ALASKA WORKERS' COMPENSATION BOARD

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

MARIO OROPEZA,	)	
	)	
Employee,	)	
Claimant,	)	
v.	)	INTERLOCUTORY DECISION
	)	AND ORDER
UNISEA, INC.,	)	
Employer,	)	AWCB Case No. 200902828
and	)	
	)	AWCB Decision No. 15-0074
ALASKA NATIONAL INSURANCE,	)	
	)	Filed with AWCB Anchorage, Alaska
Insurer,	)	on June 29, 2015
Defendants.	)	
	)	

UniSea, Inc.'s (Employer) February 20, 2015 petition to dismiss Mario Oropeza's (Employee) claims was heard on May 28, 2015, in Anchorage, Alaska, a date selected on March 31, 2015. Attorney Robert Bredesen appeared and represented Employer. Attorney Joseph Kalamarides appeared and represented Employee. Employee appeared telephonically and testified. The record closed on June 8, 2015, to allow Employee to submit a statement and affidavit of attorney's fees, and for Employer to respond.

ISSUES

Employee filed three claims: December 8, 2009, March 18, 2012 and March 17, 2015. Employer contends the December 8, 2009 and March 18, 2012 claims should be dismissed for failure to prosecute. Specifically, Employer argues the controversion filed on April 17, 2012 started the running of the two-year time limit under AS 23.30.110(c). Employer further contends the SIME process does not toll the §110(c) deadline. Therefore, Employer contends all benefits listed in the December 8, 2009 and March 18, 2012 claims should be barred. Employer seeks an order

clarifying which benefits Employee can still pursue in the future, and dismissing Employee's December 8, 2009 and March 18, 2012 claims.

Employee contends he is not barred from seeking benefits by previous controversions. Employee contends the controversions were a preventative - or preemptive - measure to deny future benefits, known and unknown, thus attempting to terminate Employee's case after two years. Employee is only seeking benefits after April of 2014. Employee contends prior controversions cannot be used as a preventative attack on any future attempts to obtain benefits, since the original work injury was accepted as compensable and medical expenses were incurred after claim acceptance and controversion filing. Employee seeks an order denying Employer's petition to dismiss, and stating Employee may proceed with his most recent claims.

1) Should Employee's December 8, 2009 and March 18, 2012 claims be dismissed?

Employee contends his claims have been controverted and Employer resisted paying benefits. Employee contends the instant issue is complex, resulting in litigation, for which an attorney was necessary. Employee requests an order awarding attorney's fees and costs as reflected in his statement and affidavit.

Employer made no contention in respect to the attorney's fee issue, and did not object to Employee filing a statement and affidavit of attorney's fees and costs. It is presumed Employer opposes Employee's attorney's fee request.

2) Is Employee entitled to attorney's fees and costs?

FINDINGS OF FACT

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

1) On March 6, 2009, Employee filed a report of injury stating he was hurt on February 20, 2009 while working as a seafood processor at Employer's plant in Dutch Harbor, Alaska. Employee described the injury as, "Picking up and stacking rack pans, I felt my back pop and I stopped and went back to my station." Employer's section said it first knew of the claimed injury on February 21, 2009. (Report of Occupational Injury or Illness, March 6, 2009).

2) On October 20, 2009, Employee filed a claim for unspecified temporary total disability (TTD) and review of a reemployment benefit eligibility decision. The Board returned the claim as incomplete. Employee re-filed an amended claim, dated November 10, 2009, in Juneau on December 8, 2009. (Workers' Compensation Claim, December 8, 2009).

3) On December 29, 2010, Employer controverted only permanent total disability (PTD) on the grounds Employee was not yet medically stable. (Controversion Notice, December 29, 2010). Employee had no PTD claim at the time. (Workers' Compensation Claim, December 8, 2009).

4) On August 31, 2011, Employer controverted TTD beyond August 29, 2011, medical treatment beyond August 29, 2011, and permanent partial impairment (PPI). (Controversion Notice, August 31, 2011).

5) On February 21, 2012, orthopedic surgeon John Swanson, M.D. performed an Employer's Medical Examination (EME). Dr. Swanson opined Employee was medically stable by August 12, 2011, assessed an 11 percent PPI rating and stated Employee needed no additional medical treatment for the February 20, 2009 work injury. (Swanson EME Report, February 21, 2012).

6) On March 6, 2012, Employer controverted TTD after August 12, 2011, and medical benefits "except medications as needed for weaning program; physical therapy for the purpose of developing a home exercise program." (Controversion Notice, March 6, 2012).

7) On March 9, 2012, Employer controverted TTD "from 11/27/10 - 12/13/10, and from 6/1/11 - 6/3/10 [sic]." (Controversion Notice, March 9, 2012).

8) On April 2, 2012, Employee filed a claim for unspecified TTD, unspecified temporary partial disability (TPD), PTD, PPI, unspecified medical and transportation costs, review of a reemployment benefit decision, penalty, interest, unfair or frivolous controversion, attorney's fees and costs, death benefits, and "other" benefits pertaining to "nerve stem treatment." (Workers' Compensation Claim, March 18, 2012).

9) On April 17, 2012, Employer controverted TTD after August 12, 2011, TPD, PTD, "medical/transportation benefits except as recommended by Dr. Swanson," reemployment benefits, death benefits, penalty/interest, and attorney's fees. (Controversion Notice, April 17, 2012).

10) On May 24, 2012, Employer filed a petition for a second independent medical examination (SIME). (Petition, May 24, 2012).

11) On June 12, 2012, the parties appeared at a prehearing conference and stipulated to an SIME. (Prehearing Conference Summary, June 12, 2012).

12) On September 20, 2012, neurosurgeon John Cleary, M.D. performed an SIME. Dr. Cleary's report opined:

> [Employee] has attained maximum medical improvement with treatment and that no additional treatment is indicated or recommended. . . [Employee's] history is consistent with his sustaining a lumbar straining injury at his place of work on February 20, 2009. The subsequent cascade of treatment that ensued arose as a result of that injury. . . .

In response to the parties' question whether Employee reached medical stability with regard to the February 20, 2009 work injury, Dr. Cleary opined:

> As stated above, it is the undersigned's opinion, and medically probable, that [Employee] had reached maximum medical improvement at the time of his visit with Dr. Saleh on February 3, 2011. . . .

Dr. Cleary opined no further treatment was warranted for the February 20, 2009 work injury and assessed a 10 percent PPI rating. (Cleary SIME Report, September 20, 2012). Dr. Cleary's SIME report was filed on a medical summary on October 10, 2012. (Medical Summary, October 10, 2012). A note in the Division's computer database states Dr. Cleary's report was sent to the parties on October 12, 2012. (ICERS database, accessed June 29, 2015).

13) On October 4, 2012, Employer controverted specific benefits related to medical benefits. (Controversion, October 4, 2012).

14) On February 12, 2013, Employee and Employer's attorney attended a prehearing conference. The prehearing conference summary states:

> Claimant recently had an SIME. The case is proceeding and medicals have been paid to date.
>
> Claimant questioned who would be responsible for medical bills if his back issues required a surgery in the future?
>
> **In addition, he wanted to know what the statute of limitations was for filing such a claim in the future. The Board designee stated that the Board could not give him legal advice.** In general terms, if he believed he needed surgery in the future and he filed a claim against the ER, the ER would have the right to raise

> all the defenses that it raised previously and any other that might arise in the future.
>
> But the Board designee stated emphatically that he should seek legal advice if he was not sure how to proceed with settling his claim for current damages as well as future claims. He was also told he could speak to one of the Board's technicians, but they would not give him legal advice, rather they could explain procedures that are utilized in WC cases and what the various documents that have been filed say.
>
> In addition, if the claimant needed advise as to which documents to file, the technicians could help with that as well.
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> ER also told claimant that she would check with her client and if her client approved, she would draft a settlement offer to EE.
>
> Finally, claimant was also told how hearings and mediation worked and what would be involved before a C & R could be approved.

The summary included language advising Employee about the two year time limit for requesting a hearing under AS 23.30.110(c):

> 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, February 12, 2013) (emphasis added in bold).

15) Additionally, prehearing conference summaries from the following dates contain the same or similar §110(c) language: March 31, 2015; May 14, 2013; and February 2, 2010. Several other summaries from prehearings held in this case do not contain the §110(c) warning. (Record).

16) Employee testified: Between April of 2012 and April of 2014, his pain was lingering and "progressively getting worse." By approximately April 2014, Employee decided to pursue additional treatment, and contacted Employer's adjuster to request a magnetic resonance imaging

(MRI) scan. Because Employer would not authorize treatment, Employee pursued care through California public aid and had an MRI in December 2014. It was at that time Employee contacted the division and was advised to file an Affidavit of Readiness for Hearing (ARH). Employee believes all his TTD and PPI benefits have been paid as of the hearing date. (Employee). Employee's attorney stated Employee is not seeking review of a reemployment benefits eligibility decision. (Employee's Hearing Argument).

17) On January 2, 2015, Employee filed an ARH requesting a hearing on a claim dated December 29, 2014. (Affidavit of Readiness for Hearing, December 29, 2014). No claim has been filed on or around December 29, 2014. (Record).

18) On January 13, 2015 the parties attended a prehearing conference. The prehearing conference summary states:

> Mr. Oropeza's ARH has a couple of errors in that it refers to a Workers' Compensation Claim dated 12/29/2014 in line 12. Mr. Oropeza's claims are dated 12/8/2009 and 3/18/2012. . . .
>
> EE was advised another prehearing will be scheduled when he files his revised ARH with the corrected dates of his claims or WCCs listed above under Employee Filings. . . . (Prehearing Conference Summary, January 13, 2015).

19) On January 15, 2015, Employer denied all benefits. (Controversion Notice, January 16, 2015).

20) On February 23, 2015, Employer filed a petition to dismiss. The petition stated, "The employer and carrier request a dismissal of this claim in accord with AS 23.30.110(c)." Employer's petition did not specify which claims it wanted dismissed. (Petition, February 23, 2015).

21) On February 24, 2015, attorney Joseph Kalamarides filed his appearance on Employee's behalf. (Notice of Appearance, February 24, 2015). Prior to this, Employee had been unrepresented. (Observations).

22) On March 17, 2015, Employee filed a claim for unspecified TTD, unspecified medical costs, and attorney's fees and costs. The claim stated, "This claim amends a prior claim dated 3-18-12." (Workers' Compensation Claim, March 17, 2015).

23) On April 6, 2015, Employer denied specific benefits related to TTD, medical costs, and attorney's fees and costs. (Controversion Notice, April 6, 2015).

24) Employer does not contend the March 17, 2015 claim is untimely. (Record; Observations).

25) On May 26, 2015, Employee filed affidavits of attorney's and legal assistant fees incurred by Joseph Kalamarides and Douglas Johnston, respectively. (Affidavit of Counsel, May 26, 2015; Affidavit of Douglas Johnston, May 26, 2015). Employer did not file an objection. (Record).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
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> (3) this chapter may not be construed by the courts in favor of a party;
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> (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, 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 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) The department shall adopt rules. . . and shall adopt regulations to carry out the provisions of this chapter. . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

> **AS 23.30.110. Procedure on Claims.** (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability following an injury, or at any time after death, and the board may hear and determine all questions in respect to the claim. . . .

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

AS 23.30.110(c) requires an employee to prosecute a claim in a timely manner. *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995). The only act required of the employee to "prosecute the claim" is to file a request for hearing within two years of controversion; the board "may require no more of the employee." *Tonoian v. Pinkerton Security*, AWCAC Decision No. 029 (January 30, 2007) at 9, *citing Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 913 (Alaska 1996) and *Huston v. Coho Electric*, 923 P.2d 818, 820 (Alaska 1996). *See also Pruitt v. Providence Extended Care*, 297 P.3d 891 (Alaska 2013). 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).

The Alaska Supreme Court found the language of AS 23.30.110(c) clear, requiring an employee to request a hearing within two years of the controversion date or face claim dismissal. *Tipton* at 913. Citing *Doyon Drilling*, *Tipton* also noted dismissal under AS 23.30.110(c) does not prevent the employee from applying for different benefits, or raising other claims, based upon a given injury. *Tipton* at 913 n.4.

The Court compared AS 23.30.110(c) to a statute of limitations for the particular claim at issue. *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska 1987). Statutes with language similar to AS 23.30.110(c) were referred to by Professor 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 Court distinguished dismissal of a specific claim from dismissal of the entire case, stating §110(c) is not a comprehensive "no progress rule." *Wagner v. Stuckagain Heights*, 926 P.2d 456, 459, n. 7 (Alaska 1996). AS 23.30.110(c) is like a statute of limitations in its effect on the claim dismissed by its operation, but it does not terminate all rights based on a given injury. *University of Alaska Fairbanks v. Hogenson*, AWCAC Decision No. 074 at 16 (February 28, 2008), citing *Tipton*.

Certain events relieve an employee from strict compliance with §110(c). The Court held the board owes a duty to every claimant to fully advise him of "all the real facts" bearing 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). The Board's failure to correct an employer's erroneous assertion to a *pro se* claimant that his claim was already time-barred rendered the claimant's ARH timely. *Bohlmann v. Alaska Const. & Engineering*, 205 P.3d 316 (Alaska 2009). Applying *Richard*, *Bohlmann* held the board has a specific duty to inform a *pro se* claimant how to preserve his claim under §110(c). *Richard* is applied to excuse noncompliance with §110(c) when the board failed to adequately inform a claimant of the two-year time limitation. *See, e.g., Dennis v. Champion Builders*, AWCB Decision No. 08-0151 (August 22, 2008). On the other hand, the Court noted "the Commission and the Board already exercise some discretion and do not always strictly apply the statutory requirements." *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 196 (Alaska 2008) at 197-198, *citing Tonoian v. Pinkerton Security*, AWCAC Decision No. 029 (January 30, 2007), and *Omar v. Unisea, Inc.*, AWCAC Decision No. 053 (August 27, 2007).

Certain legal grounds may excuse a *pro per* claimant's noncompliance with §110(c), including lack of mental capacity, or incompetence; lack of notice of the time-bar; and equitable estoppel against a governmental agency. *Tonoian* at 11. *Tonoian* held a material misleading or incorrect

instruction as to filing a specific form or a regulation-based procedure may be grounds for applying equitable estoppel against the board, but an error regarding statutory requirements, including the requirement an ARH must be filed within two years of controversion, may not. *Id*. at 15.

The board has generally held the SIME process tolls the §110(c) deadline for the period the parties are actively in the SIME process. *Aune v. Eastwood, Inc*., AWCB Decision No. 01- 0259 (December 19, 2009); *Rollins v. Icicle Seafoods, Inc.*, AWCB Dec. No. 07-0071 (April 3, 2007) *Turpin v. Alaska General Seafoods*, AWCB Decision No. 09-0054 (March 18, 2009); *Snow v. Tyler Rental, Inc.*, AWCB Decision No. 11-0015 (February 16, 2011) *Villalobos v. Alaska Communications Systems*, AWCB Decision No. 14-0063 (May 1, 2014); (*but see Almendarez v. Compass Group USA*, AWCB Decision No. 11-0146 (September 21, 2011), relying on *Kim* for the proposition the SIME process does not toll the §110(c) deadline)). However, identifying the "brackets" defining the SIME timeline is not fully settled. (*See, e.g., Rollins* (holding the Board's order for an SIME is the definitive tolling act under *Aune*); *Turpin* (holding the deadline began tolling when Employee filed a claim requesting an SIME); *Snow* (holding the tolling commenced when the parties filed the signed SIME form)).

In *Harkness v. Alaska Mechanical, Inc.*, AWCAC Decision No. 12-004 (February 12, 2013), the Commission refused to toll the §110(c) deadline when the "quantum of evidence" did not support the board's finding the parties had stipulated to an SIME. The commission noted even if it had accepted the board's finding of a stipulation, the fact the parties never filed an SIME form or followed through with the SIME process demonstrated the parties were not actively in the SIME process and tolling was not appropriate. *Harkness*, at 21-23. The board has generally held the tolling ceases and the deadline recommences when the parties receive the SIME report. *See also, McKitrick v. Municipality of Anchorage*, AWCB Decision No. 10-0081 (May 4, 2010), at 7 (citations omitted).

Over the lifetime of a workers' compensation case, many claims may be filed as new disablements or medical treatments occur. *Egemo v. Egemo Construction Company*, 998 P.2d 434, 440 (Alaska 2000). In *Egemo* the Court held, "new medical treatment entitles a worker to

restart the statute of limitations for medical benefits," and in *Bailey v. Texas Instruments*, 111 P.3d 321 (Alaska 2005), the Court held dismissal of a claim does not necessarily preclude an employee from filing a later claim for medical costs incurred subsequent to that dismissal.

In *Hogenson* the commission held when a claim for benefits expires under AS 23.30.110(c) and is dismissed, a later-filed claim for the same benefits for the same injury may not revive the expired claim, but that a later-filed claim for the same benefits on a different nature of injury previously unknown to the employee, or for a different benefit from the same injury, is not extinguished with the earlier claim. *Id.* at 10.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
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> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
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> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion (actual or in fact) is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id*. at 152-153.

> **AS 23.30.155. Payment of compensation.**
> . . . .
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> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. . . .

ANALYSIS

1) Should Employee's December 8, 2009 and March 18, 2012 claims be dismissed?

It is well-established the board owes a duty to every claimant to fully advise him of "all the real facts" bearing upon his right to compensation, and to instruct him on how to pursue that right under law. *Richard.* Additionally, the board has a specific duty to inform an unrepresented claimant how to preserve his claim under AS 23.30.110(c). *Id.*; *Bohlmann*. Here, Employee asked the workers' compensation officer at the February 12, 2013 prehearing conference "what the statute of limitations was" to pursue additional benefits or treatment under the Act. The officer declined to meaningfully answer Employee's question, or verbally inform him of the two-year time limitation. *Id.* However, the February 12, 2013 prehearing conference summary includes language advising Employee in non-technical terms about the two year time limit for requesting a hearing under AS 23.30.110(c). At least three other prehearing conference summaries also contained the same or similar §110(c) language. Compliance cannot be excused on grounds of lack of mental capacity or incompetence, lack of notice of the time-bar, or

equitable estoppel, because none has been alleged. *Tonoian*. Therefore, it cannot be said Employee lacked notice of the two-year §110(c) deadline. AS 23.30.001; AS 23.30.135; *Richard*.

The Alaska Supreme Court has not definitively settled the issue whether the SIME process tolls the §110(c) deadline. However, contrary to Employer's hearing brief argument, the Commission said in *Harkness* SIME tolling is appropriate in certain cases. Many board decisions, without precedential value, have held the SIME process tolls the §110(c) deadline for the period the parties are actively in the SIME process. Here, the parties stipulated to an SIME on June 12, 2012. Dr. Cleary's September 20, 2012 SIME report was forwarded to the parties on October 12, 2012. In line with longstanding policy allowing tolling of §110(c) by the SIME process, the time period from June 12, 2012 through October 12, 2012 will be tolled. AS 23.30.001; AS 23.30.135; *Harkness.*

On December 29, 2010, Employer filed a controversion denying PTD benefits. However, as Employee had no active claim for PTD at that time, the December 29, 2010 controversion did not start the two-year §110(c) deadline on Employee's December 8, 2009 claim. AS 23.30.155. On August 31, 2011, Employer controverted specific benefits related to TTD beyond August 29, 2011, medical treatment beyond August 29, 2011, and PPI. Employee had two years from that controversion - or until August 31, 2013 - to request a hearing on his December 29, 2010 claim. AS 23.30.110(c). Assuming the four months between June 12, 2012 and October 12, 2012 are tolled by the SIME process, Employee had until December 31, 2013 to request a hearing on his December 8, 2009 claim. Employee did not file his ARH until December 29, 2014, which was 363 days after the §110(c) deadline had passed. Therefore, Employee's December 8, 2009 claim will be dismissed as untimely. AS 23.30.110(c); *Doyon Drilling*; *Tipton*; *Kim*; *Pruitt*.

On April 17, 2012, Employer controverted specific benefits related to TTD after August 12, 2011, TPD, PTD, medical and related transportation benefits, reemployment benefits, death benefits, penalty/interest, and attorney's fees. AS 23.30.155. Two years after April 17, 2012 is April 17, 2014. Again allowing for four months of tolling due to the SIME process, Employee had until August 17, 2014 to request a hearing on his March 18, 2012 claim. As stated above,

Employee did not file his first ARH in this case until December 29, 2014. Because Employee's December 29, 2014 ARH was 134 days late, his March 18, 2012 claim will be dismissed as untimely. AS 23.30.110(c); *Doyon Drilling*; *Tipton*; *Kim*; *Pruitt*.

Alternately, Employee is only seeking benefits from April of 2014 onward, after he purportedly experienced a recurrence of conditions possibly entitling him to additional benefits. The March 17, 2015 claim by its own language states it amends the March 18, 2012 claim. Therefore, the March 17, 2015 claim supersedes the March 18, 2012 claim and renders it moot. AS 23.30.005(h). The December 8, 2009 claim seeks only TTD and review of the reemployment benefits eligibility decision. Employee testified all TTD benefits have been paid up to the date of the May 28, 2015 hearing. Employee is also not seeking review of a reemployment benefits eligibility decision. The December 8, 2009 claim is also moot. *Id.* Therefore, it follows there is only one "active" claim in this case under which benefits are being sought: the "amended" March 17, 2015 claim for unspecified TTD, unspecified medical costs, and attorney's fees and costs. *Rogers & Babler*. The December 8, 2009 and March 18, 2012 claims will also be dismissed as moot. AS 23.30.005; AS 23.30.135.

Employer requests an order clarifying what benefits Employee may seek in the future. This decision will not issue an advisory opinion. Employee's right to additional benefits will be decided at a merits hearing on Employee's March 17, 2015 claim, if Employee chooses to seek such a hearing. Additionally, Employee may file new claims as new disablements or medical treatments occur or are needed. *Egemo.* Further, new medical treatment entitles Employee to restart the statute of limitations for medical benefits. *Id.* And claim dismissal does not necessarily preclude Employee from filing a later claim for medical costs incurred subsequent to that dismissal. *Bailey*; *Hogenson.*

2) Is Employee entitled to attorney's fees and costs?

Employee filed attorney's and legal assistant fee affidavits. Employer did not object. Nevertheless, an award of compensation or other benefits is a prerequisite to the award of attorney's fees under either AS 23.30.145(a) or (b). Because Employee did not prevail in resisting Employer's February 20, 2015 petition nor was he awarded benefits, his request for attorney's and legal assistant fees and costs will be denied. AS 23.30.145; *Harnish*.

CONCLUSIONS OF LAW

1) Employee's December 8, 2009 and March 18, 2012 claims are dismissed.
2) Employee is not entitled to attorney's fees and costs.

ORDER

1) Employer's February 20, 2015 petition to dismiss is granted with respect to Employee's December 8, 2009 and March 18, 2012 claims.
2) Employee's December 8, 2009 claim is dismissed as moot and also as time-barred under AS 23.30.110(c).
3) Employee's March 18, 2012 claim is dismissed as moot and also as time-barred under AS 23.30.110(c).
4) Employee's claim for attorney's fees and costs is denied.

Dated in Anchorage, Alaska on June 29, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
Matthew Slodowy, Designated Chair

_____
Patricia Vollendorf, Member

_____
Robert Weel, Member

PETITION FOR REVIEW

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

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 Mario Oropeza, employee / claimant v. Unisea, Inc., employer; Alaska National Insurance, insurer / defendants; Case No. 200902828; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on June 29, 2015.

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Elizabeth Pleitez, Office Assistant