ALASKA WORKERS' COMPENSATION BOARD

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

JOHN E. FRANKLIN, Employee, Claimant, v. SLAYDEN PLUMBING & HEATING, INC., Employer, and LIBERTY NORTHWEST INSURANCE CO., Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200623206 AWCB Decision No. 19-0132 Filed with AWCB Anchorage, Alaska on December 18, 2019

John Franklin's (Employee) June 26, 2019 petition for more time to request a hearing and Slayden Plumbing & Heating's (Employer) related request to bar and deny his claim, both under AS 23.30.110(c), were heard on November 13, 2019, in Anchorage, Alaska, a date selected on October 16, 2019. Employee's August 8, 2019 Affidavit of Readiness for Hearing gave rise to this hearing. Employee appeared, represented himself and testified. Attorney Colby Smith appeared and represented Employer and its insurer. At hearing, the parties agreed: 1) Employee was not trying to join case 201715890, which was a duplicate number the division assigned to this case accidentally, with the instant matter; 2) he was not trying to join the instant matter with an injury he had in 2015, with another employer; and 3) the injury date for this case is September 22, 2006. The record closed at the hearing's conclusion on November 13, 2019.

ISSUE

Employee admits he neither timely filed a hearing request nor asked for additional time to file one. He contends a division staff member gave him bad advice, so his claim should not be denied.

Employer contends Employee filed a claim, Employer controverted it and he did not request a hearing or request additional time to file a hearing request within two years. It contends Employee's January 30, 2017 claim is time-barred and should be denied.

Is Employee's January 30, 2017 claim time barred and should it be denied; or should his request for an extension of time to ask for a hearing be granted?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On September 22, 2006, Employee injured his back when lifting and moving an object while working for Employer. (Report of Occupational Injury or Illness, September 22, 2006).

2) On January 30, 2017, Employee sent the division an email to which he attached a claim for benefits. The email states in part:

> . . . My current medical insurance provider has denied payment for current medical treatment despite the length of time in between the original date of injury as this injury was a worker compensation claim in its inception. I need resolution in this situation so one way or another I may proceed with my medical treatment. . . . (Email, January 30, 2017).

Employee's claim checked the box for permanent partial impairment (PPI). (Claim for Workers' Compensation Benefits, January 30, 2017).

3) Employee testified he filed his claim against Employer on advice from a Workers' Compensation Technician. His health insurance had denied payment based on his medical records suggesting he had a work-related injury, not covered by health insurance. (Employee).

4) On February 17, 2017, Employer denied Employee's right to PPI benefits, contending it had received no evidence of a PPI rating and had obtained reports suggesting he had a subsequent injury with another Employer. The denial, which Employer served by first-class mail, advised:

> If the insurer/employer filed this controversion 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.
>
> **IF YOU ARE UNSURE WHETHER IT IS TOO LATE TO FILE A CLAIM OR REQUEST A HEARING, CONTACT THE NEAREST AWCB OFFICE**. (Controversion Notice, February 17, 2017; emphasis in original).

5) Two years from the date Employer filed and served its February 17, 2017 controversion notice, plus three days for service by mail, made Employee's hearing request or request for additional time to file a hearing request due by February 20, 2019 (February 17, 2017 + two years = February 17, 2019 + three days = February 20, 2019). A similar calculation method would apply to the other two relevant controversion notices. (Experience; judgment).

6) On February 28, 2017, the parties attended a prehearing conference; the summary states:

> (3) **STATUTE OF LIMITATIONS**: If a controversion notice is served and filed, after the date of filing of his workers' compensation claim, EE must request a hearing, by serving and filing an Affidavit of Readiness, http://www.labor.alaska.gov/wc/forms/wc 6107.pdf, within two years of the controversion having been filed, to avoid possible dismissal of his claim. A post-claim controversion was received by the board on 2/17/2017, and therefore a hearing must be requested by 2/16/2018. Some events in the case may toll (extend) this deadline as to some or all of the claims. However, EE is urged to remain aware of the earliest deadline and the possibility that the claim could be barred if a hearing is not timely requested.

The prehearing conference summary does not advise Employee he could request an extension of time to request a hearing if, when the two-year date arrived, he was not prepared for hearing on his case's merits. (Prehearing Conference Summary, February 28, 2017; emphasis in original).

7) The February 28, 2017 prehearing summary provided an incorrect deadline for requesting a hearing, which was one year too early. (Experience; judgment).

8) No party took action to correct the mistaken date. (Agency file).

9) Employee testified he was unaware there was an error in the February 28, 2017 prehearing summary or that the designee had typed the wrong deadline. He admitted the designee's error in the summary played no direct role in him requesting a hearing thereafter. (Employee).

10) On March 23, 2017, Employer denied "all benefits" contending Employee had received Employer's medical releases but had not signed and returned them within 14 days or petitioned

for a protective order. The denial, served by first-class mail, advised Employee he had to file an Affidavit of Readiness for Hearing form within two years of the controversion date or his claim might be denied. It did not advise him he could ask for more time to request a hearing. (Controversion Notice, March 23, 2017).

11) On April 3, 2017, Employer again denied "all benefits" contending Employee failed to attend an employer's medical evaluation (EME). The denial, served by first-class mail, advised Employee he had to file an Affidavit of Readiness for Hearing form within two years of the controversion date or his claim might be denied. It did not advise him he could ask for more time to request a hearing. (Controversion Notice, April 3, 2017).

12) On May 17, 2017, the parties addressed Employer's request for orders requiring Employee to sign releases and attend an EME. The designee advised Employee:

> When an 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, May 17, 2017).

13) On August 9, 2017, Employer for the third time denied "all benefits," based on opinions from its EME report. The denial, served by first-class mail, advised Employee he had to file an Affidavit of Readiness for Hearing form within two years of the controversion date or his claim might be denied. It did not advise him he could ask for more time to request a hearing. (Controversion Notice, August 9, 2017).

14) On March 21, 2018, Employee called the division and spoke with a Workers' Compensation Officer I, who recorded in Employee's agency file the following:

> EE wished to know what the status of his claim was. I reviewed with EE the applicable controversions and claims. Suggested EE may wish to file an amended claim for medical costs. Explained to EE SIME. Updated EE's address. Mailed EE claim, petition, atty list, and WC and You. (Agency file, March 21, 2018).

15) At hearing, Employee testified he called the division on March 21, 2018, to find out how to obtain medical treatment and the designee told him he had already missed the deadline to file for

a hearing, based on documentation the designee reviewed in Employee's electronic file. Employee recalls the conversation with the designee. When he heard the designee say he had already missed the deadline for requesting a hearing, Employee thought his claim "was dead." The designee suggested he take the EME report to his attending doctor for review to see if he disagreed with it. The designee told Employee if his doctor disagreed with the EME report, he could ask for an SIME. He did not advise Employee to file something to save his claim. (Employee).

16) Employer contends Employee has not requested a second independent medical evaluation (SIME); Employee agrees. (Record).

17) On February 20, 2019, the deadline ran out for Employee to request a hearing on his January 30, 2017 claim, or request additional time to ask for a hearing. (Experience, judgment).

18) Employee did not file a hearing request or ask for more time by the deadline. (Observations).

19) On March 19, 2019, Employee next contacted with the division. He called to ask about his case and controversions. A technician "[e]xplained the claim process and EE asked [her] to please send him a claim to fill out," and she did. (Agency file, March 19, 2019).

20) On June 26, 2019, Employee petitioned to join an additional employer and requested an extension of time to request a hearing under AS 23.30.110(c). The joinder request was actually a request to merge two AWCB case numbers into one case number for this injury. Employee's need to request an extension of time was "[d]ue to extenuating circumstances unable to request a hearing on cases." (Petition, June 26, 2019).

21) On August 8, 2019, Employee requested a hearing on his June 26, 2019 petition. (Affidavit of Readiness for Hearing, August 8, 2019).

22) At hearing, Employee testified beginning April 25, 2017, he had a series of unfortunate events including the death of a child in the family home. Given this and related ensuing events, including relocating from the home, Employee said he was not in the best state of mind for some time and could not find his paperwork. He admittedly received and reviewed each controversion notice including the parts advising him about his rights to timely request a hearing; they were not confusing. Employee also received "Workers' Compensation and You" and reviewed it. Eventually, Employee's attending physician reviewed and commented on the EME report in 2019. Employee had been receiving medical care off and on for his work injury since 2006. His health insurance paid the bills until suddenly, for reasons not clear to Employee, his health insurer decided it would no longer pay for this injury because it might be work-related. Meanwhile, Employee

had a 2015 work injury to the same body part while working for a different employer, Klebs Plumbing & Heating (Klebs). Klebs' insurer denied his claim and, when his health insurance also declined to keep paying for his medical care, Employee contacted the division and filed a claim in 2019 in this case. Employee worked full-time in 2018, up to 50 or more hours per week. He had not been incarcerated during the relevant period and his civil law issues would not have prevented him from filing a document in this case. Though he suffered depression following his child's death, Employee agreed he did not seek mental health care and was not mentally incompetent. In his opinion, the only thing that interfered with his ability to attend to his claim was his ongoing custody battle with his son's mother in civil court, which required prolonged hearings. That issue resolved in November 2018. (Employee).

23) Employee further testified nothing during the relevant two-year period prevented him from filing a hearing request. However, after talking with the board designee on March 21, 2018, Employee focused his effort on having his doctor comment on the EME report, as directed. He does not know why he did not file "something," regardless of the advice he had received, except he did not know how to file a motion. A designee told Employee at the August 8, 2019 prehearing conference that he had truly missed the filing deadline. Immediately thereafter, he spoke with another designee who suggested he file a hearing request nonetheless; he did the same day. (*Id*.).

24) Though the controversions in this case were clear, Employee was confused about how various controversion notices affected his duty to request a hearing; *e.g.*, he did not understand which controversion notices triggered the duty to request a hearing. (*Id*.).

25) Employee knew in June 2019, when he came to the division offices, that the time limit had passed. However, when asked when he "first knew" the time limitation had passed, Employee said March 21, 2018. When asked to clarify, Employee testified he knew the date had truly passed when he called the division in March 2019. When asked why he called at all in March 2019, if he thought the time had already passed a year earlier, Employee said he had spoken to a friend about his case. He was trying to figure out how to obtain more medical treatment. Employee did not know he could file for an extension of time to request a hearing until he came in to speak with a technician at the division offices in April 2019, when division staff told him to file a petition to request more time under AS 23.30.110(c). However, on March 21, 2018, the designee did not suggest Employee file something to salvage his ability to request a hearing. Employee is not familiar with legal terms and statutes and he did not understand the process. He never

independently reviewed the record to determine if the March 21, 2018 advice he had been given by the designee was correct, because he had called the division for advice and "assumed it to be correct." Klebs has controverted his claim against it, based on an EME in that case, and he is pursuing that 2015 with Klebs. He has not had medical care for his work injury since 2016. The March 21, 2018 call with the board's designee stopped him from "trying to continue the workers' compensation avenue." When asked why the board's designee would have sent him claim forms, if his claim was already dismissed, Employee after hearing and reading the March 21, 2018 note from his agency file, remembered that the board's designee sent him claim forms so he could file additional claims for benefits not already dismissed and so he could ask for an SIME. (*Id*.).

26) Employer contends a board designee advised Employee at a prehearing conference he had to file a written hearing request within two years of a controversion, or his claim would be denied. While conceding the exact injury date was not relevant to any issues, Employer contends confusion over the injury date demonstrates why stale claims should be dismissed. It concedes there was a "typographical error" on one prehearing summary, which told Employee he had to file his request a full year before he actually had to file it. Employer contends the board satisfied its duty to advise Employee as to the date by which he had to request a hearing. It further contends a later summary again advised him about the two-year deadline. Employer contends controversions that denied "all benefits" triggered the §110(c) deadline and Employee missed three controversion-triggered deadlines. Even though some controversions addressed procedural matters, in Employer's view Employee still had to file something within two years of each controversion notice to avoid having his claim denied. Employer concedes *ex parte* communications with board staff is a valuable benefit to injured workers, but contends such conversations should not be used to avoid case dismissal under AS 23.30.110(c) especially since Employer never knew about the conversation until the hearing. Employer agrees if the statute barred Employee's claim, only his PPI claim would be denied as that was his only claim. (Employer's arguments).

27) Because the designated chair at hearing could not print the designee's March 21, 2018 note from Employee's agency file, he read it aloud. The designated chair subsequently adjourned the hearing, obtained a printed copy of the designee's March 21, 2018 note and distributed copies to the parties at hearing to allow them to read and respond to it. (Record).

28) Employee has yet to file an Affidavit of Readiness for Hearing on his claim. (Agency file).

29) Employer presented no evidence it has been prejudiced by Employee's failure to date to file a hearing request on his claim. (Experience, judgment and inferences from the above).

30) There is no evidence Employer took Employee's deposition. (Agency file).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> > (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . to employers. . . .
> >
> > (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

The board may base its decision on not only direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). However, the board cannot rely on "institutional experience" derived from its database as evidence to decide disputed facts without giving parties an opportunity to rebut that evidence. The board's use of "extra-record judicial facts," without providing parties an opportunity to see and respond to it, before the board makes an "individualized decision," violates due process. *Rusch v. Southeast Alaska Regional Health Consortium*, Alaska Supreme Court Slip Op. No. 7422 (December 6, 2019). In *Rusch*, the board decided a claimant's request for attorney fees by searching its database to derive how many years various claimant attorneys had been practicing before the board to gauge "experience" and to compare it with the claimant's lawyer's own. The board did not provide the parties with the data from its database or allow them to comment on it before the board decided the attorney fee issue. (*Id*. at 33-34).

> **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. . . .

The Alaska Supreme Court in *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska, 1963), 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.

Bohlmann v. Alaska Const. & Engineering, 205 P.3d 316 (Alaska, 2009), held the board had a duty to inform a self-represented claimant how to preserve his claim under §110(c), and specifically to correct the employer's lawyer's erroneous prehearing conference statement that the statute of limitations had already run on his claim. Consequently, *Richards* may be applied to excuse noncompliance with §110(c) when the board failed to adequately inform a claimant of the two-year time limitation. Since Bohlmann still had more than two weeks to file a hearing request at the time the employer's lawyer provided erroneous information and the board's designee did not correct it, the court found an abuse of discretion and reversed the board's dismissal of his claim and directed it to accept the tardy hearing request as timely. The court presumed Bohlmann would have timely filed his affidavit of readiness had the board or staff satisfied its duty to him, because he had consistently filed his own pleadings previously.

Certain "legal" grounds may excuse noncompliance with §110(c), such as lack of mental capacity or incompetence, and equitable estoppel against a governmental agency by a self-represented claimant. *Tonoian v. Pinkerton Security*, AWCAC Decision No. 029 (January 30, 2007).

The Alaska Supreme Court in *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912-13 (Alaska 1996) noted the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it."

In *Kim v. Alyeska Seafoods, Inc*., 197 P.3d 193 (Alaska 2008), the Alaska Supreme Court noted §110(c) though different, is "likened" to a statute of limitations and "provisions absent from subsection .110(c) should not be read into it." *Kim* said:

> . . . The board has discretion to extend the deadline for good cause. (*Id*. at 194). Subsection .110(c) is a procedural statute that 'sets up the legal machinery through

> which a right is processed' and 'directs the claimant to take certain action following controversion.' A party must strictly comply with a procedural statute only if its provisions are mandatory; if they are directory, then 'substantial compliance is acceptable absent significant prejudice to the other party.'
> . . . .
>
> We conclude that the language of subsection .110(c) satisfies these criteria and hold its provisions are directory. . . .
> . . . .
>
> On remand, the Board should fully consider the merits of Kim's request for additional time and any resulting prejudice to Alyeska. If in its broad discretion the Board determines that Kim's reasons for requesting additional time have insufficient merit, or that Alyeska would be unduly prejudiced, the Board can set a hearing of its own accord or require Kim to file an affidavit of readiness within two days -- the amount of time remaining before the original two-year period expired. (*Id*. at 199).

Pruitt v. Providence Extended Care, 297 P.3d 891, 985 (Alaska 2013), cited *Kim*'s holding, "But we also said that we did 'not suggest that a claimant can simply ignore the statutory deadline and fail to file anything.'" *Pruitt* also said in respect to the claimant, "She did not file anything indicating she wanted to prosecute the 2005 written claim until August 2009, well after the statutory deadline expired." *Roberge v. ASRC Construction Holding Co.*, AWCAC Decision No. 19-001 (September 24, 2019), said, in an SIME tolling case, "Yet the idea of a hearing did not being held on the merits of a claim is strongly disfavored by the Court and the Board has an obligation to determine if there is a way around the running of the .110(c) defense." (*Id*. at 8).

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

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

> **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 45.065. Prehearings**. . . .
> . . . .
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> (d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. . . .
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> **8 AAC 45.110. Record of proceedings**. (a) Evidence, exhibits, or other things received in evidence at a hearing or otherwise placed in the record by board order and anything filed in the case file established in accordance with 8 AAC 45.032 is the written record at a hearing before the board. A person may see or get a copy of the written record in accordance with this subsection and after completing and giving the division a written request, providing identification, and paying the fee, if required under 8 AAC 45.030. Under this section,
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> > (1) a party to a claim or a petition or a party's representative who has filed an entry of appearance in a case may see or get a copy of the written record . . . for all of the employee's case files. . . .

ANALYSIS

Is Employee's January 30, 2017 claim time barred and should it be denied; or should his request for an extension of time to ask for a hearing be granted?

The relevant facts in this case are not disputed; this is a legal issue. Employee contends he needs additional time to prepare his case for hearing before asking for one. He contends he called the division for information and was told he had already missed the filing deadline for hearing, leading him to believe his claim "was dead." Employer contends it controverted his January 30, 2017 claim on four occasions and to date, Employee has yet to request a hearing. It contends more than two years have passed since Employer filed and served the first three controversion notices. Therefore, Employer contends his claim for PPI should be dismissed under AS 23.30.110(c).

"Legal" grounds, such as lack of mental capacity, incompetence, or equitable estoppel by a governmental agency, may excuse noncompliance with §110(c). An SIME request also tolls the running of the two-year deadline under §110(c). *Tonoian*. Employee testified he experienced

some depression following an indisputably tragic event at his home during the time for which he had to request a hearing in his case. However, he conceded he never had a mental health diagnosis, became institutionalized or was unable to work full-time following that terrible event. He was not incarcerated or otherwise incapacitated during the two-year period. Thus, there is no evidence mental capacity, incompetence or incarceration prevented him from timely requesting a hearing or requesting more time to ask for a hearing. Employee does not contend he requested an SIME.

The Alaska Supreme Court has long held that §110(c) is likened to a "statute of limitations," which is a generally "disfavored defense" and neither "the law nor the facts should be strained in aid of it." *Tipton*; *Kim*. And while §110(c) is "directory," and "substantial compliance" with its terms is acceptable action to prevent claim dismissal absent significant prejudice to the other party, Employee still should have filed something to prosecute his claim timely. *Kim*; *Pruitt*. It is undisputed Employee filed nothing until June 26, 2019, well over two years after the date of the first three controversion notices. On the other hand, Employer provided no evidence of prejudice; it was able to obtain an EME upon which it could controvert Employee's claim. It argued confusion over the injury date demonstrated why the claim should be dismissed; however, Employer also conceded the precise injury date was irrelevant to the issues at hand.

The commission in *Roberge* recently advised that the Alaska Supreme Court so strongly disfavors the idea of a hearing not being held on the merits of a claim that the factfinders have an "obligation" to determine "if there is a way around the running of the .110(c) defense." Such a reason was not hard to find in this case. On January 30, 2017, Employee filed a claim for PPI benefits. Employer filed and served its first controversion on February 17, 2017. Employee should have filed either a hearing request or requested additional time to ask for a hearing by February 20, 2019. *Rogers & Babler*; AS 23.30.110(c). This date calculation includes three days added to the time deadline because Employer served the controversion by mail. 8 AAC 45.060(b). However, on February 28, 2017, a designee authored a prehearing conference summary that incorrectly told Employee his deadline for requesting a hearing was "2/16/2018," which was a full year earlier than the actual deadline. AS 23.30.110(c); *Bohlmann*. Employee candidly and credibly testified he was not aware of this date error in the prehearing summary and consequently it did not directly influence his behavior in respect to his case thereafter. AS 23.30.122; *Smith*.

However, this error directly affected later advice he got from the division. Employee credibly testified he called the division in March 2018, to inquire about his case's status. This call demonstrated Employee's intent and desire to prosecute his claim. *Bohlmann*. Employee's agency file contains a notation on March 21, 2018, showing he called the division and the designee reviewed with him "applicable controversions and claims." This note corroborates his testimony. AS 23.30.122; *Smith*. This call occurred about one year before the §110(c) deadline expired effective February 20, 2019, based on the February 17, 2017 controversion. On March 21, 2018, Employee spoke with a Workers' Compensation Officer I, who reviewed his file and incorrectly advised him he had already missed the time period to file for a hearing based on "documentation" the designee reviewed in his file. The only documentation that would support such advice is the February 28, 2017 prehearing conference summary, which contained the wrong deadline date. *Rogers & Babler*. The designee also advised Employee he may want to file an amended claim for medical costs, discussed an SIME, and mailed him a claim, petition and other documents.

The Alaska Supreme Court has long held the division has a duty to fully advise Employee of "all the real facts" bearing upon his right to compensation and how to pursue it. *Richard*. The court has also held the division has a duty to inform him how to preserve his claim under §110(c). *Bohlmann*. Though the issue in *Bohlmann* was the designee's failure to correct the employer's lawyer's erroneous prehearing conference statement that the limitation statute had already run, the designee's error here was worse, as he provided Employee with clearly erroneous information. According to his credible testimony, upon hearing this advice from the designee, Employee thought his claim "was dead," and the designee's advice stopped him from "trying to continue the workers' compensation avenue," with exception of benefits he thought might not have been already barred under §110(c). AS 23.30.122; *Smith*. Notably, the designee did not advise Employee to file a hearing request or suggest he file a request for more time to ask for a hearing. Following the designee's additional advice concerning an SIME, Employee instead focused on having his attending physician comment on the EME report, as directed.

The division failed in its duty to properly advise Employee of all the real facts bearing upon his right to compensation and how to preserve his claim under §110(c). A designee typed an incorrect date in a prehearing conference summary, which stated the date by which Employee had to request

a hearing was nearly a full year earlier than it really was. While this had no direct influence on Employee, who testified he was not aware there was an error in the summary, a different designee subsequently reviewed that report and repeated the error, telling Employee his time had already expired, when in fact it had not. Each controversion notice and various other documents from the division all encourage an injured worker to call the division if he or she has any questions about a claim. As he stated at hearing, when he called the division, Employee had a right to believe the information he received from the division's designee was correct. It was not.

Further, while all the relevant prehearing conference summaries provided general information about the two-year time bar, only one provided the exact date and that date was a full year off. Only one relevant summary even mentioned Employee's right to request more time to ask for hearing in the event he was not yet ready to file a hearing request when the two-year date drew near; and that was before the second designee told Employee his time had already run out. Controversion notices include no information advising Employee to ask for more time to file a hearing request in the event he was not ready for a hearing.

In *Bohlmann*, the injured worker had more than two weeks in which to submit the required affidavit requesting a hearing; Employee had nearly a year. The division's second designee should have at minimum reviewed the file more carefully to discern the actual date by which Employee had to request a hearing and advised him to seek more time if necessary. Given the facts in *Bohlmann*, the court said the appropriate remedy was to deem the claimant's affidavit of readiness for hearing timely filed. The claimant in *Bohlmann* filed his hearing request 25 days after the deadline had run. Here, Employee had to file something by February 20, 2019; he filed a petition requesting more time to ask for hearing on June 26, 2019, about four months later. Employer argued this case demonstrates why stale claims should be denied if not prosecuted timely, because there was confusion about the injury date. Employer conceded injury date confusion was irrelevant to any issues in this case. It provided no evidence Employee's delay in asking for more time to request a hearing prejudices it in any way. *Bohlmann*. Employer easily obtained an EME and controverted.

Employer also contends the division's designees fulfilled their responsibility under *Richard* and *Bohlmann* by adequately and repeatedly warning Employee in general about the two-year deadline

for asking for a hearing. It contends Employee nonetheless missed three post-controversion deadlines. Employer's arguments are very similar to arguments rejected in *Bohlmann*, given the division's failure to properly advise the claimant in that case in the first instance. This case differs somewhat from *Bohlmann* because there, the employer's attorney's critical misinformation was given to the claimant at a prehearing conference where both parties were present, and the designee failed to correct it. Here, the division designee gave Employee critical misinformation in an appropriate, though *ex parte*, communication. But the different circumstances do not justify this decision ignoring the most crucial evidence likely to save Employee's claim. *Roberge*. The situation here is far more egregious than the situation in *Bohlmann*.

Lastly, Employer concedes *ex parte* communication between a self-represented injured worker and division staff tasked to fulfill the division's *Richard* and *Bohlmann* duties is an important benefit to injured workers. However, it also contends this decision should not rely on such *ex parte* communications to avoid case dismissal under §110(c). Given its acknowledgment that *ex parte* communication between unrepresented claimants and division staff is important, Employer's objection to this decision considering bad advice an injured worker received from a designee in a §110(c) dismissal case is difficult to follow. First, this decision has the right to consider everything in Employee's agency file, which constitutes "the written record at a hearing," sans a valid basis to not consider it. 8 AAC 45.110(a). Second, as a party Employer had a right to obtain a copy of Employee's agency file. 8 AAC 45.110(a)(1). Third, Employer received the February 28, 2017 prehearing conference summary that recorded the incorrect deadline, subsequently repeated by the second designee. Employer had a right to correct the initial error, but did not. 8 AAC 45.065(d). Lastly, the agency file does not contain evidence that Employer ever deposed Employee. Had it taken his deposition, his hearing testimony likely would have been discovered earlier.

This case's facts differ from those in the Alaska Supreme Court's recent *Rusch* opinion. There, the court clarified its *Rogers & Babler* decision and said fact-finders cannot use "extra-record judicial facts" without providing parties an opportunity to see and respond to them before making a decision. In *Rusch,* fact-finders used the division's ICERS database to research how many years various claimant attorneys, not involved in that case, had been practicing law to gauge their "experience" and to compare it with the attorney in *Rusch* who was requesting similar fees. *Rusch*

said this practice violated the employer's due process rights, because the fact-finders did not share the information with the parties for review and comment before making a decision. By contrast, the notes upon which this decision relies simply support Employee's testimony and are in his agency file and thus are not "extra-record judicial facts." They are facts gleaned from the record in this case. 8 AAC 45.110(a)(1). Further, the designated chair read the designee's comments to the parties at hearing and provided each party with a copy of the designee's March 21, 2018 notation for their review and comment. Each party commented on the notation.

This decision need not reach Employer's argument that two other relevant controversion notices based solely on procedural issues also triggered §110(c) statutory deadlines. Once the division's designee gave Employee bad advice, he thought his claim "was dead." At that point, the damage was done. Thus, the above analysis applies equally well to subsequent controversion notices.

The law requires the Act to be interpreted to ensure fair hearings and prefers to have cases decided on their merits. AS 23.30.001(1), (2). Employee's June 26, 2019 petition for more time to request a hearing under §110(c) will be deemed timely filed to toll the statute and will be granted. *Bohlmann*. This decision will give Employee until June 30, 2020, to request a hearing on his claim. If, as that date approaches, for any reason Employee is not ready to request a hearing, he will be directed to request a second time extension.

Further, Employee is advised to obtain an attorney list from the division and consider finding an attorney to assist him in his claim. He is also advised to consider filing a claim against Klebs and joining that claim with his pending claim in this case, since the injuries appear to be similar in both instances. Employee is advised to consult with an attorney or technician concerning his right to request an SIME if his attending physician disagrees with opinions from the EME in this case. If Employee does not retain an attorney, he is encouraged to either discuss these issues with division staff or, request a prehearing conference at which time the parties can discuss the advice given in this paragraph. *Richard*; *Bohlmann*.

CONCLUSION OF LAW

Employee's January 30, 2017 claim is not time barred and should not be denied; his request for an extension of time to ask for a hearing should be granted.

ORDER

1) Employee's June 26, 2019 petition for an extension of time to request a hearing under AS 23.30.110(c) is deemed timely filed to toll the statute and is granted.
2) Employer's request for an order denying Employee's claim under AS 23.30.110(c) is denied.
3) Employee has until June 30, 2020, to request a hearing on his claim. If for any reason he is not ready by that date to request a hearing, he may request an additional extension of time.
4) The parties are directed to proceed in accordance with this decision.

Dated in Anchorage, Alaska on December 18, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert Doyle, Member

/s/
Bronson Frye, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of John E. Franklin, employee / claimant v. Slayden Plumbing & Heating, Inc., employer; Liberty Northwest Insurance Co., insurer / defendants; Case No. 200623206; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on December 18, 2019.

/s/
Charlotte Corriveau, Office Assistant