ALASKA WORKERS' COMPENSATION BOARD

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

ANDREW J. STURTEVANT, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 200715679
CHUGACH MGT. SVCS. -TAPS WRAP UP, Employer,	)	AWCB Decision No. 14-0082 Filed with AWCB Fairbanks, Alaska on June 13, 2014
and	)	
LIBERTY INSURANCE CORP., Insurer, Defendants.	)	

Chugach Management Services' (Employer) November 4, 2013 petition to dismiss was heard in Fairbanks, Alaska on March 27, 2014, a date selected on January 7, 2014. Andrew Sturtevant (Employee) appeared telephonically and testified on his own behalf. Attorney Martha Tansik personally appeared and represented Employer. The hearing began before a two-member panel, which constituted a quorum under the Act. As a preliminary matter, Employee requested the hearing be continued on the basis he was seeking legal representation and the attorney he consulted with had not yet reviewed his case. The hearing was recessed so the two panel members could deliberate Employee's request. However, they were unable to reach a consensus decision and the hearing re-convened so the chair could inform the parties attempts would be made to secure the participation of a third panel member, at which point the hearing again recessed.

Attempts to secure the participation of a third panel member were successful and the hearing reconvened before a full panel. After receiving testimony from the attorney with whom Employee

had consulted, and entertaining additional argument from the parties, the hearing again adjourned so the full panel could deliberate Employee's request for a continuance. A quorum of the panel decided to deny the continuance, at which point the hearing reconvened to hear Employer's petition to dismiss. The record closed at the hearing's conclusion on March 27, 2014.

ISSUES

Employee requested the hearing be continued on the basis he was seeking legal representation and the attorney with whom he consulted had not yet reviewed his case. He contended he could not represent himself in defense of Employer's petition to dismiss and also stated he did not think it was fair for the hearing to proceed.

Employer opposed granting Employee a continuance and contended "shopping for counsel" is not recognized as good cause for a continuance under the regulations. It contended the hearing was properly noticed and further contended a continuance would be inefficient, since there was "nothing new" here. According to Employer, Employee had been controverted since 2008 and he simply failed to pursue his claim.

1) Was Employee's request for a continuance properly denied?

Employer contends this case began in 2007, and in 2008, it controverted Employee following an employer's medical evaluation (EME). It contends Employee filed a claim three years later, and on October 21, 2011, it filed its answer and a post-claim controversion. Employer contends Employee has been provided notice of his statutory obligation to request a hearing in four prehearing conference summaries before the expiration of the statute of limitations, and in one since. It also contends Employee was provided notice of the limitations period for seeking a hearing in its October 21, 2011 controversion, yet he has still not requested a hearing or otherwise substantially complied with the statute. Therefore, Employer contends, Employee's claim should be dismissed under AS 23.30.110(c).

Employee acknowledges he was not diligent in pursuing his claim, but contends he did not know what he should do. He thought pursuing medical treatment was sufficient action to preserve his

claim. Employee contends his claim should not be dismissed because there is "no way [he] can go above [his] pay grade up against legalese like this."

2) Should Employee's October 5, 2011 claim be denied under AS 23.30.110(c)?

FINDINGS OF FACT

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

1) Employee has a long history of cervical spine complaints. (Record).

2) On June 1, 1987, Employee reported left arm pain with numbness over his left thumb. He was assessed with referred pain from his cervical spine and cervical traction was ordered. (Alaska Native Medical Center report, June 1, 1987).

3) On July 23, 1987, left C6 radiculopathy was diagnosed and Employee was reported to be improving. (Alaska Native Medical Center report, July 23, 1987).

4) On October 5, 1992, Employee was treated for a cervical spine injury after standing up and jamming his head into a light fixture. A cervical spine magnetic resonance imaging (MRI) study showed possible muscle spasm, loss or normal lordotic curve and slight loss of height at C6, which had been noted on an earlier study. (Alaska Native Medical Center reports, October 5, 1992; October 7, 1992 and Radiology report, October 5, 1992).

5) On November 3, 1992, a cervical spine MRI showed spondylosis at C5-5 and C6-7 with focal konosis [sic] and posterior disc bulging. Spinal fluid was noted impressing the cord. The disc bulge at C5-6 was associated with moderately severe spinal canal stenosis and neural foramina stenosis. The disc bulge at C6-7 was causing impingement of the C7 nerve root. (MRI report, November 3, 1992).

6) On January 22, 1993, Employee continued to complain of intermittent pain, which radiated into both elbows and numbness and tingling radiating into his left hand, which involved multiple digits. (Alaska Native Medical Center report, January 22, 1993).

7) On January 22, 1993, Employee was diagnosed with herniated cervical discs at C5-6 and C6-7. (Alaska Native Medical Center report, January 22, 1993).

8) On January 25, 1993, Employee underwent a two-level discectomy and fusion at C5-6 and C6-7. (Operative report, January 25, 1993).

9) There is a 10-year gap in the medical record concerning Employee's cervical spine. (Record; observations).

10) On June 18, 2003, cervical spine x-rays showed moderate degenerative disc disease at C6-7 with some loss of height, early marginal spondylosis and bilateral foraminal narrowing at C6-7. (X-ray report, June 18, 2003).

11) On March 21, 2004, Employee was referred to physical therapy for instruction on a home exercise program. (Chadwick report, March 21, 20014).

12) On May 21, 2004, nerve conduction and electromyography (EMG) studies were normal but suggestive of a left C6 or C7 nerve root irritation. (EMG report, May 21, 2004).

13) On May 25, 2004, a cervical spine MRI showed abnormal increased signal strength at C5-6, without clear etiology, but suggestive of prior surgery at this site. Considerable degenerative disc disease was noted at C6-7 with mild right-sided foraminal narrowing, with no evidence of protrusion. (MRI report, May 25, 2004).

14) On June 1, 2004, based upon computed tomography (CT) and MRI studies, Employee was assessed to have clinical evidence of C6-7 radiculopathy "without surgical implication" to his dysesthesias. (Alaska Native Medical Center report, June 1, 2004).

15) On September 23, 2007, Employee was riding on a crew bus that hit a bump causing Employee to jar his neck. He reported right shoulder pain radiating into his right hand. (Report of Occupation Injury or Illness, September 23, 2007).

16) On December 12, 2007, Employee sought treatment at Fairbanks Urgent Care. He was assessed with neck strain and right-sided parathesias. (Fairbanks Urgent Care report, December 12, 2007). A cervical spine MRI showed chronic C5-6 discectomy with solid vertebral body anklylosis; moderate to severe C4-5, and moderate C3-4 spondylosis due to a broad-based disc/osteophyte bulge without impingement; moderate C6-7 spondylosis without impingement; severe bilateral C3-4, bilateral C4-5, right C6-7 and moderate left C6-7 neural foraminal narrowing due to lateral disc encroachment with likely nerve root irritation. Employee was released to work as tolerated. (Fairbanks Urgent Care report, December 12, 2007; MRI report, December 12, 2007; Release to work sheet, December 12, 2007).

17) On December 13, 2007, Employee declined physical therapy and advised staff at Fairbanks Urgent Care he would follow-up with treatment at home in Wrangell, Alaska with Margaret Torreano, M.D. (Fairbanks Urgent Care report, December 13, 2007).

18) On December 17, 2007, Employee began treating at Tideline Clinic in Wrangell. Dr. Torreano diagnosed right shoulder radiculopathy and planned to refer Employee for a neurosurgical consultation. Employee was released from work and prescribed Vicodin. Employee continued to follow-up at Tideline clinic over the course of the next seven months complaining of ongoing right arm pain. He was repeatedly taken off work and prescribed additional Vicodin. (Tideline Clinic reports, December 17, 2007; January 9, 2008; January 23, 2008; March 21, 2008; April 8, 2008; April 22, 2008; May 21, 2008; June 3, 2008).

19) On March 21, 2008, cervical spine x-rays showed an intact anterior fusion at C5-6 and degenerative disc disease at C6-7 with some foraminal narrowing. They did not show any acute cervical findings or significant changes since a 2003 study. (X-ray report, March 21, 2008).

20) On June 17, 2008, Employee saw Louis Kralick, M.D., a neurosurgeon in Anchorage. Dr. Kralick diagnosed cervical degeneration, spondylosis without myelopathy, stenosis and neck pain. He took Employee off work indefinitely and recommended disc excision and fusion at C6-7 and possible disc replacement at C4-5. Employee wished to think about the surgery and planned to call Dr. Kralick's office when he was ready to schedule, pending workers' compensation approval. (Kralick report, June 17, 2008).

21) On August 15, 2008, Thomas Dietrich, M.D. performed an employer's medical evaluation (EME). Dr. Dietrich thought the 2007 work injury was the substantial cause of right upper extremity radiculopathy, most likely involving the C5 nerve root, which combined with a preexisting condition to produce the need for treatment. However, he opined the work injury only resulted in a temporary change to Employee's condition. Dr. Dietrich stated Employee was medically stable and had not incurred a permanent partial impairment (PPI). Because Employee's symptoms had improved since seeing Dr. Kralick, Dr. Dietrich also stated there was "no compelling reason" for Employee to proceed with surgery, although he did acknowledge Employee's C5 nerve root symptoms could reoccur in the future. (Dietrich report, August 15, 2008).

22) On August 28, 2008, Employer controverted reimbursement of travel expenses based on a lack of documentation. The controversion notice advised Employee he might lose his right to controverted benefits if he did not request a hearing within two years of the notice. (Controversion Notice, August 28, 2008).

23) On September 8, 2008, Employer controverted medical, indemnity and PPI benefits based on Dr. Dietrich's August 15, 2008 EME report. The controversion notice advised Employee he might lose his right to controverted benefits if he did not request a hearing within two years of the notice. (Controversion Notice, September 8, 2008).

24) There is a break in the medical record until 2011, during which Employee moved to Massachusetts. (Record; observations).

25) On June 7, 2011, Employee had a telephone conversation with board staff. The event notes in the workers' compensation electronic database state: "In juno rec'd phone call from A. Sturtevant req. claim form for appeal & Copy Req./Release of Records sent 06/08/2011 to [personal information omitted]." (Workers' Compensation Division electronic database event entry; June 7, 2011).

26) On September 29, 2011, Employee wrote a four-page letter to the workers' compensation board objecting to the EME, EME questions, controvsersion of his benefits, the adjuster's handling of his case and further explaining his cervical spine symptoms, his need for surgery and how the denial of benefits had affected him. Towards the end of the letter, he wrote: "At this time I would ask that you would please allow this case to be re-opened, re-addressed, re-visited or whatever you call it so that I may finally get the appropriate treatment of which I have been denied, for no apparent good reason." Employee signed and dated his letter on the last page. Employee's letter does not contain proof of service and was filed on October 5, 2011. (Employee letter, September 29, 2011; observations).

27) On October 5, 2011, Employee also filed an unsigned, undated claim seeking TTD from August 2008 continuing, medical and transportation costs, penalty, interest and seeking a finding of unfair or frivolous controversion. (Employee's Claim, undated).

28) On October 18, 2011, Employee sought treatment for cervical spine symptoms at Pioneer Spine and Sports Medicine, where he was seen by Raymond Auletta, M.D. He reported he originally hurt his neck while working in Alaska, where he underwent a "failed" two-level cervical fusion. Employee stated his cervical symptoms completely resolved and has near complete resolution of symptoms in his arm. He also relayed information regarding the instant work injury. Employee reported seeing a number of physician's in Alaska, including a neurosurgeon who recommended surgical decompression and repair of the "failed" fusion, "which apparently was not covered by his workers comp carrier." He stated he had not had

treatment for his cervical symptoms since 2007, but had had persistent neck and intermittent upper extremity parathesias since. Dr. Auletta suspected Employee had carpel tunnel syndrome and, perhaps, cervical radiculopathy. Dr. Auletta also thought Employee's upper extremity pain radiating from his neck may support a "double crush" scenario. (Auletta report, October 18, 2011 (quotations in original)).

29) On October 20, 2011, x-rays were taken of Employee's cervical spine. They showed a fusion of the C5-6 vertebral bodies and moderate disc space narrowing at C6-7 with endplate spurring. There was moderate bilateral neural foraminal narrowing left greater than right at C4-5 and C6-7, and moderate facet arthropathy from C3-4 through C6-7. (X-ray report, October 20, 2011).

30) On October 21, 2011, Employer answered Employee's October 5, 2011 claim denying liability for all benefits. (Employer's Answer, October 21, 2011).

31) On October 21, 2011, Employer controverted all benefits based on Dr. Dietrich's August 15, 2008 EME report and various limitations defenses. Employer's controversion notice was filed on October 24, 2011 and the filed copy does not contain time limitations notices. (Controversion Notice, October 21, 2011; observations).

32) On October 26, 2011, Employee returned to Dr. Auletta, who reviewed the x-rays. Dr. Auletta recommended physical therapy, but Employee stated "I don't understand what that's going to do for me." Dr. Auletta noted Employee "really does not seem interested in conservative therapy," but "appears somewhat fixated on the fact that a neurosurgeon in Alaska 4 years ago told him that he needs neck surgery. Dr. Auletta thought he might refer Employee to a neurosurgeon in the future. (Auletta report, October 26, 2011).

33) On October 29, 2011, a cervical spine MRI study was performed. The MRI showed a complete fusion at C5-6 with marked disc narrowing at C6-7, a small disc protrusion at C2-3, mild disc bulging at C3-4, and a small disc protrusion at C4-5. In addition to the disc narrowing at C6-7, minimal posterior osteophyte formation and disc bulging was also present, as well as mild canal stenosis and neural foraminal narrowing. (MRI report, October 29, 2011).

34) On November 4, 2011, Employee underwent electrodiagnostic testing, which did not show evidence of cervical radiculopathy or median neuropathy. (Electrodiagnostic report, November 4, 2011).

35) There is a nearly an 11 month break in the medical record pertaining to treatment of Employee's cervical spine symptoms. (Record; observations).

36) On November 18, 2011, the first prehearing conference on Employee's claim was held. Employee did not appear. Workers' Compensation Division staff attempted to telephone Employee prior to commencing the conference but did not receive an answer. Employer contended it would have liked Employee to have participated since it had numerous questions regarding Employee's claim and recent medical treatment. The summary sets forth the following notices under its "Action" section:

> The board designee provided Employee with this prehearing conference summary a copy of the pamphlet, Workers Compensation and You, which is also available at the website http://www.labor.state.ak.us/wc.
>
> ATTORNEY LIST: The board designee provided Employee with a list of attorneys with this prehearing conference summary. Should Employee wish to retain an attorney and the attorney agrees to take Employee's case, Alaska workers' compensation statutes and regulations provide for the payment of Employee's attorney if Employee prevails at hearing. If Employee does not prevail at hearing, the attorney is precluded by regulation from charging more than $300 total for representation of Employee. Most attorneys on the board's list do not charge an initial consultation fee or waive the fee if employees are unable to pay.
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> The board designee encourages the parties to seek the assistance of a Workers' Compensation Officer at (907) 4451-2889 (Fairbanks), (907) 269-4980 (Anchorage) or toll free at (877) 783-4980, if a party has any questions pertaining to this case.
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> No additional prehearing conferences were set. Either party may request another prehearing conference by submitting a Request for Conference form available at the website http://www.labor.state.ak.us/wc.
>
> **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, November 18, 2011) (emphasis in original).

37) The November 8, 2011 prehearing conference summary sent to Employee was not returned. (Record; obervations).

38) On January 19, 2012, Employer filed a petition to compel based on Employee's failure to sign and return releases. Employer attached a copy of a signed, certified mail return receipt (green card) to its petition evidencing receipt of its releases at a post office box in Wrangell, Alaska. (Employer's petition, January 17, 2012).

39) On July 5, 2012, Employer filed an affidavit of readiness for hearing (ARH) that did not specify a claim or petition to be heard. Employer's ARH was returned for this reason. (Employer's ARH, July 3, 2012; Board letter, July 9, 2012).

40) On October 2, 2012, Employee returned to Pioneer Spine and Sports Medicine complaining of neck and right arm pain. Karl Fuller, PA-C, reviewed Employee's MRI, x-rays and electrodiatgnostic studies and accessed post laminectomy syndrome, cervical intervertebral disc degeneration and cervical spondylosis without myelopathy. PA-C Fuller discussed physical therapy and trial facet injections with Employee, who indicated he did not want to consider conservative treatment options. Employee stated he "just wants to get it fixed with surgery." A surgical consult was planned. (Fuller report, October 20, 2012).

41) On October 15, 2012, Employer filed an ARH on its January 17, 2012 petition to compel. (Employer's ARH, October 11, 2012).

42) On November 19, 2012, a prehearing conference was held. Employee did not appear. Workers' Compensation Division staff telephoned Employee prior to commencing the conference and Employee contended he was ill and unable to participate. He also contended he did not receive the prehearing conference notice. Employee's notice, which had been sent to a post office box in Wrangell, Alaska, had been returned as "Not Deliverable as Addressed, Unable to Forward." The summary noted Employee's current address of record, which was in North Hampton, Massachusetts. Employer contended the conference should proceed because Employee had not signed and returned its releases. It also contended it had filed a petition to compel and an ARH on its petition. The designee and Employer agreed to set a follow-up prehearing conference at which time the designee would make a determination on Employer's

petition to compel. Employer agreed to send another set of releases to Employee's address of record in Massachusetts. (Prehearing Conference Summary, November 19, 2012; Prehearing Conference Notice, October 29, 2012).

43) The November, 19, 2012 prehearing conference summary sets forth the same AS 23.30.110(c) notice set forth in the November 18, 2011 summery. (Prehearing Conference Summary, November 19, 2012).

44) The November 19, 2012 prehearing conference summary sent to Employee was not returned. (Record; observations).

45) On November 19, 2012, prehearing conference notices for a December 4, 2012 prehearing conference were served on the parties. Employee's notice was sent to his address of record in North Hampton, Massachusetts and was not returned. (Prehearing Conference Notice, November 19, 2012; record; observations).

46) On December 4, 2012, a prehearing conference was held. Employee initially did not appear. Workers' Compensation Division staff telephoned Employee prior to commencing the conference and left a voice mail message. Employer contended it still did not have signed releases from Employee and requested an order compelling Employee to sign its releases. During the conference, Employee telephoned board staff contending he was on his way to get x-rays. He also contended he was not getting notices in the mail. Division staff confirmed with Employee his address of record was correct. Employer contended Employee's address is valid since Employee's wife signed for receipt of the last set of releases it sent. The designee declined to rule on Employer's petition to compel, but included the following notice to Employee in the summary:

> Pursuant to the Alaska Supreme Court's holdings in *Richards* and *Bohlman*, Designee advises Employee of the following "real facts" he is currently aware of that may affect his claims:
>
> **Employee is advised:** AS 23.30.108 provides for the suspension of his benefits until he delivers signed releases. Employee's continued refusal to sign and return releases may lead to the forfeiture of benefits and dismissal of his claim. Employee is encouraged to either sign and return Employer's releases, or file a petition for a protective order with the board.

The designee set a follow-up prehearing conference for December 11, 2012. (Prehearing Conference Summary, December 4, 2012 (emphasis in original)).

47) The December 4, 2012 prehearing conference summary contains the same AS 23.30.110(c) notice the November 18, 2011 and November, 19, 2012 summaries contained. (Prehearing Conference Summary, November 19, 2012).

48) On December 4, 2012, Employer controverted all benefits for Employee's failure to sign and return releases. The controversion advised Employee he might lose his right to controverted benefits if he did not request a hearing within two years of the notice. (Controversion Notice, December 4, 2012).

49) On December 4, 2012, the December 4, 2012 prehearing conference summary and prehearing conference notices for a December 11, 2012 prehearing conference were served on the parties. Employee's notice was sent to his address of record in North Hampton, Massachusetts and was not returned. (Prehearing Conference Notice, December 4, 2012; record; observations).

50) On December 4, 2012, x-rays of Employee's cervical spine were taken and compared to the October 20, 2011 x-rays. The impression was stable postsurgical and degenerative changes. There were no findings of instability. (X-ray report, December 4, 2012).

51) On December 11, 2012, the parties participated in a prehearing conference. Employee contended he had just received a "big packet" in the mail and was working on it. Employer confirmed Employee had received its recent discovery requests on November 27, 2012. Given the passage of time, Employer requested an order compelling Employee to sign and return its releases. Employee contended he would sign and return Employer's releases by the end of the week. The designee issued a ruling granting Employer's petition to compel in part and ordering Employee to sign and return Employer's releases within 10 days. (Prehearing Conference Summary, December 11, 2012).

52) The December 11, 2012 prehearing conference summary sets forth the same AS 23.30.110(c) notice set forth in the November 18, 2011, November, 19, 2012 and December 4, 2012 summaries. It also set forth the same instructions for requesting a conference set forth in the November 18, 2011 summary. (Prehearing Conference Summary, November 19, 2012).

53) The December 11, 2012 prehearing conference summary sent to Employee was not returned. (Record; observations).

54) On December 12, 2012, Employee was evaluated by Charles Mick, M.D. Dr. Mick reviewed Employee's imaging studies and noted the presence of motion between flexion and

extension at C6-7, which he though indicated pseudoarthrosis. He opined the majority of Employee's symptoms related to the pseudoarthrosis at this level. Dr. Mick suggested C6-7 facet joint injections to localize Employee's primary pain generator. If the pseudoarthrosis at C6-7 was isolated as the problem, Dr. Mick thought a fusion at this level "might be very helpful." However, Dr. Mick cautioned adjacent changes were already developing above C5-6 and these could limit the success of a C6-7 fusion. He noted Employee was "eager to proceed with something to the point of tears," and planned to evaluate Employee again following the facet injections. (Mick report, December 12, 2012).

55) On January 23, 2013, Employee underwent bilateral C6-7 facet injections. (Mercy Medical Center report, January 23, 2013).

56) On February 13, 2013, Employee followed up with Dr. Mick and reported a significant improvement in his symptoms following the facet injections. Mr. Mick discussed the proposed C6-7 fusion with Employee in detail. (Mick report, February 13, 2013).

57) On June 11, 2013, Dr. Mick performed a posterior spinal fusion at C6-7. (Operative report, June 11, 2013).

58) On July 25, 2013, Employee was seen by Donna Egan, LPN, for an initial post-op follow-up and reported a 50% improvement in his symptoms. Nurse Egan noted Employee's surgical scar had healed "beautifully" and Employee demonstrated range of motion in his neck bending forward "with no problems," turning to the left side "with no pain," but there was "a little" stiffness and discomfort turning to the right. (Egan report, July 25, 2013).

59) On July 31, 2013, Employee saw nurse Egan at his request. He was concerned about some bilateral paresthesias in his hands and fingers. Dr. Mick examined Employee, who demonstrated good grasp in his hands and a good range of motion in all ten digits. Employee also had good motor strength in both hands. Dr. Mick considered a referral to a hand specialist and a follow-up was planned. (Egan/Mick report, July 31, 2013).

60) On October 15, 2013, x-rays were taken of Employee's cervical spine. They showed no evidence of instability, progressive disc disease or other post-op complication. (X-ray report, October 15, 2013).

61) On November 6, 2013, Employer filed its instant petition to dismiss based on AS 23.30.110(c). (Employer's Petition, November 4, 2013).

62) On November 20, 2013, Employee underwent an initial physical therapy evaluation. (Richard report, November 20, 2013).

63) The medical record does not document treatment past November 20, 2013. (Record; observations).

64) On December 4, 2013, Employer filed an ARH on its November 4, 2013 petition to dismiss. (Employer's ARH, December 2, 2012).

65) On December 9, 2013, prehearing conference notices for a January 7, 2014 prehearing conference were served on the parties. Employee's notice was sent to his address of record in North Hampton, Massachusetts and was not returned. (Prehearing Conference Notice, December 9, 2013; record; observations).

66) On January 7, 2014, a prehearing conference was held. Employee did not appear. Employer's petition was set for hearing on March 27, 2014. The summary sets forth the following notice:

> **Notice to Claimant:**
> 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, January 7, 2014) (emphasis in original).

67) The January 7, 2014 prehearing conference summary was sent to Employee's address of record in North Hampton, Massachusetts and was not returned. (*Id*.; record; observations).

68) On February 21, 2014, hearing notices for the March 27, 2014 hearing on Employer's petition to dismiss were served on the parties. Employee's notice was sent to his address of record in North Hampton, Massachusetts and was not returned. (Hearing Notice, February 21, 2014; record; observations).

69) On March 26, 2014, the day before the scheduled hearing, Employee contacted Division staff in Fairbanks to inquire about a continuance. (Experience).

70) On March 27, 2014, as a preliminary matter at hearing, Employee requested the hearing be continued on the basis he was seeking legal representation and the attorney he consulted with had not yet reviewed his case. He contended he could not represent himself in defense of Employer's petition to dismiss, and also stated he did not think it was fair for the hearing to proceed. In response to questioning by the panel members, Employee contended he did not attend a January 7, 2014 prehearing conference, when the hearing date was set, because it was snowing on the east coast and he had been shoveling snow, which hurt his neck. He contended he was wearing a "horse collar" at the time and trying to rest and sleep. In response to a question inquiring why he waited until the day before the hearing to call the Fairbanks workers' compensation office and inquire about a continuance, Employee contended it was because he did not understand "what was going on." He also contended he had moved and the hearing notice, which was sent to his former address, was not forwarded to his new address. Employee contended he waited until the hearing to request a continuance because he had "never had to go through this before." He acknowledged it was his "fault" for not pursuing his case very diligently before hearing day. (Sturtevant).

71) Employer opposed granting Employee a continuance and contended "shopping for counsel" is not recognized as good cause for a continuance under the regulations. It contended the hearing was properly noticed, and further contended a continuance would be inefficient since there was "nothing new" here. According to Employer, Employee had been controverted since 2008 and he has simply failed to pursue his claim. Employer contended its attorney had been in contact with the attorney with whom Employee consulted, and he had not yet reviewed Employee's case or entered an appearance. Employer contended the attorney with whom Employee consulted was also available to assist the panel, should the panel desire his assistance. (Record).

72) After a third board member joined the panel, Michael Patterson, the attorney Employee consulted with, offered to give testimony. Mr. Patterson sought and received Employee's permission to discuss the case and testified as follows: Employee first contacted him on January 6, 2014 to inquire about representation. However, he was in the midst of a three-week trial and did not have time to review Employee's case. He still has not reviewed Employee's case, has not agreed to take Employee's case and has not entered an appearance on behalf of Employee. (Patterson).

73) A quorum of the panel decided to deny the continuance, at which point the hearing reconvened to hear Employer's petition to dismiss. (Record).

74) In defense of Employer's petition, Employee testified as follows: He acknowledged he was not diligent in pursuing his claim but he did not know the proper procedure for requesting a continuance. Employee did not know what he should do. He thought pursuing treatment was sufficient to preserve his claim. Once Employer controverted him, he wrote a letter voicing his concerns with the EME report. On cross-examination, Employee acknowledged receiving mail from Employer's adjuster and medical summaries, but was not "seeing" where he received Employer's petition to dismiss. Employee denied he had moved but stated he did not get mail in the summer and fall of 2011 because he was "not there." He was receiving mail in 2012. Employee denied filing an ARH and stated he did not know what "that" was. When questioned by the panel, Employee was not certain if he ever requested additional time to prepare his case for hearing. He did receive "three or four" petitions to compel from Employer. In response to questioning by the panel, Employee acknowledged receiving Employer's September 8, 2008 controversion, notice his case was "re-opened" and the hearing notice on Employer's petition. (Sturtevant).

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.

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.*). It is an abuse of discretion to not allow a claimant to amend his witness list at subsequent hearings when significant developments raise new factual issues. *Schmidt v. Beeson Plumbing and Heating, Inc.*, 869 P.2d 1170; 1180 (1994).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) . . . . Process and procedure under this chapter shall be as summary and simple as possible….
>
> **AS 23.30.110. 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.
> . . . .
>
> (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.
> . . . .
>
> (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 a claim in a timely manner once a claim is filed, and controverted by the employer. *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). An employee may file subsequent claims for additional benefits, and the employer must file a controversion to start the time limit of AS 23.30.110(c) against the subsequent claims. *Wicken v. Polar Mining,* AWCB Decision No. 05-0308 (November 22, 2005).

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). 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 Alaska Workers' Compensation Appeals Commission (Commission) questioned the practice of SIME tolling. *Omar v. Unisea, Inc.,* AWCAC Decision No. 053 (August 27, 2007); *Alaska Airlines v. Nickerson,* AWCAC Decision Nos. 06-0057, 06-0330 (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 the problems presented by SIME tolling, *Amendarez* noted the utility of the holding in *Kim*.

> 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. The rule in *Kim* is now well-settled and is consistently applied by the Commission. *Colrud*; *Hessel; Harkness.*

8 AAC 45.074. Continuances and cancellations.

(a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

> (M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or
>
> (N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;
>
> (2) the board or the board's designee may grant a continuance or cancellation under this section
>
> (A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;
>
> (B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or
>
> (C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection.

. . . .

When evaluating the potential for irreparable harm, some decisions have taken a "balancing of the interests" approach where the interests of the party requesting the continuance are weighed against the interests of the party opposing the continuance. *E.g. In the Matter of Oasis Apartments,* AWCB Decision No. 12-0159 (September 12, 2012); *Harris v. M-K River,* AWCB Decision No. 12-0145 (August 23, 2012).

ANALYSIS

1) Was Employee's request for a continuance properly denied?

The criteria for continuing a hearing are set forth by the regulation at 8 AAC 45.074, which instructs continuances are not favored and will not be routinely granted. 8 AAC 45.174(b). It also imposes a "good cause" requirement on granting a continuance and further specifies 14 different circumstances that constitute good cause. 8 AAC 45.074(b)(1).

Employee sought a continuance on the basis he was still seeking legal representation and further appealed for a continuance on fairness grounds. First, Employer is correct in its contention "shopping for counsel" is not recognized as grounds for a continuance. Circumstances constituting good cause under the regulation are both specific and comprehensive. They do not provide for a continuance in order to afford a party additional time to retain counsel. 8 AAC 45.074(b)(1)(A-N).

Second, Employee's request is also not persuasive on claimed fairness grounds. Employer is correct in its contention "there is nothing new here." The record rather clearly demonstrates Employee neglected his claim for nearly two and one-half years; hence, Employer's petition to dismiss. Additionally, Employee repeatedly and candidly acknowledged his lack of diligence during the hearing. For examples, although the record shows notice of the November 19, 2012 prehearing conference was not delivered to Employee, he still failed to participate in three of the other four prehearings held in his case. Moreover, on November 11, 2011, at the very beginning of the claims process, Employee was provided with an attorney list. After over two years, Employee's appeal now for more time to retain counsel is not persuasive under fairness principles. This is especially true when one contrasts Employee's near total lack of participation in a process he initiated to Employer's active participation and its efforts to timely resolve Employee's claim. Because Employee's stated grounds did not meet the good cause requirements of the regulation, Employee's request for a continuance was properly denied.

2) Should Employee's October 5, 2011 claim be denied under AS 23.30.110(c)?

The statute at AS 23.30.110(c) directs denial of the claim if a claimant does not request a hearing within two years of a post-claim controversion. The Alaska Supreme Court has held technical noncompliance with the statute may be excused is cases where a claimant has substantially complied with the statute. *Kim*. However, substantial compliance does not mean noncompliance, *id*., or late compliance, *Hessel*. 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, *Colrud*.

Employee contended at various points he did not know what he should do and he did not understand "what was going on." His contentions are unpersuasive. At least three of Employer's controversions informed Employee he must request a hearing within two years of the notice. All five prehearing conference summaries, at least four of which were likely received by Employee, explicitly advised Employee of the §110(c) requirement. As set forth above, Employee was provided an attorney list after the very first prehearing conference under his "re-opened" claim and he was afforded more than ample time to seek the assistance of counsel. The first prehearing conference summary also encouraged Employee to seek assistance from a workers' compensation technician and provided telephone numbers where he could reach one. Two prehearing conference summaries instructed Employee on how to request a prehearing conference. Therefore, if Employee was confused or uninformed, it was only due to a lack of effort on his own behalf.

It is undisputed Employee did not filed an ARH within two years of Employer's post-claim controversion and neither can Employee cite to an example of substantial compliance, such as an informal request for hearing or a request for additional time to prepare for a hearing, even when queried. Nor does such an example appear, even upon a thorough and independent review of the record. The only evidence that could even resemble substantial compliance under controlling decisional authority is Employee's September 29, 2011 letter. The dissent cites this letter as substantial compliance with the statute.

Employee's letter was filed on October 5, 2011. He wrote: "At this time I would ask that you would please allow this case to be re-opened, re-addressed, re-visited or whatever you call it so that I may finally get the appropriate treatment of which I have been denied, for no apparent good reason." Given the letter's multiple, broad, non-specific, alternative requests, the dissent's interpretation is not unreasonable. However, for the following reasons, the most persuasive interpretation of the letter is that it was not a hearing request.

First, a plain reading of Employee's letter indicates he filed it in support of initiating claim for benefits, *i.e.* "re-opened," "re-addressed," or "re-visited," rather than to request a hearing. Furthermore, Employee's letter was filed on the same day as his unsigned claim, which indicates

he intended his letter to have been part and parcel with his claim form rather than a separate hearing request. Moreover, further evidence of this interpretation is found at 8 AAC 45.050(B)(4)(B), which directs the board staff to return unsigned claims. The fact that Employee's unsigned claim, which was filed along with his signed letter, was not returned to him indicates this interpretation was also shared by board staff at the time.

Additionally, event notes from the telephone conversation Employee had with board staff prior to filing his claim clearly indicate he had called to request a claim form as opposed to inquiring about how to request a hearing. Also, 8 AAC 45.070(b) states: "The board … will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared to go to hearing." Even under *Kim*'s liberal substantial compliance standard, if Employee's September 29, 2011 letter was a request for hearing, it would have been returned because it lacked proof of service. *Id.*

Although substantial compliance does not have to necessarily come in the form of the formal, board-prescribed affidavit, it would seem whatever is filed should, at a minimum, indicate a conscientious request for a hearing. Consequently, a request for hearing should at least mention "hearing." *See Hessel*; *Colrud*. Employee's letter does not, and his request for "whatever" does not sufficiently identify any particular request, let alone a hearing request. Lastly, Employee testified at hearing he did not even know what an ARH was, which again indicates his letter was not a hearing request.

It is acknowledged the Alaska Supreme Court has instructed *pro se* litigants should be afforded some degree of procedural leniency. *Dougan*. However, under the facts here, it was far from "obvious" Employee was attempting to request a hearing with his September 29, 2011 letter. *Id.* When Employee's letter is put in the broader context of surrounding facts and circumstances, it is believe the best interpretation of the letter is he filed it in support of initiating his claim rather than to request a hearing. Therefore, since Employee has failed to substantially comply with the statute, his claim should be dismissed. AS 23.30.110(c); *Kim*.

CONCLUSIONS OF LAW

1) Employee's request for a continuance was properly denied.

2) Employee's October 5, 2011 claim should be denied under AS 23.30.110(c).

ORDER

Employee's October 5, 2011 claim is denied.

Dated in Fairbanks, Alaska on June 13, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

SARAH LEFEBVRE, INDUSTRY MEMBER, CONCURRING

The concurring opinion agrees with the designated chair's analysis and conclusions: Employee's request for continuance was properly denied and, because Employee did not substantially comply with AS 23.30.110(c), his claim should be denied. The concurrence writes separately only to expound upon and add further emphasis to the designated chair's analysis on both issues.

The Legislature prominently states the Act is be interpreted to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. AS 23.30.001(1). Furthermore, hearings are to be fair to all parties. AS 23.30.001(4). The clear import of these statutes is the Legislature recognized the need for a balanced workers' compensation system, both for employees and employers.

To achieve balance in the system, the Legislature provides parties various time periods under the Act. The time period at issue in this case is set forth at AS 23.30.110(c), which afforded Employee two years to prosecute his claim. Employee failed to take advantage of the ample time provided him, both to retain counsel and request a hearing on his claim. Additionally, as

the hearing chair points out, even without counsel, much guidance and instruction was offered Employee, yet he chose not to avail himself.

The same is true with respect to process and procedure under the Act. It was made available to Employee, but Employee simply chose not to participate. A prime example is the series of prehearing conferences held in November and December of 2012. Employee did not attend the first two conferences and the designees twice postponed ruling on Employer's petition to compel so that Employee's position could be entertained. On the other hand, throughout the history of this claim, Employer repeatedly sought to advance a resolution of the issues. Given Employee's prolonged lack of participation in a process that was made available to him, his requests now are not compelling. Considering the legislative goals of quickness and efficiency, and the legislative instruction on summary and simple procedure, the only results in this case that maintain the balanced system the Legislature intended were the denial of Employee's request for a continuance and the dismissal of his claim. AS 23.30.001(1); AS 23.30.005(h).

/s/_____
Sarah Lefebvre, concurring

ZEB WOODMAN, LABOR MEMBER, DISSENTING

The dissent respectfully disagrees with the plurality's analysis and conclusions on both issues: the denial of Employee's request for a continuance and the dismissal of Employee's claim. Instead, the dissent would add an additional principle of law, make an additional factual finding and analyze the issues as follows:

PRINCIPLES OF LAW

> **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.

The legislative history of AS 23.30.122 states the intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation Act." *De Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013). The Alaska Workers' Compensation Appeals Commission is required to accept the board's credibility determinations. *Id.* The Alaska Supreme Court defers to board determinations of witness credibility. *Id.* If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, and elects to rely on one opinion rather than the other, the Supreme Court will affirm the board's decision. *Id.* at 147. The board may choose not to rely on its own expert. *Id.* It is error for the commission to disregard the board's credibility determinations. *Id.* at 145-147.

FINDINGS OF FACT

74) Employee was credible. (Experience, judgment, observations and inferences drawn from the above).

ANALYSIS

1) Was Employee's request for a continuance properly denied?

The Legislature has directed workers' compensation claims should be heard on their merits. AS 23.30.001(2). Additionally, as the hearing chair noted above, the criteria for granting a continuance are set forth in the regulation at 8 AAC 45.074. They provide for a continuance to avoid irreparable harm. 8 AAC 45.074(b)(1)(N). Here, the medical record demonstrates Employee suffers from serious cervical spine symptoms, which may well have been aggravated by the work injury of September 23, 2007. When the continuance regulation is read in light of the Legislature's intention for claims to be heard on their merits, the result should have been granting Employee's request for a continuance.

When evaluating the potential for irreparable harm, some decisions have taken a "balancing of the interests" approach where the interests of the party requesting the continuance are weighed against the interests of the party opposing the continuance. *E.g. Oasis Apartments*; *Harris v. M-K Rivers.* In this case, a balancing of the parties' interests weighs considerably in favor of Employee. As alluded to above, Employee may be entitled to valuable benefits under the Act. Meanwhile, although it is acknowledged Employer's attorney personally appeared in Fairbanks for the hearing,

it is thought the expense and inconvenience of Employer either making a return trip to Fairbanks, or participating telephonically at a later hearing, are insignificant when compared to Employee's risk of loss. Furthermore, as was clear from Employee's representations and his testimony, he simply did not understand the Act's esoteric procedures. The dissent would have granted Employee a continuance to afford him the benefit of counsel and to better prepare a defense of Employer's petition. 23.30.001(2); 8 AAC 45.074(b)(1)(N).

2) Should Employee's October 5, 2011 claim be denied under AS 23.30.110(c)?

The Alaska Supreme Court has held technical noncompliance with §110(c) may be excused in cases where a claimant has substantially complied with the statute. *Kim*. It has further instructed *pro se* litigants are to be afforded procedural leniency. *Dougan*. As Employee's contentions and testimony make clear, he did not understand the Act's procedural requirements. During argument on his continuance request, Employee contended he did not know "what was going on" and explained he had "never had to go through this before." Later, testifying in defense of Employer's petition, he stated he did not know what he should do. He also thought pursuing medical treatment was sufficient action to preserve his claim. Moreover, Employee testified he did not even know what an ARH was. At the beginning of the hearing, Employee acknowledged he could not represent himself and, at the end of the hearing, he stated there is no way [he] can go above [his] pay grade up against legalese like this."

A review of the record reveals, on September 29, 2011, Employee wrote: "At this time I would ask that you would please allow this case to be re-opened, re-addressed, re-visited or whatever you call it so that I may finally get the appropriate treatment of which I have been denied, for no apparent good reason." Given Employee is an unrepresented claimant, his September 29, 2011 letter represents substantial compliance with the statute. *Dougan*; *Kim*. His letter was clearly requesting action to move his claim forward so he could be awarded benefits. In other words, it was a request for hearing. *Hessel*. Merely because Employee was not familiar with the specific procedure to request a hearing should not be fatal to his claim. *Dougan*.

Furthermore, 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*. As mentioned above, significant prejudice to Employer cannot be identified. Meanwhile, given Employee's lack of familiarity with procedures under the Act, the circumstances as a whole here constituted compliance sufficient to excuse Employee's failure to comply with the statute's formal requirements. *Omar*. Therefore, the dissent would not have denied Employee's claim. *Id*.; *Kim*.

/s/_____
Zeb Woodman, dissenting

APPEAL PROCEDURES

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

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

RECONSIDERATION

A party may ask the board to reconsider this decision by 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.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of ANDREW J STURTEVANT, employee / claimant; v. CHUGACH MGT. SVCS. -TAPS WRAP UP, employer; LIBERTY INSURANCE CORP., insurer / defendants; Case No. 200715679; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on June 13, 2014.

/s/_____
Darren R. Lawson, Office Assistant