hearing date was selected on April 24, 2017. The panel consisted of two members, which is a quorum under AS 23.20.005(f). Employee appeared telephonically and testified. Employee was represented by personal representative Saye Blendolo Gatei. Attorney Rebecca Holdiman Miller appeared and represented Employer. The record was left open for an additional ten days for Employee to file supplemental medical evidence and for Employer to respond to the supplemental evidence. The record closed after the panel deliberated on June 22, 2017.

ISSUE

Employer contends Employee's claim is stale and should be dismissed under AS 23.30.110(c). Employer contends Employee did not attempt to move his case toward hearing.

Employee believed he did not comply with the deadline, and argued he was too incapacitated due to his work injury to participate in his case.

Should Employee's December 9, 2005 claim, as amended on June 23, 2008, and his September 24, 2014 and November 1, 2016 claims be denied under AS 23.30.110(c)?

FINDINGS OF FACT

The following facts are undisputed or are established by a preponderance of the evidence:

1) On October 4, 2005, Employee sustained injuries when he was involved in a single vehicle rollover accident while driving for Employer. (Report of Occupational Injury or Illness, November 14, 2005).

2) On October 6, 2005 through December 6, 2005, Employee received treatment, including physical therapy at Fairbanks Memorial Hospital (FMH). (FMH Records, October 6, 2005 – December 6, 2005).

3) On November 22, 2005 through December 23, 2005, Employee underwent physical therapy at Advanced Physical Therapy. On December 19, 2005, Employee noted that he would like to move and transfer his care to Los Angeles. (Advanced Physical Therapy Records, November 22, 2005 – December 23, 2005).

4) On December 6, 2005, attorney John Franich filed an entry of appearance as Employee's counsel. (Entry of Appearance, December 6, 2005).

5) On December 12, 2005, Employee filed a workers' compensation claim (WCC), seeking temporary total disability (TTD) benefits beginning on October 4, 2005, medical benefits, penalties, interest, and attorney's fees. (WCC, December 9, 2005).

6) On December 22, 2005, the division served Employee's December 9, 2005 claim on Employer's insurer only, by certified mail with a return receipt requested. (*Id*.).

7) On May 15, 2006, Employer filed and served by mail a controversion based on an alleged lack of authorization for ongoing time loss benefits from a physician. (Controversion Notice, May 8, 2006).

8) Adding three days because Employer served the Controversion Notice by mail, Employee had to request a hearing or ask for more time to request a hearing by no later than May 19, 2008, since May 18, 2008 was a Sunday. (Experience, judgment and inferences drawn from the above).

9) On June 19, 2006, Employee began seeing George Leung, DC, in California, who recommended spinal manipulation, therapeutic exercises and physical therapy modalities. (Doctor's First Report of Occupational Injury, June 19, 2006).

10) On June 28, 2006, Employee filed an affidavit of readiness for hearing (ARH) on his "December 12, 2005" claim for "TTD, penalties, interest and attorney fees." The ARH states it was served on Liberty Northwest Insurance Company on June 28, 2006. (ARH, June 28, 2006).

11) By June 28, 2006, Employee had filed only one claim. The record is clear that the ARH pertained to the December 9, 2005 claim. There is no evidence the division returned Employee's June 28, 2006 ARH to him because it was deficient. Employee's service of the ARH on the insurer only was consistent with the way the division served the WCC on the insurer only. (Observations).

12) Employee timely filed and served a hearing request on his only pending claim, well within the deadline under AS 23.30.110(c). (Experience, judgment and inferences from the above).

13) On July 17, 2006, attorney Matthew Teaford entered his appearance for Employer and its insurer. (Entry of Appearance, July 14, 2006).

14) On July 17, 2006, Employer filed an Affidavit of Opposition (AO) to Employee's ARH, arguing discovery was not complete and the ARH was defective because it was not served on Employer and there was no indication it was filed with the Board. Employer also filed an answer to Employee's December 9, 2005 claim this same date. (AO; Answer, July 14, 2006).

15) On February 16, 2007, Employee underwent an employer's medical examination (EME) with Brian Denekas, MD. Dr. Denekas found the Employee to be medically stable and able to return to work without restriction, and diagnosed:

> 1. Possible mild musculoskeletal contusions, possible straining, and a head contusion, related to the motor vehicle accident of October 4, 2005, medically stationary. (EME Report, February 16, 2007).

16) On March 6, 2007, Employer filed a controversion notice based on the EME report. (Controversion Notice, March 6, 2007).

17) On May 23, 2007, Employee filed another ARH on his "December 12, 2005" WCC and served it on Employer's attorney only. (ARH, May 22, 2007).

18) There is no evidence in the record suggesting the division returned Employee's May 22, 2007 ARH to him because it was deficient. (Observations).

19) On May 31, 2007, Employer filed an AO to the ARH, arguing discovery was not complete and a Second Independent Medical Examination (SIME) may be necessary. (AO, May 31, 2007).

20) On July 31, 2007, a prehearing was held and the parties stipulated to an SIME. (Prehearing Notes in ICERS, July 31, 2007).

21) On May 1, 2008, Employee underwent an SIME with Alan Roth, MD based on the dispute between Dr. Leung and Dr. Denekas. On May 28, 2008, Dr. Roth issued a report opining Employee was medically stable, could return to work, and incurred a 0% permanent partial impairment rating (PPI) as a result of the work injury. (SIME Report, May 28, 2008).

22) On June 12, 2008, Employer filed a controversion notice based on the EME and SIME physician opinions. (Controversion Notice, June 12, 2008).

23) On June 23, 2008, a PHC was held and the discussion section states: "The parties attending this PHC have received and reviewed the SIME report. Mr. Franich will talk to client about proceeding with this claim and does not want the board to take any further action at this time." Employee also amended his claim to include compensation rate, PPI, and reemployment benefits. (PHC Summary, June 23, 2008.)

24) On July 15, 2008, Employer filed another controversion based on the EME and SIME physician opinions. Employer also filed an answer to the Employee's amended claim on the same date. (Controversion Notice; Answer, July 14, 2008).

25) On May 13, 2009, John Franich withdrew as Employee's counsel, stating he had instructed Employee on any pending deadlines or hearings. (Notice of Withdrawal as Counsel, May 13, 2009).

26) On September 24, 2014, Employee filed a claim, seeking TTD, permanent total disability (PTD), PPI, medical and transportation costs, and reemployment benefits. (WCC, September 24, 2014).

27) On October 20, 2014, Employer filed an answer and controversion, citing a defense under AS 23.30.110(c). (Answer and Controversion Notice, October 20, 2014).

28) On November 1, 2016, Employee filed a notice of appearance authorizing William Taunauu to act as his non-attorney representative in his case. (Notice of Appearance, November 1, 2016).

29) On November 1, 2016, Employee filed a claim for PTD, medical and transportation costs and penalty. (WCC, November 1, 2016).

30) On November 28, 2016, Employer filed an answer and controversion, citing a defense under AS 23.30.110(c). (Answer; Controversion Notice, November 28, 2016).

31) On December 6, 2016, Employee filed a notice of appearance authorizing Saye Blendolo Gatei to act as his non-attorney representative. (Notice of Appearance, December 6, 2016).

32) On December 7, 2016, Employee's representative, Saye Gatei, appeared at a prehearing conference and said the prehearing conference was premature, as he still needed to get his medical records together. Employee's representative was advised that he could work with a workers' compensation technician to file the medical records as a medical summary and that he also needed to serve Ms. Miller. Ms. Miller also needed to conduct more discovery. Employee's representative was going to request another prehearing when he was ready. (PHC Summary, December 7, 2016).

33) On January 27, 2017, Employer filed a petition to dismiss Employee's claims pursuant to AS 23.30.110(c). (Petition to Dismiss, January 27, 2017).

34) On June 8, 2017, a hearing was held on Employer's petition to dismiss. Employee's non-attorney representative stated he attempted to fax certain medical records the day of the hearing, but they did not go through. The panel left the record open to allow Employee to file the records and for Employer to respond. (Hearing Record, June 8, 2017).

35) Employee did not file the medical records. (Record).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> > (1) This chapter be interpreted 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….

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. Rodgers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **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 in accordance with its regulations at any time after the first seven days of disability following an injury, or at any time after death, and the board may hear and determine all questions in respect to the claim.
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> (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.
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> . . . .
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> (h) The filing of a hearing request under (c) of this section suspends the running of the two-year time period specified in (c) of this section. However, if the employee subsequently requests a continuance of the hearing and the request is approved by the board, the granting of the continuance renders the request for hearing inoperative, and the two-year time period specified in (c) of this section continues to run again from the date of the board's notice to the employee of the board's granting of the continuance and of its effect. If the employee fails to again request a hearing before the conclusion of the two-year time period in (c) of this section, the claim is denied.

Statutes with language similar to AS 23.30.110(c) are referred to by the late Professor Arthur Larson as "no progress" or "failure to prosecute" rules. "[A] claim may be dismissed for failure to prosecute it or set it down for hearing in a specified or reasonable time." 7 Arthur Larson &

Lex K. Larson, *Workers' Compensation Law*, Sec. 126.13 [4], at 126-81 (2002). The 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 prosecute his claim in a timely manner once it claim is filed and controverted. *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 start the time limit of AS 23.30.110(c). *Wilson v. Flying Tiger Line, Inc*. AWCB Decision No. 94-0143 (June 17, 1994).

The Alaska Supreme Court has 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); *Westfall v. Alaska International Const*., AWCB Decision No. 93-0241 (September 30, 1993). In *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912, 913 (Alaska 1996), the Alaska Supreme Court noted the language of AS 23.30.110(c) is clear, requiring an employee to request a hearing within two years of the controversion date or face claim dismissal. However, the court also noted the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Id.* at 912-913.

Certain events relieve an employee from strict compliance with the requirements of §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 *Bohlman 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). 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 the problems presented by SIME tolling, *Almendarez* noted the utility of the holding in *Kim*.

The Alaska Supreme Court has held that *pro se* litigants are held to a lesser standard than attorneys. *Dougan v. Aurora Electric, Inc.*, 50 P.3d 789, 795 (2002). A judge must inform a *pro se* litigant "of the proper procedure for the action he or she is obviously attempting to accomplish." (*Id*.; citation omitted). Specifically, a judge must notify a *pro se* litigant of defects in his or her brief and give the party an opportunity to remedy those defects. (*Id*.).

8 AAC 45.050. Pleadings.

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(e) Amendments. A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading.

(f) Stipulations.

(1) If a claim or petition has been filed and the parties agree that there is no dispute as to any material fact and agree to the dismissal of the claim or petition, or to the dismissal of a party, a stipulation of facts signed by all parties may be filed, consenting to the immediate filing of an order based upon the stipulation of facts.

(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. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.

(4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.

8 AAC 45.060. Service. . . .

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(b) . . . 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. . . .

ANALYSIS

Should Employee's December 9, 2005 claim as amended on June 23, 2008, and his September 24, 2014 and November 1, 2016 claims be denied under AS 23.30.110(c)?

AS 23.30.110(c) directs denial of a claim if a claimant does not request a hearing within two years of a post-claim controversion. Employee filed three claims and orally amended the first at a prehearing conference. Employer controverted them all.

Employee filed his first claim on December 12, 2005, and requested TTD, medical benefits, penalty, interest, and attorney's fees. Employer controverted the claim on May 15, 2006. Employee had until May 19, 2008 to file a hearing request or file a request asking for more time to request a hearing. AS 23.30.110(c); *Rogers & Babler*; 8 AAC 45.060(b). Employee filed an ARH on June 28, 2006. Employee filed the ARH well within the two-year post-claim controversion deadline. However, Employer argued the ARH was defective because Employee served it on the insurance company and not on the Employer and there was no indication he filed the ARH. Employee served the ARH on the insurer, the real party in interest, consistent with the way the division had served his claim. Had he also served the ARH on Employer, it would have simply tendered the ARH to its insurer, whom Employee had already served. *Rogers & Babler*. A division date stamp on the ARH shows Employee filed it on June 28, 2006. The division did not return the ARH to Employee suggesting it was in any way deficient. *Richard*; *Bohlmann*. There is no indication a hearing was ever scheduled or that Employee asked for a hearing to be continued. Therefore, nothing caused the statute to begin running again. The June 28, 2006 ARH was effective in suspending the running of AS 23.30.110(c). AS 23.30.110(h).

Employee then filed and served another ARH on May 23, 2007. This second ARH was also filed well within the two-year post-claim controversion deadline, which expired on May 19, 2008, and there was no argument by Employer it was defective. It is clear Employee filed an ARH on his December 9, 2005 claim within the two-year post-controversion period. This was not "substantial compliance;" it was strict, statutory compliance.

The case continued to progress and Employee underwent an EME in 2007 and an SIME in 2008. At a June 23, 2008 prehearing, Employee's counsel stated he would talk to Employee about

proceeding with his claim post-SIME and the board "should not take any further action at this time." However, at the same prehearing, Employee also orally amended his December 9, 2005 claim to add a request for compensation rate adjustment, PPI, and reemployment benefits. On May 13, 2009, Employee's counsel withdrew. There is no question Employee's June 23, 2008 amended claim "arose out of the . . . occurrence set out in the original pleading." 8 AAC 45.050(e). It is all the same injury. Therefore, it "relates back" to Employee's December 9, 2005 claim, for which he had already twice requested a hearing, in strict compliance with AS 23.30.110(c). *Id.*; *Colrud*.

On September 24, 2014, Employee, now *pro se*, filed his second claim, which added requests for permanent total disability (PTD) and transportation costs for the first time, in addition to the previously requested benefits. Employer controverted this claim on November 28, 2016. On November 1, 2016, Employee filed his third claim requesting PTD, medical and transportation costs, and penalty, which the Employer controverted on November 28, 2016.

Employer contends Employee had to file an ARH two years after the June 23, 2008 oral amendment and within two years of the date it controverted the September 24, 2014 and November 1, 2016 claims. It cites no statute or case law to support this contention. Employer however concedes Employee filed a valid ARH on his original claim, and does not argue that he ever formally withdrew it. Employee's June 28, 2006 and May 22, 2007 ARHs on his December 9, 2005 claim as amended orally at the June 23, 2008 prehearing conference were valid. The remaining question is whether the two subsequent claims are "amendments" under 8 AAC 45.050(e). The September 24, 2014 and November 1, 2016 claims all request benefits based on the same "occurrence" -- the October 4, 2005 work injury -- as the original December 9, 2005 pleading. Therefore, these claims simply amended the December 9, 2005 claim and they relate back to the original claim. Since Employee twice requested a hearing on his December 9, 2005 claim, he has strictly complied with the statute and his claims are not subject to denial under AS 23.30.110(c). AS 23.30.110(h); *Colrud*.

The Alaska Supreme Court has held *pro se* litigants are entitled to some degree of procedural leniency. *Dougan*. Employee's non-attorney personal representative, Saye Gatei, did not

become involved in the case until December 6, 2016. He was either not aware, or did not understand, the legal effect of the June 28, 2006 and May 22, 2007 ARHs and the "relation back" doctrine. Instead, he argued Employee was too incapacitated to participate in his case. *Rogers & Babler*. Given the above analysis, this decision need not decide the incapacity issue. To the extent Employer may argue Employee stipulated he failed to timely request a hearing, the facts Employee timely requested a hearing twice and that his later claims relate back to the original pleading, constitute good cause to relieve him from any stipulation on this issue. 8 AAC 45.050(f)(3).

CONCLUSION OF LAW

Employee's December 9, 2005 claim as amended on June 23, 2008, and his September 24, 2014 and November 1, 2016 claims will not be denied under AS 23.30.110(c).

ORDER

Employer's January 27, 2017 petition to dismiss Employee's claims is denied.

Dated in Fairbanks, Alaska on July 21, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kelly McNabb, Designated Chair

/s/
Jacob Howdeshell, Board Member

RECONSIDERATION

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

MODIFICATION

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

PETITION FOR REVIEW

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Asoka Seneviratne, employee / respondent v. Airport Equipment Rentals, Inc., employer; Liberty Northwest Insurance Co., insurer / petitioners; Case No. 200503146; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on July 21, 2017.

/s/
Ronald C. Heselton, Office Assistant II