ALASKA WORKERS' COMPENSATION BOARD

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

DEBRA A. MCCOY, Employee, Claimant, v. UNITED PARCEL SERVICE, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201302604 AWCB Decision No. 17-0071 Filed with AWCB Anchorage, Alaska on June 22, 2017

United Parcel Service's (Employer) February 16, 2017 "verbal petition" to dismiss Employee's September 30, 2014 claim under AS 23.30.110(c), and Debra A. McCoy's (Employee) September 3, 2016 petition for an extension of time, December 8, 2016 petition for a second independent medical evaluation (SIME), November 22, 2016 petition for an extension of time and January 11, 2017 petition to amend her September 3, 2016 petition were heard on May 23, 2017, in Anchorage, Alaska, a date selected on February 16, 2017. Attorney Chris Beltzer appeared and represented Employee who appeared and testified. Attorney Robert Griffin appeared and represented Employer. The record closed at the hearing's conclusion on May 23, 2017.

ISSUES

Employer contends it controverted Employee's September 30, 2014 claim on November 13, 2014. It contends since Employee did not timely file a hearing request or seek more time to file one, Employer is entitled to an order dismissing Employee's claim under AS 23.30.110(c).

Employee contends she substantially complied with AS 23.30.110(c). Therefore, she contends Employer is not entitled to an order dismissing her claim.

1) **Is Employer entitled to an order dismissing Employee's September 30, 2014 claim?**

Employee contends there is a medical dispute between Employer's medical evaluator (EME) and her attending physician, requiring an SIME. Alternately, she contends a gap in the medical evidence also necessitates an SIME.

Employer contends there is no medical dispute between Employee's attending physician and its EME, and no medical evidence gap. Therefore, Employer contends there is no basis for an SIME.

2) **Is Employee entitled to an SIME?**

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On February 21, 2013, Employee reportedly injured her left elbow while driving a tug while working for Employer. (Report of Occupational Injury or Illness, undated).

2) On February 26, 2013, Employee first sought treatment for her work injury at First Care, where she saw Timothy Morgan, PA-C, and later C. Bradstreet, M.D. (First Care reports, February 26, 2013; Physician's Report, March 12, 2013).

3) On June 17, 2014, Myron Schweigert, DC, saw Employee for low back symptoms. She did not mention the February 21, 2013 work injury, and Dr. Schweigert billed his care to Employee's health insurance, Blue Cross. (Schweigert report, June 17, 2014).

4) However, on July 14, 2014, Dr. Schweigert saw Employee again. Employee said her lumbar symptoms started in "Feb '14" on Employer's ramp when she "hit chuck whole hidden by snow." (Schweigert report, July 14, 2014).

5) Employee's supervisor Tim Cutmore gave her Upshur Spencer, M.D.'s name and suggested she see him for possible surgery. Cutmore's wife worked for Dr. Spencer. (Employee).

6) Employer offered no contrary evidence refuting factual finding 5, above. (Record).

7) On August 5, 2014, Dr. Spencer saw Employee for her low back. Dr. Spencer's report references Employee's workers' compensation claim against Employer. The initial report does not suggest a referral source to Dr. Spencer. (Dr. Spencer report, August 5, 2014).

8) On September 9, 2014, Employee had an office visit with Dr. Spencer. Employee says Dr. Spencer told her he could not see a break on her lumbar x-rays. Employee was confused because she had seen an x-ray, which clearly showed a broken bone. She asked Dr. Spencer to "change his records" to say her condition was not work related, so she could obtain her spinal surgery by using her health insurance. She later provided a copy to attorney Griffin at a prehearing conference so she could obtain a controversion notice. (Employee).

9) On September 9, 2014, Dr. Spencer wrote the following:

> Patient's current spinal condition is not related to her work. Patient's last visit with us was September 3, 2014, and next apt to discuss surgical options is estimated to be in December 2014. (Dr. Spencer report, September 9, 2014).

10) On September 30, 2014, Employee filed a claim requesting temporary total disability; permanent partial impairment; and medical costs and related transportation. (Workers' Compensation Claim, September 30, 2014).

11) On November 13, 2014, the parties attended a prehearing conference, summarized as follows:

> **Discussions:**
>
> While clarifying the issues identified in her Workers' Compensation Claim (WCC), Ms. McCoy informed Mr. Griffin and the Workers' Compensation Board that her sole intent in filing the WCC was to receive a controversion in response. To this end Ms. McCoy produced at the prehearing a physician's note stating that her current need for treatment was not caused by a work place injury. Upon review of this document Mr. Griffin assured Ms. McCoy that he would issue a Controversion shortly.
>
> The Board Designee confirmed with Ms. McCoy that she had no wish to pursue her claim which she clearly affirmed. The parties agreed that this development rendered the issue of a protective order moot. Ms. McCoy was reminded of her rights to pursue her claim and her .110(c) deadline to file an ARH after a

controversion is filed. Ms. McCoy stated that she fully understands the implications of her actions.

Workers' Compensation & You:

The Board designee included a copy of the pamphlet, Workers Compensation and You, with Employee's copy of this prehearing summary. The pamphlet is also available at the website http://www.labor.state.ak.us/wc. In addition**, the Board designee encourages Employee to seek the assistance of a Workers' Compensation Technician at (907) 269-4980, if Employee has any questions pertaining to his [sic] claim.**

Attorney List:

The Board designee also included a list of attorneys with Employee's copy of this prehearing summary. The designee also informs Employee that should she wish to retain an attorney and the attorney agrees to take her case, Alaska workers' compensation statutes and regulations provide for the payment of Employee's attorney if she prevails at hearing. If Employee's attorney 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.

Statute of Limitations:

The Employee is reminded that, IF a controversion notice is served and filed, after the date of filing of his/her workers' compensation claim, he/she must serve and file an affidavit requesting 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/her claim. NO CONTROVERSION HAS YET BEEN FILED.

Action:

No additional prehearing conferences were set. Either party may request another prehearing conference by submitting a Request for Conference form, which is also available online at http://www.labor.state.ak.us/wc.

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.
>
> **Order:**
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> Parties will proceed in accordance with this prehearing conference summary. (Prehearing Conference Summary, November 13, 2014).

12) Employee testified she did not go into detail about the reasons why she wanted a controversion notice at the November 13, 2014 prehearing conference. She conceded the "young man in charge" advised her she had two years "if you need to do something." She recalls no other advice from the prehearing conference. Employee has no recollection of ever receiving the November 13, 2014 prehearing conference summary. According to Employee, the first time she saw the summary was when her attorney emailed it to her recently. (Employee).

13) On November 14, 2014, Employer filed a notice denying Employee's claim based on the September 9, 2014 medical record from Dr. Spencer, which stated Employee's "current spinal condition is not related to her work." Employer served this notice on Employee by mail on November 13, 2014. (Controversion Notice, November 13, 2014).

14) Two years from November 14, 2014, with three days added for service by mail, is November 17, 2016, a date which is neither a weekend nor a holiday. (Experience; judgment; observations).

15) On April 14, 2015, Timothy Cohen, M.D., performed lumbar surgery to address Employee's low back complaints. (Operative Report, April 14, 2015).

16) After Employee recovered sufficiently from her surgery, she began searching for medical documentation supporting what she said her doctors had told her, *i.e.*, that her work injury with Employer probably caused the condition in her lower back. Employee's efforts at first were casual, but as time went by, she began contacting Dr. Cohen's office more frequently to obtain his supporting opinion. She also began searching for an attorney for more than a year, unsuccessfully, as she did not yet have Dr. Cohen's supporting medical opinion. (Employee).

17) After attorney Steven Constantino declined her case, Employee reviewed his letter and noted the two-year warning, which reminded her what Brian said at the prehearing conference. Confused about what to do next, Employee called Brian at 10:36 AM on July 20, 2016, to find out what she should do. Employee hand-wrote notes on attorney Constantino's June 28, 2016 letter,

summarizing her conversation with Brian. Brian told her to go online and obtain a generic petition, fill it out as best as she could, and give a reason why she needed more time. (*Id*.).

18) Employee knew her two-year limitation period to "do something" was running out, and she thought she had to take action by September 3, 2016. The significance of this date to Employee is not clear, but it prompted her to write a letter to Dr. Cohen on July 22, 2016, to prompt a response to her inquiries for a supporting medical opinion. (*Id*.).

19) On September 8, 2016, Employee, unrepresented, filed a petition on which she checked block "18" labeled "OTHER," and said "EXTENSION OF TIME." Employee listed the reason for her petition as, "NEED TO OBTAIN A LAWYER WITH ENOUGH RESOURCES TO PROCESS THE CASE." Employee attached to her petition a June 28, 2016 letter from attorney Steven Constantino declining representation based on his "limited resources." Hand-written on the letter was "7-20-16 Brian - WC 10:36," and "Both WC & UPS" and "Generic →'Petition' of Extension & why." (Petition, September 3, 2016; Constantino letter, June 28, 2016).

20) Employee thought the main thing she needed was more time to find a lawyer because she really needed help to go forward with her case. She understood once she filed for "an extension of time," it would "bide me time" to find an attorney. No one told Employee she also had to file an "ARH" after she filed her petition for an extension of time, and she does not know what "ARH" means. When she received an agreement from attorney Griffin regarding her extension of time, Employee thought she had done all that was necessary. She had no further communication with the board after she filed her petition for extension of time. (Employee).

21) On September 26, 2016, Employer non-opposed Employee's September 3, 2016 petition:

> In her September 3, 2016 Petition, the employee requests an, 'Extension of Time -- Need to obtain a lawyer with enough resources to process the case.' The employer and adjuster here by non-oppose said Petition and agree to a 30-day extension of time in which to obtain legal counsel. . . . (Non-Opposition to Employee's 9/3/16 Petition, September 26, 2016).

22) On October 7, 2016, Dr. Cohen stated

> Ms. McCoy is a patient of mine [sic] on her initial presentation, she related her injury to an impact in February 2013 which I understood occurred while working. Her injury with her pars defect and spondylolisthesis and the need for [sic] for subsequent surgery is more likely than not caused by this impact injury in February 2013. (Dr. Cohen report 2016).

23) Once she obtained this supporting documentation, Employee decided to ask attorney Constantino to reconsider taking her case, and when he declined again, she filed another petition very similar to her first request for an extension of time. (Employee).

24) On cross-examination, Employee said she understood the two years during which she needed to take some action began to run on September 3, 2016, when she "reopened" her case and filed her first petition. Brian did not tell Employee what to put in the boxes on the generic petition. Employee chose to state in the petition that she needed an attorney. In respect to what her intention was for filing the September 3, 2016 petition Employee stated, "My intention was to keep that case active so that I could pursue the workers' compensation claim." Employee said when attorney Griffin agreed to give her 30 more days, this "confirmed in my mind that I had done the right thing." Brian never told Employee to state on the petition that she needed to "stop 110(c) from running" or to state she needed more time "to file an Affidavit of Readiness for Hearing." (*Id*.).

25) On November 22, 2016, Employee, still self-represented, filed another petition requesting an "EXTENSION OF TIME," stating:

> I WAS GRANTED AN EXTENSION OF TIME UNTIL NOVEMBER 26, 2016, TO OBTAIN AND SECURE A LAWYER TO PROCESS MY CASE. HOWEVER, FOR REASONS BEYOND MY CONTROL TO SECURE LEGAL COUNSEL, I RESPECTFULLY REQUEST ADDITIONAL TIME BEYOND THE HOLIDAYS, PERHAPS UNTIL THE END OF JANUARY 2017.

Employee attached a November 22, 2016 letter she wrote to workers' compensation officer Brian Zematis at the board. In her letter, Employee stated:

> I respectfully request consideration of having my time to obtain legal counsel extended until after the holidays. With the additional information provided in a letter by Dr. Cohen, Anchorage Neurological Associates, Inc., that indicates that my spinal condition was 'more likely than not caused by the incident of February 21, 2013.'

Employee certified that she faxed the petition and attachment to Employer's counsel. (Petition, November 22, 2016).

26) On December 8, 2016, Employee through counsel filed a petition requesting an SIME under AS 23.30.041 and 8 AAC 45.092(g)(3). Employee's petition states:

> Employee considers Dr. Spencer to be employer's medical evaluator. Dispute exists between Dr. Spencer's 09/09/14 record and Dr. Cohen's record dated 10/07/2016. . . . (Petition, December 8, 2016).

On this same day, Employee also filed an SIME form on which she listed Dr. Spencer as Employer's physician. (SIME form, December 8, 2016).

27) On December 8, 2016, Employer answered Employee's November 22, 2016 petition "seeking to have until the end of January 2017 in which to secure counsel." Employer non-opposed the petition and agreed Employee "may have until January 31, 2017 in which to secure representation." (Answer to Petition Dated November 22, 2016, December 8, 2016).

28) On January 11, 2017, Employee filed for "EXTENTION [sic] TO FILE" requesting:

> To the extent necessary, this petition and amends EE's pet. for an extension dated 09/03/2016. EE's intention was to request time to find an attorney and time to process her case. EE had surgery on 04/15/2015. Recovery was lengthy. Afterward, EE sought information from her treating physician about her case. She received it on 10/07/2016. To the extent EE's 09/30/14 WCC and ER's 11/13/14 contro apply, EE requests an extension to file an ARH until after discovery is complete incl. an SIME. (Petition, January 11, 2017).

29) On January 11, 2017, the parties attended a prehearing conference at which Employer "verbally asserted a 110(c) defense." (Prehearing Conference Summary, January 11, 2017).

30) On January 17, 2017, Employer answered Employee's January 11, 2017 petition to amend her September 3, 2016 petition. Employer contended Employee's original petition was "clear," and sought only to obtain a lawyer with "sufficient resources to process her case." Employer contended, "[T]here is no request for additional time for a lawyer." It further contended Employee's January 11, 2017 petition "is a backhanded attempt" to extend the AS 23.30.110(c) deadline to make her more recent petitions timely. Employer contended it answered Employee's September 3, 2016 request by agreeing to a 30-day extension for the stated purpose. It opposed Employee's request for an SIME. As to the request for an extension of time to file an Affidavit of Readiness for Hearing, Employer contended Employee untimely filed the November 11, 2017 request two months after the two-year statute ran out. (Answer to Employee's January 11, 2017 Petition, January 17, 2017).

31) On January 17, 2017, Employer also answered Employee's December 8, 2016 petition for an SIME. Employer denied Dr. Spencer was its EME and consequently, denied there was a medical

dispute between her attending physician and its EME warranting an SIME. (Answer to Employee's December 8, 2016 Petition, January 17, 2007).

32) There is no gap in the medical evidence. (*Id*.).

33) Employer concedes there is no requirement for a person to seek more time to obtain an attorney, which they can obtain even "in secret" without notice to anyone, anytime they want. (Employer's hearing arguments).

34) On the injury date, Employee drove her "tug" over a snow-covered "chuck hole" which caused her tug to stop abruptly and thrust her forward. Her left elbow hit the windowsill and the incident "slammed" her down into the seat. Employee's elbow and left shoulder were her main issues initially. She did not report her low back initially, but it later became an issue. Over the next year, Employee began feeling pain in her feet, moving up into her buttocks. By March 2014, Employee's lumbar spine pain was so intense she began to become "un-functional." She had seen physicians on her own post-injury for lumbar spine symptoms but there was never a discussion about any connection to a work injury. After recovering from the loss of her nephew, Employee began seeking low back treatment again. A chiropractor took x-rays and told Employee her back "was broken." To Employee's understanding, this caused disc "shifting." The chiropractor told Employee a hard impact on her "bottom" could cause a broken bone in her spine and the only such impact Employee could recall was her work injury with Employer. (Employee).

35) Following this chiropractic visit, Employee tried to "reopen" her workers' compensation case by speaking with her supervisors. Employee's supervisors said they would call "corporate" to discuss the matter. Employee's union representative accompanied her to another meeting with her supervisors. It was during one of these conversations that Tim Cutmore gave Employee Dr. Spencer's name and recommended him. Ultimately, Employee's union representative told her Employer was not going to reopen her case. Employer did not offer light duty. (*Id*.).

36) Eventually, Employee contacted workers' compensation officer Brian Zematis, who suggested she file a claim. Employee had filed no previous workers' compensation claims. (*Id*.).

37) Employee initially did not think workers' compensation insurance was "on the table" for her back injury, so she tried to think of a way to get her surgery accomplished. She decided to obtain a controversion so her health insurance, Blue Cross, would pay for her surgery. (*Id*.).

38) Employer conceded had Employee asked for an extension of time to seek a hearing, "we would not be here today," implying Employer would have granted the request. Employer also

stated the board should have told Employee when she inquired that she needed to specify she wanted an extension of time to stop the statute of limitations from expiring. However, Employer contended none of that happened and Employee simply requested more time to find an attorney. Employer contends *Kim* is distinguishable from this case because in *Kim* an attorney filed a petition substantially requesting an extension of time to toll the statute of limitations. By contrast, Employer contends Employee failed to make a reasonable effort to comply with the statute, and searching for an attorney for a year and a half does not meet *Kim's* requirement. As for the SIME request, Employer contends the dispute is between two attending physicians and Employee is merely "doctor shopping." (*Id*.).

39) Employer did not offer evidence it was prejudiced by Employee's filings. (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 . . . employers. . . .
>
> (2) workers compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

The board may base its decision on not only 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 23.30.095. Medical treatments, services, and examinations**. . . .
> . . . .
>
> (e) The employee shall . . . if requested by the employer . . . submit to an examination by a physician or surgeon of the employer's choice. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation are suspended . . . and . . . may . . . be forfeited. . . .
> . . . .
>
> (k) In the event of a medical dispute . . . between the employee's attending physician and the employer's independent medical evaluation, the board may require that a

> second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

The Alaska Workers' Compensation Appeals Commission in *Bah v. Trident Seafoods Corp.,* AWCAC Decision No. 073 (February 27, 2008), said an SIME under AS 23.30.095(k) is to assist the board, and not to give employees an additional medical opinion at the employer's expense.

> **AS 23.30.110. Procedure on claims**. . . .
> . . . .
>
> (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 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 Alaska Supreme Court in *Tipton v. ARCO Alaska, Inc.,* 922 P.2d 910, 912-913 (Alaska 1996) noted the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it."

In *Kim v. Alyeska Seafoods, Inc*., 197 P.3d 193 (Alaska 2008), the Alaska Supreme Court noted §110(c) though different, is "likened" to a statute of limitations and "provisions absent from subsection .110(c) should not be read into it." *Kim* said:

> Subsection .110(c) is a procedural statute that 'sets up the legal machinery through which a right is processed' and 'directs the claimant to take certain action following controversion.' A party must strictly comply with a procedural statute only if its provisions are mandatory; if they are directory, then 'substantial compliance is acceptable absent significant prejudice to the other party.'
>
> > . . . A statute is considered directory if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create 'guidelines for the orderly conduct of public business'; and (3) 'serious, practical consequences would result if it were considered mandatory.'
>
> We conclude that the language of subsection .110(c) satisfies these criteria and hold its provisions are directory. . . .
> . . . .

> On remand, the Board should fully consider the merits of Kim's request for additional time and any resulting prejudice to Alyeska. If in its broad discretion the Board determines that Kim's reasons for requesting additional time have insufficient merit, or that Alyeska would be unduly prejudiced, the Board can set a hearing of its own accord or require Kim to file an affidavit of readiness within two days -- the amount of time remaining before the original two-year period expired. (*Id*. at 199).

Smith v. CK Auto, Inc., 204 P.3d 1001, 1011 (Alaska 2009) stated the proposition that the court treats "pleadings of pro se litigants less stringently than those of lawyers." *Pruitt v. Providence Extended Care*, 297 P.3d 891, 985 (Alaska 2013), cited *Kim*'s holding, "But we also said that we did 'not suggest that a claimant can simply ignore the statutory deadline and fail to file anything.' *Pruitt* also said in respect to the claimant, "She did not file anything indicating she wanted to prosecute the 2005 written claim until August 2009, well after the statutory deadline expired."

> **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 board's credibility findings are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **8 AAC 45.060. Service**. . . .
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> (b) . . . Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or . . . upon the party's representative. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail. . . .
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> **8 AAC 45.082. Medical treatment**. . . .
> . . . .
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> (b) A physician may be changed as follows:
> . . . .
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> (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury . . . an employee does not designate a physician as an attending physician if the employee gets service

> . . . .
>
> (B) from a physician
>
> (i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician. . . .
>
> (3) for an employee injured on or after July 1, 1988, an employer's choice of physician is made by having a physician or panel of physicians selected by the employer give an oral or written opinion and advice after examining the employee, the employee's medical records, or an oral or written summary of the employee's medical records. . . .
>
> (4) regardless of an employee's date of injury, the following is not a change of an attending physician:
> . . . .
>
> (C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician. . . .

ANALYSIS

1) Is Employer entitled to an order dismissing Employee's September 30, 2014 claim?

Employee filed a claim on September 30, 2014. Employer controverted the claim on November 14, 2014. The two-year period to request a hearing or to request more time to make the hearing request began on November 14, 2014. Employer served the controversion notice on Employee by mail. Adding three days to the two-year period, the date by which Employee had to take some action to preserve her claim was November 17, 2016. AS 23.30.110(c); *Kim*; 8 AAC 45.060(b).

The law disfavors statutes of limitations. *Tipton*. Neither the law nor the facts deserve straining to effect a dismissal under AS 23.30.110(c). *Id*. The legislature wants claims decided fairly on their merits whenever possible. AS 23.30.001(1), (2). Employee contends her September 3, 2016 petition for an extension of time substantially complied with the law as explained in *Kim*. Employer contends all she did was request more time to find an attorney, to which it consented. It contends this is not substantial compliance with AS 23.30.110(c) or *Kim*.

The online "Petition" does not expressly include a block one can check to request relief under *Kim*, or to toll the running of AS 23.30.110(c). It does contain an "Other" block. After receiving advice from workers' compensation officer Brian Zematis, Employee checked "Other" on her September 3, 2006 petition and requested "EXTENSION OF TIME." As Employer's attorney conceded at hearing, one need not request more time to find an attorney. A party needs no permission to begin or cease looking for legal representation. There are no legal or procedural ramifications to a claim's status by having or not having a lawyer. *Rogers & Babler*. However, in addition to requesting more time, Employee's September 3, 2016 petition gave three distinct "reasons" for her request: (1) to obtain a lawyer; (2) with enough resources; and (3) to process the case.

The first two reasons are immaterial to the question of whether Employee's pleading substantially complied with *Kim* under AS 23.30.110(c). Employee unrepresented when she filed her September 3, 2016 petition. Employee's pleadings do not require the same stringent requirements as pleadings filed by attorneys. *Smith*. On the other hand, Employee could not simply ignore the statutory deadline and "fail to file anything." *Pruitt*. Employee timely filed something, a petition for an extension of time for the only thing for which she legally needed more time -- to request a hearing. Under statute and decisional law, Employee's substantial compliance occurred when she petitioned for an extension of time for the third stated reason, to -- "process the case." Employee's petition for an extension of time to "process the case" stands in stark contrast to the claimant in *Pruitt* whose case was dismissed because she did not file anything indicating she wanted to "prosecute her claim" until four years after her time expired. *Pruitt*. When it comes to dismissing an unrepresented litigant's claim and ending litigation without a merits hearing, there is no significant distinction between the phrases "process the case" and "prosecute her claim." *Rogers & Babler*. Therefore, Employer is not entitled to an order dismissing Employee's claim under AS 23.30.110(c).

As to the petition's merits, Employee's first two reasons for filing the September 3, 2016 petition are relevant. Given the awkward start to her claim, where she had her treating physician write a letter not helpful to her current claim, Employee will undoubtedly benefit from an attorney's assistance. Thus, her reasons for requesting more time to request a hearing are reasonable. *Rogers & Babler*. Employee filed her September 3, 2016 petition on September 8, 2016. Employer has no evidence of prejudice and implied had Employee put the words it wanted to see on her petition,

Employer would have agreed to the extension. In conformance with *Kim*, Employee's September 3, 2016 petition has merit. Even if her reasons for filing the petition had no merit, under *Kim* she would still be entitled to more time to make a proper hearing request because her initial request was timely. There are 70 days between September 8, 2016 and November 17, 2016, the end date for the statute of limitations based on the controversion. In fairness, Employee will have 70 days from this decision's date either to file an Affidavit of Readiness for Hearing on her September 30, 2014 claim, or to request an additional time extension meeting the requirements set forth in *Kim*.

2) Is Employee entitled to an SIME?

Employee may obtain an SIME when there is a significant medical dispute between her attending physician and an EME. AS 23.30.095(k); *Bah*. Employee contends such a dispute exists in this case between her attending physician Dr. Cohen and Dr. Spencer, whom she contends is an EME. Employer contends there is no medical dispute because Dr. Spencer is not its EME. This issue turns on whether Dr. Spencer is an EME. There are no disputed facts. This is a legal question.

An EME plays a specific role in a workers' compensation case. An employer obtains an EME by requesting that an employee attend a medical examination by a physician "of the employer's choice." AS 23.30.095(e). The "request" is mandatory and if the employee refuses, her rights to compensation may be suspended and forfeited. *Id*. By contrast, Employee said her supervisor at work gave her Dr. Spencer's name. 8 AAC 45.082(b)(2)(B)(i). The supervisor's wife worked for Dr. Spencer. Employer provided no contrary evidence. Employee is credible. AS 23.30.122; *Smith*. Employee's supervisor also suggested she see Dr. Spencer because Employee said she might need lumbar surgery. 8 AAC 45.082(b)(4)(C). There is no evidence suggesting Employee had to see Dr. Spencer, or if she refused, her rights to benefits would be at peril. In short, an employer obtains an EME by making an enforceable "choice," not by giving an employee a doctor's name or making a suggestion. AS 23.30.095(e); 8 AAC 45.082(b)(3). Under these rather peculiar facts, the current medical dispute exists between two physicians, but neither is an EME. Therefore, Employee is not entitled to an SIME at this time. AS 23.30.095(k); *Bah*.

CONCLUSIONS OF LAW

1) Employer is not entitled to an order dismissing Employee's September 30, 2014 claim.
2) Employee is not entitled to an SIME.

ORDER

1) Employer's February 16, 2017 verbal petition to dismiss Employee's September 30, 2014 claim under AS 23.30.110(c) is denied.
2) Employee's September 3, 2016 petition for an extension of time to request a hearing is granted.
3) Employee has 70 days from this decision's date either to file an Affidavit of Readiness for Hearing on her claim or to request an additional time extension pursuant to the *Kim* criteria.
4) Employee's December 8, 2016 petition for an SIME is denied.
5) Employee's November 22, 2016 petition for an extension of time and her January 11, 2017 petition to amend her September 3, 2016 petition are denied as moot.

Dated in Anchorage, Alaska on June 22, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Brett Stubbs, Member

/s/
Pat Vollendorf, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Debra A. McCoy, employee / claimant v. United Parcel Service, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201302604; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on June 22, 2017.

/s/
Elizabeth Pleitez, Office Assistant