ALASKA WORKERS' COMPENSATION BOARD

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

GARY R. DAVIS, Employee, Claimant, v. WRANGELL FOREST PRODUCTS, Employer, and WAUSAU UNDERWRITERS INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 198803834 AWCB Decision No. 18-0018 Filed with AWCB Juneau, Alaska On February 27, 2018

Wrangell Forest Products and Wausau Underwriters Insurance Company's (Employer) November 7, 2017 petition to dismiss Gary R. Davis's (Employee) August 7, 2013 workers' compensation claim was heard on February 6, 2018, in Juneau, Alaska, a date selected on December 6, 2017. Attorney Martha Tansik appeared and represented Employer. Employee appeared telephonically, represented himself and testified. The record closed on February 6, 2018.

ISSUE

Employer contends Employee failed to request a hearing on his claim within two years of the date Employer controverted it. Employer contends the second independent medical evaluation (SIME) process did not toll the two-year time period in AS 23.30.110(c) because the SIME

commenced after the two-year time period. Employer contends Employee provided no legal excuse for failing to timely request a hearing. Employer seeks an order dismissing Employee's claim.

Employee contends his December 18, 2017 letter timely requested a hearing. Employee contends Employer should be estopped from asserting a defense under AS 23.30.110(c) because Employer agreed to a SIME, attended prehearing conferences, and defended against Employee's request for a second SIME after the two-year time period in AS 23.30.110(c) ran. Employee contends justice requires a hearing on the merits of his claim because he is not an attorney and his failure to request a hearing was unintentional.

Should Employee's claim be dismissed for failure to timely request a hearing?

FINDINGS OF FACT

The following facts are reiterated from *Davis and Wrangell Forest Products v. C&R Logging Company*, AWCB Decision No. 89-0064 (March 9, 1989) (*Davis I*), *Davis v. Wrangell Forest Products*, AWCB Decision No. 17-0049 (May 2, 2017) (*Davis II*), are undisputed or are established by a preponderance of the evidence:

1) On January 21, 1987, Employee injured his back when a log rolled on him while employed with C&R Logging Company. (*Davis I*).

2) On March 9, 1988, Employee reported he injured his back again carrying coils of haywire while employed with Employer. (*Id.*).

3) On May 5, 1988, John Gibson, M.D., performed an L3-4 micro discectomy. He noted, "There were epidural adhesions present binding down the nerve root. In addition, there was a bulging disc." (*Id.*).

4) On December 26 and 28, 1988, David Samani, M.D., evaluated Employee's right knee. Employee reported he injured his right knee on December 25, 1988, when he slipped on ice, and his left knee gave out causing him to twist his right knee. Dr. Samani diagnosed a right medial meniscal tear and recommended a diagnostic arthroscopy. (*Id.*).

5) On January 11, 1989, Joseph Shields, M.D., recommended arthroscopic knee surgery and opined Employee's "back and subsequent nerve difficulties with his left leg caused his left leg to

give way and that is the direct cause of the fall and the injury to Employee's right knee." He opined Employee's right knee difficulties are attributable to the March 1988 work injury. (*Id.*).

6) On January 12, 1989, Employee underwent right knee trochlea debridement and arthroscopic partial medial meniscectomy. Dr. Shields diagnosed a medial meniscus tear with minimal fraying of the anterior cruciate ligament and traumatic chondromalacia of the trochlear side of the patella-femoral joint. (*Id.*).

7) On June 6, 1989, Hamid Mehdizadeh, M.D., performed a bilateral laminectomy at L3-L4 l with cauda equine decompression and exploration of the L3-L4 nerve root bilaterally, a laminectomy at L4-L5, a left sided discectomy at L3-L4 with decompression of the L3-L4 nerve root on the left side, a posterior interbody fusion of L3-L4 using a cadaver back bone, and placed Harrington rods between L3-L4 with a cross link between the Harrington rods. Dr. Mehdizadeh also performed a posterior and anterior and posterolateral fusion at the L3-L4 levels. (*Id.*).

8) On December 3, 1990, a compromise and release (C&R) settlement agreement was approved. It settled indemnity benefits for Employee's March 3, 1988 work injury; medical benefits remained open. (*Davis II*).

9) On December 12, 2012, Brent Adcox, M.D., an orthopedic spine surgeon, examined Employee's left knee and ordered an MRI. Dr. Adox noted:

> [Employee] has a history of left knee pain for quite some time. He has a little genu varum in that knee with a history of some torn cartilage in that knee and surgical treatment of that. The knee hurts when he is walking on unsteady ground. It feels like it catches.

Dr. Adcox opined the medial aspect of Employee's knee had some early degenerative change, secondary to his previous meniscectomy. (*Id.*).

10) On December 12, 2012, an x-ray of Employee's left knee showed significant medial compartment narrowing with subchondral sclerosis consistent with degenerative osteoarthritis. (*Id.*).

11) On December 12, 2012, an MRI of Employee's left knee posteromedial meniscus demonstrated an absent free edge consistent with a vertical tear or bucket-handle-type tear, possible small displaced meniscal fragments in the medial compartment, focal loss of articular cartilage on the medial femoral condyle with corresponding subcondylar edema in the femoral condyle, a small Baker's cyst and small joint effusion. (*Id.*).

12) On January 3, 2013, Dr. Adcox diagnosed Employee with a left medial meniscus tear and left medial femoral condyle chondromalacia and recommended left arthroscopic knee surgery for a partial medial meniscectomy. Dr. Adcox noted Employee "had no specific injury" to his left knee. (*Id.*).

13) On January 22, 2013, Employee had left knee surgery, which included a partial medial meniscectomy and subchondral medial femoral condyle drilling. Employee suffered with knee pain for "quite some time" and he had a "history of a previous medial meniscectomy that did well." (*Id.*).

14) On May 6, 2013, Dr. Adcox stated Employee "is better than he was prior to surgery but he still has some startup pain. This is all related to his osteoarthritis he has in his knee." He noted Employee "understands his preexisting osteoarthritis is the likely underlying source of all of his pain, as it is startup pain and it gets better with time." (*Id.*).

15) On May 29, 2013, Michael R. Fraser, Jr., M.D., an orthopedist, performed an Employer Medical Evaluation (EME). Dr. Fraser stated Employee reported he injured his left knee in December 2012, while walking on a treadmill when Employee got a shooting pain down the right leg which caused Employee to stumble and twist his left knee. Dr. Fraser diagnosed Employee with left knee osteoarthritis with varus gonarthrosis. He opined Employee's left knee condition is unrelated to the March 1988 work injury and the March 1988 work injury is not the substantial factor for the left knee arthritis and need for treatment. He stated the substantial cause of Employee's left knee arthritis is Employee's weight, activity level and genetic disposition. (*Id.*).

16) On July 2, 2013, Employer denied all benefits for Employee's left knee based on Dr. Fraser's EME report and the C&R settlement agreement. Employer served Employee by mail to his address of record and included the following warning:

> When must you request a hearing (Affidavit of Readiness for Hearing form)?
>
> If the insurer/employer filed this controversy notice after you filed a claim, you must request a hearing before the AWCB within two years after the date of this controversion notice. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within two years.

(Controversion Notice, July 2, 2013).

17) On August 7, 2013, Employee claimed a lower back injury but did not indicate which benefits he was seeking on the claim form. (Claim, August 7, 2013).

18) On August 30, 2013, Employer denied all benefits for Employee's left knee based on Dr. Fraser's EME report and the December 3, 1990 C&R. (Controversion Notice, August 30, 2013).

19) Employer's August 30, 2013 controversion notice is on the board prescribed form, but only the front of the form is in the file. On the reverse side of the form in use at that time it states:

> When must you request a hearing (Affidavit of Readiness for Hearing form)?
>
> If the insurer/employer filed this controversy notice after you filed a claim, you must request a hearing before the AWCB within two years after the date of this controversion notice. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within two years.

(Observation, Experience).

20) On September 3, 2013, Employee explained he is seeking medical benefits for his lower back and left knee. Employee confirmed receiving the "Workers' Compensation and You" pamphlet. The board designee noted an affidavit of readiness for hearing (ARH) form "is a formal request for a hearing and is filed once discovery is complete and the parties are fully prepared for hearing." The designee advised Employee:

> 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. The board designee will include an Affidavit of Readiness for Hearing form, which is also available at the website http://www.labor.state.ak.us/wc, with this prehearing conference summary.

The division served the September 3, 2013 prehearing conference summary on Employee by first-class mail and included an ARH form. (Prehearing Conference Summary, September 3, 2013; Prehearing Conference Summary Served, September 3, 2013).

21) On October 27, 2014, Employee visited Dr. Adcox to discuss if work was a substantial factor in the need for medical treatment for his left knee. Dr. Adcox noted:

> [Employee] had a note from [Employer] regarding his request for my opinion on the left knee and its [sic] relevance to a work-related low back injury and a right knee injury that occurred back in 1988. [I had an] in-depth conversation with [Employee] [about] his history of intermittent radicular pain stemming from his low back injury. He was on a treadmill when he had radicular pain emanating from his lumbar spine, which caused him to wince, have a misstep onto the rail twisting the knee with a subsequent injury; therefore, I believe as this individual's treating physician to a reasonable degree of medical certainty that his left knee injury is related in consequence to his lumbar spine injury from 03/09/88 as the cause of the twisting to his left knee.

Dr. Adcox diagnosed a left knee meniscus tear subsequent to an injury precipitated by radicular pain from his back causing an "unfortunate accident on a treadmill." (*Davis II*).

22) On June 11, 2015, Employee requested an SIME. (Petition, June 11, 2015).

23) On July 2, 2015, Employer acknowledged a dispute between Dr. Adcox and Dr. Fraser. Employer requested a delay of the SIME allow Dr. Fraser to examine Employee because the previous EME was over two years old. (*Davis II*).

24) On July 23, 2015, the division served Employee with an August 20, 2015 prehearing conference notice to his address of record. (Prehearing Conference Notice, July 23, 2015).

25) On August 20, 2015, Employer attended a prehearing conference; Employee did not attend. The board designee scheduled another prehearing conference on September 22, 2015. The prehearing conference summary included the following notice:

> 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 20, 2015)

26) On August 21, 2015, Employee called the division and updated his address of record. (ICERS, Phone Call Entry, August 21, 2015). The division served Employee a copy of the August 20, 2015 prehearing conference summary by first-class mail to Employee's updated address of record and to his previous address. (ICERS, Prehearing Conference Summary Served, August 21, 2015).

27) On September 11, 2015, Dr. Fraser performed an EME. Dr. Fraser diagnosed Employee with left knee osteoarthritis with varus gonarthrosis. He opined the March 1988 work injury is not the substantial factor for Employee's left knee arthritis and Employee's need for additional treatment. Dr. Fraser stated the substantial cause of Employee's left knee arthritis is Employee's weight, activity level, prior injury requiring arthroscopy and a genetic deposition. (*Davis II*).

28) On September 22, 2015, the parties stipulated to a SIME by an orthopedist and that the parties agreed they may add neurosurgery as a specialty if, after evaluation by both parties' physicians, a neurosurgical dispute exists. The prehearing conference summary stated:

> 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, September 22, 2015).

29) On September 23, 2015, the division served the September 22, 2015 prehearing conference summary on Employee by first-class mail. (Prehearing Conference Summary Served, September 23, 2015).

30) On November 13, 2015, Employee saw Kristen Jessen, M.D., for a neurological consultation. Dr. Jessen noted Employee fell on a treadmill in 2013, injuring his left knee during the fall. She assessed Employee with diabetic polyneuropathy and lumbosacral radiculopathy. She suspected Employee "had an episode of radicular pain which caused the left lower extremity to buckle which in turn caused the left knee damage, which was sustained during the fall." (*Davis II*).

31) On December 14, 2015, Employer filed the SIME binder containing medical records. (SIME Medical Records, December 14, 2015).

32) On December 21, 2015, Employer filed SIME questions. (SIME Questions, December 21, 2015).

33) On January 12, 2016, Employee filed an SIME question. (SIME Questions, January 12, 2016).

34) On January 12, 2016, the parties filed a SIME form signed by both Employer and Employee listing "orthopedic physician" as the medical specialty. (*Davis II*).

35) On March 8, 2016, Peter E. Diamond, M.D., an orthopedist, performed a SIME. Dr. Diamond diagnosed Employee with (1) lumbar sprain/strain secondary to the January 1987 incident; (2) L3-4 herniated disc secondary to the March 1988 incident; (3) status post multiple surgeries with failed back syndrome secondary to L3-4 herniated disc; (4) history of right knee arthroscopy with right knee partial medial meniscectomy and chondromalacia of trochlea; (5) and history of left knee arthroscopy, partial medial meniscectom and treatment of Grade IV chondromalacia, medial femoral condyle of the left knee. He opined the March 1988 work injury was a substantial factor in causing disability and the need for treatment for Employee's lumbar and right knee injuries but was not a substantial factor in the recent medical treatment for the left knee. Dr. Diamond stated he would revise his opinion if there is documentation the episode described on the treadmill resulted in the left knee injury; however, only the meniscus tear would be the consequence of the treadmill incident, not of the underlying arthritic condition. Dr. Diamond analyzed Employee's medical record and stated:

> The etiology of the left leg giving out is unclear, but it would be reasonable to conclude, to a reasonable degree of medical probability, that the left leg collapse on 12/28/88 was related to the lumbar injury, and therefore, that the right knee problem with subsequent medical meniscectomy is attributable to the [March 1988] injury.
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> . . . .
>
> The first mention of knee pain is by Dr. Adcox on 12/12/12, noting that [Employee] had a history of left knee pain for 'sometime,' noting a history of prior surgery for a cartilage tear from which the examinee recovered. However, the records available to me do not document previous left knee surgery. It is unclear whether a left knee injury and arthroscopy had previously occurred, or if Dr. Adcox and/or [Employee] are conflating the left knee with the right knee. Moreover, there is a reference in an Independent Medical Evaluation to a note by Dr. Adcox on 10/27/1[sic], documenting an injury specifically secondary to

> radicular pain while [Employee] was on a treadmill for his lumbar spine injury, causing him to wince, misstep, and twist the knee. Unfortunately, the laterality is not specified in this note, and all I have is a second-hand copy, rather than the original note.
>
> However, a further note by Dr. Adcox on 1/3/13 again indicates no specific injury to the left knee, just chronic, intermittent knee pain.
> . . . .
>
> I cannot determine, to a reasonable degree of medical probability, the etiology of the left knee pain, but it appears clear that the examinee had pre-existent arthritis prior to the 1/22/13 left knee arthroscopy. It would therefore be my opinion, based on the records available to me, that the right knee meniscus tear and a portion of subsequent arthritis are secondary to the [March 1988] injury, but that the left knee condition is not, in fact, demonstrably secondary to the lower back injury. Ascribing the right knee is based on the assumption that [Employee]'s left leg gave out because of radicular pain and/or weakness.
> . . . .

Dr. Diamond said an examination of Employee's left knee by a neurosurgeon is inappropriate and further treatment for either knee would "most reasonably be performed by an orthopedic surgeon." (*Id.*).

36) On March 23, 2016, the division received Dr. Diamond's SIME report. (SIME Report, March 23, 2016).

37) On April 6, 2016, Employee called the division and spoke with a workers' compensation officer about how he "should approach the SIME report." The officer advised Employee to call Employer's attorney "to see what Employer was thinking or planning to do." Employee planned to call back the following week. (ICERS, Phone Call Entry, April 6, 2016).

38) On December 21, 2016, Employee called the division and told a workers' compensation officer he wanted another SIME by a neurosurgeon. The officer advised Employee to file a petition for an SIME and request a hearing on the petition if Employer does not agree to another SIME. The officer mailed Employee by first-class mail a petition, an SIME form, and the "Workers' Compensation and You" pamphlet. (ICERS, Phone Call Entry, December 21, 2016; ICERS Letter Entry, December 21, 2016).

39) On January 30, 2017, Employee requested an SIME with a neurosurgeon. Employee contended an SIME by a neurosurgeon is necessary because the attached portions of medical reports demonstrated a dispute between the parties' physicians. (*Davis II*).

40) On February 6, 2017, Employer opposed Employee's petition for a SIME with a neurosurgeon. (*Id.*).

41) On March 1, 2017, the parties stipulated to a hearing on April 18, 2017 on Employee's petition for a SIME with a neurosurgeon pending receipt of an ARH form completed by Employee. The board designee directed Employee to complete the ARH form enclosed with the prehearing conference summary. The prehearing conference summary stated:

> 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, March 1, 2017).

42) On March 2, 2017, the division served the March 1, 2017 prehearing conference summary on Employee by first-class mail and included an ARH form. (Prehearing Conference Summary Served, March 1, 2017).

43) On March 14, 2017, Employee requested a hearing on his January 18, 2017 petition. (*Davis II*).

44) On May 2, 2017, *Davis II* denied Employee's January 20, 2017 petition for an additional SIME with a neurosurgeon. (*Davis II*).

45) Employee appealed *Davis II* and on June 23, 2017, the Alaska Workers' Compensation Appeals Commission affirmed *Davis II*'s denial of Employee's petition for an additional SIME. *Gary R. Davis v. Wrangell Forest Products and Wausau Underwriters Insurance Company*, AWCAC Decision No. 17-0049 (June 23, 2017).

46) On November 7, 2017, Employer requested Employee's August 7, 2013 claim be dismissed for his failure to request a hearing on his claim. (Petition, November 7, 2017).

47) On November 16, 2017, Employee called the division and spoke with a workers' compensation technician about Employer's November 7, 2017 petition. The technician

discussed the deadline for requesting a hearing. (ICERS, Phone Call Entry, November 16, 2017).

48) On December 6, 2017, Employee stated he did not want his case dismissed. The prehearing conference summary stated:

> 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, December 6, 2017).

49) On December 7, 2017, the division served the December 6, 2017 prehearing conference summary on Employee by first-class mail. (Prehearing Conference Summary Served, December 6, 2017).

50) On December 18, 2017, Employee opposed Employer's November 7, 2017 petition:

> I am writing this letter to oppose this petition to dismiss dated on 11/17/17. I realize I made a mistake but that was two years ago. I would hope that my total cooperation over the years on this matter would help 'carry the day' so to speak for my case.

(Opposition, December 18, 2017).

51) On January 9, 2018, Employer called the division and told a workers' compensation officer it had not received Employee's December 18, 2017 letter. The officer emailed Employer a copy of Employee's December 18, 2017 letter to Employer. (ICERS, Email Entry, January 9, 2018).

52) Employee has not requested a hearing on his claim. (Record).

53) At hearing, Employee contended his December 18, 2017 letter met the requirements under AS 23.30.110(c). Employee contended justice requires a hearing on the merits of his claim. Employee contended Employer should not be allowed to assert an AS 23.30.110(c) defense because of Employer's delay in asserting the defense. (Employee).

54) Employee testified he is not an attorney and simply made a mistake by not requesting a hearing on his claim. Employee stated he had no additional excuse for failing to request a hearing on his claim. (*Id.*).
55) Employer accepted compensability for Employee's March 1988 back injury and December 1988 right knee injury. (Record).

PRINCIPLES OF LAW

The board may base its decisions on not only 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*, 747 P.2d 528, 533-534 (Alaska 1987).

> **AS 23.30.110. Procedure on claims.**
> . . . .
>
> (c) Before a hearing is scheduled, a party seeking a hearing shall file a request for hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. . . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.
> . . . .

AS 23.30.110(c) requires an employee to prosecute his controverted claim in a timely manner. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). Only after a claim is filed can the employer file a controversion to start the time limit of AS 23.30.110(c). *Wilson v. Flying Tiger Line, Inc*. AWCB Decision No. 94-0143 (June 17, 1994).

In *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912, 913 (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 after claim 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." *Id.* at 912-13.

Technical noncompliance with AS 23.30.110(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). The Alaska Supreme Court stated because AS 23.30.110(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, *Id*. at 198, or late compliance. *Providence Health System v. Hessel*, AWCAC Decision No. 131 at 8 (March 24, 2010) at 6. Although substantial compliance does not require a formal affidavit, it nevertheless still requires a claimant to file, within two years of a controversion, either a request for hearing, *id.*, or a request for additional time to prepare for a hearing. *Denny's of Alaska v. Colrud*, AWCAC Decision No. 148 (March 10, 2011). Attending prehearings, an employer's medical evaluation and a third doctor's evaluation does not establish substantial compliance. *Hessel*.

"Rare situations" have also been found to toll the limitation statute, for example when a claimant is unable to comply with AS 23.30.110(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). *Aune* began tolling the two-year time limit in AS 23.30.110(c) when the parties stipulated to an SIME and the board designee ordered an SIME in a prehearing conference, all of which occurred prior to the two-year time limit in AS 23.30.110(c). In *Snow v. Tyler Rental Inc.*, AWCB Decision No. 11-0015 (February 16, 2011), the board held the signing of the SIME form tolled the time limit in AS 23.30.110(c) until the SIME report was received. In *McKitrick v. Municipality of Anchorage*, AWCB Decision No. 10-0081 (May 4, 2010), the board tolled the time limit in AS 23.30.110(c) when the employer petitioned for an SIME and the board ordered the SIME prior to the two-year time limit until the SIME process was complete. In *Harkness v. Alaska Mechanical, Inc.*, AWCAC Decision No. 176 (February 12, 2013), the Commission refused to toll the AS 23.30.110(c) deadline when the "quantum of evidence" did not support the board's finding the parties had stipulated to an SIME. The Commission noted even if it had accepted the board's finding of a stipulation, the fact the parties never filed an SIME form or followed through with the SIME process demonstrated the parties were not actively in the SIME process and tolling was not appropriate. *Harkness*, at 21-23. In *Narcisse v. Trident Seafoods Corp.*, AWCAC Decision No. 242 (January 11, 2018), the SIME process began

and ended prior to the AS 23.30.110(c) deadline from the employer's after claim controversion. The Commission tolled the AS 23.30.110(c) time clock beginning on the date of the prehearing conference the parties further discussed the SIME and the employee's attorney promised to file SIME questions, medical binders, and SIME form, ended the tolled period on the date the of the SIME examination and added that tolled time period to the original AS 23.30.110(c) deadline. *Id*. at 21. The Commission noted an employee has only the remainder of the AS 23.30.110(c) time period to request a hearing. *Id*. at 22 (citation omitted).

Certain "legal" grounds might also excuse noncompliance with AS 23.30.110(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). A claimant bears the burden of establishing with substantial evidence a legal excuse from the AS 23.30.110(c) statutory deadline. *Hessel* at 8. The Alaska Supreme Court held the board owes a duty to every claimant to advise him fully 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 AS 23.30.110(c). Consequently, *Richards* is applied to excuse noncompliance with AS 23.30.110(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).

The Alaska Supreme Court has held that courts hold *pro se* litigants to a lesser standard than attorneys. *Dougan v. Aurora Electric, Inc.*, 50 P.3d 789, 795 (2002). A judge must inform a *pro se* litigant "of the proper procedure for the action he or she is obviously attempting to accomplish." *Id* (citation omitted). Specifically, a judge must notify a *pro se* litigant of defects in his or her brief and give the party an opportunity to remedy those defects. (*Id*.).

In *Wausau Insurance Companies v. Van Biene*, 847 P.2d 584, 588 (Alaska 1993), the Alaska Supreme Court held the Alaska Workers' Compensation Board possesses authority to invoke equitable principles to prevent an employer from asserting statutory rights. It said equitable

estoppel elements include "assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice." *Id*. The court concluded, "A finder of fact could not reasonably find that a person in the position of Van Biene could reasonably interpret Wausau's conduct as amounting to an implied communication that no social security offset would be required. At best, such conduct subsequent to Gerke's conversation and letter indicates only neglect or an internal mistake." The Court relied significantly on the fact Wausau apprised Van Biene both orally and in writing that workers' compensation benefits would be offset in the event she received social security survivor's benefits, and no representations were made by Wausau to Van Biene that it would not seek to offset social security survivor's benefits in the event that she received such payments. *Id*. at 589.

> **8 AAC 45.060. Service**. . . .
> . . . .
>
> (b) . . . If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail. . . .
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> **8 AAC 45.063. Computation of time**
> (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.
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> **8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

Should Employee's claim be dismissed for failure to timely request a hearing?

Employee claimed benefits for his left knee on August 7, 2013. Employer's August 30, 2013 controversion notice triggered the beginning of the two-year time period in AS 23.30.110(c). *Wilson*; *Tipton*. Employee had two years, or 730 days, to request a hearing on his claim or

provide written notice he still wants a hearing but had not completed all discovery. AS 23.30.110(c); *Colrud*. Because Employer served its August 30, 2013 controversion notice on Employee by mail, three days need to be added to the prescribed period. 8 AAC 45.060(b). Consequently, Employee had until September 2, 2015 to request a hearing on his claim or provide written notice he still wants a hearing but had not completed all discovery. AS 23.30.110(c); 8 AAC 45.060(b); *Colrud*. (August 30, 2013 + 2 years or 730 days = August 30, 2015 + 3 days = September 2, 2015).

An SIME may toll the two-year time clock under AS 23.30.110(c). *Aune*. The SIME process must commence before the two-year time period ends to toll the time period under AS 23.30.110(c). *Aune*; *Snow*; *McKitrick*. Something more than a stipulation to an SIME is necessary to demonstrate the parties were actively in the SIME process and toll the time period under AS 23.30.110(c). *Harkness*. An order for an SIME, filing a mutually signed SIME form, or a promise to file SIME questions and medical binders and a mutually signed SIME form prior to a completed SIME may demonstrate the parties were actively in the SIME process. *Aune*; *Snow*; *McKitrick*; *Harkness*; *Narcisse*. Employee's June 11, 2015 request for an SIME is insufficient to demonstrate the parties were actively in the SIME process. *Id.*

After the two-year time period in AS 23.30.110(c) ended on September 2, 2015, Employer and Employee stipulated to an SIME with an orthopedic surgeon and set deadlines for the SIME process; Employer and Employee filed a mutually signed SIME form, the SIME medical binder, and SIME questions; and the SIME took place. Because Employee's June 11, 2015 petition is insufficient evidence to demonstrate the parties were actively in the SIME process and the SIME process took place after the two-year deadline expired, the two-year time period in AS 23.30.110(c) was not tolled by the SIME. As determined previously, Employee had until September 2, 2015 to request a hearing on his claim or provide written notice still wants a hearing but had not completed all discovery. Employee did not request a hearing on his claim or provide written notice he still wants a hearing but had not completed all discovery by September 2, 2015. Employee failed to actually or substantially comply with AS 23.30.110(c). *Rogers & Babler*.

If Employee's June 11, 2015 petition was sufficient evidence to demonstrate the parties were actively involved in the SIME process, the SIME process tolled only the remaining portion of the two-year time period under AS 23.30.110(c). *Narcisse*. Between Employer's August 13, 2013 controversion and Employee's June 11, 2015 petition, 650 days of the two-year time period under AS 23.30.110(c) had run. On June 11, 2015, Employee had 80 days left of the two-year time period under AS 23.30.110(c) to request a hearing (2 years or 730 days – 650 days = 80 days).

The remaining 80 days of the two-year time period in AS 23.30.110(c) began to run again when the division received the SIME report on March 23, 2016. *Aune*; *Snow*. To begin running the remaining time period under AS 23.30.110(c) on August 30, 2015, would require Employee to request a hearing or provide written notice he wants a hearing but had not completed all discovery by November 23, 2015 (August 30, 2015 + 80 days + 3 days = Saturday, November 21, 2015 = Monday, November 23, 2015). AS 23.30.110(c); 8 AAC 45.060(b); 8 AAC 45.063(a); *Colrud*. It would be illogical to require Employee to request a hearing before the SIME appointment on March 8, 2016. To begin running the remaining time period under AS 23.30.110(c) on the date of the SIME appointment, March 8, 2016, would require Employee to request a hearing while waiting to receive the SIME report. It is logical to require Employee to request a hearing when he received the outstanding SIME report, on March 23, 2016.

If Employee's June 11, 2015 petition for an SIME tolled the two-year time period under AS 23.30.110(c) and time began to run again on March 23, 2016, Employee was required to request a hearing or provide written notice he wants a hearing but had not completed all discovery by June 14, 2016 (March 23, 2016 + 80 days = June 11, 2016 + 3 days = June 14, 2016). AS 23.30.110(c); 8 AAC 45.060(b); *Colrud*. Employee did not request a hearing on his claim nor did he provide written notice he wants a hearing on his claim but had not completed all discovery by June 14, 2016. Therefore, if Employee's June 11, 2015 petition for an SIME tolled the two-year time period under AS 23.30.110(c), Employee still failed to actually or substantially comply with AS 23.30.110(c). *Rogers & Babler*.

Employee contended his December 18, 2017 letter met the AS 23.30.110(c) statutory requirement. However, the letter did not request a hearing or request additional time to prepare for a hearing and it was filed after the original AS 23.30.110(c) time period and after the end of the tolled AS 23.30.110(c) time period. Therefore, Employee's December 18, 2017 letter failed to actually or substantially comply with AS 23.30.110(c). *Rogers & Babler*.

Employee's failure to comply with AS 23.30.110(c) cannot be excused on grounds of lack of mental capacity or incompetency, lack of notice of the time-bar or equitable estoppel against a governmental agency because none has been alleged. *Tonoian*. There is no time limit in AS 23.30.110(c) for Employer to request dismissal for failure to timely request a hearing. However, Employee contends Employer should be estopped from asserting AS 23.30.110(c) as a defense because Employer agreed to an SIME, attended prehearing conferences, and defended against Employee's request for a second SIME after the AS 23.30.110(c) two-year time period ended without raising AS 23.30.110(c) as a defense. The elements of estoppel are assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice. *Van Biene*. Employer did not represent to Employee that it would not seek to dismiss his claim for failure to comply with AS 23.30.110(c). Employer provided Employee written notice of the AS 23.30.110(c) time limit on Employer's controversion notices. Therefore, it is not reasonable for Employee to conclude Employer's failure to request dismissal until its November 7, 2017 petition amounted to an implied waiver of the AS 23.30.110(c) defense. Employer's conduct does not support a finding of waiver or equitable estoppel. *Roger & Babler*; *Van Biene.*

Employee contends justice requires a hearing on the merits of his claim because he is not an attorney and he simply made a mistake. While a procedural requirement may be waived if manifest injustice would result from strict application of the regulation, a waiver may not be employed merely to excuse a party from filing to comply with the requirements of law or to permit a party to disregard the requirements of law. 8 AAC 45.195. 8 AAC 45.195 does not permit excusal of Employee's failure to actually or substantially comply with a statute, AS 23.30.110(c), as it only permits waiver a procedural requirement of a regulation. While Employee is unrepresented and is held to a lesser standard, he is required to prosecute his claim

in a timely manner and his pro se status does not excuse noncompliance or late compliance. *Jonathan*; *Kim*; *Hessel; Dougan*. The board designee informed Employee of the AS 23.30.110(c) statutory requirement at the first prehearing conference and four additional prehearing conference summaries warned Employee of the AS 23.30.110(c) statutory requirement. The division also provided Employee the pamphlet "Workers' Compensation and You" and an ARH form twice. The record demonstrates the division satisfied its duty to properly advise Employee about time limitations for requesting a hearing on his claim. *Richard*; *Bohlman*; *Dennis*. Employee demonstrated he knew how to request a hearing because he requested a hearing on his January 30, 2017 petition for a SIME. Therefore, Employee failed to produce evidence establishing manifest injustice would result. *Rogers & Babler*. The panel will not waive the requirement of AS 23.30.110(c). Employee's claim for medical benefits for his right knee injury will be dismissed for failure to timely request a hearing.

CONCLUSION OF LAW

Employee's August 7, 2013 claim for right knee medical benefits will be dismissed for failure to timely request a hearing.

ORDER

1) Employer's November 7, 2017 petition to dismiss Employee's claim is granted.
2) Employee's August 7, 2013 claim for right knee medical benefits is dismissed.

Dated in Juneau, Alaska on February 27, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Charles Collins, Member

/s/
Bradley Austin, 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 GARY R. DAVIS, employee / claimant; v. WRANGELL FOREST PRODUCTS, employer; WAUSAU UNDERWRITERS INSURANCE COMPANY, insurer / defendants; Case No. 198803834; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on February 27, 2018.

/s/
Dani Byers, Technician