ALASKA WORKERS' COMPENSATION BOARD

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

RACHEL S. McVEY, Employee, Claimant, v. ALASKA ARCHITECTURAL LIGHTING, INC., Employer, and STATE FARM FIRE & CASUALTY CO., Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 200218741 AWCB Decision No. 16-0072 Filed with AWCB Anchorage, Alaska On August 22, 2016

Alaska Architectural Lighting, Inc. and State Farm Fire & Casualty's (Employer) May 23, 2016 petition to dismiss was heard on the written record in Anchorage, Alaska, on August 2, 2016, a date selected on June 29, 2016. Self-represented Rachel S. McVey (Employee) did not submit a hearing brief or evidence. Attorney Michelle Meshke represented Alaska Architectural Lighting, Inc. On August 8, 2003, a compromise and release agreement (C&R) in which Employee waived all benefits but future medical benefits was approved. On April 1, 2011, a second C&R was approved in which Employee waived all past and future benefits, including medical benefits. Employee filed a claim on July 22, 2013, withdrew it on October 30, 2013, and Employer petitioned for an order confirming Employee's claim withdrawal, which was granted on January 10, 2014, and Employee's July 22, 2013 claim was withdrawn with prejudice. *McVey v. Alaska*

Architectural Lighting, Inc., AWCB Decision No. 14-0004 (January 10, 2014) (*McVey I*). The record closed at the hearing's conclusion on August 2, 2016.

ISSUE

Employer contends Employee's April 13, 2016 claim should be dismissed with prejudice because she seeks benefits previously waived under prior C&R agreements. Further, Employer contends its obligations have been discharged under the Alaska Workers' Compensation Act (Act), and Employee's claim is barred by the law of the case because *McVey I* found Employee waived all benefits to which she may be entitled. Employer contends *McVey I* found Employee is not entitled to any further workers' compensation benefits; her July 15, 2013 claim was dismissed with prejudice, and therefore cannot be refiled and re-litigated. Employer contends Employee's claim is frivolous and barred by AS 23.30.105.

Employee's position is unknown. She did not file a hearing brief addressing whether an order dismissing her claim should be granted. It is assumed she opposes Employer's petition.

Should Employee's April 13, 2016 claim be dismissed with prejudice?

FINDINGS OF FACT

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

1) *McVey I*'s factual findings are adopted in their entirety. (*McVey I.*)

2) Employee worked for Employer from January 29, 2001 through November 1, 2002. (August 8, 2003 C&R.)

3) On October 7, 2002, Employee reported to Employer she had a cumulative injury to her bilateral wrists and hands, shoulders, and arms from overuse through repetitive typing while working for Employer. She filed a Report of Injury on October 9, 2002. (Report of Injury, October 9, 2002, ICERS Case and Injury Screens; C&R, August 8, 2003.)

4) Employee sought care from Stacey Nieder, M.D., Sean Hadley, M.D., and hand specialist Michael McNamara, M.D. None could find an explanation for Employee's pain complaints and nerve conduction studies for normal. (Chart Note, Dr. Nieder, October 21, 2002; Chart Note, Dr. McNamara, October 29, 2002; Chart Note, Dr. Hadley, November 4, 2002.)

5) On January 17, 2003, at Employer's request, neurologist Lynne Bell, M.D., evaluated Employee and concluded she could return to work in her pre-injury occupation. Dr. Bell was unable to identify objective evidence to explain Employee's pain complaints and self-imposed limitations. (EME Report, Dr. Bell, January 17, 2003.)

6) On March 6, 2003, Dr. Nieder reviewed Employee's job description and determined Employee could return to her job at the time of injury. (SCODDOT for Order Clerk, Receptionist, Accounting Clerk, and Salesperson, Dr. Nieder, March 6, 2003.)

7) On August 8, 2003, a preponderance of evidence demonstrated C&R approval was in Employee's best interest; and the C&R in which Employee waived all benefits except specific future medical treatment was approved. Medical treatment waived included physical therapy and work hardening for Employee's bilateral shoulder and arm conditions. Employee contended no further medical benefits were due. Employee was represented by an attorney. (C&R, August 8, 2003; experience, judgment, observations, and inferences drawn from the above.)

8) On July 1, 2010, Employee filed a claim for additional medical benefits. (Workers' Compensation Claim, July 1, 2010.)

9) On July 21, 2010, Employer controverted medical benefits, relying upon the C&R approved on August 8, 2003, and the January 17, 2002 EME report. (Controversion Notice, July 21, 2010.)

10) On November 1, 2010, at Employer's request, Jacquelynn Weiss, M.D., Ph.D., evaluated Employee. Dr. Weiss was unable to make a physical, anatomic, or physiologic diagnosis and determined work was not a substantial factor in Employee's continued symptoms and pain complaints. Dr. Weiss determined Employee needed no further diagnostic tests and opined she had received excessive treatment, which was not beneficial, reasonable or necessary. She stated, "Ongoing treatment is not needed for the process of recovery." (EME Report, Dr. Weiss, November 1, 2010.)

11) On March 27, 2011, Employee signed an affidavit, which states, in part, as follows:

> The Affiant being duly sworn deposes and states as follows:
> . . . .
>
> 3. The settlement pays my past medical bills which are significant. It would be a huge burden for me to pay individually.

> 4. I have discussed this settlement with my lawyer at length, and it is my belief that the settlement is in my best interest. There is substantial medical and factual evidence against my position and I could easily lose this claim if it went to a hearing, in which case I would get nothing. I have already settled any claim I might have had for disability benefits.
>
> 5. I understand that by entering into this C&R, I am giving up my rights to pursue a claim for further disability benefits, medical care, PPI, vocational rehabilitation, and all other benefits.
>
> 6. I also understand that if I should suffer a future injury at work, that employer could argue that the substantial cause of that injury is my current condition and I would have no recourse against the carrier / employer in this claim.
>
> 7. I also understand that by entering into this C&R, I am giving up my rights to pursue a claim for medical care.
>
> 8. Again, I think this C&R is fair and equitable, it is in my best interest, and I urge the Board to approve it.

(Affidavit of Employee, March 27, 2011.)

12) On April 1, 2011, a preponderance of evidence demonstrated C&R approval was in Employee's best interest. The C&R was approved under which Employee waived her entitlement to "any and all past, present, and future" medical benefits and compensation benefits. Employer agreed to pay on Employee's behalf outstanding medical bills totaling $10,876.00. Employee was represented by an attorney. (C&R, April 1, 2011; experience, judgment, observations, and inferences drawn from the above.)

13) On July 22, 2013, Employee filed a claim seeking temporary total disability (TTD) for several periods, permanent total disability (PTD), permanent partial impairment (PPI), medical costs, unfair or frivolous controversion, attorney fees and costs, housing assistance, and "other," which stated, "Employee has tried to work for 11 yrs. 9 mo. and cannot find stable work." Employee was not represented. She described her injury as follows:

> Over use typing on computer. Arms curled in, now base of muscle mass in forearm. Discoloration in hands swell, elbows swell – numbness now currently in hands, fingers and elbows. Burning fire in forearm & hands on a continual basis.

She described the nature of her injury as:

> Over use at work data entry clerk. Arms curled in constricted for 7 mo. Lost all use of arms.

Her stated reason for filing the claim was:

> Condition of arms feel worse.
> What are my statutes of limitations.
> Not paying medical.
> Need housing assistance.
> What benefits do I qualify for.
> Compensation benefits.

(Workers' Compensation Claim, July 15, 2013.)

14) On August 9, 2013, Employer filed its answer and denied all requested benefits. Employer asserted the claim was barred by the 2003 and 2011 C&Rs. (Answer, August 8, 2013.)

15) At an October 15, 2013 prehearing conference, Employee expressed confusion about the C&Rs, but stated she understood her case was closed by the C&Rs' approval. When asked about her claim, Employee explained she had applied for public assistance and Social Security benefits and was told she needed to file a workers' compensation claim. Employer's attorney offered to work with Employee and tell the agencies Employee's workers' compensation case was closed. (Prehearing Conference Summary, October 15, 2013.)

16) On October 30, 2013, Employee filed a letter "cancelling" her July 15, 2013 claim, explaining it was a Social Security issue and her claim should be closed. (Rachel McVey Letter, October 24, 2013.)

17) On November 22, 2013, Employer wrote to the board requesting an order confirming the withdrawal of Employee's claim. (Employer Letter, November 22, 2013.)

18) The letter was treated as a petition for an order confirming Employee's withdrawal of her July 15, 2013 claim. (Record.)

19) On December 10, 2013, a board designee wrote the parties and explained even with Employee's withdrawal, the Act did not provide for entry of an order dismissing a claim without a stipulation or a hearing. A written record hearing was set for January 2, 2014. (Letter to Parties, December 10, 2013.)

20) On January 10, 2014, *McVey I* concluded an order confirming withdrawal of Employee's July 15, 2013 claim was appropriate and Employer's November 22, 2013 petition was granted. Employee's July 15, 2013 claim was withdrawn with prejudice. (*McVey I*.)

21) Employee did not appeal *McVey I*. (Record.)

22) On April 13, 2016, Employee filed a claim seeking TTD, PTD, "From: 2002 Through: Life," PPI, medical costs, a compensation rate adjustment, and a finding of unfair or frivolous controversion. Employee's describes how the injury or illness happened as:

> 2012, I was working at home, took a nap and woke up my right arm purple from my elbow. My heart rate was high (151) and referred by a paramedic to go to the ER. I was in AK Regional that day and it took all week for my arm to look better with circulation. It hurt couldn't lift it, ached, hard to do anything looked like something was broken - my elbow. Both elbows still swell w/ work. I know that ice will heal my elbows every day after work.

She describes the nature of injury as:

> Overuse. Data Entry Clerk (typing). Bill Engle said every time I went to him to tell him I am hurting 'deary go back to work nothing is wrong with you.' Both C&R state 'All benefits denied by Employer.'

Employee's reason for filing the claim was:

> This is related to my work injury and I have to live with this for the rest of my life when doctors told me three months I would be back to fine health. Dr. Hadley told me it will only take you three months to heal. Every time I tried to get help to have my arms healed I'm told by doctors what happened 10/4/2002, said overuse my arms locked. Bill Engle denied the benefits in 2002, 2011.

(Workers' Compensation Claim, April 13, 2016.)

23) On May 2, 2016, Employer filed its answer to Employee's claim. Employer disputed all Employee's claims and asserted 14 affirmative defenses, including, "The claim is barred under AS 23.30.100, AS 23.30.105, AS 23.30.110(c), or otherwise barred by law or equity." (Answer, May 2, 2016.)

24) Aside from attorney fees and costs, housing assistance, and "other," the benefits sought in Employee's April 13, 2016 claim are identical to those sought in her July 15, 2013 claim, which was withdrawn with prejudice. (Record; experience, judgment, observations, and inferences drawn from the above.)

25) Employee and Employer were both parties to the August 8, 2003 order approving the parties' first C&R, to the April 1, 2011 order approving the parties' second C&R, and to the action in which it was ordered Employee's July 15, 2013 claim was withdrawn with prejudice. (Record.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . . .
>
> (3) 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 regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

Pre-2005 Statutes:

> **AS 23.30.012. Agreements in regard to claims.** At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter in accordance with the applicable schedule in this chapter, but a memorandum of the agreement in a form prescribed by the board shall be filed with the board. Otherwise, the agreement is void for any purpose. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter and, if it

> involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. The board may approve lump-sum settlements when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

Post 2005 Statutes:

> **AS 23.30.012. Agreements in regard to claims**. (a) At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter, but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose. Except as provided in (b) of this section, an agreement filed with the division discharges the liability of the employer for the compensation, notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245, and is enforceable as a compensation order.
>
> (b) The agreement shall be reviewed by a panel of the board if the claimant or beneficiary is not represented by an attorney licensed to practice in this state, the beneficiary is a minor or incompetent, or the claimant is waiving future medical benefits. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter, and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. A lump-sum settlement may be approved when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

Approved settlement agreements under AS 23.30.012 have the same legal effect as awards, but cannot be modified under AS 23.30.130. *Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1158 (Alaska 1993).

> **AS 23.30.105. Time for filing of claims.** (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, . . . except that, if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215.

> (b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard. . . .

In *W.R. Grasle Co. v. Alaska Workmen's Compensation Board*, 517 P.2d 999 (Alaska 1974), the Alaska Supreme Court repealed the four year statute of limitations of AS 23.30.105(a). Thus, a claim must be filed within two years of actual or chargeable knowledge of the nature of the disability and its relation to employment, and after disablement. *Id.*

The limitations period under AS 23.30.105(a) is an affirmative defense which must be raised in response to a claim. *Horton v. Nome Native Community Ent.*, AWCB Decision No. 94-0139 (June 16, 1994). In workers' compensation cases, the employer bears the burden of proof to establish the affirmative defense of failure to timely file a claim. *Egemo v. Egemo Construction Co.*, 998 P. 2d 434, 438 (Alaska 2000); *Anchorage Roofing Co., Inc. v. Gonzales*, 507 P.2d 501, 504 (Alaska 1973). The purpose of §105 is to "protect the employer against claims too old to be successfully investigated and defended." *Morrison-Knudson Co. v. Vereen,* 414 P.2d 536, 538 (Alaska 1966) (citing 2 Larson, Workmen's Compensation s 78.20 at 254 (1961)).

> **8 AAC 45.160. Agreed settlements.** (a) The board will review a settlement agreement that provides for the payment of compensation due or to become due and that undertakes to release the employer from any or all future liability. A settlement agreement will be approved by the board only if a preponderance of evidence demonstrates that approval would be for the best interest of the employee or the employee's beneficiaries. . . .

In *Lindekugel v. Fluor Alaska, Inc.*, 934 P.2d 1307 (Alaska 1997), the Alaska Supreme Court held any agreement that "discharges the liability of the employer" must meet the requirements of AS 23.30.012 and 8 AAC 45.160, or it is void for all purposes. *Howard v. State of Alaska*, AWCB Decision No. 99-0026 (February 4, 1999), citing *Lindekugel*, stated:

> [T]he Board and Superior court have addressed the issue of dismissal with prejudice in several claims. Essentially, the Board and Superior court have concluded the Board lacks authority to dismiss claims with prejudice, absent a hearing or written settlement approved by the Board.

A C&R agreement that conforms to AS 23.30.012 and 8 AAC 45.160's requirements and resolves all benefits to which an injured worker may be entitled, discharges an employer's liability and serves to dismiss an employee's claim with prejudice when approved. (*Lindekugel*.)

"Dismissal with prejudice amounts to a final judgment on the merits for *res judicata* purposes." *Smith v. CSK Auto, Inc.*, 132 P.3d 818 (Alaska 2006). For *res judicata* purposes, a final judgment on the merits does not require a full trial on the merits. *DeNardo v. Calista Corp.*, 111 P.3d 326, 329 (Alaska 2005). A *res judicata* defense may be based upon a prior dismissal on the merits. *Shepard v. Bering Sea Originals*, 578 P.2d 587, 589 (Alaska 1978). Dismissal of a claim with prejudice is treated as dismissal on the merits and is, therefore, a final judgment on the merits. *Tolstrup v. Miller*, 726 P.2d 1304, 1307 (Alaska 1986).

A fundamental principle of law is every person is entitled to their day in court. Moreover, once a court with competent personal and subject matter jurisdiction over the parties renders a final judgment, that decision should conclude the matter between the parties and a final decision is conclusive upon the parties in any subsequent litigation involving the same cause of action. These principles provide the foundation for the *res judicata* doctrine. The *res judicata* doctrine dictates when a judgment or order in one action will have a binding effect in a future action. 38 Wayne L. Rev. 383, The Doctrine of Res Judicata in Workers' Compensation Cases. (Fall 1991)(citations omitted).

The Alaska Supreme Court has held the *res judicata* doctrine "may be applied to adjudicative determinations made by administrative agencies." *Jeffries v. Glacier State Telephone Co.*, 604 P.2d 4, 8 (Alaska 1979). Additionally, it is well-settled that *res judicata* may be applied to decisions of workers' compensation boards. *See, e.g., Thompson v. Schweiker*, 665 F.2d 936, 940 (9th Cir.1982); *Hazel v. Alaska Plywood Corp.*, 16 Alaska 642, 648 (D. Alaska 1957); *McKean v. Municipality of Anchorage*, 783 P.2d 1169, 1171 (Alaska 1989), 3 A. Larson, *The Law of Workmen's Compensation* §79.72(a) (1983). Notwithstanding the doctrine's general applicability, *res judicata* is not always applied as rigidly to preclude issues in workers' compensation proceedings as it is in judicial proceedings. *Thompson*, 665 F.2d at 940; 3 A. Larson, *supra.*

The Board, the superior court and parties use the term "*res judicata*" in its broad sense to include the doctrine of collateral estoppel. "The doctrine of 'estoppel' relates to the effect of a prior judgment as conclusively determining disputed issues which arise again in a second proceeding." *Jeffries*, 604 P.2d at 8 n. 11. As a general rule, in order for the doctrine of *res judicata* to apply to future litigation, three elements must be present. First, the plea of *res judicata* or collateral estoppel must be asserted against a party to the first action. Second, the issue to be precluded from re-litigation by operation of the *res judicata* doctrine must be identical to the issue decided in the first action. Third, and finally, the issues in the first action must have been resolved by a final judgment on the merits. *Murray v. Feight*, 741 P.2d 1148, 1153 (Alaska 1987). *Res judicata* prevents a party from bringing a cause of action that has already been litigated and decided. *Alderman v. Iditarod Properties, Inc.*, 104 P.3d 136, 141 (Alaska 2004).

Black's Law Dictionary, Fifth Edition, defines "dismissal with prejudice" as follows:

> An adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause. It is res judicata as to every matter litigated.

ANALYSIS

Should Employee's April 13, 2016 claim be dismissed with prejudice?

The *res judicata* doctrine is applicable in this matter. The first requirement, Employee's involvement in the initial and previous claims, is satisfied. Employee was a party to the order approving the August 8, 2003 C&R, which resolved all benefits except specific future medical benefits. Thereafter, on July 1, 2010, Employee filed a claim for additional medical benefits. This claim, to which Employee was a party, concluded with a final order approving a C&R on April 1, 2011, after it was found a preponderance of the evidence demonstrated the C&R was in Employee's best interest. Employee filed yet another claim on July 22, 2013. A hearing on Employer's petition to confirm Employee's withdrawal of the petition with prejudice was held and Employee was a party. *McVey I* issued a final decision and order confirming withdrawal of Employee's claim with prejudice. Employee has again asserted entitlement to workers'

compensation benefits against Employer and the *res judicata* defense is being maintained against Employee. (*Murray*.)

The second element is also met. The issues Employer requests be precluded from being litigated again and dismissed are identical to those issues which have been settled through approved C&Rs and withdrawn with prejudice in *McVey I*. (*Id.*) The August 8, 2003 C&R resolved all benefits, except specific future medical treatment. Those benefits resolved included TTD, PPI, PTD, reemployment benefits, and compensation rate adjustment. The only benefit to which Employee remained entitled was limited future medical care. She was no longer entitled to physical therapy or work hardening for her bilateral shoulder and arm conditions. The August 8, 2003 C&R was reviewed and approved because a preponderance of the evidence demonstrated settlement was in Employee's best interest. The C&R approval's effect was to discharge Employer's liability for compensation of all benefits waived. Once approved, a C&R "is enforceable the same as an order or award of the board." (AS 23.30.012 pre-2005 amendments.) These claims were dismissed with prejudice upon C&R approval. (*Lindekugel*.) However, despite Employee's assertion in the C&R that no further medical benefits were due, Employee filed a claim for additional medical benefits, on July 1, 2010. This claim, too, was resolved on April 1, 2011, through an approved C&R. A preponderance of the evidence demonstrated Employee's waiver of entitlement to "any and all past, present, and future" medical benefits and compensation benefits was to Employee's best interest. Employer paid on Employee's behalf outstanding medical bills. After approval of both C&Rs, all workers' compensation benefits to which Employee could potentially be entitled were resolved. The approved C&Rs were enforceable awards, and brought finality to Employee's claims and discharged Employer's liability for any future workers' compensation benefits Employee may claim for this injury. (AS 23.30.012 pre-2005 amendments and post-2005 amendments.) Approval of the C&Rs operates as adjudication on Employee's claims' merits (*Smith*; *Alderman*) and claim dismissal with prejudice. (*Lindekugel*.)

However, despite Employee's March 27, 2011 affidavit in which she swore under oath she understood she was giving up her right to pursue further disability benefits, medical care, PPI, reemployment benefits, and other benefits, she filed yet another claim on July 22, 2013 seeking

TTD, PTD, PPI, medical benefits, a finding of frivolous and unfair controversion, attorney fees and costs, and housing assistance. Employee stated she filed the claim because the Social Security Administration instructed her to do so, but that she understood her case was closed by the C&Rs. She requested her claim be "closed." In turn, Employer requested an order withdrawing Employee's claim "with prejudice" to avoid the undue burden of defending against a future meritless claim.

McVey I granted Employer's petition, and ordered Employee's claims for TTD, PTD, PPI, medical, and other benefits were withdrawn with prejudice. *McVey I* is a final order on the merits of Employee's claim. (*Smith; DeNardo; Shepard; Tolstrup.)* Employee's claims were all resolved by *McVey I*'s order withdrawing Employee's claim with prejudice. *McVey I* operates as an adjudication on the merits. (*DeNardo, Alderman*)

Employee filed yet another claim against Employer on April 13, 2016. The benefits sought in the April 13, 2016 claim are nearly exact replicas of those sought in the July 15, 2013 claim, which was adjudicated on its merits. Employee seeks to re-litigate issues raised in three prior proceedings. All three elements for application of the *res judicata* doctrine are met. (*Murray*.) Employee's claim is barred under the *res judicata* doctrine. (*Jeffries*.)

Employee's claim will again be dismissed with prejudice. The legal effect is Employee is forbidden from filing another workers' compensation claim against Employer based upon her 2002 work injury. (*DeNardo*.)

Alternatively, had Employee's claim not been barred by *res judicata*, it would be barred by AS 23.30.105(a), which requires a claim be filed within two years from the injury date, or two years from actual or chargeable knowledge of the nature of the disability and its relation to employment, and after disablement. (*W.C. Grasle*.) Employer's answer to Employee's claim raises the affirmative defense Employee's April 13, 2016 claim is barred under AS 23.30.105, and this is the first hearing on Employee's claim. Therefore, Employee's failure to file her claim within the period prescribed in AS 23.30.105 may bar compensation. (AS 23.30.105(b).)

Employee's April 13, 2016 claim refers to a 2012 incident when she awoke from a nap, her right arm was purple, and her heart rate was high. She attributed this to her 2002 work injury. Employee is not specific about the date the purple arm incident occurred in 2012. This may have been a latent injury. Employee may have filed a claim within two years of the 2012 purple arm incident when she filed her July 15, 2013 claim, which she "cancelled" and which was withdrawn with prejudice by *McVey I.* Had Employee's claim not been barred by *res judicata* and assuming, hypothetically, she had a latent injury, her claim had to be filed no later than two years from the 2012 purple arm incident. The claim at issue was filed on April 13, 2016 and is barred under AS 23.30.105(a). (*W.R. Grasle*; *Morrison-Knudsen*.)

Employee's March 27, 2011 affidavit states she understood if she suffered a future injury at work, "that employer" could argue the substantial cause of the injury was her "current condition" and she would have no recourse against the Employer. This decision does not bar Employee from filing a report of injury or bringing a claim against a "new" employer if work for that employer aggravated, exacerbated, or combined with a pre-existing condition. Employee is, however, barred from filing a subsequent claim against Employer for her 2002 injury.

CONCLUSION OF LAW

Employee's April 13, 2016 claim should be dismissed with prejudice.

ORDER

1) Employee's April 13, 2016 claim is barred by the *res judicata* doctrine.
2) Alternatively, Employee's April 13, 2016 claim is barred because she failed to timely file the claim under AS 23.30.105.
3) Employer's petition to dismiss Employee's April 13, 2016 claim with prejudice is granted.
4) Employee's April 13, 2016 claim is dismissed with prejudice.
5) Employee is barred from bringing a subsequent claim involving her October 4, 2002 work injury against Employer.

Dated in Anchorage, Alaska on August 22, 2016.

ALASKA WORKERS' COMPENSATION BOARD

_/s/_____
Janel Wright, Designated Chair

_/s/_____
Amy Steele, Member

_/s/_____
Rick Traini, 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 Rachel S. McVey, employee / claimant v. Alaska Architectural Lighting, Inc., employer; State Farm Fire & Casualty Co., insurer / defendants; Case No. 200218741; 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 August 22, 2016.

_/s/_____
Charlotte Corriveau, Office Assistant