ALASKA WORKERS' COMPENSATION BOARD

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

MUBAARAQ HUSSEIN, Employee, Claimant, v. DUTCH HARBOR SURIMI, Employer, and ACE AMERICAN INSURANCE CO, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201811063 AWCB Decision No. 21-0071 Filed with AWCB Anchorage, Alaska on August 9, 2021

Mubaaraq Hussein's (Employee) April 13, 2021 petition to extend the AS 23.30.110(c) deadline was heard in Anchorage, Alaska, on August 5, 2021, a date selected on June 15, 2021. A May 26, 2021 hearing request gave rise to this hearing. A Somali interpreter was present to interpret from English to Somali and Somali to English. Attorney Jeffrey Holloway appeared and represented Dutch Harbor Surimi and Ace American Insurance Co (Employer). Mubaaraq Hussein (Employee) appeared, represented himself and testified. There were no other witnesses. The record closed at the hearing's conclusion on August 5, 2021.

ISSUE

Employee requests an order extending the AS 23.30.110(c) deadline to request a hearing. He contends the deadline should be extended because he still has pain in his hand injured while working for Employer. Employee contends he needs at least one year but a two year extension would be better.

Employer contends an extension should not be granted because Employee has not articulated a valid reason to justify extending the time to request a hearing under AS 23.30.110(c).

Should the deadline for Employee to file a hearing request be extended?

FINDINGS OF FACT

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

1) On July 31, 2018, Employee's right hand was lacerated while working for Employer as a fish processor. Employee was struck between the second and third digits on his right hand by a screw press cover. An x-ray revealed comminuted right proximal phalanx fracture. Employee could not be released to work on modified duty and was sent to Anchorage to receive surgery. He was referred to Owen Ala, M.D. (First Report of Occupational Injury, August 1, 2018; Iliuliuk Family & Health Services, Chart Note and Letter to Whom It May Concern, Sarah Spelsberg, PA, July 31, 2018; X-ray Report, Jonathan Coyle, M.D., July 31, 2018.)

2) On August 3, 2018, the fracture was reduced and post-reduction x-rays showed a "well-anatomically reduced proximal phalanx index fracture." Comminution still existed and Employee was diagnosed with right index finger proximal phalanx comminuted, displaced fracture with open wound to the index finger's metacarpophalangeal joint. Employee was casted and taken off work. (Chart Note, Maggie Laufenberg, PAC, August 3, 2018.)

3) On September 10, 2018, Employee had no infection or active drainage. Although he was unable to flex his index finger without pain, he was able to use his flexor muscles, had full extension of his index finger and his entire finger had normal sensation. X-rays showed a comminuted right index finger fracture that was healing and starting to remodel. Employee had no soft tissue swelling and carpal distances were well maintained. His healing was "routine." He was advised to continue to protect the fracture but he was also referred to physical therapy to begin finger movement. He was released to return to work in one week with no use of his right hand. (Chart Note, Christina Waters, PAC, September 10, 2018.)

4) On December 13, 2018, Employee underwent a right index finger rotational osteotomy. (Operative Report, Marc Kornmesser, M.D., December 13, 2018.)

5) On December 26, 2018, Employee began a six week occupational therapy plan for treatment two times per week to address functional limitations including weakness, stiffness, edema, scar management and right dominant hand coordination. He attended 30 therapy sessions and missed

two. He completed therapy on February 26, 2019; however, additional therapy was ordered to start on March 8, 2019 and end on April 19, 2019. The new goal was to prepare Employee to be independent and compliant with a home exercise program to facilitate his full rehabilitation potential. (Ortho Alaska OPA Therapy, December 26, 2018, February 26, 2019, March 8, 2019.)

6) On April 3, 2019, Dr. Kornmesser said Employee was medically stable, had incurred a permanent partial impairment (PPI) and no longer possessed the physical capacity to return to work as a seafood processor because he could not lift more than 50 pounds and was unable to work in temperatures below 40 degrees. Employee was referred to Sean Taylor, M.D., for a PPI rating. Employee was able to fully extend his finger and had no rotational deformity. He was unable to make a full composite fist with his index finger but the long, ring and small fingers were normal. Dr. Kornmesser advised Employee further surgery was not going to improve his finger motion or discomfort and, if Employee wished to have the plate removed, he would have to wait two years. (Responses to Nurse Case Manager Christine Crosby's Questions, Dr. Kornmesser, April 3, 2019.)

7) On April 17, 2019, Employee complained of severe pain when his right index finger was palpated; however, Dr. Taylor did not notice any facial grimacing. When Dr. Taylor stressed Employee's ligaments he did not have pain. Nor did he have instability or right hand atrophy. He was only able to flex his right index finger joint to 50 degrees and his right hand grip strength was 45 pounds and his left hand was 100 pounds. Employee was rated with a one percent PPI. (PPI Rating, Dr. Taylor, April 17, 2019.)

8) On April 23, 2019, a functional capacity evaluation placed Employee in the light-medium physical demand class. H complained of hand pain but participated enough to complete a testing validity profile because 19 of 24 validity criteria were valid. Employee did not meet the physical demands for a fish processor. A work hardening program was recommended to improve his performance so he could meet the physical demands and return to work as a fish processor. (Functional Capacity Evaluation, John DeCarlo, MSOT, April 23, 2019.)

9) On May 30, 2019, Employee went to Orthopedic Physicians of Alaska to speak with Dr. Kornmesser. He was informed Dr. Kornmesser was out of the clinic "right now." Employee asked if Dr. Kornmesser had communicated with Dr. Taylor regarding "the diagnosis" and was told the doctors agreed. (Communication Note, Amanda Scott, May 30, 2019.)

10) On September 4, 2019, Michael Patterson entered his appearance on Employee's behalf and filed a claim for temporary total disability (TTD) benefits, attorney fees and costs, interest and work hardening, AS 23.30.041(k) benefits, and a reemployment benefits eligibility evaluation. (Entry of Appearance, Michael Patterson, Esq., September 4, 2019; Claim, September 4, 2019.)

11) On July 29, 2019, Employee's occupational therapy concluded. He was instructed to continue his home exercise program and follow up with Dr. Kornmesser, as needed. (Ortho Alaska OPA Therapy, July 29, 2019.)

12) On September 18, 2019, Employer denied any disability benefits were due. (Answer, September 18, 2019.)

13) On October 16, 2019, Employer filed a post claim controversion. Benefits controverted are TTD from April 3, 2019 forward; PPI greater than one percent; medical costs that are not reasonable or necessary or not for services performed pursuant to a treatment plan or do not comply with the usual and customary fee schedules and AS 23.30.097 time frames; and transportation costs to healthcare facilities for treatment that is not reasonable or necessary or not supported by proper documentation. Employer did not controvert reemployment benefits or reasonable and necessary medical care. The controversion notice described all applicable deadlines, including AS 23.30.110(c)'s, and said:

> When must you request a hearing (Affidavit of Readiness for Hearing form)?
>
> > 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, October 16, 2019.)

14) On November 12, 2019, the first prehearing in this case was held. Employee's attorney was "still gathering discovery" and "working through discovery." An additional prehearing was scheduled for December 12, 2019. (Prehearing Conference Summary, November 12, 2019.)

15) On December 12, 2019, Employee's attorney was working on answering Employer's interrogatories and at the parties' request another prehearing was scheduled for January 16, 2020. (Prehearing Conference Summary, December 12, 2019.)

16) On January 16, 2020, the parties were working on settling the case and another prehearing was scheduled for February 20, 2020. (Prehearing Conference Summary, January 16, 2020.)

17) On February 20, 2020, the parties were still working on settling the case and another prehearing was scheduled for March 31, 2020. (Prehearing Conference Summary, February 20, 2020.)

18) On February 20, 2020, Employer petitioned for an order compelling Employee to comply with discovery. It had served Employee with interrogatories and requests for production on October 18, 2019, and Employee did not petition for a protective order or respond. Employer requested: correspondence between Employee and his medical providers from the injury date until October 18, 2019; Employee's income tax returns, including W2 and 1099 forms, from 2016 through 2019; any documents, correspondence or application for Medicaid benefits, public assistance, unemployment compensation, Employer sponsored short term and long term disability, Medicare benefits, and for veterans benefits from the U.S. Department of Veterans Affairs; and documents related to any employment Employee had from July 30, 2018 through his response date. (Petition, February 20, 2020.)

19) On March 17, 2020, Employee wished to discuss if there was any further treatment to relieve his pain and discomfort since his injury. He complained most of his symptoms are associated with cold intolerance and pain, and pain prevents him from doing any "significant" activity or work. Employee's ability to flex his index finger was limited but he was able to fully extend it. He had no rotational abnormality and no pain with palpation along his finger. He had discomfort with passive full motion at the middle finger joint and wrist flexion and extension caused hand discomfort. X-rays showed complete fracture healing, there was no evidence the hardware or plate alignment failed, the fracture line could not be seen, nor could any abnormality. (Chart Note, Alan Swenson, M.D., March 17, 2020.)

20) On March 31, 2020, a prehearing was held to address Employer's February 20, 2020 petition to compel. The record was left open for one week to permit Employee to respond to Employer's petition. (Prehearing Conference Summary, May 18, 2020.)

21) On March 31, 2020, Employee opposed Employer's petition. Employee responded to Employer's interrogatories on December 12, 2019. On March 3, 2020, after requesting a 10 day extension to respond to Employer's requests for production, which Employer did not oppose, Employee responded by email on March 6, 2020. (Opposition to Petition to Compel Discovery, March 31, 2020.)

22) On May 18, 2020, the board designee denied Employer's February 20, 2020 petition to compel. The designee found Employee responded to the discovery request "to the best of his ability." No additional prehearings were scheduled. (Prehearing Conference Summary, May 18, 2020.)

23) On September 4, 2020, Employee's attorney withdrew his appearance. He did not file an attorney fee lien. (Notice of Withdrawal, September 4, 2020; Observation.)

24) On November 11, 2020, Jason Gray, M.D., anticipated Employee's hand hypersensitivity would improve. Employee believed the hardware caused his symptoms and was adamant about having it removed. Dr. Gray told Employee removal has a 50-50 chance of providing notable improvement and it was possible he may have significant gains, but Dr. Gray could not make a guarantee. He thought Employee would benefit whether the hardware was removed or not from intensive occupational therapy focusing on desensitization, mirror therapy, and stretching. Dr. Gray had a thorough discussion with Employee regarding the risks and benefits of conservative versus surgically excised hardware and explained risks included bleeding, scar, infection, pain, damage to surrounding structures, loss of function, sensation or finger, persistent and worsening stiffness, refracture through screw holes, and the possible need for additional procedures. Employee wished to proceed with surgical intervention and signed all the necessary paperwork. Dr. Gray scheduled surgery and ordered occupational therapy to begin within the first week after surgery. This is the last medical report in Employee's record. (Pre-Operative History & Physical, Dr. Gray, November 11, 2020.)

25) On December 1, 2020, Employee was found not eligible for reemployment benefits. Dr. Gray reviewed DOT/SCODRDOT job descriptions for Fish Cleaner, Commercial or Institutional Cleaner, Crater, Checker Bakery Products and, Food Sales Clerk, and predicted Employee will have the permanent physical capacities to perform the physical demands of his job of injury as well as the majority of jobs he performed during the ten-year period prior to his injury. He was informed his physician need only predict whether he will have the permanent physical capacities

to perform the physical demands of his jobs and that his medical treatment need not be complete, nor did he have to be medically stable, prior to Dr. Gray providing his predictions. Employee was notified he must complete and return the attached petition form within 10 days if he disagreed with the decision. He did not appeal the determination. (Reemployment Eligibility Determination, December 1, 2020; Observation.)

26) On April 13, 2021, Employee filed a petition to extend the AS 23.30.110(c) deadline to request a hearing. (Petition, April 13, 2021.)

27) On May 12, 2021, Employer objected to Employee's petition because it had not received a copy of it or anything related to the case "recently." Employee said he sent the petition to Mr. Holloway via email but did not send a copy of the medical summary also filed on April 13, 2021. The designee explained all documents submitted to the Board must be served to Employer. The designee attached Employee's petition to Employer's prehearing conference summary copy and asked Employee to serve the medical summary to Employer. He was advised Employer has the right to file an answer to his petition within 20 days of service and that if the parties did not agree to extend the AS 23.30.110(c) deadline, he can request a hearing by filing a hearing request and the necessary form was provided. (Prehearing Conference Summary, May 12, 2021.)

28) On May 19, 2021, Employer opposed Employee's petition for an AS 23.30.110(c) deadline extension. Employer contended the petition had not been served on Employer and Employee did not articulate a valid reason, or any reason, to justify extending the AS 23.30.110(c) deadline to request a hearing. (Opposition to Petition, May 19, 2021.)

29) On May 26, 2021, Employee requested a hearing on his April 13, 2021 petition to extend the AS 23.30.110(c) deadline. (Affidavit of Readiness for Hearing, May 26, 2021.)

30) On June 4, 2021, Employer opposed Employee's hearing request. On May 26, 2021, Employer received multiple versions of Employee's affidavit of readiness for hearing. Employer wished to discuss Employee's petition at a prehearing. (Affidavit of Opposition, June 4, 2021.)

31) On June 15, 2021, Employee's petition to extend the AS 23.30.110(c) deadline was set for hearing. Employer asserted Employee did specify his reason for requesting the extension. Employee explained he is still experiencing pain in his injured hand and because the deadline to request a hearing is approaching he asked for an extension. The only issue set for the August 5, 2021 hearing is Employee's April 13, 2021 request for additional time to file the request for

hearing on his September 4, 2019 claim, which was controverted on October 16, 2019. (Prehearing Conference Summary, June 15, 2021.)

32) Each prehearing conference summary issued in this matter provides October 16, 2019 is the post-claim controversion date and contains the following notice to claimant:

> 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.

(Observation.)

33) On July 8, 2021, Employee called a workers' compensation officer about the August 5, 2021 hearing and his deadlines and said he filed all documents he has. He was advised to file his brief by July 29, 2021, and to explain the reasons he needs more time. Employee said one reason he needs more time is because he is trying to hire an attorney. (ICERS Database, Communications, Phone Call, July 8, 2021.)

34) Employee testified he requested an extension to request a hearing because he does not have a lawyer, does not have workers' compensation insurance and still has metal in his finger. He claimed he is unable to find Dr. Kornmesser and he cannot find a job in Alaska because wherever he applies when the employer learns he had an injury, they refuse to hire him. Employee requests a one or two year extension because he wants to know the damage to his finger and he tried to "make a settlement" but Employer did not respond to his offer. When Employee spoke to a doctor, he was told three issues can arise from hardware removal surgery: 1) bleeding; 2) nerve damage; and 3) infection. He wants to wait to request a hearing until after he learns the result of hardware removal. Employee said since September 2020, he has attempted to find an attorney to represent him. He spoke to "about" four attorneys who all said they cannot take his case. He claimed his lawyer withdrew with only two months left to request a hearing and the other attorneys he has spoken to told him they would not take his case because

there was not enough time. He believes his life and the fact he cannot work are more important than the increased cost to Employer if an extension is granted. Employee feels Employer has turned a blind eye to his condition and has taken advantage of his ignorance of the law and the English language. He said he has no need to seek appointment of a guardian or conservator for mental incompetency. Employee confirmed he can manage his own affairs. (Hussein, Hearing Testimony, August 5, 2021.)

35) Employer argued Employee's request for an extension of the deadline to request a hearing should be denied. The legislature's intent is quick, fair, efficient and predictable benefit delivery at a reasonable cost to employers, which requires individuals to request a hearing within two years of a post-claim controversion. Employer contended the board is a division of the executive branch and is required to enforce, not circumvent, the legislative intent articulated in AS 23.30.001 and AS 23.30.110(c). It asserted a valid excuse for an extension to request a hearing does not include finding a lawyer or lack of a lawyer and points out most injured employees do not have attorneys. Employer confirmed Employee's medical benefits have not been controverted and he has not treated for months. Therefore, no further medical discovery is needed. The longer a case is open, the more costly it becomes. Employer is prejudiced by having to keep reserves open when a case is held open and not heard within two years of the post-claim controversion. Employer explained that its experience modifier, which is an adjustment to Employer's insurance rates based upon open claims, among other things, and insurance rates increase the longer a claim remains open. As time passes, medical evidence becomes stale and harder for factfinders to consider, which leads to resources being spent to obtain more recent medical evidence. Employer will be prejudiced with increased litigation costs, experience modifier and insurance rate increases if Employee's hearing request deadline is extended. (Employer Hearing Arguments, August 5, 2021.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) This chapter be interpreted so as to ensure the quick, efficient, fair, andpredictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter.
> . . . .

> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.110. Procedure on Claims.**
> . . . .
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> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. . . . If 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.
> . . . .

Statutes with language similar to AS 23.30.110(c) are referred to in Professor Arthur Larson's treatise as "no progress" or "failure to prosecute" rules. "[A] claim may be dismissed for failure to prosecute it or set it down for hearing in a specified or reasonable time." 7 Arthur Larson & Lex K. Larson, *Workers' Compensation Law*, §126.13[4], at 126-81 (2002). The statute's object is not to "generally pursue" the claim, it is to bring a claim to the board for a decision quickly so the goals of speed and efficiency in board proceedings are met. *Providence Health System v. Hessel,* AWCAC Decision No. 131 (March 24, 2010).

AS 23.30.110(c) requires an employee to timely prosecute a claim once the employer controverts. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). AS 23.30.110(c) requires an employee to request a hearing within two years of the controversion or face claim dismissal. *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912-13 (Alaska 1996).

Certain legal grounds may excuse noncompliance with AS 23.30.110(c), such as lack of mental capacity or incompetence; lack of notice of the time-bar to a self-represented claimant, or equitable estoppel asserted against a government agency by a self-represented claimant. *Tonoian v. Pinkerton Security,* AWCAC Decision No. 029 (January 30, 2007). However, *Tipton* said the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Id*.

Technical noncompliance with AS 23.30.110(c) may be excused when a claimant has substantially complied with the statute. *Kim v. Alyeska Seafoods, Inc.,* 197 P.3d 193 (Alaska, 2008), *accord*, *Omar v. Unisea, Inc.,* AWCAC Decision No. 053 (August 27, 2007) (remanded to the board to determine whether the circumstances as a whole constituted compliance sufficient to excuse failure to comply with the statute). 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, *Hessel* at 12, and although substantial compliance does not require the filing of a formal affidavit, it nevertheless still requires a claimant to file, within two years of a controversion, either a request for hearing, *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).

A request for additional time constitutes substantial compliance and tolls the time-bar until the board decides whether to give the claimant more time to pursue the claim. *Kim*. If the claimant's request for additional time is denied, the two-year time limit begins to run again, and the claimant has only the remainder of that time period to request a hearing. *Id*. The board has discretion to consider the request's merits for additional time and any resulting prejudice to the employer. *Id*. at 199.

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).

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possiblity of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objetively measurable improvement for a period of 45 days; this presumption may be rebuted by clear and convincing evidence;
> . . . .

Richard v. Fireman's Fund Insurance Co., 384 P.2d 445, 449 (Alaska 1963), held the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation. *Bohlman v. Alaska Const. & Engineering*, 205 P.3d 316 (Alaska 2009), 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.

ANALYSIS

Should the deadline for Employee to file a hearing request be extended?

Employee would like his deadline to request a hearing to be extended one and, better yet, two years so that he will know the full extent of the damage to his finger. Employer opposes the extension. Employee filed a September 4, 2019 claim for TTD benefits, attorney fees and costs, interest, work hardening and a reemployment benefits eligibility evaluation. Employer controverted his claim on October 16, 2019. A claim must be prosecuted timely once filed and controverted.
AS 23.30.001; *Jonathan*; *Tipton*.

Legal grounds, such as lack of mental capacity, incompetence, or equitable estoppel asserted against the division may provide grounds to extend the deadline to request a hearing. *Tonoian*. Noncompliance with the AS 23.30.110(c) deadline may be excused if the board or its designee did not properly advise Employee of the deadline. *Richard*; *Bohlman*. Employee did not point to any misinformation Employer, or the division or its staff, gave him. Employer's controversion notice and every prehearing conference summary repeatedly gave Employee sufficient, legal notice and warning he has two years from the October 16, 2019 controversion to request his claim be heard. AS 23.30.110(c); *Kim*; *Rogers & Babler*. Employee confirmed he can capably manage his affairs, has never sought a guardian or conservator, and does not lack the mental capacity to request a hearing. He proficiently requested a deadline extension and requested a hearing on his April 13, 2021 petition.

Employee must provide good cause for an extension to be granted. *Kim*. AS 23.30.110(c)'s object is to bring a claim to hearing for a decision quickly so the goals of speed and efficiency in board proceedings are met. *Hessel*. Various issues raised by Employee's claim have been resolved without litigation. Employee's claim requested a reemployment benefits eligibility evaluation, which was conducted. Employee was found ineligible for reemployment benefits because he has the physical capacity to perform jobs he held in the 10 year period prior to his work injury. The determination was not appealed and is no longer an issue. However, if Employee chooses to pursue hardware removal and, thereafter, experiences greater difficulties with his finger and his physician were to change his opinion and decide Employee is no longer has the physical capacity to perform his job of injury or many of those he held in the 10 years

prior, Employee has only one year from the December 1, 2020 determination he is not eligible for reemployment benefits to request modification. *Richard*.

Attorney fees, likewise, are no longer an issue because Employee and his attorney have parted ways. His attorney assisted him to comply with Employer's discovery requests and prevented his case from being dismissed; however, while he represented Employee, no additional benefits were obtained and he did not file an attorney fee lien. *Rogers & Babler*.

The claim also requests work hardening, which was recommended by Mr. DeCarlo when he performed Employee's functional capacity evaluation. Three months after the functional capacity evaluation, Employee completed extensive occupational therapy and Dr. Kornmesser directed Employee to continue his therapy through a home exercise program. Work hardening is a medical benefit that has not yet been ordered by Employee's physician. Employee's medical benefits remain open and billable for reasonable and necessary medical treatment ordered by his physician. He has not sought medical treatment since November 11, 2020. If there is a dispute regarding Employee's entitlement to work hardening, good cause does not exist to delay hearing this issue because it would merely prolong a decision regarding medical treatment that may be reasonable and necessary. AS 23.30.001; *Hessel*.

Likewise, Employee's request for a one or two year extension so he can wait and see if his finger improves or gets worse is not good cause to grant a hearing request extension on his claims for TTD benefits and interest. Employee's treating physician declared him medically stable on April 3, 2020, told him if he wished to have hardware removed, he must wait two years and Employee was referred for a PPI rating. His TTD benefits were therefore controverted on April 3, 2020. The last time he sought treatment, on November 11, 2020, Dr. Gray told Employee hardware removal was optional. Employee told Dr. Gray he wished to proceed with hardware removal, surgery was scheduled but, apparently did not occur because Employee has not received treatment since November 11, 2019. During that year waiting period after April 3, 2019, Employee remained medically stable. AS 23.30.395(28). The legislature's intent is decisions be made to ensure injured workers receive indemnity and medical benefits quickly, efficiently and at a reasonable cost to employers. AS 23.30.001. If Employee is entitled to TTD benefits and

the issue is not heard for an additional one or two years, Employer will be prejudiced because interest would continue to accrue, which is not be a reasonable cost Employer is expected to bear. *Id.* Increased insurance rates due to a lengthy open claim will also prejudice Employer. *Rogers & Babler*.

Employee's reasons for requesting additional time have insufficient merit and Employer will be prejudiced if the extension Employee requests is granted. *Kim*. Because an extension to request a hearing will be denied, the two-year time limit begins to run again, and Employee has only the remainder of the two years period to request a hearing. *Id*. Since the deadline did not pass prior to this order's issuance it is not necessary to further extend the deadline. *Id*. Employee must file his hearing request no later than October 16, 2021 to avoid claim dismissal.

CONCLUSIONS OF LAW

The deadline for Employee to file a hearing request should not be extended.

ORDER

1) Employee's April 13, 2021 petition to extend his AS 23.30.110(c) deadline is denied.
2) Employee must request a hearing no later than October 16, 2021, or his claim may be dismissed under AS 23.30.110(c).

Dated in Anchorage, Alaska on August 9, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, Designated Chair

/s/
Robert Weel, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 MUBAARAQ HUSSEIN, employee / claimant v. DUTCH HARBOR SURIMI, employer; ACE AMERICAN INSURANCE CO, insurer / defendants; Case No. 201811063; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on August 9, 2021.

/s/
Nenita Farmer, Office Assistant