

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

EDWARD G. JAPS,)	
Employee,)	
Claimant,)	FINAL DECISION AND ORDER
)	
v.)	AWCB Case No. 201016179
)	
STUMPY'S TREE SERVICE,)	AWCB Decision No. 14-0121
Employer,)	
)	Filed with AWCB Anchorage, Alaska
and)	on August 29, 2014
)	
LIBERTY NORTHWEST INSURANCE)	
CO.,)	
)	
Insurer,)	
Defendants.)	

Stumpy's Tree Service's May 13, 2014 Petition to dismiss Edward G. Japs' December 9, 2011 claim was heard on August 13, 2014 in Anchorage, Alaska. This hearing date was selected on July 1, 2014. Attorney Jayme Keller appeared and represented Stumpy's Tree Service and Liberty Northwest Insurance Co (Employer). Mr. Japs (Employee) did not appear. The record closed at the hearing's conclusion on August 13, 2014.

ISSUES

Employee did not appear for the hearing, and a call to his telephone number of record was answered by a message stating the number was no longer in service. The designated chair orally ruled that the hearing proceed in Employee's absence.

1. *Was the oral ruling to proceed with the hearing in Employee's absence correct?*

Employer contends Employee's December 9, 2011 claim should be dismissed under AS 23.30.110(c) because he failed to request a hearing within two years of Employer's December 29, 2012 controversion. Because he did not appear, Employee's position is unknown, but it is assumed he opposes dismissal.

2. *Should Employee's December 9, 2011 claim be dismissed?*

FINDINGS OF FACT

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

1. Employee reported that on October 18, 2010, he was cutting up logs, when one snapped back, hitting his hand and ribs. (Report of Injury, October 21, 2010).
2. On March 30, 2011, Employee filed a claim seeking medical costs, penalty, interest, and objecting to Employer's recoupment of an alleged overpayment of benefits. (Claim, March 30, 2011).
3. A prehearing conference was held June 8, 2011. Employee did not attend, but was served with the prehearing conference summary at his address of record. The summary include the following:

STATUTE OF LIMITATIONS:

Mr. Japs is reminded that, IF a controversion notice is served and filed, after he filed his workers' compensation claim, he must request a hearing, in accordance with 8 AAC 45.070, within two years of the date the controversion was filed to avoid possible dismissal of his claim. NO CONTROVERSION HAS YET BEEN FILED. (Prehearing Conference Summary, June 8, 2011).

4. On October 14, 2011, Employer filed a controversion notice, denying all benefits based on the opinion of its medical evaluator, Anthony Woodward, M.D. Under "Time Limits," the notice stated:

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 the benefits denied on the front of this form if you do not request a hearing within two years. (Controversion Notice, October 7, 2011).

5. On December 6, 2011, Attorney Michael J. Patterson entered his appearance on behalf of Employee. (Entry of Appearance, December 6, 2011).
6. On December 7, 2011, Employee filed another claim, seeking temporary total disability (TTD), permanent partial impairment (PPI), medical and transportation costs, interest, attorney fees and costs, and a second independent medical evaluation (SIME). (Claim, December 6, 2011).
7. On January 3, 2012, Employer filed another controversion notice, denying TTD, PPI, Reemployment Benefits, and Medical Care. Under "Time Limits," the notice stated:

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 the benefits denied on the front of this form if you do not request a hearing within two years. (Controversion Notice, December 29, 2011).
8. On December 18, 2013, Mr. Patterson filed a petition on behalf of Employee requesting an additional 90 days to request a hearing, stating he had not been able to contact Employee for over 60 days. (Petition, December 17, 2013).
9. At the February 7, 2014 prehearing conference, the parties stipulated that Employee would have until May 7, 2013 to file an affidavit of readiness for hearing (ARH), and that the AS 23.30.110(c) deadline was tolled from December 17, 2013 until May 7, 2014. (Prehearing Conference Summary, February 7, 2014).
10. On May 12, 2014, Employer filed a petition seeking to dismiss Employee's December 9, 2011 claim for failing to request a hearing within the time allowed by AS 23.30.110(c). (Petition, May 9, 2014).
11. On May 30, 2014, Mr. Patterson withdrew as Employee's attorney. (Notice of Withdrawal, May 30, 2014).
12. A prehearing conference was held on July 1, 2014. Employee did not attend, and an attempt to reach him by telephone at his number of record resulted in a message the number was no longer in service. A hearing was set for August 13, 2014 on Employer's petition to dismiss. A copy of the prehearing conference summary was served on Employee at his address of record in Kenai, Alaska. (Prehearing Conference Summary, July 1, 2014).
13. On July 15, 2014, notice of the August 13, 2014 hearing was served on Employee at his address of record. (Hearing Notice, July 15, 2014).

14. Employee has not requested a hearing on his December 9, 2011 claim. (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) 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 Board may base its decision not only on direct testimony and other tangible evidence, but also on the Board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

AS 23.30.110. Procedure on claims.

(a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filled 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 filling of the controversion notice, the claim is denied.

. . . .

(h) The filling 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 once a claim is filed, and controverted by the employer. *Jonathan v. Doyan 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 section 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 section 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*, AWCBC Decision No. 08-0151 (August 22, 2008). Certain “legal” grounds might also excuse noncompliance with section 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. (January 30, 2007).

“Rare situations” have also been found to toll the limitation statute, for example when a claimant is unable to comply with section 110(c) because the parties are awaiting receipt of necessary evidence such as an SIME report. *Aune v. Eastwood, Inc.*, AWCBC 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*, AWCBC 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*, AWCBC decision No. 08-0151 (August 22, 2008); *see also Alaska Mechanical v. Harkness*, AWCAC Decision No. 12-0013 at (February 12, 2013) (addressing whether the SIME process was “initiated”).

Technical noncompliance with section 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 section 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 controversy, 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).

8 AAC 45.063. Computation of time

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

AAC 45.070. Hearings

....

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

- (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;
- (2) dismiss the case without prejudice; or
- (3) adjourn, postpone, or continue the hearing.

ANALYSIS

1. Was the oral ruling to proceed with the hearing in Employee's absence correct?

Where a party does not appear at hearing, but was served with notice of the hearing, the first option in order of priority under 8 AAC 45.070(f) is to proceed with the hearing in the party's absence. Here, the July 1, 2014 prehearing conference summary stated when the hearing was scheduled; it was served on Employee at his address of record. The hearing notice was mailed to Employee on July 15, 2014 at his address of record. Employee was served with notice of the hearing, and the decision to proceed with the hearing in his absence was correct.

2. Should Employee's December 9, 2011 claim be dismissed?

Because the AS 23.30.110(c) two-year time period was tolled at the February 7, 2014 prehearing, it is necessary to determine the last date Employee could timely request a hearing. Employer's controversion was filed January 3, 2012. Barring anything that would have tolled the two-year time period, Employee would have had to request a hearing by January 3, 2014. However, because of the parties' stipulation, the time was tolled beginning December 17, 2013, 17 days

before it would have expired. By the parties' stipulation, the time period began to run again on May 7, 2014. It would have expired 17 days later, on May 24, 2014, but May 24, 2014 was a Saturday. The following Monday, May 26, 2014 was Memorial Day, a holiday. Consequently, the time period ran until the close of business on the next business day – Tuesday, May 27, 2014.

Employee has not filed an affidavit of readiness for hearing or any informal request for a hearing, either before or after the AS 23.30.110(c) timeline expired. Employee failed to request a hearing on his December 9, 2011 claim within the time allowed by AS 23.30.110(c), and his claim will be dismissed.

CONCLUSIONS OF LAW

1. The oral ruling to proceed with the hearing in Employee's absence was correct.
2. Employee's December 9, 2011 claim will be dismissed.

ORDER

1. Employer's May 13, 2013 petition is granted.
2. Employee's December 9, 2011 claim is dismissed.

EDWARD G. JAPS v. STUMPY'S TREE SERVICE

Dated in Anchorage, Alaska on August 29, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Ronald P. Ringel, Designated Chair

David Kester, Member

Mark Talbert, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

A party may ask the board to reconsider this decision by 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 EDWARD G. JAPS, employee / claimant; v. STUMPY'S TREE SERVICE, employer; LIBERTY NORTHWEST INSURANCE CO., insurer / defendants; Case No. 201016179; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on August 29, 2014.

Elizabeth Pleitez, Office Assistant