ALASKA WORKERS' COMPENSATION BOARD

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

SAMI A SAAD, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No(s). 200708366
TRIDENT SEAFOODS CORP, Employer,	)	AWCB Decision No. 14-0027
and	)	Filed with AWCB Anchorage, Alaska On March 3, 2014
LIBERTY MUTUAL INSURANCE CORPORATION, Insurer, Defendants.	)	

Trident Seafoods Corporation's Petition to Dismiss Sami A. Saad's January 14, 2009, workers' compensation claim was heard on February 12, 2014, in Anchorage, Alaska, a date selected on November 21, 2013. Sami Saad (Employee) appeared telephonically, represented himself, and testified. Attorney Jeffrey Holloway appeared and represented Trident Seafoods Corporation and Liberty Mutual Insurance Corporation (collectively, Employer). No other witnesses were called. The record closed at the hearing's conclusion on February 12, 2014.

ISSUES

Employer contends Employee's claim should be dismissed in accordance with AS 23.30.110(c) for failure to request a hearing within two years of Employer's February 13, 2009 post-claim controversion. Employee further contends Employee's claim should be dismissed because he failed to timely request a hearing once a hearing previously scheduled to address his claim was continued.

Employer finally contends that by operation of law dismissal is mandatory because the two-year time bar in AS 23.30.110(c) cannot be tolled for any reason. Employer argues that even if the time bar was tolled for the second independent medical evaluation (SIME), the time for requesting a hearing began to run again once the SIME report was received, and Employee allowed the time to run without requesting a hearing.

Employee contends he has done everything necessary to preserve his claim and it should not be dismissed under AS 23.30.110(c).

Should Employee's claim be dismissed in accordance with AS 23.30.110(c)?

FINDINGS OF FACT

The following findings of fact and factual conclusions, limited to those necessary to determine the narrow issue presented, are established by a preponderance of the evidence:

1. On January 1, 2009, Employee filed a workers' compensation claim (claim) seeking medical costs, temporary total disability (TTD) benefits, permanent partial impairment (PPI) benefits, and alleging unfair and frivolous controversion, for bilateral hand injuries, specifically bilateral tendon sheath ganglions, resulting from working long hours and performing repetitive work in Employer's fish processing plant in 2007. (Claim).
2. On February 13, 2009, Employer filed an Answer and a Controversion Notice denying compensability. (Answer, Controversion Notice, January 14, 2009). The Controversion Notice advised Employee:

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

3. On July 9, 2009, the first prehearing conference in this case was held. It was conducted by an experienced hearing officer. Process and procedure were explained to the parties "in some detail." The parties stipulated to a second independent medical evaluation (SIME), and deadlines for filing medical records were established. Employee was provided with a copy of the official pamphlet "Workers' Comp and You," and a list of claimants' attorneys maintained by the Division of Workers' Compensation. Employee was cautioned as follows:

> The EE is reminded 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 for Hearing" in accordance with 8 AAC 45.070, requesting a hearing 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 has been filed and is dated **2/13/09** and agree a hearing must be requested by **2/13/11**, barring some other ground to extend the deadline. Some events in the case may toll (extend) this deadline as to some claims and the controversion is not effective until it is filed with the board, however, the parties are urged to remain aware of this earliest deadline **2/13/11** and the possibility of dismissal if a hearing is not timely requested. (Emphasis in original).

(Amended Prehearing Conference Summary, July 28, 2009).

4. Thereafter, prehearings were conducted on February 16, 2010, April 9, 2010, April 16, 2010, June 1, 2010, June 24, 2010, October 13, 2010, and November 30, 2010, all of which Employee attended. There was no discussion of .110(c) at any of these prehearings, nor was the boilerplate .110(c) warning language repeated in any of those conference summaries. (Prehearing conference summaries, stated dates).
5. Employer filed additional controversion notices on April 9, 2010 and June 1, 2010. These controversion notices contained a different version of the .110(c) dismissal advisory:

> When must you request a hearing?
> Within two years after the date the insurer/employer filed this controversion notice, you must request a hearing before the AWC Board. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within the two years. Before requesting a hearing, you should file a written claim.

(Controversion Notices, filed April 9, 2010, June 1, 2010).

6. The SIME agreed to at the July 9, 2009 prehearing conference was initially scheduled to take place on January 5, 2010. Employee was out of the country seeking medical care in the United Arab Emirates (UAE) and failed to attend. After the SIME was first re-scheduled for April 24, 2010, it was re-scheduled again, for May 29, 2010, because Employee was again out of the country. (*Saad v. Trident Seafoods, Inc*., AWCB Decision No. 10-0093 (May 21, 2010) (*Saad I*).

7. Employer experienced difficulty obtaining unaltered medical releases from Employee, and obtaining medical records from treating physicians and facilities in the UAE, and ultimately petitioned to delay the SIME report until Employee's records from abroad were received. (Prehearing conference summaries, February 16, 2010, April 9, 2010, April 16, 2010).
8. On May 21, 2010, Employer's petition requesting the SIME report not be completed or issued until Employee's medical records from his care abroad in January and April, 2010 was granted. The SIME remained scheduled for May 29, 2010. (*Saad I*).
9. Employee failed to attend the May 29, 2010 SIME. (Prehearing conference summary, June 24, 2010).
10. On October 13, 2010, another prehearing conference convened for the purpose of re-scheduling the SIME. The parties were informed it would be scheduled within the next 30 days. Employee was advised orally and in writing that should he fail to attend the re-scheduled SIME, the Employer might petition the Board for dismissal of his claim, which might be granted. This caution was repeated in a later prehearing conference summary when the SIME was re-scheduled for December 11, 2010. Employee was further cautioned that his failure to produce relevant medical records or sign releases could also result in dismissal of his claim. Employee attended the SIME as scheduled. (Prehearing conference summaries, October 13, 2010, November 30, 2010, January 25, 2011).
11. On December 28, 2010, the board received the SIME report. John J. Lipon, D.O., diagnosed bilateral fibrous nodule or ganglion cyst, proximately caused by his work activities for Employer, and concluded Employee's work injury was the substantial cause of his need for medical treatment. He recommended surgical removal of the ganglion from Employee's right hand, and a cortisone injection for the subsiding ganglion in his left hand. Dr. Lipon opined Employee would reach medical stability four weeks post-surgery. (Prehearing conference summary, January 25, 2011; SIME Report, December 11, 2010).
12. At a January 25, 2011 prehearing conference convened to discuss the SIME report:

> Employer began . . . by stating it was now willing to pay for Employee to have the surgery on his right hand as recommended by the SIME physician Dr. Lipon, a cortisone injection in the left hand, and 4 weeks of temporary total disability (TTD). Additionally, [Employer] would consider additional treatment and indemnity benefits if recommended by the surgeon performing the procedures, and a PPI evaluation upon medical stability. [Employer] made it clear [it] would pay for surgery to be performed in the Seattle area only . . .

> Mr. Saad [orally] amended his 1/14/2009 claim to include payment for out of pocket expenses for treatment since his injury . . . including to Dubai from Seattle . . .
>
> [Employer] and the designee attempted to make it clear to [Employee] he could have his surgery before a hearing is scheduled on the remaining issues in his claim. . .
>
> [Employer] clarified that since this matter was going to be heard on the issues remaining and added to Mr. Saad's claim, [it] wants the board to also hear [its] . . . petition for reimbursement of cancellation fees for the SIME appointment . . . and [orally] asserted an overpayment of TTD of $4,572.04 . . .
>
> Mr. Saad was quite upset his case has not been adjudicated more rapidly; however he failed to understand his case would have moved along more quickly if his SIME appointments had not been missed or rescheduled three times over the course of nearly a year . . . Mr. Saad expressed his dissatisfaction and concerns for over an hour. Ultimately, the designee was able to schedule a hearing on Mr. Saad's claim . . . (Prehearing conference summary, January 25, 2011).

Based on Employee's oral amendment of his claim, his oral request for hearing, Employer's oral petition for reimbursement of overpayment of TTD, and oral non-opposition to the request for hearing, the designee scheduled a hearing on Employee's claim for June 16, 2011. The issues listed for hearing included Employee's January 14, 2009 claim for medical costs, TTD, PPI, unfair and frivolous controversion, harassment by the EME physician, payment for out of pocket expenses for treatment since his injury, travel associated with that treatment including from Seattle to Dubai and from Dutch Harbor to Seattle, and lodging in Washington since his injury, and interest. Also scheduled for hearing were Employer's petition for reimbursement of SIME cancellation fees, and overpayment of TTD. (Prehearing conference summary, January 25, 2011).

13. Employee's January 25, 2011 oral request for hearing was made within two years of Employer's first post-claim controversion notice, filed on February 13, 2009. (Observation).
14. On March 7, 2011, Employer filed a petition to compel Employee to attend a deposition, and to continue the June 16, 2011 hearing. (Petition to Compel, to Continue Hearing, March 6, 2011).
15. Employee did not attend an April 28, 2011 prehearing conference to discuss Employer's petition to compel deposition and continue the hearing date. The conference proceeded in his absence. Employee was ordered to attend a properly noticed deposition. The conference

summary noted that if the deposition required Employee to travel more than 30 miles from his residence, he was to be reimbursed at the rate established by the Board. A hearing on Employer's petition to continue the June 16, 2011 hearing date was scheduled for May 18, 2011. Also at this prehearing, Employer orally withdrew an April 19, 2011 Controversion Notice. (Prehearing conference summary, April 28, 2011).

16. On May 5, 2011, another prehearing conference was convened to review the matters discussed on April 28, 2011. Employee participated telephonically. "Mr. Saad asked what a deposition was, and the designee explained. Mr. Saad stated that he had no problem attending a deposition, but wanted to be paid for his time and for transportation." (Prehearing conference summary, May 5, 2011).
17. On May 20, 2011, good cause was found and Employer's petition to continue the June 16, 2011 hearing was granted. Employee did not oppose Employer's continuance request. *Saad v. Trident Seafoods Corp*., AWCB Decision No. 11-0067 (May 20, 2011)(*Saad II*).
18. *Saad II* advised the parties:

> [B]ecause the continuance here is granted upon Employer's request, the restrictions otherwise imposed by AS 23.30.110(h) do not apply in this case. However, the parties are reminded that a party seeking a hearing after a continuance has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070(b).
> (*Id*. at 7).

19. At an August 4, 2011 prehearing conference, Employer's petition to compel Employee to sign releases and Employee's petition for protective order were considered. The board designee noted Employee's petition for protective order was untimely, but reviewed the proffered releases and found them appropriate. Employee was ordered to sign and within 10 days return to Employer a medical release, an employment records release, a workers' compensation release and a Social Security release. The designee instructed Employee: "failure to sign and return the releases could result in the forfeiture of his benefits or the dismissal of his claim." (Prehearing conference summary, August 4, 2011).
20. An October 20, 2011 prehearing conference was convened to consider Employer's August 26, 2011 petition to dismiss Employee's claim for failure to return the releases ordered at the August 4, 2011 prehearing conference. Employee did not appear. Acknowledging it had not filed an Affidavit of Readiness for Hearing (ARH), Employer stated it wanted a hearing on

its petition to dismiss. The designee, noting his authority under 8 AAC 45.070(b)(3), set Employer's petition to dismiss for hearing on December 7, 2011. (Prehearing conference summary, October 20, 2011).

21. On November 10, 2011, another prehearing was convened with Employee present, to revisit the discussion from the October 20, 2011 prehearing. Employer explained it had petitioned to dismiss Employee's claim because he had not timely returned the releases he had been ordered to sign, when they were finally returned, the Social Security and employment records releases had been altered, and the workers' compensation release had not been signed. Employee stated he would sign whatever releases Employer sent him. The designee instructed the parties' their arguments would be considered at the December 7, 2011 hearing on Employer's petition to dismiss. (Prehearing conference summary, November 10, 2011).
22. At the December 7, 2011 hearing, the board ruled orally, and set a timetable within which unaltered releases were to be delivered to Employer or Employee's claims would be dismissed without further action. Employee's correct address was established. The oral order was followed up with a letter summarizing the timeframes established in the oral order, with a formal decision and order to follow. The letter was sent by both regular and certified mail to Employee's address of record. Employee was notified his failure to claim the certified mail copy of the letter would not excuse any failure to comply with the established timeframes. Employer was ordered to immediately send to Employee the releases he was previously ordered to sign, and provide the board proof of mailing. Employee was ordered to immediately sign the releases, without altering or limiting their efficacy, and return them to Employer. Employee was strongly encouraged to return the releases by certified mail should it become necessary for him to prove they were timely mailed and received. Employer was ordered to notify the board and Employee upon receipt of the unaltered releases. Employee was informed no further extensions of time to return the signed releases would be granted. If the signed, unaltered releases were not delivered to Employer by December 27, 2011, Employee's case would be dismissed without further proceedings. (*Saad v. Trident Seafoods Corp.*, AWCB Decision No. 12-0009 (January 12, 2012 at 11) (*Saad III*).
23. On December 9, 2011, Employer filed an affidavit confirming the releases in question were mailed to Employee by certified mail on December 8, 2011, to the Employee's address of record, and attaching a copy of the letter and releases sent. (*Id*. at 11).

24. On or about December 20, 2011, Employee called the board office stating he had not received the releases from Employer and asking how to proceed. (*Id.* at 12).
25. A prehearing conference was convened on December 21, 2011. Employee confirmed he had not received the releases ordered mailed to him on December 8, 2011. The designee noted other recent mailings from the board to Employee had been returned, and the online U.S. Postal Service Track & Confirm service indicated the mail was being returned because Employee had moved and left no forwarding address. Employee stated the post office box was in his name, he had not moved, and he was receiving other mail there. The designee recommended Employee contact the Postal Service about the problem, but noted there was not time to re-mail the releases for Employee to timely return them as ordered. The designee suggested faxing the releases, but Employee asked that they be emailed. The designee stated he would have Division staff scan the releases and email them to Employee immediately following the hearing. The designee strongly suggested Employee send the releases to Employer by certified mail as quickly as possible. Employer objected to the prehearing as inappropriate given that the hearing had taken place and Employer had complied with the board's oral order to mail the releases to Employee by December 8, 2011. The designee noted Employer's concern, but stated his belief that the *Richards* case obligated the board to respond to Employee's inquiry concerning how to proceed to protect his rights. The releases were emailed to Employee after the prehearing conference concluded. (*Id.*)
26. On December 28, 2011, Employer filed an affidavit stating all releases were received from Employee on December 27, 2011, and all were unaltered and signed. (Affidavit of Marcia Roadifer, December 27, 2011).
27. On January 12, 2012, *Saad III*, addressing Employer's petition to dismiss Employee's claim for his failure to return releases, issued. The panel enumerated actions Employee has undertaken which have significantly delayed these proceedings:
    a. Failure to timely return releases in January, 2010, necessitating a petition to compel;
    b. Failure to attend the SIME scheduled with Dr. Wilson on January 5, 2010
    c. Scheduling travel overseas when a hearing had been scheduled in April, 2010;
    d. Failure to attend the SIME scheduled with Dr. Lipon on April 24, 2010;
    e. Failing to appear at the re-scheduled hearing in May, 2010;

f. Failure to comply with informal discovery by refusing to attend a deposition, necessitating a petition to compel;
g. Failure to attend a properly scheduled prehearing conference on April 28, 2011;
h. Failure to return releases in May, 2011, necessitating a petition to compel;
i. Failure to return unaltered releases after a board order, resulting in the petition to dismiss;
j. Failure to attend a properly noticed prehearing conference to address the petition to dismiss; and.
k. Failure to claim certified mail.

(*Saad III* at 18).

28. The panel noted, however, that once Employee was ordered to attend his deposition, was ordered to attend the SIME, and was ordered to sign unaltered releases or face dismissal of his claim, he did so. Accordingly, the panel found Employee had not wilfully violated a board order, and his case would not be dismissed. The panel, however, "strongly cautioned" Employee, "that further actions on his part which unreasonably thwart[ed] Employer's efforts to investigate and prepare its case, or which unnecessarily delay[ed] these proceedings, may support a successful petition to dismiss in the future." (*Id*. at 19).
29. Employer's instant petition to dismiss Employee's claim does not allege Employee has thwarted its efforts to investigate and prepare its case, or unnecessarily delayed these proceedings. (Observation).
30. Since Employer's petition to continue the June 16, 2011 hearing was granted in *Saad II*, neither party has filed an ARH for or otherwise requested a hearing on either Employee's claim, or Employer's requests for reimbursement of a TTD overpayment and SIME cancellation fees. (Record).
31. At Employee's request, on November 21, 2013, another prehearing conference was convened. The board designee noted there did not appear to be any petitions that could be resolved at a prehearing and asked if a hearing should be set on Employee's claim. Employer objected, saying Employee had not filed an ARH, and his time to do so under AS 23.30.110(c) had expired. Employer made an oral petition to dismiss Employee's claim, and argued it should be heard before a hearing on the merits of Employee's claim was scheduled for hearing. Based on Employer's oral petition and oral request for hearing on the

petition, a hearing on Employer's oral petition to dismiss Employee's claim under AS 23.30.110(c) was set for February 12, 2014. (Prehearing conference summary, November 21, 2013).

32. Employer has not identified nor argued it suffered any prejudice by the failure of this case to have proceeded to hearing to date. (Record).

PRINCIPLES OF LAW

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

1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

2) worker's compensation cases shall be decided on their merits except where otherwise provided by statute;

3) this chapter may not be construed by the courts in favor of a party;

4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

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

AS 23.30.005. Alaska Workers' Compensation Board.

. . .

(h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

. . .

(m) The board may by regulation delegate authority to the director to assist the board in administering and enforcing this chapter.

> **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 . . . and the board may hear and determine all questions in respect to the claim.
> . . .
> (c) Before a hearing is scheduled, a party seeking a hearing shall file a request for hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. After completion of the hearing the board shall close the hearing record. If a settlement agreement is reached by the parties less than 14 days before the hearing, the parties shall appear at the time of the scheduled hearing to state the terms of the settlement agreement. Within 30 days after the hearing record closes, the board shall file its decision]. . . 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.
> . . .
>
> (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.

AS 23.30.110(c) requires an employee to prosecute a claim in a timely manner. If an employee does not request a hearing within two years of an employer's filing a notice controverting an employee's claim, the employee's claim is denied. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). 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).

However, the only act required of the employee to prosecute his claim is to file a request for hearing within two years of controversion; the board "may require no more of the employee." *Tonoian v. Pinkerton Security,* AWCAC Decision No. 029 (January 30, 2007) at 9, citing *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 913 (Alaska 1996) and *Huston v. Coho Electric*, 923 P.2d 818, 820 (Alaska 1996). An employee's timely filed hearing request permanently tolls section .110(c). *Huston* at 820.

Once a hearing has been requested on a claim, it is mandatory**,** not discretionary, that a hearing be scheduled and held. *Summers v. Korobkin Construction,* 814 P.2d 1369, 1371 (Alaska 1991). Likening .110(c) to a statute of limitations defense, the Alaska Supreme Court in *Tipton* reiterated that such defenses are "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Tipton* at 912-913. *Tipton* rejected the employer's assertion an employee must request a hearing every time a hearing is cancelled. *Id.*

Examining the legislative history of §110(c), the Court in *Kim v. Alyeska Seafoods, Inc.*, concluded the primary purpose of requiring an affidavit of readiness for hearing was to create guidelines for the orderly conduct of public business. 197 P.3d 193 (Alaska 2008) at 197. It held §110(c) is a procedural statute which "sets up the legal machinery through which a right is processed" and "directs the claimant to take certain action following controversion," and is thus directory only, not mandatory. In the absence of significant prejudice to the other party, substantial compliance with the statute, rather than strict compliance, is necessary. 197 P.3d 193, 196 (Alaska 2008). The *Kim* court reaffirmed *Tipton,* again likening AS 23.30.110(c) to statutes of limitations and noting their disfavor. *Id.* at 198. The court in *Kim* allowed that Mr. Kim's timely request for a continuance, and truthful affidavit explaining why he was not then prepared for hearing, was but one example of "substantial compliance" with the .110(c) requirement a request for hearing and affidavit of readiness be filed within two years of controversion. *Id.*

"Substantial Compliance rule." See Substantial Performance doctrine. *Black's Law Dictionary,* Eighth Edition (2004).

"Substantial Performance doctrine." The rule that if a good-faith attempt to perform does not precisely meet the . . . statutory requirements, the performance will still be considered complete if the essential purpose is accomplished . . . *Black's Law Dictionary*, Eighth Edition (2004).

> **8 AAC 45.065. Prehearings**. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on
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> (1) identifying and simplifying the issues . . . .
>
> (2) amending the papers filed or the filing of additional papers;
>
> (3) accepting stipulations, requests for admissions of fact, or other documents that may avoid presenting unnecessary evidence at the hearing;
>
> (4) limiting the number of witnesses, identifying those witnesses, or requiring a witness list in accordance with 8 AAC 45.112;
>
> (5) the length, filing, and the date for service of legal memoranda if different from the standards set out in 8 AAC 45.114;
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> (6) the relevance of information requested under AS 23.30.107(a and AS 23.30.108;
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> (7) petitions to join a person;
>
> (8) consolidating two or more cases, even if a petition for consolidation has not been filed; . . .
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> (9) the possibility of settlement or using a settlement conference to resolve the dispute; . . .
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> (10) discovery requests; . . . .
>
> (11) the closing date for discovery;
>
> (12) the closing date for serving and filing of video recording s, audio records
> . . .
>
> (15) other matters that may aid in the disposition of the case.
>
> (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.

…

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). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.
. . .

(b) Except as provided in this section and 8 AAC 45.074 (c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074 (b). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.

(1) A hearing is requested by using the following procedures:
. . .

(C) For an appearance in-person at the hearing, except for a venue determination, a party must file an affidavit of readiness in accordance with (2) of this subsection requesting an in-person hearing.

(2) Except as provided in (1) of this subsection, a party may not file an affidavit of readiness for hearing until after the opposing party files an answer under 8 AAC 45.050 to a claim or petition or 20 days after the service of the claim or petition, whichever occurs first. If an affidavit is filed before the time set by this paragraph,

(A) action will not be taken by the board or designee on the claim or petition; and

(B) the party must file another affidavit after the time set by this paragraph.

(3) If the board or designee determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing, the board or

designee will give notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e).

(c) To oppose a hearing, a party must file an affidavit of opposition in accordance with this subsection. If an affidavit of opposition to a hearing . . . is filed . . . , the board or its designee will, within 30 days after the filing of the affidavit of opposition, hold a prehearing conference. In the prehearing conference the board or its designee will schedule a hearing date within 60 days or, in the discretion of the board or its designee, schedule a hearing under (a) of this section on a date stipulated by all the parties. If the affidavit of opposition is not in accordance with this subsection, and unless the parties stipulate to the contrary, the board or its designee will schedule a hearing within 60 days, and will exercise discretion in holding a prehearing conference before scheduling a hearing.

. . .

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing . . .

(c) Except for a continuance or cancellation granted under (b)(1)(H) of this section,

(1) The affidavit of readiness is inoperative for purposes of scheduling another hearing;
(2) The board or its designee need not set a new hearing date at the time a continuance or cancellation is granted; the continuance may be indefinite; and
(3) A party who wants a hearing after a continuance or cancellation has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070.

ANALYSIS

Should Employee's claim be dismissed in accordance with AS 23.30.110(c)?

Employer contends Employee's claim should be dismissed under AS 23.30.110(c) for his alleged failure to request a hearing within two years of Employer's first post-claim controversion. The relevant post-claim controversion in this case was filed on February 13, 2009. At the July 9, 2009 prehearing conference at which this date was established, the parties further agreed that barring some event which extended the deadline, the earliest date by which a hearing request must be made without risking dismissal was February 13, 2011.

At the January 25, 2011 prehearing conference, Employee orally amended his claim to include transportation expenses, and requested his claim be set for hearing. Employer did not oppose the

request for hearing. Instead, Employer orally petitioned for reimbursement of an alleged TTD overpayment, and orally requested a hearing on both its oral petition and a pending formal petition for reimbursement of SIME cancellation fees. The parties stipulated to a June 16, 2011 hearing date on all issues. Accordingly, Employer's contention Employee failed to request a hearing within two years of the first post-claim controversion is in error. Employee not only requested a hearing within the prescribed time period, but obtained a hearing date. By timely requesting a hearing on his claim Employee fulfilled his obligation under AS 23.30.110(c). The Board "may require no more of the employee." *Tonoian v. Pinkerton Security,* AWCAC Decision No. 029 (January 30, 2007) at 9, citing *Huston v. Coho Electric,* 923 P.2d 818, 820 (Alaska 1996) and *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 913 (Alaska 1996).

The June 16, 2011 hearing date was later continued at Employer's request. Since that time, neither party has requested the hearing be re-scheduled. Citing AS 23.30.110(h) and *Saad II*, Employer next contends Employee's claim should be dismissed because he failed to timely request a hearing once the previously scheduled hearing was continued. Employer's argument misconstrues AS 23.30.110(h) and *Saad II*'s reference to it. The language of AS 23.30.110(h) is clear and unambiguous. Filing a hearing request "suspends the running of the two-year time period for claim dismissal specified in [.110(c)]." Thereafter, only where an *employee* requests a continuance is the original hearing request rendered inoperative, and the two-year time period resumes its run. And only where an *employee* has requested the continuance must he or she file a subsequent hearing request within the time remaining, or risk dismissal under .110(c).

Where, as here, Employer and not Employee requested the continuance, .110(c) remained tolled and did not resume its run when Employer's continuance request was granted. While AS 23.30.110(h), 8 AAC 45.070(b) and 8 AAC 45.074(c) inform that regardless of who requests a continuance any party seeking a hearing after a continuance is granted must file a new affidavit of readiness for hearing, where a continuance is granted at an employer's request, no .110(c) time clock runs against an employee during the period. Employer's suggestion that irrespective of which party requests the continuance, employee's time under .110(c) continues running once the continuance is granted, misstates .110(h) entirely, by adding a provision to it that simply is

not there. Having timely requested a hearing on January 25, 2011, Employee's time under .110(c) was permanently tolled. *Huston* at 820.

To distinguish this case from *Kim v. Alyeska Seafoods, Inc*., 197 P.3d. 193 (Alaska 2008), where the employee's timely continuance request constituted substantial compliance with .110(c), Employer's contends that here Employee "did not file anything."[1] The contention is inaccurate. At the January 25, 2011 prehearing conference Employee orally stated a readiness for and request for hearing. The SIME report had been received. Employer did not object to setting the hearing, and in fact orally petitioned for an overpayment of TTD, and orally requested its oral petition, as well as a pending formal petition for reimbursement of SIME cancellation fees, be included among the issues for hearing.

If Employer's contention is that requests made by a party orally at prehearing conferences are invalid, its argument contradicts customary board practice, and Employer's own conduct throughout this very case. Business transacted at prehearing conferences, oral or otherwise, is conducted under authority of AS 23.30.005 and 8 AAC 45.065. Accepting oral petitions, amendments to pleadings, and requests for hearing at prehearing conferences ensures that process and procedure under the Act is as simple and summary as possible. The practice promotes the Act's mandate that it be interpreted to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers. Indeed, Employer has benefitted from the practice on multiple occasions in this case. At the January 25, 2011 prehearing Employer orally petitioned for reimbursement of an alleged TTD overpayment, and orally requested a hearing on this and another petition. At an April 28, 2011 prehearing Employer orally withdrew an April 19, 2011 Controversion. At an October 20, 2011 prehearing, Employer, readily acknowledging it had not filed an affidavit of readiness for hearing, orally requested and obtained a hearing on its August 25, 2011 petition to dismiss for failure to return releases. At a November 21, 2013 prehearing, Employer orally petitioned to dismiss Employee's claim under AS 23.30.110(c), and again without filing an ARH orally requested and obtained a hearing on that oral petition. In its hearing brief Employer confirms and endorses its own practice of filing oral petitions and oral ARHs at prehearing conferences,

[1] Hearing Brief of Trident Seafoods Corporation, February 5, 2014, at 9.

but nowhere explains why its oral actions are lawful yet Employee's are not. Any contention Employee's January 25, 2011 oral request for hearing was invalid is unpersuasive. At the very least, Employee's, and for that matter Employer's unopposed requests for hearing made orally at prehearing conferences, constitute substantial compliance with the requirement a formal request for hearing and affidavit of readiness be filed before a hearing will be scheduled. Done within two years of the first post-claim controversion, Employee's oral request for hearing satisfied his.110(c) obligation to timely request a hearing on his claim.[2]

CONCLUSIONS OF LAW

Employee's claim will not be dismissed under AS 23.30.110(c).

ORDER

1. Employer's petition to dismiss Employee's claim under AS 23.30.110(c) is denied.
2. **A prehearing conference is scheduled with board designee Ronald Ringel on March 24, 2014, at 10:00 a.m.** The purpose of the prehearing conference is to set Employee's January 14, 2009 workers' compensation claim for hearing.

[2] This resolution makes unnecessary consideration of Employer's remaining alternative arguments: that by operation of law dismissal is mandatory because the two-year time bar in AS 23.30.110(c) cannot be tolled for any reason; and even if the time bar is tolled for the SIME, the time began to run again once the SIME report was filed, and Employee allowed the time to run without requesting a hearing. The first post-claim controversion was filed February 13, 2009, making February 13, 2011 the earliest date by which Employee must request a hearing. The SIME in this case was completed, and the SIME report received on December 28, 2010. Employee requested a hearing on January 25, 2011. The SIME process had no effect on the section .110(c) timeframe in this case.

Dated in Anchorage, Alaska on March 3, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Linda M. Cerro, Designated Chair

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Ron Nalikak, Member

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Mark Talbert, 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.

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.

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of SAMI A. SAAD, employee / claimant; v. TRIDENT SEAFOODS CORPORATION, employer; LIBERTY MUTUAL INSURANCE CORPORATION, insurer / defendants; Case No. 200708366; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 3, 2014.

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Sertram Harris, Office Assistant II