ALASKA WORKERS' COMPENSATION BOARD

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

RICHARD ROBERGE, Employee, Claimant, v. ASRC CONSTRUCTION HOLDING CO., Employer, and ARCTIC SLOPE REGIONAL CORP., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201410169 AWCB Decision No. 18-0128 Filed with AWCB Juneau, Alaska on December 14, 2018

ASRC Construction Holding Co.'s (Employer) September 6, 2018 petition to dismiss Richard Roberge's (Employee) November 5, 2015 claim was heard on November 6, 2018, in Juneau, Alaska, a date selected on October 11, 2018. An October 11, 2018 prehearing conference hearing request gave rise to this hearing. Attorney Nora Barlow appeared and represented Employer. Attorney Eric Croft appeared and represented Employee. There were no witnesses. The record closed on November 6, 2018.

ISSUE

Employer contends Employee failed to request a hearing within the two-year time period under AS 23.30.110(c). It contends the two-year time period began running when Employer filed its after-claim controversion. Employer contends the filing of the mutually signed Second Independent Medical Evaluation (SIME) form then tolled the two-year time period. It further

contends the parties' receipt of the SIME report ended the tolling of the two-year time period and the time period began to run again. Employer subsequently contends Employee failed to send his interrogatory letter to the SIME physician within 30 days after receipt of the SIME report as required under 8 AAC 45.092(j)(1). Employer contends it also failed to send interrogatories and to notice a deposition of the SIME physician within 30 days after receipt of the SIME report as required under 8 AAC 45.092(j)(1). Consequently Employer contends Employee's interrogatory letter cannot be considered and this letter, along with Employer's own late notice of deposition, cannot toll the running of the two-year time period. Employer requests an order granting its petition to dismiss Employee's claim.

Employee contends he timely requested a hearing within the two-year time period under AS 23.30.110(c). He contends the SIME process began before Employer filed its after-claim controversion when Employee petitioned for an SIME. Employee contends the two-year time period began running when the parties received the SIME report. He contends his letter to the SIME physician tolled the running of the two-year time period under 8 AAC 45.092(j)(2). Employee contends receipt of the SIME physician's response to his letter ended the tolling of the two-year time period and the time period began to run again. Employee requests an order denying Employer's petition to dismiss Employee's claim.

Should Employee's November 5, 2015 claim be denied for failing to timely request a hearing?

FINDING OF FACTS

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

1) On May 14, 2014, Employee injured his left shoulder while carrying rebar. (First Report of Injury, June 16, 2014).

2) On May 18, 2015, H. Graeme French, M.D., an orthopedic surgeon, recommended electrical diagnosing testing for left carpal tunnel syndrome and low ulnar nerve compression. (French Medical Report, May 18, 2015).

3) On July 31, 2015, Theresa McFarland, M.D., orthopedic surgeon, and Lewis Almaraz, M.D., neurologist, evaluated Employee for an Employer's Medical Evaluation (EME). They opined

Employee's work injury is not the substantial cause of his need for electromyogram (EMG) and nerve conduction studies, rather his intervening development of left cubital tunnel and carpal tunnel syndrome is the substantial cause of Employee's need for these studies. (EME Report, July 31, 2015).

4) On September 2, 2015, Dr. French wrote a letter addressed to the claims adjuster disagreeing with Drs. McFarland's and Almaraz's conclusions in the July 31, 2015 EME report. He referred Employee to Kaj Johansen, M.D., a specialist in treating neurogenic thoracic outlet syndromes. (French letter, September 2, 2015).

5) On September 28, 2015, Employer denied medical treatment for Employee's right shoulder and medical, temporary total disability (TTD), temporary partial disability (TPD), and permanent partial impairment (PPI) benefits related to thoracic outlet syndrome or nerve injury. (Controversion Notice, September 28, 2015).

6) On October 5, 2015, Employer denied medical treatment for Employee's left shoulder and medical, TTD, TPD, and PPI related to thoracic outlet syndrome or nerve injury based on the July 31, 2015 EME report. (Controversion Notice, October 5, 2015).

7) On November 5, 2015, Employee's attorney entered an appearance for Employee. (Entry of Appearance, November 5, 2015).

8) On November 5, 2015, Employee filed his claim seeking TTD from August 19, 2015 through stability, PPI greater than six percent, medical costs, penalty, interest and attorney's fees. Employee also sought a weekly compensation rate of $1,143, medical treatment recommended by Dr. French, authorization for a referral to Dr. Johansen and an SIME. (Claim for Workers' Compensation Benefits, November 5, 2015).

9) On November 17, 2015, Employee petitioned for an SIME. He contended a dispute existed between Dr. French, Employee's treating physician, and Drs. McFarland and Dr. Almaraz, the EME physicians, regarding compensability, degree of impairment, treatment, medical stability, and functional capacity. Employee contended Dr. French's September 2, 2016 letter and the July 31, 2015 EME report contained the medical opinions in dispute. (Petition, November 17, 2015).

10) On December 2, 2015, Employer filed a controversion notice denying TTD from August 19, 2015 and ongoing, PPI greater than six percent, all medical benefits after July 31, 2015, compensation rate adjustment, penalty, interest and attorney's fees and costs based on the July 31, 2015 EME report. Employer served Employee and his attorney with a copy of the

controversion notice by United States Postal Service. (Controversion Notice, December 2, 2015).

11) On December 2, 2015, Employer answered Employee's November 5, 2015 claim, stating:

> Employer and Insurer agree that there is a medical dispute between the treating physician and the IME physician. Employer, however, by acknowledging the existence of a medical dispute does not agree that an SIME is warranted. Employer will only stipulate to an SIME once the Employer and Employee agree upon the SIME issues and submit an executed SIME form. Until such time, Employer and Insurer maintain that the SIME process has not begun. (Answer, December 2, 2015).

12) On January 7, 2016, at a prehearing conference, the parties discussed the following:

> The parties are still in the discovery process. Employee advised medical releases have been signed and sent to Employer. Employer said they would like to take deposition in February of Employee and Dr. French.
>
> The parties are discussing Employee being sent for SIME(s) evaluations(s) and are looking at setting deadlines in March. The parties will be discussing the SIME specialty(ies) needed and will further discuss the process at the February 11, 2016 10:00 am prehearing [conference]. (Prehearing Conference Summary, January 7, 2016).

13) On January 7, 2016, Employer's attorney emailed a representative from Employee's attorney's office and stated:

> I talked with Katie [Weimer] and she is willing to authorize an EMG before the SIME. However, the tests need to be done by someone other than to whom Dr. French has referred [Employee]. I can contact a nurse case manager in Idaho for a list of names. I won't go through an EME vendor. Let me know what you think. (Email, January 7, 2016).

14) On January 18, 2016, a representative from Employee's attorney office emailed Employer's attorney the name and contact information for two medical providers, including CDA Spine, and stated, "Here are two places [Employee] is looking into for [nerve conduction studies]. Are you having any luck?" (Email, January 19, 2016).

15) On January 29, 2016, a representative from Employee's attorney's office emailed Employer's attorney and stated, "[Employee] contacted CDA Spine and they will do the nerve conduction testing. If you[r] client will authorize I'll get [Employee] to get in as quickly as possible. (Email, January 29, 2016).

16) On February 2, 2016, Employer's attorney emailed the representative from Employee's attorney's office and stated, "I obtained authority from client to move forward with testing! Sorry about the delay." (Email, February 2, 2016).

17) On February 11, 2016, at a prehearing conference, the parties stipulated to an SIME and set deadlines to submit SIME medical binders, SIME questions and a mutually signed SIME form. (Prehearing Conference Summary, February 11, 2016).

18) On February 11, 2016, the reemployment benefits administrator (RBA) designee sent a letter to the parties. It noted the reemployment benefit specialist asked Employee's treating physician to provide a prediction regarding Employee's permanent physical capacities as it relates to his ability to perform the physical demands as represented in DOT/SCODRDOT job descriptions. In response to the questions posed by the specialist, Employee's physician responded in the affirmative by checking the box marked "Yes" for each of the jobs represented by the DOT/SCODRDOT job descriptions and added a qualifier to his prediction indicating his response is predicated on Employee receiving treatment for a specific condition, neurogenic thoracic outlet syndrome (TOS). The letter stated based on all the information received, the RBA designee would find Employee not eligible for reemployment benefits and set a deadline date of close of business on February 24, 2016 to receive any additional information Employee, Employer or the specialist would like her to consider. (Letter, February 11, 2016).

19) On February 22, 2016, Employee filed his claim seeking review of the RBA eligibility determination and attorney fees and costs. (Claim, February 22, 2016).

20) On February 22, 2016, Employee filed an affidavit of readiness for hearing (ARH) on his February 22, 2016 claim. (ARH, February 22, 2016).

21) On February 25, 2016, the RBA designee found Employee ineligible for reemployment benefits. (February 25, 2016).

22) On March 9, 2016, Employer's attorney emailed a representative from Employer's office asking, "Any luck with the studies?" (Email, March 9, 2016).

23) On March 18, 2016, Employer filed a controversion notice denying an appeal of the RBA eligibility evaluation and attorney fees and costs. (Controversion Notice, March 18, 2016).

24) On March 31, 2016, at a prehearing conference, the parties discussed the following:

> The parties want to put the SIME process on hold and agreed not to take any action on Employee's February 22, 2016 ARH or schedule a hearing until Employee had nerve conduction and EMG studies. Those results will help them

> determine the next steps before proceeding. (Prehearing Conference, March 31, 2016).

25) On April 6, 2016, Employee filed SIME medical binders. (SIME Medical Binders, April 6, 2016).

26) On April 11, 2016, Employer filed SIME medical binders. (SIME Medical Binders, April 11, 2016).

27) On April 14, 2016, Employer's attorney emailed Employee's attorney and stated, "Wondering if we are making any progress on EMG studies. Let me know!" (Email, April 14, 2016).

28) On May 16, 2016, Employer filed a controversion notice denying AS 23.30.041(k) stipend. (Controversion Notice, May 16, 2016).

29) On June 2, 2016, the division received a mutually signed SIME form. The form was signed and dated by a representative from Employee's attorney's office on November 17, 2015 and by Employer's attorney on June 2, 2016. It listed compensability, degree of impairment, treatment, medical stability, and functional capacity as the disputes in issue and attached Dr. French's September 2, 2015 letter and Drs. McFarland's and Almaraz's July 31, 2015 EME report. (SIME Form, June 2, 2016).

30) On June 9, 2016, the parties were notified by letter sent by first class mail the SIME with Lorne Direnfeld, M.D., neurologist, was scheduled on September 22, 2016, at 8:30 a.m. and the SIME with Floyd Pohlman, M.D., orthopedist, was scheduled on September 23, 2016, at 10:00 a.m. (Employee Notification Letters, June 9, 2016).

31) On October 4, 2016, the division received Dr. Direnfeld's SIME report. The board designee mailed the parties a copy of the SIME report. Dr. Direnfeld stated, "Additional investigations that would be helpful in clarifying [Employee]'s diagnosis include an EMG and nerve conduction study in the upper extremities." (Direnfeld SIME Report, October 4, 2016; Letter, October 4, 2016).

32) On October 10, 2016, Employer's attorney sent Employee's attorney a letter stating:

> Dr. Direnfeld believes that the most likely cause of [Employee]'s left hand sensory symptoms includes median nerve entrapment at the wrist and ulnar nerve entrapment at the wrist or the elbow. He feels additional investigation would be helpful in clarifying [Employee]'s diagnosis included an EMG nerve conduction study in the upper extremities. (SIME pp. 50-51.)

> We were aware of the need for EMG conduction studies and my client communicated to your office on 1/7/16 that the studies were authorized. On 1/18/16, Patty Jones sent an email indicating that [Employee] had identified two clinics in Idaho who could perform the studies and then on 1/29/16 Ms. Jones followed up with an email indicating that [Employee] had, in fact, selected one of the two clinics. On 2/2/16, I again communicated to Ms. Jones that my client had authorized [Employee] to proceed with the studies. In March, not having heard anything, I emailed Ms. Jones inquiring as to the status of the studies. At this point, we had put the SIME process on hold pending the EMG studies. In April, I emailed your office inquiring into the status of the studies. In May, the board contacted us regarding the status of the SIME and the SIME was thereafter scheduled.
>
> Thus, I was surprised to find in Dr. Direnfeld's SIME report that [Employee] told Dr. Direnfeld that the Employer declined to pay for EMG and nerve conduction studies. (SIME p. 3). As described above, the Employer authorized the EMG studies nine months before the SIME exam occurred and any suggestion by [Employee] to the contrary is false. The authorization for the EMG studies remain in place and [Employee] should expedite obtaining the studies. (Letter, October 10, 2016).

33) On October 20, 2016, the division received Dr. Pohlman's SIME report and it noted the parties were copied. (Pohlman SIME Report, October 20, 2016).

34) Both Employer's and Employee's hearing briefs state Employee received Dr. Pohlman's SIME report on October 24, 2016. (Employee Hearing Brief, November 1, 2018; Employer Hearing Brief, November 1, 2018; observation).

35) On December 16, 2016, a representative from Employee's attorney's office emailed Employer's attorney and asked, "Would your client agree to the testing recommended by the SIME doctors?" (Email, December 16, 2016).

36) On December 19, 2016, Employer's attorney emailed the representative from Employee's attorney's office and stated, "I'll let you know and [get] back to you on this." (Email, December 19, 2016).

37) On February 6, 2017, Dr. French performed scalene block injections to evaluate Employee's neurogenic outlet syndrome. Dr. French noted significant improvement in sensation in Employee's ring and little fingers following the anterior scalene injection and near complete return of normal sensation in the entire hand following the pectoralis minor injection. He referred Employee to Dr. Johansen for decompression of Employee's left brachial plexus

because his response to the injections suggested he would have a 90 percent chance of significant improvement of neurologic function in his left arm. (French Medical Report, February 6, 2017).

38) On February 13, 2017, a representative from Employee's attorney's office emailed Employer's attorney and stated, "I dropped the ball on this. Do you have any response to my December 16 email to you?" (Email, February 13, 2017).

39) On February 13, 2017, Employer's attorney emailed the representative from Employee's attorney's office and stated, "We will not agree at this point. We authorized the procedure for the SIME and [Employee] never took any action. It's now too late." (Email, February 13, 2017).

40) On February 13, 2017, Employer filed a medical summary form with Dr. French's February 6, 2017 Medical Report and served it on Employee by email. (Medical Summary Form, February 13, 2017).

41) On April 5, 2017, Employee filed a letter addressed to Dr. Direnfeld and served upon Employer, stating:

> Thank you for your evaluation of [Employee] and your report dated September 28, 2016.
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> On Page 51, you recommend further testing. "Additional investigations that would be helpful in clarifying [Employee]'s diagnosis include an EMG and nerve conduction study in the upper extremity." The insurance company has not agreed to this further testing.
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> On February 6, 2017, [Employee] had a scalene block injection that provided [Employee] substantial but temporary relief. "The patient had near complete return of normal sensation in the entire hand following the pectorals minor injection, including near normal sensation in the thumb and index finger."
>
> Please review this medical record. If the results of the injection change any of your conclusions, let the Board and the parties know in a supplemental report. In particular, please inform us if you still feel that an EMG and nerve conduction study would be diagnostically useful. (Letter, April 5, 2017).

42) On April 24, 2017, the division received a letter from Dr. Direnfeld responding to Employee's April 5, 2017 letter stating, the recommendations he made "continue to apply." (Direnfeld Response Letter, April 24, 2017).

43) On May 30, 2017, Employee filed a claim requesting medical treatment recommended by Dr. Direnfeld. (Claim, May 30, 2017).

44) On June 5, 2017, Employer noticed taking a video deposition of Dr. Direnfeld on August 17, 2017. (Notice of Taking Video Deposition, June 5, 2017).

45) On June 19, 2017, Employer filed a controversion notice denying the EMG nerve conduction studies recommended by Dr. Direnfeld. (Controversion Notice, June 19, 2017).

46) On June 28, 2017, Employer noticed cancellation of the video deposition of Dr. Direnfeld. (Notice of Cancellation of Video Deposition, June 28, 2017).

47) On August 27, 2018, Employee requested a hearing on his November 5, 2015 claim. (ARH, August 27, 2018).

48) On September 6, 2018, Employer opposed Employee's August 27, 2018 ARH contending it was untimely under AS 23.30.110(c). (Opposition, September 6, 2018).

49) On September 6, 2018, Employer petitioned to dismiss Employee's claim under AS 23.30.110(c). (Petition, September 6, 2018).

50) In its November 1, 2018 hearing brief Employer contends the February 11, 2016 prehearing conference did not toll the two-year time period because Employee delayed the SIME process when he failed to obtain the nerve conduction and EMG studies. It contends filing of the mutually signed SIME form on June 2, 2016 demonstrated that the parties were actively in the SIME process, which tolled the time under AS 23.30.110(c) until Dr. Pohlman's SIME report was received on October 24, 2016. Employer contends Employee had until April 26, 2018 to file his ARH, making his August 27, 2018 ARH untimely. (December 2, 2015 + 2 years = December 2, 2017; June 2, 2016 through October 24, 2016 = 145 days; December 2, 2017 + 145 days = April 26, 2018). Alternatively, Employer contends the February 11, 2016 prehearing conference tolled the two-year period under AS 23.30.110(c) and Employee had until August 16, 2018 to file his ARH, making Employee's August 27, 2018 ARH untimely. (February 11, 2016 through October 24, 2016 = 257 days; December 2, 2017 + 257 days = August 16, 2018). It contends 8 AAC 45.092(k) states that communication to an SIME physician occurring after 30 days after receipt of the SIME report cannot be admitted into evidence nor considered by the board at hearing. Employer contends Employee's April 5, 2017 letter to Dr. Direnfeld cannot toll the running of AS 23.30.110(c) because Employee failed to file and serve the letter within 30 days after receiving Dr. Direnfeld's SIME report. Employer requests an order granting its petition to dismiss Employee's November 5, 2015 claim. (Employer Hearing Brief, November 1, 2018).

51) In his November 1, 2018 hearing brief Employee contends the SIME process began on November 17, 2015, when Employee petitioned for an SIME before Employer's December 2, 2015 after-claim controversion. He contends the two-year time period under AS 23.30.110(c) began running when the parties received Dr. Pohlman's SIME report on October 24, 2016. Employee contends his April 5, 2017 letter to Dr. Direnfeld tolled the two-year time period again and time began running again on April 25, 2017, when he received Dr. Direnfeld's response. Employee contends he was required to file his ARH by November 12, 2018 (October 24, 2016 + 2 years = October 24, 2018; April 5, 2017 through April 25, 2017 = 19 days; October 24, 2018 + 19 days = November 12, 2018). Employee contends his August 27, 2018 ARH was timely. (Employee Hearing Brief, November 1, 2018).

52) Employer further contends there is no authority to carve out an exception to the two-year time period under AS 23.30.110(c) for the SIME process. It contends Employee's November 17, 2018 petition is not sufficient evidence to demonstrate the parties were actively in the SIME process. Employer contends the evidence demonstrates the parties were actively in the SIME process when the parties filed the mutually signed SIME form on June 2, 2016, and the two-year time period tolled. It contends neither party timely noticed a deposition or sent interrogatories under 8 AAC 45.092(j)(1). Employer contends there was no admissible outstanding discovery and not reason why Employee could not have filed an ARH on April 26, 2018. It contends the parties resolved the dispute over the nerve conduction and EMG studies on February 2, 2016, when Employer authorized Employee's January 29, 2016 selection of CDA Spine to conduct the studies. Employer contends Employee delayed the SIME process because he did not obtain the studies. (Employer Hearing Arguments, November 6, 2018).

53) Employee further contends his November 17, 2015 petition was sufficient evidence to demonstrate the parties were actively in the SIME process and it tolled the two-year time period under AS 23.30.110(c). He contends there was a legitimate dispute regarding whether the nerve conduction and EMG studies should be completed before the SIME and who should conduct the studies as evidenced by the January 7, 2015 email and March 31, 2018 prehearing conference summary. Employee contends he cooperated with the SIME process. He contends his April 5, 2017 letter did not violate 8 AAC 45.092(j)(1) because Employee filed the letter with the board and filed it and served it on Employer under 8 AAC 45.092(j)(2), not 8 AAC 45.092(j)(1). Employee contends dismissing a claim is disfavored and his claim should be decided on the

merits. He contends he aggressively pursued the SIME and could not file an ARH while in the SIME process. (Employee Hearing Arguments, November 6, 2018).

PRINCIPLES OF LAW

> **AS 23.30.001. Legislative intent.** 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;
> . . . .

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**. . . .
> . . . .
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> (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, once a claim has been filed and controverted by the employer, to prosecute the employee's claim in a timely manner. *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121 (Alaska 1995). Generally, failure to request a hearing within this time limitation requires a claim be dismissed. *Bailey v. Texas Instruments, Inc.*, 111 P.3d 321 (Alaska 2005). AS 23.30.110(c) is similar to a statute of limitations in that such defenses are "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 198 (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. *Id*. at 196. However, substantial compliance does not mean noncompliance or late compliance. *Id*. at 198. 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. *Id*.; *Denny's of Alaska v. Colrud*, AWCAC Decision No. 148 (March 10, 2011). The board has power to excuse failure to file a timely request for hearing when the evidence supports application of a form of equitable relief, such as when the parties are participating in the second independent medical evaluation (SIME) process. *Kim*, at 197-198; *Tonoian v. Pinkerton Sec*, AWCAC Decision No. 029 at 11 (January 30, 2007). A claimant bears the burden of establishing by substantial evidence a legal excuse from the AS 23.30.110(c) statutory deadline. *Providence Health System v. Hessel*, AWCAC Decision No. 131 at 8 (March 24, 2010).

Certain events relieve an employee from strict compliance with the requirements of AS 23.30.110(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 *Bohlman v. Alaska Const. & Engineering*, 205 P.3d 316 (Alaska 2009), the Court, applying Richard, held the board has a duty to inform a *pro se* claimant how to preserve his claim under AS 23.30.110(c) with specificity when warranted by the facts, but did not delineate the full extent of the duty to inform an employee regarding the AS 23.30.110(c) statute of limitations. Consequently, *Richard* is applied to excuse noncompliance with AS 23.30.110(c) when the board failed to adequately inform a pro se 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 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*. An erroneous statement by adjudication staff as to the specific form that a request for hearing must take, or the specific day on which the two years expires, may be grounds for application of estoppel against the board. *Id*. at 7. In *Harkness v. Alaska*

Mechanical, AWCAC Decision No. 176 (February 12, 2013), the Alaska Workers' Compensation Appeals Commission (AWCAC) held the board did not owe an employee a duty to advise him of the need to file an ARH during the period he was represented by an attorney because his attorney is presumed to have been capable of advising him. *Harkness* at 17.

The board has generally held the SIME process tolls the AS 23.30.110(c) deadline for the period the parties are actively in the SIME process. In *Aune v. Eastwood, Inc.*, AWCB Decision No. 01-0259 (December 19, 2009), the board began tolling the two-year time period 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 period in AS 23.30.110(c).

In *Turpin v. Alaska General Seafoods*, AWCB Decision No. 09-0054 (March 18, 2009), the board began tolling the two-year period when the *pro se* claimant filed a claim requesting an SIME. It noted the claimant believed she was participating in the SIME process by agreeing to sign releases and give a deposition. *Id*. at 22-23. Turpin also found the division did not adequately inform the claimant of the two-year period in light of her pending SIME request and the employer was not prejudiced by any action of the employee. *Id*.

In *McKitrick v. Municipality of Anchorage*, AWCB Decision No. 10-0081 (May 4, 2010), the board tolled the time period in AS 23.30.110(c) when the employer petitioned for an SIME and the board designee ordered the SIME in a prehearing conference until the SIME process was completed including any discovery or deposition requested from the SIME physician after the report. *McKitrick* noted it would be illogical to require the employee to file an ARH on the merits of his claims while awaiting an SIME examination, report, deposition, or other discovery related to the SIME. *Id*. at 22.

In *Snow v. Tyler Rental Inc.*, AWCB Decision No. 11-0015 (February 16, 2011), the board held the signing of the SIME form, which occurred on the same day the prehearing conference the parties stipulated to an SIME was held, tolled the time period in AS 23.30.110(c) until the SIME

report was received. The signed SIME form gave notice the parties needed to request more time to prepare for hearing. *Id*. at 16.

In *Harkness*, the AWCAC 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 AWCAC noted even if it had accepted the board's finding of a stipulation at a prehearing conference, 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. *Narcisse* began tolling the AS 23.30.110(c) time period on the date of the prehearing conference when the parties further discussed the SIME and the employee's attorney promised to file SIME questions, medical binders, and an SIME form. It 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. *Narcisse* noted the two-year time period is tolled when some action by the employee shows a need for additional time before requesting a hearing, and a request for an SIME is a demonstration that additional time is needed before a hearing is held. *Id*. at 22. An employee has only the remainder of the AS 23.30.110(c) time period to request a hearing. *Id.* (citation omitted).

> **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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> (b) Upon petition by a party and for good cause, the board will, in its discretion, extend any time period prescribed by this chapter
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> **8 AAC 45.092. Second independent medical evaluation.**
> . . . .

> (j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to
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> (1) submit interrogatories or depose the examiner, the party must
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> (A) file with the board and serve upon the examiner and all parties, within 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the interrogatories; if notice or the interrogatories are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or serves interrogatories; and
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> (B) initially pay the examiner's charges to respond to the interrogatories or for being deposed; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155(d), the charges may be awarded as costs to the prevailing party;
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> (2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or
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> (3) question the examiner at a hearing, the party must initially pay the examiner's fee for testifying; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155(d), the board will, in its discretion, award the examiner's fee as costs to the prevailing party.
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> (k) If a party's communication with an examiner is not in accordance with (j) of this section, the board may not admit the evidence obtained by the communication at a hearing and may not consider it in connection with an agreed settlement.

An "interrogatory" is a written question (usually in a set of questions) submitted to an opposing party in a lawsuit as part of discovery. (Black's Law Dictionary, 947 (Tenth Ed. 2014)).

ANALYSIS

Should Employee's November 5, 2015 claim be denied for failing to timely request a hearing?

Employee claimed benefits for his left shoulder on November 5, 2015 and petitioned for an SIME on November 17, 2015. Employer filed its first after-claim controversion notice on

December 2, 2015. An SIME may toll the two-year time period in 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 complete SIME may demonstrate the parties were actively in the SIME process. *Aune*; *Turpin*; *McKitrick*; *Snow*; *Harkness*; *Narcisse*. Employee's November 17, 2015 petition for an SIME is insufficient to demonstrate the parties were actively in the SIME process. *Id.* However, the February 11, 2016 prehearing conference is sufficient to demonstrate the parties were actively in the SIME process because the parties stipulated to an SIME and deadlines were set to file SIME questions, medical binders, and a mutually signed SIME form and the SIME was completed. *Id.* Therefore, the February 11, 2016 prehearing conference tolled the two-year time period in AS 23.30.30.110(c) because it occurred prior to the end of two-year time period in AS 23.30.110(c) on December 2, 2017. *Id.* (December 2, 2015 + 2 years = December 2, 2017).

The time period in AS 23.30.110(c) remained tolled until the SIME process was completed, including any discovery or deposition requested from the SIME physician after the report. *McKitrick*. Employee's April 5, 2017 letter contained an additional question for the SIME physician, asking Dr. Direnfeld to review the February 6, 2017 medical report and opine whether the results of the scalene block injection changed any of his conclusions and recommendations. An interrogatory is a written question. *Black's*. It is undisputed Employee received Dr. Pohlman's SIME report on October 24, 2016. Regulation 8 AAC 45.092(j)(1) requires submission of additional SIME questions and a notice of scheduling a deposition of the SIME physician within 30 days after the SIME report was received. Employee's April 5, 2017 letter containing an additional written question for the SIME physician falls under 8 AAC 45.092(j)(1) rather than 8 AAC 45.092(j)(2) because it contained a written question. Allowing a letter sent to the SIME physician that contains a question to fall under 8 AAC 45.092(j)(2) because a letter is a communication in writing regarding the SIME report permits a party to disregard the 30 day time limit under 8 AAC 45.092(j)(1). Employee's April 5, 2017 letter did not comply with 8 AAC 45.092(j)(1) because it was submitted more than 30 days after the last SIME report was received

on October 24, 2016. Employer's June 5, 2017 deposition notice also failed to comply with 8 AAC 45.92(j)(1) because it was noticed more than 30 days after the last SIME report was received. Neither Employee's April 5, 2017 letter nor Employer's June 5, 2017 deposition notice extended the SIME process. *McKitrick*; 8 AAC 45.092(j)(1).

It could be argued the February 6, 2017 medical report was new evidence which did not exist within the 30 days after Dr. Pohlman's SIME report was received on October 24, 2016 and new constitutes good cause to extend the 30 days under 8 AAC 45.092(j)(1); 8 AAC 45.063(b). However, Employee waited 51 days after receiving the February 6, 2017 medical report in the February 13, 2017 medical summary before asking Dr. Direnfeld to review it and opine whether it changed any of his conclusions and recommendations on April 5, 2017 (February 13, 2017 through April 5, 2017 = 51 days). Employee's 51 day delay was not minimal and there is no reason why Employee could not have sent the letter to Dr. Direfeld within 30 days after receiving the February 6, 2017 medical report. Employee's 51 day delay is contrary to the Act's purpose of providing quick, efficient and fair conduct of a hearing. 8 AAC 45.092(j)(1); AS 23.30.001(1). Therefore, the SIME process was completed once the last SIME report was received on October 24, 2016 and the tolling of AS 23.30.110(c) ended. *McKitrick*; 8 AAC 45.092(j)(1); 8 AAC 45.092(j)(2).

The period in AS 23.30.110(c) tolled for 256 days from February 11, 2016 until October 24, 2016. *Aune*; *Turpin*; *McKitrick*; *Snow*; *Harkness*; *Narcisse*. Employee had until August 20, 2018 to request a hearing on his claim or provide written notice he still wants a hearing but has not completed all discovery. AS 23.30.110(c); 8 AAC 45.060(b); 8 AAC 45.063(a); *Colrud*. (December 2, 2015 + 2 years = December 2, 2017; December 2, 2017 + 256 days = August 15, 2018; August 15, 2018 + 3 days = Saturday, August 18, 2018 = Monday, August 20, 2018).

While the AS 23.30.110(c) defense is disfavored, an employee must prosecute his claim in a timely manner. *Tipton*; *Kim*; *Jonathan*. Technical noncompliance may be excused where a claimant has substantially complied with AS 23.30.110(c). *Kim*. Substantial compliance does not mean noncompliance or late compliance. *Kim*; *Hessel*. The claimant must file within two years of the after-claim controversion, either a request for a hearing or a request for additional

time to prepare for hearing. *Hessel*; *Colrud*. Only in rare circumstances will noncompliance with the deadline be excused, including lack of mental capacity or incompetence, or sufficient lack of notice of the time-bar. *Tonoian*.

Employee had until August 20, 2018, to request a hearing on his November 5, 2015 claim or provide notice he still wants a hearing but had not completed all discovery. AS 23.30.110(c); *Colrud*. Employee did not request a hearing on his November 5, 2015 claim or provide written notice he still wants a hearing but had not completed all discovery by August 20, 2018. Employee's August 27, 2018 request for a hearing was seven days late. Employee's April 5, 2017 letter did not request a hearing or additional time to prepare for a hearing. Therefore, Employee's April 5, 2017 letter failed to actually or substantially comply with AS 23.30.110(c). *Rogers & Babler*. Employee failed to actually or substantially comply with AS 23.30.110(c). *Id*.

Employee did not provide sufficient cause to excuse noncompliance with the AS 23.30.110(c) deadline. There is no evidence of lack of mental capacity, incompetence or lack of notice of the time bar. *Tonoian*. Because an attorney represented Employee since November 5, 2015, there is no evidence of equitable estoppel against a governmental agency. *Richard*; *Bohlman*; *Dennis*; *Tonoian*; *Harkness*; *Turpin*. Employee's April 5, 2017 letter does not constitute good cause to excuse noncompliance with AS 23.30.110(c) because Employee waited 51 days to question Dr. Direnfeld about the February 6, 2017 medical report. As stated previously, Employee's 51 day delay in sending Dr. Direnfeld his question contravenes the Act's purpose of providing quick, efficient and fair conduct of a hearing. Furthermore, Dr. Direnfeld's response to Employee's April 5, 2017 letter was received on April 24, 2017, 483 days before the AS 23.30.110(c) deadline. (April 24, 2017 through August 20, 2018 = 483 days). There is no reason why Employee could not have requested a hearing before the AS 23.30.110(c) deadline. The parties' disputes regarding whether Employee's May 14, 2014 work injury is the substantial cause of Employee's need for EMG and nerve conduction studies and which physician should perform the studies do not constitute good cause to excuse noncompliance with the AS 23.30.110(c) deadline because they are disputes to be resolved at hearing. On November 5, 2015, Employee claimed medical benefits, including the studies recommended by his treating physician on May 18, 2015, and Employer denied all medical treatment on December 2, 2015. The parties

continued to dispute the issues during the SIME process and after the SIME reports were received. The SIME reports address whether Employee's work injury is the substantial cause of his need for EMG and nerve conduction studies. These disputes are clearly issues to be resolved at a hearing. Extending the AS 23.30.110(c) deadline after the SIME process is complete because there are disputes to be resolved at hearing is illogical. This decision will not excuse noncompliance with the AS 23.30.110(c) deadline. Employee's November 5, 2015 claim will be denied for failure to timely request a hearing.

CONCLUSION OF LAW

Employee's November 5, 2015 claim will be denied for failure to timely request a hearing.

ORDERS

1) Employer's September 6, 2018 petition to dismiss Employee's November 5, 2015 claim is granted.
2) Employee's November 5, 2015 claim is denied.

Dated in Juneau, Alaska on December 14, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Charles Collins, Member

/s/
Bradley Austin, 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 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 RICHARD ROBERGE, employee / claimant v. ASRC CONSTRUCTION HOLDING CO., employer; ARCTIC SLOPE REGIONAL CORP., insurer / defendants; Case No. 201410169; 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 December 14, 2018.

/s/
Dani Byers, Technician