ALASKA WORKERS' COMPENSATION BOARD

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

CHARLAYNE O'BRIEN, Employee, Claimant, v. CENTRAL PENINSULA GENERAL HOSPITAL, Employer, and WAUSAU UNDERWRITERS INSURANCE COMPANY and ALASKA NATIONAL INSURANCE COMPANY, Insurers, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200701733 AWCB Decision No. 16-0082 Filed with AWCB Anchorage, Alaska On October 5, 2016

Charlayne O'Brien's (Employee) February 24, 2016 petition to extend AS 23.30.110(c) deadline and March 31, 2016 petition to continue all future hearings was heard on September 6, 2016 in Anchorage, Alaska. The hearing date was selected on August 9, 2016. Employee appeared telephonically and testified. Attorney Richard Wagg appeared and represented Central Peninsula General Hospital (Employer) and workers' compensation insurer Alaska National Insurance Company (Alaska National). Attorney Nora Barlow appeared and represented Employer and insurer Wausau/Liberty Mutual Insurance Company (Liberty). There were no witnesses. The record closed at the conclusion of the hearing, on September 6, 2016.

ISSUES

As a preliminary issue, Employee contended that due to recent medical problems, doctors' appointments, and medical procedures, she did not have adequate time to prepare for the September 6, 2016 hearing. Employee contended the hearing should be continued.

Alaska National and Liberty objected to continuing the hearing. Both contended this case has already been significantly delayed by Employee, and that Employee has had adequate time to prepare, as shown by her filing extensive briefing and evidence solely on the continuance issue. Both insurers also noted the primary issue for hearing was not the merits of Employee's claims, but rather only the AS 23.30.110(c) deadline issue. An oral order issued denying Employee's request for a continuance.

1) **Was the oral order denying Employee's request for a continuance correct?**

Employee contends she suffers from medical conditions related to the alleged work injury which prevent her from standing or sitting for prolonged periods. Employee contends these conditions make her unable to do the tasks necessary to prepare for a hearing on the merits, such as sitting at a desk reviewing documents or writing, and using office equipment. Employee contends significant discovery still remains outstanding, preventing this case from being heard. Employee requests an order extending the deadline for filing an affidavit of readiness for hearing (ARH), but does not specify how much additional time she needs.

Alaska National and Liberty object to granting Employee an extension to file an ARH. Both insurers contend discovery is nearly complete, and whatever medical records not yet exchanged are either missing or of little consequence. Both insurers also contend Employee is exaggerating her health problems, and point to a medical report opining Employee suffers from Munchausen's syndrome unrelated to work for Employer, leading her to prolong and delay final resolution of this case. Both insurers contend this case should be ready for hearing within several months, and no additional time should be granted for Employee to request a hearing.

2) **Should the deadline for Employee to file an ARH be extended?**

Employee contends she will be unable to participate in any hearings in this case in the foreseeable future. Employee contends the soonest she could participate in this case would be to attend a prehearing in approximately nine months, where she would better be able to evaluate her readiness. Employee requests an order cancelling and continuing all hearings in this case indefinitely.

Alaska National and Liberty contend there is no medical evidence supporting Employee's contention that she is unable to prepare for hearing on the merits of this case. Alaska National and Wausau contend Employee is able and active in her case, as evidenced by her filing extensive briefing and pleadings. Alaska National requests Employee's petition for indefinite continuances be denied, and that a decision issue ordering Employee to file an ARH within six months. Liberty requests Employee's petition for continuances be denied, and that a decision issue reinstating the deadline under AS 23.30.110(c) for Employee to request a hearing. Both insurers contend unlimited, indefinite continuances are contrary to law.

3) Should all future hearings be continued?

FINDINGS OF FACT

All findings in *O'Brien v. Central Peninsula General Hospital*, AWCB Decision No. 13-0079 (July 15, 2013) (*O'Brien I*) are incorporated herein. The following additional facts are undisputed or established by a preponderance of the evidence:

1) On July 15, 2013, *O'Brien I* issued in AWCB case 200701733. The only issue in *O'Brien I* was whether Employee should be granted additional time to prepare for and bring her case to hearing. *O'Brien I* stated Employee's contentions as:

> Employee contends her health, including recent spinal surgery, has prevented her from preparing for hearing, and seeks additional time, at least eight to twelve months, to prepare her case and bring it to hearing. Employer opposes and asks the Board to instead provide a short deadline be set within which Employee must act or suffer dismissal of her claim. (*O'Brien I*).

O'Brien I granted Employee's request for additional time to prepare her case for hearing and granted Employee eight months from issue date to bring her case to hearing. *O'Brien I* also held:

> [O]n February 18, 2011, Employer filed a copy of a June 10, 2003 Report of Injury (ROI), reflecting Employee reporting injury to her "Back, SI Bilat" from "lifting a patient max (A) w/c to mat" while employed as a physical therapist with Central Peninsula General Hospital. The hospital's workers' compensation insurance carrier at that time was Alaska National Insurance Company, not Wausau Underwriters, the carrier at the time of Employee's 2008 injury, the subject of this claim. . .
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> . . .[F]rom a file review in this case. . . Because Central Peninsula Hospital was insured by a different workers' compensation insurance carrier in 2003, and because there may be some relation between Employee's 2003 and 2008 work injuries to her back and sacroiliac joints, to ensure complete relief and due process among the parties it may be necessary to join Employee's 2003 injury with the 2008 injury, and to join Alaska National Insurance Company. Because the issue of joinder was not addressed at the February 20, 2013 hearing, no decision with respect to joinder will be made at this time. (*Id*.).

O'Brien I ordered a prehearing conference be set to address the joinder issue. (*Id*.).

2) On August 19, 2013, Employee filed a claim for unspecified temporary total disability (TTD), permanent total disability (PTD), permanent partial impairment (PPI), medical and related transportation costs, penalty, interest, and attorney's fees and costs. (Workers' Compensation Claim, August 19, 2013).

3) On August 29, 2013, Employer's insurer Alaska National controverted all benefits in AWCB 200308494. (Controversion Notice, August 29, 2013).

4) On November 19, 2013, *O'Brien v. Central Peninsula General Hospital*, AWCB Decision No. 13-0151 (November 19, 2013) (*O'Brien II*) ordered claims and parties in AWCB cases 200701733 and 200308494 be formally joined under master case 200701733M. (*Id.*).

5) On August 5, 2015, Employee was seen by psychiatrist Keyhill Sheorn, M.D., for an employer's medical evaluation (EME). Dr. Sheorn's report states:

> [Employee'] primary diagnosis would be Factitious Disorder, also known as Munchausen's syndrome. This is a mental disorder in which a person repeatedly and deliberately acts as if he or she has an illness when they are not really sick. Munchausen's syndrome is considered a mental illness because it is associated with severe emotional difficulties.
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> People with this disorder have an inner need to be seen as ill or injured, but are not motivated by what we know as secondary gain. These patients, like [Employee], are willing to undergo painful or risky tests and operations in order to obtain the sympathy and special attention given to people who are truly ill. . .

> Consistently throughout [her medical records, Employee] has demonstrated these signals of a factitious disorder. . .
>
> [Employee's] totality is being enthralled with her a cascade of medical complaints. Her disability is of her own volition, and this in itself is the handicap. Her disorder is disabling. . .
>
> There has been an extraordinary overuse of medical resources already. She is no sicker and no better for any of it. She has refused the opportunities for mental health care and her family doctor has colluded with her rather than following the strong advice of other providers. . .
>
> The strongest recommendation this examiner can make would be to instantly terminate any controllable avenue by which [Employee] can procure unnecessary, and even harmful, medical attention. There has been an impressive iatrogenic element that has facilitated a mentally ill patient to damage her body and her personal life.
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> There was a staggering overprescription of addicting drugs as well as innumerable invasive procedures that had to have caused true pain and disability. . .
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> Munchausen's is tenacious, much like a delusional disorder, and tends to stay fixed over time. There is an obsessive component to [Employee's] disorder which also appears fixed. . . (Sheorn EME Report, August 5, 2015).

6) On February 24, 2016, Employee filed a petition to "extend the deadline for filing an Affidavit of Readiness for Hearing under AS 23.30.110(c)." (Petition, February 24, 2016).

7) On March 15, 2016, Employer filed an opposition to Employee's February 24, 2016 petition. The opposition states:

> A post-claim controversion was filed on 8/27/13. The statute of limitations for employee to request a hearing under AS 23.30.110(c) will run on 8/27/15.
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> The employee, through counsel, and [Employer] have entered into settlement discussions and stipulate to a six month extension of time (or until 2/29/16) for employee to file an ARH on her claim dated 8/15/13. (Opposition, March 15, 2016).

8) On March 17, 2016 a prehearing conference was held. Employee attended telephonically. The Board designee set a hearing for April 19, 2016. The issues for hearing are listed as: "Determine the date the AS 23.30.110(c) deadline runs as to each employer" and "Employee's February 24, 2016 petition to extend the § 110(c) deadline." No objection to a hearing being set

is noted in the prehearing conference summary. (Prehearing Conference Summary, March 17, 2016).

9) On March 28, 2016, Employee's treating physician, Marguerite McIntosh, M.D., wrote a letter to Andrew Weiss, M.D., stating Employee was now "bed-bound" most of the time, and that Employee "has never tolerated doing paperwork while sitting at a table and leaning forward." (McIntosh Letter, March 28, 2016).

10) On March 31, 2016, Employee filed a petition to continue the April 19, 2016 hearing, contending she was "unable to participate adequately." (Petition, March 31, 2016). Employee also filed a three-page memorandum in support, along with a proposed Board order. (Memorandum, March 31, 2016). The memorandum attached a letter from Dr. McIntosh as an exhibit, which states:

> Recently while doing a functional capacity evaluation (FCE), [Employee] had a severe exacerbation of her condition. . . Although she was able to be independent in most activities of daily living, after this FCE she is in severe pain and primarily bed-bound again. She is physically incapable of attending the hearing scheduled on 4/19/2016 because of the severity of her pain and her inability to sit up for more than 15 minutes at a time. (McIntosh Letter, March 28, 2016).

11) On April 13, 2016, orthopedic surgeon Steven Humphries, M.D. wrote a "To Whom it May Concern" letter:

> [Employee] is a well-known patient of my practice who I have been treating since 2011. Recently during a functional capacity exam the patient has had a severe exacerbation of her symptoms, most notably in the sacroiliac area. The patient is having severe back and sacroiliac pain currently and is in treatment for this. . .
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> [T]he patient cannot travel to Anchorage due to these symptoms and I will not be able to provide any dates for clearance on travel until we can assess the patient after injections. . . . (Humphries Letter, April 13, 2016).

12) On April 11, 2016, an emergency prehearing conference was held to address Employee's March 31, 2016 petition to continue the April 19, 2016 hearing. Employee attended telephonically. The prehearing conference summary states:

> Considering the parties' representations, and weighing considerations of prejudice due to additional delay, Board Designee finds good cause under 8 AAC 45.074(b)(1)(C) to continue the April 19, 2016 hearing. However, because this

> case has already involved some delay, a prehearing is set for April 27, 2016 at 1:00 P.M., at which Employee should be prepared to discuss setting this case for hearing. (Prehearing Conference Summary, April 11, 2016).

13) On April 27, 2016, a prehearing conference was held. Employee attended telephonically. A hearing was set for May 25, 2016. The issues for hearing are listed as: "Determine the date the AS 23.30.110(c) deadline runs as to each employer" and "Employee's February 24, 2016 petition to extend the § 110(c) deadline." (Prehearing Conference Summary, April 27, 2016).

14) On May 2, 2016, Employee was seen for follow-up by PA-C Timothy Harrelson at Kenai Spine in Soldotna, Alaska. PA-C Harrelson's chart note states:

> [Employee] has a very extensive and complex back history. She has had previously eight spine surgeries between the lumbar spine, thoracic spine, and cervical spine. . . She comes in today using a cane to walk through the clinic but does ask for a wheelchair to be wheeled out to the lobby once the evaluation is complete. . . At this point, she reports that she is back to not being able to do much more during the course of an average day than lye [sic] in bed and to get out of bed for basic functions. . . (Harrelson Chart Note, May 2, 2016).

15) On May 13, 2016, Employee filed a petition to cancel the May 25, 2016 hearing, contending Dr. McIntosh and Dr. Humphries are not available to testify and that a second independent medical examination (SIME) is required. (Petition, May 13, 2016).

16) On August 9, 2016, a prehearing conference was held. Employee requested a continuance of the September 6, 2016 hearing, which the Board designee denied, noting the continuance issue would be best added as a preliminary issue to be addressed by the hearing panel. (Prehearing Conference Summary, August 9, 2016).

17) On September 6, 2016, Alaska National filed an ARH on Employee's August 19, 2013 claim. (ARH, September 6, 2016). On September 15, 2016, Employee filed an affidavit of opposition to a hearing being set. (Affidavit of Opposition, September 15, 2016).

18) Employee testified: On August 25, 2016, she had sacroiliac joint fusion surgery, and is still recovering from that procedure under the care of Dr. Weiss. She did not feel prepared for the September 6, 2016 hearing, because she is on pain medication and is still recovering. She believes the functional capacity evaluation she underwent on February 25, 2016 aggravated her conditions and put her in more pain. It took Employee "many months" to prepare the brief for the September 6, 2016 hearing. Employee believes she will be "irreparably harmed" if required to

attend a hearing on the merits of this case any time soon. The best Employee can predict as to her readiness in this case is she may be able to attend a prehearing conference in nine months. Employee disagrees with a diagnosis of Munchausen's syndrome, and contends there is medical evidence to the contrary. Employee believes an additional SIME may be necessary in this case. When questioned, Employee did not state how long she seeks a continuance of this case or when she would be able to adequately prepare. Employee would prefer to personally attend any hearing scheduled in this case, but she does not know when she will again be able to travel. (Employee).

19) When questioned, Employee stated the only medical record she is still waiting for is a report from Dr. Weiss opining on causation. (*Id.*). Employee stated there may be other records, though she is not certain what they are. (*Id.*).

20) Liberty's attorney argued: An "incredible amount of money" has been spent by her client since 2008 litigating this case. Liberty does not believe there are any significant medical records missing in this case, as the parties have already engaged in extensive and ongoing discovery. In the event there are any missing or incomplete records, Liberty's attorney offered to work with Employee to evaluate all the medical records for completeness, and assist Employee in organizing and filing them. (Employer's Hearing Argument).

21) As of the date of this decision, there have been 16 prehearing conferences, one unsuccessful mediation, and two hearings in this case. (Record).

22) Throughout the hearing, Employee was coherent, articulate, and tracked the proceedings attentively. (Experience, judgment, observations, and inferences from all of the above). Employee demonstrated extensive knowledge of the procedural and factual background of this case and also her medical history. (*Id.*).

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.
> . . . .

> (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 23.30.110. Procedure on Claims.**
> . . . .
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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.
> . . . .
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> (h) The filing of a hearing request under (c) of this section suspends the running of the two-year time period specified in (c) of this section. However, if the employee subsequently requests a continuance of the hearing and the request is approved by the board, the granting of the continuance renders the request for hearing inoperative, and the two-year time period specified in (c) of this section continues to run again from the date of the board's notice to the employee of the board's granting of the continuance and of its effect. If the employee fails to again request a hearing before the conclusion of the two year time period in (c) of this section, the claim is denied.

AS 23.30.110(c) requires an employee to prosecute a claim in a timely manner once a claim is

filed and controverted by the employer. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). The Alaska Supreme Court has compared AS 23.30.110(c) to a statute of limitations. *Suh v. Pingo Corp*., 736 P.2d 342, 346 (Alaska, 1987). In *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910 (Alaska 1996), the Alaska Supreme Court noted the language of AS 23.30.110(c) is clear, requiring an employee to request a hearing within two years of the controversion date or face claim dismissal. However, the court also noted the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Tipton*, 922 P.2d at 912-13.

Certain events relieve an employee from strict compliance with the requirements of §110(c). The Alaska Supreme Court held the board owes a duty to every claimant to fully advise him of "all the real facts" that bear upon his right to compensation, and to instruct him on how to pursue that right under law. *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska, 1963). In *Bohlmann v. Alaska Const. & Engineering*, 205 P.3d 316 (Alaska 2009), the Court, applying *Richards*, held the Board has a specific duty to inform a *pro se* claimant how to preserve his claim under §110(c). Consequently, *Richard* is applied to excuse noncompliance with §110(c) when the board failed to adequately inform a claimant of the two-year time limitation. *Dennis v. Champion Builders*, AWCB Decision No. 08-0151 (August 22, 2008).

Certain legal grounds might also excuse noncompliance with §110(c), such as lack of mental capacity or incompetence, and equitable estoppel against a governmental agency by a *pro se* claimant. *Tonoian v. Pinkerton Security*, AWCAC Decision No. 029 (January 30, 2007). "Rare situations" may also require tolling of the limitation statute, for example when a claimant is unable to comply with §110(c) because the parties are awaiting receipt of necessary evidence such as an SIME report. *Aune v. Eastwood, Inc.*, AWCB Decision No. 01-0259 (December 19, 2009).

Finally, technical noncompliance with §110(c) may be excused in cases where a claimant has substantially complied with the statute. *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193 (Alaska, 2008), *accord Omar v. Unisea, Inc.*, AWCAC Decision No. 053 (August 27, 2007). The Alaska Supreme Court stated 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*, 197 P.3d at 196. However, substantial compliance does not mean noncompliance, *Id.* at 198, or late compliance, *Providence Health System v. Hessel*, AWCAC Decision No. 131 (March 24, 2010), at 11-12. And, although substantial compliance does not require the filing of a formal affidavit, it nevertheless still requires a claimant to file, within two years of a controversion, either a request for hearing or a request for additional time to prepare for a hearing. *Denny's of Alaska v. Colrud*, AWCAC Decision No. 148 (March 10, 2011).

In *Tonoian v. Pinkerton Security*, AWCAC Decision No. 029 (January 30, 2007), the Commission held "if 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." *Tonoian*, at 9. In that case, the Commission held the claimant had legal notice of her obligations under AS 23.30.110(c) even though she had not actually opened or read the controversion notices containing the statutory language. *Id.*, at 12.

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings are "binding for any review of the board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007).

> **AS 23.30.135. Procedure before the board.** 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. . . .

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

(b) Except as provided in this section and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.

(1) A hearing is requested by using the following procedures:

. . . .

(B) On the written arguments and evidence in the board's case file regarding a claim or petition, a party must file an affidavit of readiness for hearing in accordance with (2) of this subsection requesting a hearing on the written record. If the opposing party timely files an affidavit opposing a hearing on the written record, the board or designee will schedule an in-person hearing. If the opposing party does not timely file an affidavit opposing the hearing on the written record, the board will, in its discretion, decide the claim or petition based on the written record. If the board determines additional evidence or written arguments are needed to decide a claim or petition, the board will schedule an in-person hearing or will direct the parties to file additional evidence or arguments.

. . . .

(2) Except as provided in (1) of this subsection, a party may not file an affidavit of readiness for hearing until after the opposing party files an answer under 8 AAC 45.050 to a claim or petition or 20 days after the service of the claim or petition, whichever occurs first. If an affidavit is filed before the time set by this paragraph,

(A) action will not be taken by the board or designee on the claim or petition; and

(B) the party must file another affidavit after the time set by this paragraph.

(3) If the board or designee determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing, the board or

designee will give notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e). . . .

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

> (B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or
>
> (C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection. . . .

ANALYSIS

1) Was the oral order denying Employee's request for a continuance correct?

The primary issue for the September 6, 2016 hearing was not the merits of Employee's claims, but rather only the AS 23.30.110(c) deadline. Employee filed her petition to extend the deadline for filing an ARH under § 110(c) on February 24, 2016. A hearing on the § 110(c) deadline issue was initially set on March 17, 2016. Employee had well over five months to prepare for hearing on the § 110(c) issue. Employee filed considerable briefing, petitions, and evidence solely on the continuance issue, showing her ability to thoroughly prepare. AS 23.30.135; *Rogers & Babler*. At hearing, she was articulate, tracked the proceedings attentively, and demonstrated considerable knowledge of the procedural and medical background of this case. *Id.* There is evidence in the medical record in the form of Dr. Sheorn's August 5, 2015 EME report that Employee suffers from Munchausen's syndrome, which arguably could impact Employee's willingness to see this case heard and concluded, and possibly lead her to request repeated continuances in order to prolong the proceedings. *Id.* Because of this, Employee's testimony on the issue of her ability to prepare for hearing in this case is given less weight. AS 23.30.122; *Smith*; *Thoeni*. Continuances are not favored and will not be routinely granted. 8 AAC 45.074(b). Weighing the prejudice to Employer of having to litigate repeated continuances, and in light of the fact that Employee was well prepared for the instant hearing, Employee has not sufficiently articulated specific factual bases justifying a continuance. AS 23.30.001; AS 23.30.135; *Rogers & Babler*. Therefore, under these facts, there was no "good cause" to continue the hearing and the oral order denying her request was correct. *Id.*

2) Should the deadline for Employee to file an ARH be extended?

Alaska National controverted all benefits on August 29, 2013. Under the plain language of the statute, Employee had two years from the time of the controversion, or until August 29, 2015, to request a hearing on her claim. AS 23.30.110(c); 8 AAC 45.070; *Kim*. The parties stipulated to extend this date until February 29, 2016. On February 24, 2016, Employee filed the instant petition to extend the § 110(c) deadline. On March 17, 2016 a prehearing conference was held and the Board designee set a hearing for April 19, 2016. Although no objection to a hearing being set is noted in the March 17, 2016 prehearing conference summary, Employee immediately filed a petition to continue that hearing. Three more prehearings were held before Employee's petitions were heard on September 6, 2016.

The Act requires an employee to prosecute a claim in a timely manner once a claim is filed and controverted by the employer. AS 23.30.001; *Doyon*; *Suh*. The first report of injury in this case was filed on June 10, 2003, almost 13 years and three months ago. During this time, many continuances and other requests for extensions of time have been granted or agreed to by the parties. Dr. Sheorn's August 5, 2015 EME diagnoses Employee with Munchausen's syndrome, a psychiatric disorder, which may explain Employee's repeated requests to extend deadlines in this case. *Rogers & Babler*. While Employee has obtained medical opinions supporting her contention she has medical conditions which make it hard for her to prepare, there is no reliable evidence Employee is totally incapacitated. AS 23.30.001; AS. 23.30.135; *Tonoian*; *Rogers & Babler*; *Aune*. On the contrary: Employee demonstrates a high degree of preparation and organization through her pleadings and briefs, and the record shows she is knowledgeable and articulate during prehearings and hearings. *Id*. This fact strongly supports Dr. Sheorn's diagnosis of Munchausen's. *Id*. As above, Employee's testimony on her ability to prepare for hearings is given less weight because of this diagnosis. AS 23.30.122; *Smith*; *Thoeni*. While Employee stated she prefers to personally appear at a hearing on the merits, injured workers and other witnesses regularly participate and testify at Board hearings telephonically, and so this concern is untenable as a grounds for additional time. AS 23.30.001; AS. 23.30.135.

Employee's concerns over her inability to prepare for hearing must be weighed against an employer's and insurer's due process rights to have a case fairly, efficiently, and finally adjudicated. AS 23.30.001. Employee has not convincingly shown why additional time should be granted for her to prepare for a hearing on the merits of her case. *Id.*; AS 23.30.135; *Rogers & Babler*. Dismissals under statutes of limitations are generally disfavored. *Tipton.* Employee's February 24, 2016 petition to extend the AS 23.30.110(c) deadline will be granted in part. *Id*. Employee will be granted six months from the date of this decision to file an ARH on her August 19, 2013 claim. AS 23.30.110; AS 23.30.135; 8 AAC 45.070. If Employee fails to request a hearing within six months of this decision, her claim may be dismissed. *Id*.

3) Should all future hearings be continued?

Contrary to Employee's assertions her ongoing medical issues make her incapable of preparing for a hearing in this case, Employee has demonstrated a high degree of preparedness and involvement in this case. AS 23.30.001; AS 23.30.135; *Rogers & Babler*. Granting an "indefinite" continuance to this case would not serve the Act's purpose of ensuring quick, efficient, and fair delivery of benefits to injured workers entitled to them at a reasonable cost to employers. *Id.* There is no procedure or legal precedent for granting an "indefinite" continuance in cases under the Act. *Id*. Employee's March 31, 2016 petition to continue all future hearings will be denied. *Id*.

CONCLUSIONS OF LAW

1) The oral order denying Employee's request for a continuance was correct.
2) The deadline for Employee to file an ARH will be extended.
3) No order will issue continuing all future hearings in this case.

ORDER

1) Employee's February 24, 2016 petition to extend the time to request a hearing is granted in part.
2) Employee's March 31, 2016 petition to continue all future hearings is denied.
3) Employee has six months from the date of this decision to file an ARH on her August 19, 2013 claim.
4) If Employee files to file an affidavit of readiness for hearing in accord with this decision, her August 19, 2013 claim may be dismissed.

Dated in Anchorage, Alaska on October 5, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Stacy Allen, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of CHARLAYNE O'BRIEN, employee / claimant; v. CENTRAL PENINSULA GENERAL, employer; WAUSAU UNDERWRITERS INSURANCE COMPANY, insurer / defendants; Case No. 200701733; 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 October 5, 2016.

/s/
Pamela Hardy, Office Assistant