ALASKA WORKERS' COMPENSATION BOARD

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

TRACY O. ATKINS, Employee, Claimant,	)	FINAL DECISION AND ORDER ON REMAND
v.	)	AWCB Case No. 200920434
INLET TRANSPORTATION & TAXI SERVICE, INC., Uninsured Employer,	)	AWCB Decision No. 16-0004
and	)	Filed with AWCB Anchorage, Alaska on January 6, 2016
WORKERS' COMPENSATION BENEFITS GUARANTY FUND, Defendants.	)	

The Alaska Workers' Compensation Benefits Guaranty Fund's (Fund) December 2, 2013 petition to dismiss Tracy O. Atkins' (Employee) April 8, 2011 workers' compensation claim (claim) under AS 23.30.110(c) and AS 23.30.015(h) was heard on remand from the Alaska Workers' Compensation Appeals Commission (Commission) on December 9, 2015 in Anchorage, Alaska. *Atkins v. Inlet Transportation & Taxi Service, Inc.*, AWCB Decision No. 14-0045 (*Atkins I*) had been issued on March 28, 2014. The instant hearing date was selected on August 18, 2015. Inlet Transportation & Taxi Service, Inc. (Employer) did not appear. Assistant Attorney General Siobhan McIntyre appeared and represented the Fund. Attorney Eric Croft appeared and represented Employee, who appeared and testified. Other witnesses included Penny Helgeson, who appeared in person, and Miranda Kennedy and Warren Vincent, who appeared telephonically. The record closed at the hearing's conclusion on December 9, 2015.

ISSUES

The Fund contends Employee's claim should be dismissed under AS 23.30.110(c) because Employee did not file an Affidavit of Readiness for Hearing (ARH), or request more time to do so, within two years after the Fund filed its first, good-faith controversion of all benefits. Employee contends the first controversion had no factual or legal basis, and therefore was irrelevant. Employee contends his claim should not be dismissed for noncompliance with §110(c) because he relied on procedural instructions from board designees, and filed his ARH within two years after the filing of the second controversion, in which the AS 23.30.015(h) settlement defense was initially raised.

Should Employee's claim be dismissed under AS 23.30.110(c)?

The Fund contends Employee's claim should be dismissed under AS 23.30.015(h) because Employee settled with a negligent third party without the Fund's written approval. Employee admits he did not obtain authorization from the Fund but contends his claim should not be dismissed for numerous reasons: (1) only Employer, not the Fund, can provide written approval under §015(h); (2) Employer was aware of and/or consented to some or all of the third-party settlements; (3) a §015(h) defense should be disallowed under the equitable doctrines of unclean hands, equitable estoppel, and substantial compliance; and (4) neither Employer nor the Fund suffered any actual or financial prejudice from the third-party settlement.

Should Employee's claim be dismissed under AS 23.30.015(h)?

FINDINGS OF FACT

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

1) On September 6, 2009, while working as a taxicab driver, Employee incurred multiple, serious injuries in a head-on motor vehicle accident caused by the other driver, Jeffrey Vincent, who died at the scene (Alaska Motor Vehicle Collision Report, reviewed March 26, 2010; Report of Occupational Injury or Illness, April 8, 2011.)

2) On April 19, 2011, Employee filed a claim for temporary total disability, permanent partial impairment, medical and transportation costs, penalty and interest. The claim requested joinder of the Fund under AS 23.30.082. (Claim, April 8, 2011; mistakenly dated April 8, 2009; observation.)

3) On May 5, 2011, Employee, represented by attorney Stuart Cameron Rader, signed releases of all claims against the deceased tortfeasor, Jeffrey Vincent, and his father, Warren Vincent, for a total of $119,668.64. This amount included $13,493.98 in attorney fees to Mr. Rader and $6,174.66 in prejudgment interest, meaning that Employee received $100,000.00. On May 20, 2011, National Continental Insurance Company issued warrants to Employee and his counsel totaling $119.405.14. (Releases of claims regarding Jeffrey and Warren Vincent, signed by Employee only, May 5, 2011; warrants, May 20, 2011.)

4) On May 9, 2011, the Fund controverted all benefits on two grounds: (1) taxicab drivers are not covered by the Alaska Workers' Compensation Act (Act) under AS 23.30.230(a)(7); and (2) "Treatment for lumbar pain after slip and fall on ice on 02/14/11." The controversion was filed on board-prescribed Form 07-6105 (Rev. 8/97). The standard form is two-sided, and the back side notifies Employees of the need to request a hearing within two years of a post-claim controversion. However, Employee's case file includes only the first page of the controversion form, and consequently it is unknown whether he was served notice of the AS 213.30.110(c) deadline on the form. (Controversion Notice, filed May 11, 2011.)

5) The issues of whether Employee was an employee for purposes of the Act and whether he was exempt from the Act as a taxicab driver have not yet been set for hearing, and have not been decided. (*Atkins I* transcript, pp. 12-16; observation.)

6) At a prehearing conference on July 7, 2011, Employee was made aware of the May 9, 2011 controversion, and received the following written notice regarding the two-year period in which to request a hearing on a post-claim controversion:

> Employee is reminded, if a controversion notice is served and filed after the date of filing of Employee's workers' compensation claim, Employee must serve and file an affidavit, in accordance with 8 AAC 45.070, requesting a hearing within two years of the post-claim controversion to avoid possible dismissal of Employee's claim. AS 23.30.110(c) provides: "If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied." Some events in the case may toll (extend) this deadline as to some claims, however, the parties are urged to

> remain aware of the earliest deadline and the possibility of dismissal if a hearing is not timely requested.

The Prehearing Conference Summary stated Employee had already received an ARH form and the Division of Workers Compensation's (Division) pamphlet, *Workers' Compensation and You: Information for Injured Workers*, and the summary gave the online address for both. (Prehearing Conference Summary, July 7, 2011.)

7) At a prehearing conference on August 9, 2011, Employee was reminded of the May 9, 2011 controversion, and again received written notice regarding the two-year period in which to request a hearing on a post-claim controversion:

> **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, August 9, 2011; emphasis in original.)

8) The summary from the October 20, 2011 prehearing conference included the same notice of the May 9, 2011 controversion, and the same AS 23.30.110(c) warning language as in the August 9, 2011 summary. (Prehearing Conference Summary, October 20, 2011.)

9) On October 21, 2011, the Fund controverted all benefits under AS 23.30.015 due to Employee's third-party settlements. The controversion, like one filed May 11, 2011, was filed on board-prescribed Form 07-6105 (Rev. 8/97), but Employee's case file includes only the first page of the controversion form, and consequently it is unknown whether he was served notice of the AS 213.30.110(c) deadline on the form. *Atkins I* erroneously found the controversion was filed on October 24, 2011; the actual filing date was October 27, 2011. (Controversion Notice, filed October 27, 2011; observation.)

10) On August 24, 2012, Employee called the board and spoke with Workers' Compensation Officer (WCO) Penny Helgeson, who memorialized the phone call in the Division database as:

"[from Employee; questions regarding] dates of claim, controversions, potential deadlines. Discussed role of WCO I in 'assisting' with case procedures, [Workers' Compensation] protocols. [Employee] states he has contacted an [attorney] who will likely be taking his case." (Division database, Event Details screen, August 24, 2012; bracketed portions abbreviated in original.)

11) On April 29, 2013, WCO Helgeson left the Adjudications Division. She was replaced as WCO I by former Workers' Compensation Technician Cynthia Stewart on May 14, 2013. (Record; Division employment files.)

12) On August 7, 2013, WCO Stewart and Employee spoke by phone about the status of his case, and Employee was subsequently provided with a Request for Conference (RFC) form with which to ask for a prehearing. The conversation is the first interaction noted in the Division database between Employee and the board since his August 24, 2012 phone call with WCO Helgeson, nearly a year earlier. (Division database, Event Details screen, August 7, 2013; observation.)

13) On September 2, 2013, WCO Stewart spoke telephonically with Employee. She noted he did not return the RFC form and did not show for a previously scheduled appointment. WCO Stewart "[a]dvised [him] his deadline was coming up." *Atkins I* erroneously found this phone call took place on September 9, 2013. (Division database, Event Details screen, September 2, 2013; observation.)

14) The summary from the October 14, 2013 prehearing conference noted that it had been 14 months since the prior prehearing conference, and stated:

> There was some discussion as to what the applicable statute of limitations is in this case. Employee filed his claim on 4/8/2011 and it was controverted by the fund on 5/9/2011 and on 10/21/2011. Employee was in contact with division staff who on at least one occasion advised him his deadline was coming up after 5/9/2013. [Employee] stated he was advised by phone his deadline was 10/27/2013 by more than one WC staff member. Fund pointed out if [Employee] does not file an ARH by 10/27/2013, this becomes a moot point. Designee explained to [Employee] the Fund is saying he has to file his ARH by 10/27/2013 or his argument would have no merit.

(Prehearing Conference Summary, October 14, 2013.)

15) On October 24, 2013, Employee filed an ARH on his April 8, 2011claim (ARH, October 24, 2013.)

16) On December 2, 2013, the Fund petitioned to dismiss Employee's claim under AS 23.30.015(h) for settling a third-party claim without the employer's written approval, and under AS 23.30.110(c)

for not filing an ARH within two years after the filing of the Fund's May 9, 2011 controversion (Petition to Dismiss, December 2, 2013.)

17) On January 3, 2014, Employee wrote in response to the October 14, 2013 Prehearing Conference Summary:

> IT STATES THAT, 'EMPLOYEE WAS IN CONTACT WITH DIVISION STAFF WHO ON AT LEAST ONE OCCASION ADVISED HIM HIS DEADLINE WAS COMING UP AFTER 5/9/2013'. I WOULD NOT BE CONCERNED BY THIS LINE OF TEXT, BUT WITH THE OPPOSING CONSUL BEING A STICKLER FOR DETAILS I THINK THAT IT IS IN MY BEST INTEREST TO ADDRESS THIS SO THAT IT IS ALSO A MATTER OF RECORD. WITH THAT SAID: I STRONGLY DISAGREE WITH THE STATEMENT REFERENCED IN THIS FIRST PARAGRAPH. I HAVE NOT BEEN ABLE TO FIND ANY SUPPORTING PAPER WORK TO SUBSTANTIATE THAT ALLEGATION. AS I STATED, I WAS TOLD ON MORE THAN ONE OCCASION THAT MY DEADLINE WAS 10/27/2013, BASED ON THE FACT THAT THE LAST CONVERSION DATE WAS 10/27/2011, AND THAT THE STATUE OF LIMITATIONS WAS TWO (2) YEARS FROM DATE OF LAST CONVERSION. THUS IS WHY I AM REQUESTING THAT 'DIVISION STAFF' AND/OR RECORDS BE PRODUCED, TO CORROBORATE THE ALLEGATION. OTHER WISE THIS ARGUMENT OF ME NOT FILING TIMELY IS MOST DEFINITELY, AND IRREFUTABLY, A MUTE POINT, AND I WOULD ASK THAT IT BE STRICKEN FROM THE RECORD, OR AT LEAST AMENDED TO BE A FACTUAL ACCOUNTING, SO AS NOT TO DELAY THESE PROCEEDINGS ANY LONGER

(Employee e-mail, January 3, 2014; emphasis and typographical errors in original.)

18) At a prehearing conference on January 8, 2014, a hearing was set for March 12, 2014 on Employee's April 8, 2011 claim for TTD, PPI, medical costs, transportation, penalty and interest. The prehearing officer noted, "Additionally there is the question of whether and how much of Employee's benefits may be offset by his third party recovery." In response to a January 27, 2014 objection from the Fund, the January 8, 2014 Prehearing Conference Summary was amended to change the March 12, 2014 hearing issues to the Fund's December 2, 2013 Petition to Dismiss under AS 23.30.110(c) and AS 23.30.015(h). (Prehearing Conference Summary, January 8, 2014; Amended Prehearing Conference Summary, January 27, 2014.)

19) At deposition on February 12, 2014, Employee, representing himself, was asked if WCO Helgeson's entry in the Division's database regarding their August 24, 2012 phone conversation "correctly reflect[ed] basically what your discussion was." He responded, "As far as I can

recall." When asked, "Do you recall anything else about that conversation?," Employee testified, "Nope. Not from two years ago, no." (Deposition, February 12, 2014, p. 56.)

20) At hearing on March 12, 2014, Employee, still representing himself, was asked under cross-examination about his deposition testimony regarding the August 24, 2012 conversation with WCO Helgeson:

> **A. In regards to when I said – you said, 'Do you recall anything else about that conversation,' and I said, 'No.'**
>
> **Actual statement, what I do have on that conversation, I wrote down and it is at home. I apologize I don't have that with me today, but I did write it down. That's why I was always able to draw back to that particular conversation with Penny Helgeson, because everything she told me, I wrote it down, including the dates I talked to her and the dates she said that the conversion [sic], not conversion [sic], but the date she said that I had [to] do a filing by.**

Employee testified he had not entered the document into evidence. (*Atkins I,* pp. 107-108.)

21) At hearing on March 12, 2014, Employee testified he followed instructions and directions from board designees:

> As far as late filings and all of that, I did exactly what the workman's [sic] compensation board asked me to do. I double-checked with them, 'What do I need to do?' I told them I know nothing about this. I told them from the start, 'I will be leaning on you very heavily, because I know nothing.'

Employee testified as to his lack of understanding regarding his filing deadline:

> [O]n the pretrial summaries, I know there has been a lot of mention of I have been told about the two-year period in which to file.
>
> On that itself, and I brought this up as an issue, it's very unclear, in my way of thinking and the way I look at it, just the reading of it, it's very unclear as to when that two-year clock starts.
>
> It says 'after conversion [sic].' I have had three conversions [sic], if I'm not mistaken. My understanding was after a conversion [sic], that's when the clock started, the two-year clock.
>
> And I think that is reflected in the record also as to the time that I was told that I had to do a filing. I think it was October 27th, if I'm not mistaken. So I just wanted to make that really clear, because it is extremely vague. It just says 'after the conversion [sic].' It doesn't say the first conversion [sic], second conversion [sic], middle conversion [sic], last conversion [sic]. It just says 'after conversion [sic] notice.'

He later referred again to the prehearing conference summaries:

> You know, I spoke to the wording on the reminder here. Like I said, that wording, it's very vague. It's very vague. It does not say the 'first conversion [sic], the initial conversion [sic].' It just says 'conversion [sic].'
>
> And maybe along the line I got it mixed up, but somewhere my understanding was, what's the term, tolls the bar, the time bar or something. I think I heard that terminology, that the prehearing conferences, setting the conferences was what kicked that clock.
>
> And so I was under impression, like when I talked to Ms. Helgeson, we went over all the things, we went over all of the facts, where we were, what the conversions [sic] were, how many there were, okay, where are we right now? And I got the date of 10/27, if I'm not mistaken. That's when I needed to file, to file by that date, or everything was going to be moot.

Employee testified the information he subsequently received from WCO Stewart regarding the filing date was the same. He further testified that the ARH and the statute of limitations issue had come up in a prehearing conference, but he was confused: "I wasn't even familiar what ARH was, what it really entailed, . . ." Employee emphasized he had done the "very best" he could to comply, that he was trying to be as honest as he could, and "there is absolutely nothing I have done that's been malicious." (*Atkins I* transcript, pp. 38-41, 96, 99-100, 132-133; 142-143.)

22) At hearing on March 12, 2014, the designated chairperson asked Employee about his failure to comply with the AS 23.30.110(c) deadline:

> Q. Okay, Mr. Atkins, I have one last question and I think you have answered it probably a couple of times, but just to reiterate, according to our files, there were three prehearing conference summaries.
>
> **A. Yes.**
>
> Q. That warned you, and those were after the controversion, the May 9, 2011 controversion, and they warned you of a two-year deadline to file an affidavit of readiness for hearing?
>
> **A: Right.**
>
> Q. Or your claim might be dismissed. Could you please just recap for me why it is that you did not do that?
>
> **A: Why I did not?**
>
> Q. Why you did not in that two-year period.

> **A: Sure, from the time I filed up until – is that what you're speaking of?**
>
> Q. The relevant two-year period is the time between when the controversion in May of 2011 was filed and then you have a two-year gap in which you have to file an Affidavit of Readiness for Hearing. And so my question is: There were three prehearing conference summaries you received during that time that had language in them warning you of a two-year, in essence, statute of limitations. Could you just please reiterate for me why it is that you did not file that?
>
> **A: Yes, I can. The reason I didn't file it, number one, I wasn't in complete knowledge of what ARH actually was. I knew, to my understanding, it was two years to file for a hearing. The reason I did not file is I was under the impression that it was after – and this is from information that I received, after conversion [sic], two years after the conversion [sic]. Okay. I didn't know it had to be two years after the first conversion [sic], because I had three of them. And that's what reflects in the record is from that last conversion [sic], I was working off that two-year period.**
>
> **That's where I got my dates from here, Workman's [sic] Compensation, so I called specifically to ask them, where are we here, what do I have to do, because the other two-year mark that I had in mind was two years from the date of the accident. There is something around that that you had to file a Comp claim within two years of the date of that accident. And also I didn't – I just did not know that was it, that I had to file sooner than what I did. I thought I was going by what I was told per Penny Helgeson and Cynthia Stewart.**

(*Atkins I* transcript, pp. 114-116.)

23) As a witness for the Fund at the March 12, 2014 hearing, WCO Helgeson testified she had no recollection of her August 24, 2012 conversation with Employee independent from her notes in the Division database. She testified she memorialized in the database "[t]hings that are substantive, that are important." In reference to the August 24, 2012 conversation, the direct examination continued:

> Q. . . . if you had given [Employee] specific dates of deadlines, would you have provided those exact dates?
>
> **A. That is my usual protocol. When we discuss a date certain, when I'm saying, 'According to this document, it appears that,' and we actually talk a date certain, I do try to make a notation in here, and I will say that in those very similar terms, 'That it appears that this would be the date that this would need to be done or this is the date we discussed.' That's my usual protocol.**
>
> Q. Thank you. And you would put that in your notes?

A. I would put that in this note.

On cross-examination, Employee asked:

> Q. As far as I recall, we only had one conversation, as far as I recall. Do you recall anything different than that?
>
> **A. I do not.**

Employee then asked WCO Helgeson about her protocol regarding putting notes in the Division database after conversations with claimants:

> Q. I'm not trying to be a stickler.
>
> **A. I understand. So you're saying that if I spoke to somebody on the phone and if I was addressing something other than routine questions, like whether or not we were open, what time we were open until or did we carry the forms, would I make a note to the system?**
>
> Q. Yes.
>
> **A. In most instances, yes.**

In the course of his cross-examination Employee stated, regarding the August 24, 2014 conversation, "I wrote everything down, because I was very specific." (*Atkins I* transcript, pp. 123-125, 128-130.)

24) On March 28, 2014, *Atkins I* granted in part and denied in part the Fund's December 2, 2013 Petition to Dismiss Employee's April 8, 2011 claim. The claim was dismissed under AS 23.30.015(h), and the AS 23.30.110(c) was therefore found to be moot and was not analyzed. (*Atkins I*.)

25) On April 28, 2014, Employee filed his appeal of *Atkins I* to the Commission, on the grounds that "I believe that the board made factual findings that were not supported by substantial evidence & lack of pertinent evidence, which I feel lead to the law being applied incorrectly." (Notice of Appeal, April 13, 2014.)

26) On November 20, 2014, attorney Eric Croft entered his appearance as Employee's counsel. (Commission's Memorandum and Order Remanding Case (Remand), July 16, 2015, p. 3.)

27) On July 16, 2015, the Commission remanded *Atkins I* for "further proceedings and factual findings to address [Employee's] equitable arguments, and for additional findings . . . to address the Fund's asserted defense under AS 23.30.110(c)." The Remand noted:

> [Employee's] brief, filed on November 24, 2014, asserted that the board had erred by falling to consider the conduct of the employer, the policy underlying AS 23.30.015, the equitable principles of unclean hands, and the doctrine of substantial compliance, adding that the issues to be decided included whether AS 23.30.015(h) applies to an uninsured employer, and whether any other equitable doctrines applied. The Fund's brief responded that AS 23.30.015(h) applies to uninsured employers without regard to whether the employer was prejudiced by the settlement, and that the doctrines of unclean hands and substantial compliance were inapplicable. [Employee's] reply brief argued that absent prejudice to the employer, AS 23.30.015(h) does not bar compensation when the employee settles without the employer's written approval, and that on the facts of this case the settlement did not prejudice the employer.

The Commission instructed, "[Employee's] argument relating to AS 23.30.015(h) need not be considered at all, if his claim is otherwise barred by AS 23.30.110(c) (which the board declined to consider in light of its ruling the other issue before it)." (Remand, July 16, 2015, pp. 3-5; footnotes omitted.)

28) A prehearing conference on August 18, 2015 set a hearing for December 9, 2015. An amended Prehearing Conference Summary, issued on August 24, 2015, set out five hearing issues, as agreed upon by counsels for Employee and the Fund:

1. The Fund's AS 23.30.110(c) defense
2. Mr. Atkins' equitable arguments regarding AS 23.30.015(h)
3. Mr. Atkins' substantial compliance argument
4. Whether AS 23.30.015(h) should be applied if the Employer suffers no prejudice from the settlement (including who has the burden of proving whether or not there was prejudice)
5. Whether AS 23.30.015(h) applies to an uninsured employer

(Amended Prehearing Conference Summary, August 24, 2015.)

29) As a witness for the Fund at the December 9, 2015 hearing, WCO Helgeson testified she had been employed as a WCO I in the Adjudications Section from February 1, 2011 through April 28, 2013. Prior to February 1, 2011, she worked for the Department of Law, Attorney General's office, Civil Division, Torts and Workers' Compensation Section, where she worked on workers' compensation claims on behalf of the State of Alaska. WCO Helgeson testified her main duties as a WCO I were to provide responses or be a source of information for the public regarding the Division's procedures and protocols. WCO Helgeson again testified she had no direct recollection of speaking with Employee, but she confirmed that the August 24, 2012 comments in the Division database were entered by her, as evidenced by the inclusion of her initials. In response to the

question, "When you speak with claimants, if you provide a specific date would you usually put that in your notes?," WCO Helgeson testified, "Yes, that would be my usual protocol." She had access to all the entries in the Division database, including controversions, and her duties included speaking to claimants about ARH deadlines in relation to controversions. She testified her protocol in terms of providing information to claimants in cases where two controversion had been filed was to tell them that the deadline date could apply to either or both controversion; she clarified this statement by noting it was important that claimants were cognizant of the fact that controversions are treated separately unless there is a reason that they are not. When asked, "If there was more than one controversion, would you recommend anything else to claimants?," WCO Helgeson testified, "I always, well I shouldn't say I always, it was my protocol (I have no way of auditing myself to know if I always did it)" to advise unrepresented claimants to discuss the controversions at a prehearing conference, where both parties would be present and could agree on the correct ARH filing deadline(s). (Helgeson.)

30) In numerous other cases in the Division's database, WCO Helgeson entered a specific date by which a claimant needed to pursue his claim under AS 23.30.110(c). (Experience, observation.)

31) WCO Helgeson's testimony was credible. (Experience, judgment, observations, unique and peculiar facts of the case, and inferences drawn from all of the above.)

32) At the December 9, 2015 hearing, Employee relied on notes he had written on a manila folder regarding filing deadlines, to which he had referred in *Atkins I*, but had only recently entered into evidence. The document reads in relevant part:

PER PENNEY HELGESON @AWCB	8/24/2012	CYNTHIA STEWART
INITIAL CLAIM	4/8/2011	
FILING DATE	4/19/2011	> REPORT OF INJURY
CONTROVERSION NOTICE	5/11/2011	
CONTROVERSION NOTICE	10/27/2011	
"THIRD PARTY PAY OUT"		> HEARING DEADLINE 10/26/2013
RE-INITIATED CONTACT W/AWCB	8/2/13	

Employee testified he had received all three Prehearing Conference Summaries dating from 2011, and was aware of the controversion filed on May 11 of that year. On August 24, 2012, he called to speak with Cynthia Stewart, at that time a Workers' Compensation Technician, but could not reach her and was instead directed to WCO Helgeson. Employee testified that everything recorded in the above table, with the exception of the last line, was "directly what I got from [WCO Helgeson]," written while he was on the phone with her on August 24, 2012. He testified he did not fabricate this document at a later date, and it was "very highly unlikely" that things were said that were not included in his notes, because he was "being very specific with the reason he called." Employee stated he wrote down everything so to be clear about what he was supposed to be doing and to get his dates right; he was unrepresented, didn't know anything about what he was doing, and his board contacts were supposed to be helping him. He testified he remembers the August 24, 2012 conversation, and WCO Helgeson gave him an ARH deadline of October 26, 2013. He testified he did not know he had to bring the notes to the *Atkins I* hearing; there was "so much mess going on" and he didn't really even know what an ARH was all about. (Atkins.)

33) Employee testified he reinitiated contact with the board on August 2, 2013, as recorded in the same notes in which he memorialized his August 24, 2012 conversation with WCO Helgeson. He testified he believed he spoke with board representatives in the period between August 2012 and August 2013, but he didn't recall details and could not definitively say he had had no contact with the board in that year. Regarding his September 2, 2013 conversation with WCO Stewart, Employee testified she told him his ARH filing deadline was October 24, "if I'm not mistaken."

34) Employee's testimony was not entirely credible. (Experience, judgment, observations, unique and peculiar facts of the case, and inferences drawn from all of the above.)

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;

> **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.

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler,* 741 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.110. Procedure on Claims**.
> . . .
> (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. ... 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 at 9 (January 30, 2007), 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). 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 at 12 (March 24, 2010).

The Alaska Supreme Court (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). The 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 of the claim. *Tipton* at 913. Board-prescribed controversion forms provide adequate notice of the §110(c) time-bar. *Hessel* at 3. Dismissal for failure to timely file an ARH is usually automatic and non-discretionary. *See, e.g., Hornbeck v. Interior Fuels,* AWCB Dec. No. 08-0072 (Apr. 17, 2008); *Beaman v. Kiewit Construction*, AWCB Decision No. 06-0101 (April 27, 2006).

On the other hand, the Court noted the Alaska Workers' Compensation Appeals Commission (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 193, 197-198 (Alaska 2008), citing *Tonoian* and *Omar v. Unisea, Inc.,* AWCAC Decision No. 053 (August 27, 2007). The statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Tipton* at 912-13.

Certain events relieve an employee from strict compliance with the requirements of §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). In *Bohlmann v. Alaska Construction & Engineering,* 205 P.2d 316 (Alaska 2009), the Court held the board's failure to correct an employer's erroneous assertion to a self-represented claimant his claim was already time-barred rendered the claimant's ARH timely. Applying *Richard*, *Bohlmann* stated the board has a specific duty to inform a self-represented claimant how to preserve his claim under §110(c). *Richard* has been applied to excuse noncompliance with §110(c) where, during the operative two-year period, the sole means of communicating the ARH deadline to claimants with limited reading comprehension abilities was on the reverse side of controversion forms. *See, e.g., Dennis v. Champion Builders*, AWCB Decision No. 08-0151 (August 22, 2008); *Austin v. Norquest Seafoods, Inc*., AWCB Dec. No. 08-0114 (June 18, 2008).

Failure to file a timely request for hearing may be excused when the evidence supports application of a recognized form of equitable relief. *Kim* at 197-198, citing *Tonoian* at 11. In *Tonoian* the Commission held a claimant may be legally excused from a statutory deadline for reasons such as lack of mental capacity or incompetence, lack of notice of the time-bar to a *pro se* litigant, and equitable estoppel against a governmental agency by a pro se litigant. *Tonoian* at 11.

In *Denny's of Alaska v. Colrud,* AWCAC Decision No. 148 (March 10, 2011), a self-represented claimant testified she suffered from a condition that affected her memory, but the Commission found her forgetfulness did not rise to the level of mental incapacity or incompetence. Substantial evidence showed she was capable of conducting her daily affairs, including driving a newspaper route seven days a week and remembering to attend doctor's appointments, and therefore she did not lack the mental capacity to mail an ARH form or request more preparation time before the statutory deadline. *Colrud* at 12.

Technical noncompliance with §110(c) may be excused in cases where a claimant has substantially complied with the statute. In *Omar*, the commission remanded the case to the board to consider whether, among other things, "circumstances as a whole" constituted compliance with the requirements of §110(c) sufficient to excuse the employee's failure to meet the statutory deadline. In *Kim*, the Supreme Court held because §110(c) is a procedural statute, its application is directory rather than mandatory, and substantial compliance is acceptable absent significant prejudice to the other party. *Kim* at 196. However, substantial compliance does not mean noncompliance (failing to file anything), *id.* at 198, or late compliance (filing after the deadline), *Hessel* at 11-12. Though substantial compliance does not require a formal affidavit be filed, it still requires a claimant to file, within two years of a controversion, a request for either a hearing or additional time to prepare for one. *Colrud* at 11.

AS 23.30.120. Presumptions.
(a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter; . . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Id.* An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991).

However a claimant seeking to establish a legal excuse from operation of the AS 23.30.110(c) time bar is not entitled to the presumption of compensability under AS 23.30.120: "there is no statutory presumption that a person seeking to be excused from the operation of the provisions of this chapter is entitled to a presumption of excuse." *Tonoian* at 4.

> Thus, a claimant asserting that the employer waived, or is estopped from, enforcement of the statute of limitations bears the burden of producing evidence of the facts necessary to establish waiver or estoppel and persuading the board that the facts asserted by the claimant are more likely true than not. . . . [I]f the board finds the claimant failed to request a hearing within two years of a post-claim controversion, the claimant bears the burden of producing evidence and persuading the board that the facts establish a legal excuse for the delay. *Id.* (footnote omitted.)

See also, Rockney v. Boslough Construction, Inc., AWCB Decision No. 05-0188 (July 15, 2005) at 2, citing *Halliday v. Ridgway's Inc.*, 3AN-92-1231 Civ (Alaska Super., November 9, 1992).

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

> **AS 23.30.155. Payment of compensation.**
> (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . .

A controversion notice must be filed in good faith to protect an employer from a penalty for nonpayment of benefits. *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352, 358 (Alaska 1992). The

employer must possess sufficient evidence in support of the controversion that, if the employee does not introduce evidence in opposition to the controversion, the board would find the employee not entitled to benefits. *Id.,* citing *Kerley v. Workmen's Comp. App. Bd.*, 4 Cal.3d 223; 93 Cal.Rptr. 192, 197; 481 P.2d 200, 205 (1971) (the only satisfactory excuse for delay in payment of disability benefits, whether prior to or subsequent to an award, is genuine doubt from a medical or legal standpoint as to liability for benefits). A good-faith controversion can be based on a legal defense that, even if unsuccessful, is "not legally implausible." *Irby v. Fairbanks Gold Mining, Inc.*, 203 P.3d 1138, 1147 (Alaska 2009). "[C]olorable legal arguments . . . based in part on undisputed facts" are sufficient to support a controversion. *Id.*

> **AS 23.30.230. Persons not covered**.
> (a) The following persons are not covered by this chapter:
> . . .
> (7) an individual who drives a taxicab whose compensation and written contractual arrangement is as described in AS 23.10.055(a)(13), unless the hours worked by the individual or the areas in which the individual may work are restricted except to comply with local ordinances;

ANALYSIS

Should Employee's claim be dismissed under AS 23.30.110(c)?

On April 19, 2011, Employee filed a claim related to injuries sustained while working as a taxicab driver. The Fund filed a controversion of all benefits on a board-prescribed form on May 11, 2011. Employee's contention that the first controversion should be ignored as irrelevant because it has no factual or legal basis is misplaced. The controversion was filed on two grounds, the primary being that taxicab drivers are not covered by the Act, pursuant to AS 23.30.230(a)(7). Employer presented a colorable legal argument based on the undisputed fact Employee was injured while driving a taxi for hire. Hypothetically, if Employee did not introduce evidence in opposition to the controversion, the board would find him not entitled to benefits. Therefore the controversion was valid and filed in good faith under *Irby* and *Harp*, meaning Employee was required to request a hearing within two years of the May 11, 2011 filing date or face denial of his claim under AS 23.30.110(c). Because "an act must be done" and the controversion was served on Employee by mail, three days needed to be added to the prescribed period. 8 AAC 45.060(b). The deadline for Employee to request a hearing on the benefits in his April 19, 2011 claim was therefore May 14,

2013, unless he was legally excused from doing so. Employee did not file his ARH until October 24, 2013.

Dismissal due to noncompliance with the clear language of AS 23.30.110(c) is usually automatic and non-discretionary. *Tipton; Hornbeck; Beaman.* Certain facts can relieve a claimant from strict compliance with §110(c) requirements, but the employee bears the burden of producing evidence and persuading the board that the facts of his case establish a legal excuse for his filing delay. *Tonoian.* Here Employee contends his claim should not be dismissed because he relied on incorrect information given him by Division representatives, beginning August 24, 2012, and he filed his ARH by the date they told him he should. If Employee convinces the board that the facts necessary to excuse his filing delay were more likely true than not, his noncompliance with the May 14, 2013 deadline would be excused. *Bohlmann; Richard; Tonoian.*

Prior to August 24, 2012, the board clearly fulfilled its *Richard* and *Bohlmann* duty to advise and instruct Employee how to pursue his legal rights. Employee attended three prehearing conferences prior to his May 14, 2013 filing deadline. All three – in July, August and October 2011 – took place prior to the Fund's second controversion, filed on October 27, 2011. The three prehearing conference summaries all recorded Employee's April 19, 2011 claim and the May 9, 2011 controversion, and specifically informed Employee his claim faced dismissal if he did not file an ARH within two years following the filing of the post-claim controversion. Employee was also provided with an ARH form and *Workers' Compensation and You: Information for Injured Workers*, as well as the online address for both documents.

The case turns around a dispute over the contents of the August 24, 2012 phone conversation between Employee and WCO Helgeson, which took place more than eight months before the May 14, 2013 §110(c) deadline. The parties agree they only spoke on this one occasion. WCO Helgeson testified her notes in the Division database indicated Employee had called with questions regarding the dates of his claim, controversions and potential deadlines. However, because she had no independent recollection of the August 24, 2012 conversation, she was unable to say definitively whether on that occasion, contrary to her usual protocol, she had given Employee a filing deadline but neglected to memorialize that fact. She instead testified she usually recorded things that were

substantive and important, such as a "date certain"; it would not have been her normal practice to provide a claimant with a specific date but not record that fact in the database. When asked what recommendations she gave to claimants who had received more than one post-claim controversion, WCO Helgeson testified, "I always, well I shouldn't say I always, it was my protocol (I have no way of auditing myself to know if I always did it)" to advise unrepresented claimants to discuss the controversions at a prehearing conference, where both parties would be present and could agree on the correct ARH filing deadline(s).

By August of 2012 WCO Helgeson had acquired considerable expertise in her position, which mainly involved providing responses and being a source of information for the public regarding the Division's procedures and protocols. She had been a WCO for 18 months, and prior to that had worked on workers' compensation claims as an employee of the State of Alaska Department of Law, Attorney General's office. WCO Helgeson's testimony at the two hearings was found credible because it was logical, consistent, and included no contradictory statements; moreover her assertions regarding her standard practice of documenting "dates certain" was corroborated by the observation that in numerous other cases in the Division's database, WCO Helgeson entered a specific date by which a claimant needed to pursue a claim under AS 23.30.110(c).

On the other hand, Employee testified that on August 24, 2012, WCO Helgeson gave him, and he relied upon, erroneous information that caused him to miss his May 14, 2013 filing deadline. However Employee's testimony regarding the August 24, 2012 discussion altered over time. At deposition on February 12, 2014, Employee was asked if WCO Helgeson's database entry "correctly reflect[ed] basically what your discussion was." Employee responded, "As far as I can recall." When asked, "Do you recall anything else about that conversation?," Employee testified, "Nope. Not from two years ago, no." A month later, under cross-examination at *Atkins I*, he changed his story, testifying he had taken specific notes during the August 24, 2012 discussion, including the date he needed to file an ARH: "Actual statement, what I do have on that conversation, I wrote down and it is at home. I apologize I don't have that with me today, but I did write it down. That's why I was always able to draw back to that particular conversation with Penny Helgeson, because everything she told me, I wrote it down, including . . . the date she said that I had [to] do a filing by." At the remand hearing, Employee produced for the first time the

manila folder on which he testified he had, during the course of the August 24, 2012 conversation, written down everything "so to be clear about what he was supposed to be doing and to get his dates right." Contrary to his deposition testimony, in the instant hearing Employee testified he remembers the August 24, 2012 conversation, and that WCO Helgeson gave him a specific ARH deadline of October 26, 2013.

As evidence, Employee's folder notes are problematic on at least two accounts. First, the folder is a self-serving document, and there is no way to authenticate when it was prepared. Second, even if it could be proved the document was not fabricated later than the disputed phone conversation, there is no way to authenticate that it is a complete and accurate record of the discussion. Employee's notes record the dates of the filing dates of both controversions (May 11, 2011 and October 27, 2011) but include only one "hearing deadline," October 26, 2013. Employee testified it was "very highly unlikely" that things were said that were not included in his notes, but the absence of a recorded "hearing deadline" corresponding to the May 2011 controversion is not conclusive proof that a deadline was not discussed; it may have been, and Employee may simply have failed to write it down.

At the time of *Atkins I,* Employee was an unrepresented claimant in a multi-year case involving multiple legal issues. It is therefore understandable that he did not totally comprehend the adjudicative process, as demonstrated by testimonial statements such as "it's very unclear as to when the two-year clock starts," "I've had three conversions, if I'm not mistaken" (when in fact he had two "controversions"), the §110(c) wording on the prehearing conference summaries "is extremely vague", and "I wasn't in complete knowledge of what ARH actually was." Employee's self-described confusion about various aspects of his case, combined with his inconsistent and contradictory testimony, render his version of events less likely to be accurate, and therefore less credible than WCO Helgeson's.

Any reliance on subsequent alleged misinformation from board representatives, including WCO Cynthia Stewart, is misplaced because, by his own account, after the August 24, 2012 conversation with WCO Helgeson, Employee did not re-initiate contact with the board until August 2, 2013, nearly three months after his §110(c) deadline had passed. Careful examination of the record as a

whole demonstrates that Employee failed to convince the board that the facts necessary to excuse his filing delay were more likely true than not. *Tonoian.* Consequently, his claim will be dismissed by operation of law under AS 23.30.110(c). While this result may seem harsh to a seriously injured man, to do otherwise would contravene the legislative intents to ensure the quick, efficient, fair, and predictable delivery of benefits to entitled workers at a reasonable cost to employers, and for process and procedure to be as summary and simple as possible. AS 23.30.001(1); AS 23.30.005(h).

Should Employee's claim be dismissed under AS 23.30.015(h)?

Due to the conclusion reached above, and under remand instructions from the Commission, there is no need to analyze this issue.

CONCLUSIONS OF LAW

1) Employee's claim should be dismissed under AS 23.30.110(c).

2) Whether Employee's claim should be dismissed under AS 23.30.015(h) is moot and will not be addressed.

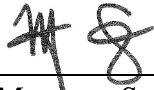
ORDER

1) The Fund's December 2, 2013 petition to dismiss Employee's April 8, 2011 claim under AS 23.30.110(c) is granted.

2) The Fund's December 2, 2013 petition to dismiss Employee's April 8, 2011 claim under AS 23.30.015(h) is denied as moot.

Dated in Anchorage, Alaska on January 6, 2016.

ALASKA WORKERS' COMPENSATION BOARD



Margaret Scott, Designated Chair

Amy Steele, 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 TRACY O. ATKINS, employee / claimant; v. INLET TRANSPORTATION & TAXI SERVICE, INC., uninsured employer; and WORKERS' COMPENSATION BENEFITS GUARANTY FUND, defendants; Case No. 200920434; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on January 6, 2016.

Elizabeth Pleitez, Office Assistant