ALASKA WORKERS' COMPENSATION BOARD

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

JASON W. VANDERPOOL,	)	
	)	
Employee,	)	FINAL DECISION AND ORDER
Claimant,	)	
	)	AWCB Case No. 201700230
v.	)	
	)	AWCB Decision No. 21-0123
STATE OF ALASKA,	)	
	)	Filed with AWCB Juneau, Alaska
Self-Insured Employer,	)	on December 28, 2021
Defendant.	)	
	)	

State of Alaska's (Employer) June 16, 2021 petition to dismiss was heard on December 7, 2021, in Juneau, Alaska, a date selected on October 21, 2021, after the record for the September 21, 2021 written record hearing was reopened on September 27, 2021, for oral argument. A June 16, 2021 request for hearing gave rise to this hearing. Attorney Timothy Twomey appeared and represented Jason W. Vanderpool (Employee). Attorney Kim Stone appeared telephonically and represented Employer. The record closed on December 8, 2021 after Employee filed and the Division served a requested bankruptcy order.

ISSUE

Employer contends Employee failed to file an affidavit of readiness for hearing (ARH) timely and failed to comply substantially when he filed it, a petition and a claim five months past the deadline. It contends discussing a possible second independent medical evaluation (SIME) at a prehearing conference did not toll the two-year deadline. Employer contends Employee never filed a petition seeking an SIME or an SIME form and failed to request additional time before the AS 23.30.110(c) deadline. It contends it never agreed to an SIME and the only further

communication between the parties regarding the case occurred after the deadline passed. Employer contends Employee's wrongful termination lawsuit against Employer, bankruptcy proceeding and COVID-19 did not constitute good cause to excuse his failure to timely request a hearing or additional time to prepare for a hearing. It contends it is not required to show prejudice as there is a conclusive presumption it is prejudiced and there is no merit to Employee's request to accept a late-filed ARH. Employer contends Employee's attorney's errors do not establish good cause to extend the deadline; it requests an order dismissing Employee's claim.

Employee concedes he failed to comply strictly with the AS 23.30.110(c) deadline. He contends there were "lengthy and ongoing communications" between the parties regarding an SIME, the claim and his status and condition. Employee contends Employer changed legal representation and the new attorney changed strategies as the prior attorney was considering stipulating to an SIME. He contends Employer's new attorney should have inquired about an ARH instead of waiting until the deadline expired to raise the defense. Employee contends Employer was not prejudiced by his delay in filing an ARH, the law favors a hearing on the merits of his claim and dismissing his claim would deny him justice. He contends his attorney's errors should excuse his failure to timely file and serve an ARH. Employee contends his civil wrongful termination lawsuit against Employer and bankruptcy and COVID-19 are good causes to extend the deadline. He contends denying his original claim serves no legitimate purpose because he filed another claim seeking medical costs, which were not included in his first claim, including past medical costs and future medical treatment, future disability benefits after the future medical treatment, and impairment benefits. Employee seeks an order denying Employer's petition to dismiss. Alternatively, he also requests clarification on whether his new claim filed after Employer's petition survives dismissal.

Should Employer's petition to dismiss Employee's claim be granted?

FINDINGS OF FACT

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

1) On January 1, 2017, Employee reported a traumatic injury to multiple body parts caused by ice or snow. He did not otherwise describe the event. (First Report of Injury, January 5, 2017).

2) On January 15, 2019, Crowson Law Group entered its appearance on behalf of Employee and Twomey signed as "Attorney for Employee." (Notice of Withdrawal, January 15, 2019).

3) On January 31, 2019, Employee sought temporary total disability (TTD) and permanent partial impairment (PPI) benefits, transportation costs, a finding of unfair or frivolous controvert, a penalty for late paid benefits, interest and attorney's fees and costs as he "slipped on ice that had been irregularly placed" and injured his left knee and back. (Claim for Workers' Compensation Benefits, January 31, 2019).

4) On February 21, 2019, Lars Johnson entered his appearance on behalf of Employer. (Entry of Appearance, February 21, 2019).

5) On February 28, 2019, Employer filed and served upon Employee by first-class mail a controversion notice denying all benefits. It relied on an Employer's Medical Evaluation (EME) report and contended Employee was medically stable and did not sustain a permanent partial impairment as a result of the work injury. The controversion notice included:

> **TO EMPLOYEE . . . . READ CAREFULLY**
> . . . .
>
> **TIME LIMITS**
> . . . .
>
> 2. When you must 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 IS TOO LATE TO FILE A CLAIM OR REQUEST A HEARING CONTACT THE NEAREST AWCB OFFICE.**
> (Controversion Notice, February 28, 2019).

6) On October 23, 2019, Employee requested a prehearing conference to discuss "benefits of having an SIME." (Request for Conference Form, October 23, 2019).

7) On November 14, 2019, Employee stated he obtained insurance through a new employer and could not obtain the imaging his physician recommended. Employer's attorney stated, "[I]t

might be premature to begin an SIME now." He was sending Employee revised medical releases going back to February 2011, based upon February 2013 medical records recently received. "The parties agreed it was appropriate to allow more time for them to gather records before an SIME. Later, if they do not agree on the need for an SIME, Employee can file a petition." The prehearing conference summary included:

> **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. (Prehearing Conference Summary, November 14, 2019).

8) Employer subsequently filed and served medical evidence. (Medical Summary, November 26, 2019; January 13, 2020; February 12, 2020).

9) Employee also filed and served medical evidence. (Medical Summary, March 3, 2020; April 21, 2020).

10) April 21, 2020 was the last date a party filed medical evidence in this claim. (Record).

11) On March 9, 2021, attorney Siobhan McIntyre deposed Employee for his civil wrongful termination lawsuit against Employer. He described his work history, the work injury, medical records prior to and after the work injury, paperwork and communications regarding his employment termination, and his responses to discovery requests in the civil suit. (Videotaped Deposition of Jason Vanderpool, March 9, 2021).

12) On June 11, 2020, Kim Stone entered her appearance as counsel for Employer and included an email address for service. (Substitution of Counsel, June 11, 2020).

13) On June 11, 2021, Mr. Twomey emailed Ms. Stone to the email address she provided on the substitution of counsel:

> As you may know, we represent [Employee] with regard to his employment claims. We also have been involved in his workers compensation proceedings - which seem to have stalled to some extent. Your predecessor indicated that our SIME request would be considered after the state conducted additional discovery - we were expecting agreement to proceed with a stipulated SIME - can we now move that forward?
>
> I understand [Employee] has paid for treatment that was not paid by WC following his employment termination. I think Lars had previously made a comment that [Employee's] health insurance was funding his care. That is a more recent development. [Employee's] financial situation was severely impacted by the failure to fund his medical care – including resort to bankruptcy protection.
>
> [Employee] informs me that the most recent opinion from Dr. Curtis in Seattle is that surgery for his back condition is not advised due to risk factors. [Employee] has an appointment next week with Dr. Burcell [sic] in Juneau to review a recent MRI and discuss a plan of care. Care for [Employee's] SI joint and his knee have been deferred. He has been told to expect a permanent disability.
>
> While [Employee] is currently employed - his employment situation is not ideal. He perceives ongoing retaliation and improper conduct by management regarding his employment and advancement opportunities.
>
> I have approached the State regarding the possibility of a global mediation to address Jason's employment practices claims as well as the State's obligations under workers compensation.
>
> I invite your consideration of a guided negotiation/mediation. . . . (Email, June 11, 2021).

14) On June 16, 2021, Employer requested Employee's January 31, 2019 claim be dismissed under AS 23.30.110(c), contending he had not requested a hearing within two years of Employer's February 28, 2019 post-claim controversion. (Petition, June 16, 2021). It also requested a written record hearing on its petition. (ARH, June 16, 2021).

15) On August 2, 2021, Employer denied all benefits based upon AS 23.30.110(c) and included the February 28, 2019 controversion notice.

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> **TIME LIMITS**
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> . . . .

> 2. When you must request a hearing (Affidavit of Readiness for Hearing form)?
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> 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 IS TOO LATE TO FILE A CLAIM OR REQUEST A HEARING CONTACT THE NEAREST AWCB OFFICE.** (Controversion Notice, August 2, 2021).

16) On August 16, 2021, Employee requested a written record hearing on an August 2, 2021 "petition." (ARH, August 16, 2021).

17) On August 16, 2021, Employee requested his late-filed ARH be accepted or he be allowed to file an amended claim. He contended there was justification for delay in proceedings because:

a) A bankruptcy proceeding arose after the January 21, 2019 claim was filed due in part to medical expenses incurred for this claim.

b) Strict adherence with the ongoing COVID pandemic is "particularly harsh" because "other legal proceedings have been delayed and deadlines relaxed in the interest of justice."

c) Employer was not prejudiced as it was not deprived of any evidence or defense.

d) There was confusion over the deadline due to Employer's August 2, 2021 controversion notice as Employee "could be led to believe he has an additional two years to address the August 2, 2021 controversion" and confusion over deadlines can justify leniency.

e) There has been "ongoing communication about the claim and discussion of Employee's status and condition throughout the pendency of the claim."

f) Employer's former counsel represented that Employer was considering stipulating to an SIME because Employee's treating physicians did not agree with the EME and Employer indicated at a prehearing conference that it wanted to conduct more discovery before addressing the appropriateness of an SIME, and Employee cooperated with discovery.

g) The January 31, 2019 claim did not include medical costs and Employee seeks to amend his claim to include medical costs incurred an prospective medical treatment he has not yet undergone, future TTD for recovery from the procedures and a PPI rating upon completion of care.

h) Employee did not lose all future rights to benefits.

(Employee's Motion to Accept Late-Filed Affidavit of Readiness for Hearing or Alternatively to Amend Claim, August 16, 2021; Memorandum in Support of Employee's Motion to Accept Late-Filed Affidavit of Readiness for Hearing or Alternatively to Amend Claim, August 16, 2021).

18) On August 16, 2021, Twomey filed an affidavit stating he is the attorney assigned to Employee's workers' compensation case and civil complaint for wrongful termination as a result of his work injury and pursuing a claim. He received notice Employee filed for bankruptcy on December 20, 2020, and the firm's involvement was "put on hold pending clarification or our ongoing role"; Twomey did not represent Employee in the bankruptcy proceedings. The bankruptcy case was filed October 30, 2020, and there was a bankruptcy stay on actions involving Employee. His bankruptcy proceedings arose "in part due to incurred medical expenses" he would not have incurred had Employer been paying benefits." The AS 23.30.110(c) deadline to request a hearing "had not been calendared by the former Crowson Law Group case worker" and the failure was "due to inadvertence." (Affidavit in Support of Employee's Motion to Accept Late-Filed Affidavit of Readiness for Hearing or Alternatively to Amend Claim, August 16, 2021).

19) On August 16, 2021, Employee sought TTD and PPI benefits, past and future medical costs, transportation costs, a penalty for late paid compensation, interest, an unfair or frivolous controversion finding, and attorney's fees and costs for his same work injury date. He also included the following statement under the description of the injury:

> My leg went out (as it frequently does) and I fell in August 2017 while fishing and messed up my big toe. It got better, then worse, and in 2019 I went to the doctor. He wanted to do x-rays and an MRI, but I could not afford it because I did not have insurance. It started bothering me again and got progressively worse. Now that I have insurance, I went to the doctor again to get it checked. He took x-rays and said that I have arthritis in that toe due to a traumatic injury, which he said was a direct result of the fall that I had in 2017. He gave me a steroid shot to see if it would help, and it did. It is supposed to last about 3 months. The doctor said the only way to really fix it is to do surgery to remove the joint and put a plate in. The toe thing was a direct result of me falling. The fall was a direct result of my workplace injury, which caused my leg to give out due to my SI joint. (Amended Claim for Workers' Compensation Benefits, August 16, 2021).

20) On August 17, 2021, a workers' compensation officer rejected Employee's August 16, 2021 ARH because an August 2, 2021 petition did not exist. (Letter, August 17, 2021).

21) On August 17, 2021, Employee requested a written record hearing on his January 31, 2019 claim. (ARH, August 17, 2021).

22) On August 25, 2021, Employer opposed Employee's August 17, 2021 ARH, contending claim was barred under AS 23.30.110(c), and contended setting a hearing before the written record hearing on Employer's petition to dismiss would incur a substantial expense and unnecessary work for both parties to prepare for hearing. Employer stated if a hearing was set on Employee's claim, discovery was not complete as an SIME may be needed. (State Opposition to Vanderpool's Late Filed Affidavit of Readiness for Hearing, August 25, 2021).

23) On September 9, 2021, Employer denied all benefits related to Employee's foot and great toe contending there is no medical evidence relating the work injury to a fall on an unspecified date in August 2017, nor is there medical evidence proving the work injury is the substantial cause of his need for foot or toe treatment. (Controversion Notice, September 9, 2021).

24) On September 13, 2021, a motion was filed in Employee's bankruptcy case for authorization to appoint Twomey as special counsel to pursue and prosecute claims. (Notice of Motion for Authorization to Employ Special Counsel to Pursue and Prosecute Claims of the Debtor and for Ratification of Employment Agreements, September 13, 2021; Memorandum In Support Of Motion For Authorization to Employ Special Counsel Pursue and Prosecute Claims of the Debtor and for Ratification of Employment Agreements, September 13, 2021).

25) On September 14, 2021, Employer field a brief, which did not request dismissal of Employee's August 16, 2021 claim. (Hearing Brief on Petition to Dismiss Claim, September 14, 2021).

26) On September 21, 2021, a written record hearing was held. (Agency file).

27) On September 27, 2021, the panel reopened the September 21, 2021 written record hearing for oral argument pursuant to AS 23.30.135 and 8 AAC 45.120(m) as it had questions for the parties regarding the briefs and evidence submitted, including statements in the briefs regarding communications between the parties' attorneys, the June 11, 2021 email and the bankruptcy motion. (Letter, September 27, 2021).

28) On August 7, 2021, Employee filed an October 5, 2021 order authorizing the Chapter 7 trustee to employ Crowson Law Group, LLC, as special counsel to pursue and prosecute (a) the

wrongful termination claim of Employee against Employer and (b) a workers' compensation claim for an injury he sustained while he was employed by [Employer]. He did not include proof of service on Employer. (Order Authorizing Employment of Special Counsel to Pursue and Prosecute Claims of the Debtor and Ratifying Employment Agreements; Email, August 7, 2021).

29) On August 8, 2021, Division staff emailed Employer the October 5, 2021order because it did not show proof of service to opposing counsel. (Email, August 8, 2021).

30) In his oral argument, Employee contended there was excusable neglect under Civil Procedure Rule 60 and requested an order relieving him from claim dismissal. He also contended medical treatment for the work injury was delayed due to COVID-19 and his attorney contracted COVID-19 in August. (Record).

31) Employee was required to take some action to request a hearing or to preserve his right to request one by no later than Wednesday, March 3, 2021 (February 28, 2019 + 2 years + 3 days = Wednesday, March 3, 2021). (Experience, judgment, observations).

32) There was no Division edict relieving a party from AS 23.30.110(c)'s requirements due to COVID-19. (Workers' Compensation Bulletin 20-03, March 17, 2020).

PRINCIPLES OF LAW

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

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.**
>
> . . . .

> (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 Dec. 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). Only after a claim is filed, can the employer file a controversion to start the time limit in AS 23.30.110(c). *Wilson v. Flying Tiger Line, Inc*. AWCB Dec. No. 94-0143 (June 17, 1994). An employee may file subsequent claims for additional benefits, and the employer must controvert to start the time limit of AS 23.30.110(c) against the subsequent claims. *Wicken v. Polar Mining*, AWCB Dec. No. 05-0308 (November 22, 2005).

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 Dec. 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. Although substantial compliance does not require filing 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 one. *Denny's of Alaska v. Colrud*, AWCAC Dec. 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 more time is denied, the two-year time 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.

> . . . The board has discretion to extend the deadline for good cause. (*Kim* 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. (*Kim* at 199).

Omar v. Unisea, Inc., AWCAC Dec. No. 053 (August 27, 2007), remanded a matter to the Board to consider whether "the circumstances as a whole constitute compliance with the requirements of [AS] 23.30.110(c) sufficient to excuse any failures." *Omar* found the SIME process had tolled the running of the statute of limitations and the two ARHs the Board considered were filed after the time had run in AS 23.30.110(c). However, the Board had failed to consider a previously and timely filed ARH. *Omar* directed the Board to consider on remand:

> If the board determines that the August 2003 affidavit of readiness for hearing was not a valid request for a hearing, the board shall make specific findings whether the circumstances require dismissal of Omar's claims or whether some other action is appropriate. In engaging in this inquiry, the board shall give due attention to the effect of Mr. Gerke's communications to the parties with respect to the requirements and time bar of AS 23.30.110(c) as well as to Omar's AS 23.30.110(c) obligations and to any substantive deficiencies in Omar's August 2003 affidavit of readiness for hearing. The board should evaluate the circumstances surrounding staff efforts made to communicate with Omar, whether Omar was self-represented, and whether Omar was instructed as to how any defects or errors could be remedied.
>
> . . . Do the circumstances as a whole constitute compliance with the requirements of AS 23.30.110(c) sufficient to excuse any failures by Omar to comply with the statute? (*Omar* at 7-8).

Pruitt v. Providence Extended Care, 297 P.3d 891, 985 (Alaska 2013), citing *Kim*, said the claimant did not substantially comply with AS 23.30.110(c) because, "She did not file anything indicating she wanted to prosecute the 2005 written claim until August 2009, well after the statutory deadline expired." It explained:

> The prehearing conference summary from February 2006 shows that the Board told Pruitt to contact staff at the Board "for assistance in filing an [affidavit of readiness for hearing], if she decides she wants to continue with the case." It also gave Pruitt some warning, in addition to the warnings on the notices of controversion that she had to file a request for a hearing within two years of the controversions. Yet in spite of this information, Pruitt took no action in her case for more than three years, waiting until her long-term disability ended to take action on her workers' compensation claim. Her 2009 hearing request cannot be considered substantial compliance with the statute.

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 Dec. No. 029 (January 30, 2007). *Tonoian* held the Board's "obligation to give notice was satisfied by mailing the Board-approved controversion forms," and "[t]he obligation to inform and instruct self-represented litigants on how to pursue their claims did not require division staff to seek out [the claimant] and urge her to file paperwork on time or to volunteer information that it may have reasonably assumed she has been told." *Id.* at 12, 14. *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.*

A claimant bears the burden of establishing with substantial evidence a legal excuse from the AS 23.30.110(c) statutory deadline. *Hessel*. A claimant who bears the burden of proof must "induce a belief" in the minds of the fact-finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

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 fully advise a claimant 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 AS 23.30.110(c), and to correct the employer's lawyer's incorrect prehearing conference statement that AS 23.3.0.110(c) had already run on his claim. *Bohlmann* said *Richards* may be applied to excuse noncompliance with AS 23.30.110(c) when the Board failed to adequately inform a claimant of the two-year time limitation. Since Bohlmann still had more than two weeks to file a hearing request when the employer's lawyer gave wrong information, and the Board's designee did not correct it, the Court found an abuse of discretion and reversed the Board's dismissal and directed it to accept the tardy hearing request as timely. The Court presumed Bohlmann would have timely filed his hearing request had the Board or staff satisfied its duty to him, because he had consistently filed his own pleadings previously.

Davis v. Wrangell Forest Products, AWCAC Dec. No. 18-007 (January 2, 2019), held because Davis "was never told of the actual date by which he needed to request a hearing and his continuing actions to prosecute his claim . . . [he] substantially complied with the requirements of the Act and is entitled to a hearing on the merits of his claim. The Board's assistance to [Davis] was insufficient to apprise him of the deadline for requesting a hearing on the merits, since the Board never told [him] when he must file an ARH. Even though [Davis] still has not requested a hearing on the merits of his claim for medical treatment, it is apparent from the record and his actions to pursue his claim that, had he been fully informed about the deadline for asking for a hearing on the merits, he, like [Bohlmann], would have timely requested a hearing." Subsequently, in its order on the parties' motions for reconsideration, the Commission in *Davi*s held:

> The Commission, following the reasoning raised by the Court in *Bohlmann*, now holds that in cases involving a pro se claimant, the Board shall advise the claimant at the first prehearing, following a [claim], employer's answer, and employer's controversion, when and how to request a hearing. The Board designee in the first prehearing needs not only to advise the pro se claimant as to how to calculate the timeline in AS 23.30.110(c) for requesting a hearing, but must also provide the claimant with an actual date by which an ARH must be filed in order to preserve the claim. (Order on Motion for Reconsideration, March 1, 2019).

The Board has power to excuse failure to file a timely request for hearing when evidence supports equitable relief, such as when the parties are participating in the SIME process. *Kim*, 197 P.3d at 197; *Tonoian*, AWCAC Dec. No. 029 at 11 (January 30, 2007); *Snow v. Tyler Rental, Inc.*, AWCB Dec. No. 11-0015 (February 16, 2011). However, in *Alaska Mechanical v. Harkness*, AWCAC Dec. No. 176 (February 12, 2013), the Commission held a stipulation for an SIME was not enough; the parties must follow through on the stipulation to toll the running of the two-year time period.

Narcisse v. Trident Seafoods Corp., AWCAC Dec. No. 242 (January 11, 2018), 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.

Roberge v. ASRC Construction Holding Co., AWCAC Dec. No. 269 (September 24, 2019), addressed the tolling effect of an SIME. Roberge petitioned for an SIME on November 17, 2015, and at a February 11, 2016 prehearing conference, the parties agreed to it. Their stipulation was recorded in the prehearing conference summary. *Roberge* held AS 23.30.110(c)'s time limitation tolling begins when parties stipulate to an SIME and remains in place until a final SIME report is received. *Roberge* noted there had been delay and obstruction by both parties. In reversing the Board's decision dismissing a claim based on an untimely hearing request, *Roberge* stated:

> Yet the idea of a hearing 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 15.

McKitrick v. Municipality of Anchorage, AWCB Dec. No. 10-0081 (May 4, 2010), found the AS 23.30.110(c) two-year time period was tolled when the employer petitioned for and the Board ordered an SIME; it also ordered the time was tolled until the SIME process was complete. *McKitrick* noted it would be illogical to require the employee to request a hearing on his claim's merits while awaiting an SIME examination, report, deposition, or other discovery related to the SIME.

Citing *Jonathon*, *Tipton* also noted dismissal under AS 23.30.110(c) does not prevent the employee from applying for different benefits, or raising other claims, based upon a given injury. *Tipton* at 913 n. 4. The Court distinguished dismissal of a specific claim from dismissal of the entire case, stating AS 23.30.110(c) is not a comprehensive "no progress rule." *Wagner v. Stuckagain Heights*, 926 P.2d 456, 459 n. 7 (Alaska 1996). Over the lifetime of a workers' compensation case, many claims may be filed as new disablements or medical treatments occur. *Egemo v. Egemo Construction Company*, 998 P.2d 434, 440 (Alaska 2000). *Egemo* held, "new medical treatment entitles a worker to restart the statute of limitations for medical benefits." In *Bailey v. Texas Instruments*, 111 P.3d 321 (Alaska 2005), the Court held dismissal of a claim does not necessarily preclude an employee from filing a later claim for medical costs incurred subsequent to that dismissal. Dismissal under AS 23.30.110(c) can create a later issue.

In *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 779 (Alaska 2002), the Court held *res judicata*, or claim preclusion, applies to workers' compensation cases; however it is not always applied as rigidly in administrative proceedings as in judicial proceedings. *Id*. at 779-80. When applicable, *res judicata* precludes a subsequent suit between the same parties asserting the same claim for relief when the matter raised was, or could have been, decided in the first suit. *Id*. at 780. Application of the principle requires the issue to be decided to be identical to that already litigated, and a final judgment on the merits. *Id*.

In *Morrison-Knudsen Company v. Vereen*, 414 P.2d 536, 538, the employee was a 25-year-old laborer with little education or medical knowledge. He was injured on July 14, 1960, and treated with a doctor who, on October 15, 1960, released him for work. Subsequent to his discharge, the employee experienced further back difficulty in January 1961, which resulted in hospitalization and treatment by a second doctor. It was not until the second doctor's report on June 22, 1961, that the employee learned his then disabling back trouble was attributable to the July 14, 1960 injury. Employee timely complied with AS 23.30.105(a) on two separate grounds:

> First, on the basis of several letters which had been introduced into evidence before the Board, the superior court determined that claimant had filed a claim for compensation within two years of the date of the employer's last payment of compensation to claimant. (Note: The evidence is undisputed that claimant sustained an accidental injury on July 14, 1960, and that subsequent thereto his employer voluntarily paid compensation until October 15, 1960.) Secondly, the superior court further concluded that claimant had filed a claim for compensation within two years after the first acquired 'knowledge of the nature of his disability and its relation to his employment.'

Id. at 538. As noted by *Morrison-Knudsen*:

> Failure to file a claim for compensation within the statutory period cannot be excused by an argument that the employer was not harmed by the lateness of filing. Like any statute of limitation, this one carries a conclusive presumption that the defendant is prejudiced by reason of the enhanced difficulty of preparing a defense.

Id. note 3 quoting A. Larson, *The Law of Workers' Compensation*, §78.26 at 251 (1964).

8 AAC 45.060. Service. . . .

> (b) . . . Service by mail is complete when deposited in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. 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.
> . . . .

> **Alaska Constitution, Article 1, Section 11**. In all criminal prosecutions, the accused shall have the right . . . to have the assistance of counsel for his defense.

In *City of Valdez v. Salomon*, 637 P.2d 298 (Alaska 1981), a plaintiff filed a personal injury action against the city. The city attorney wrote a letter to the plaintiff's attorney asking him to let city's attorney know if the city's insurer did not respond to the summons and complaint so the city attorney could enter an appearance to protect against a default judgment. The plaintiff never answered the letter but applied for a default judgment against the city. The city's subsequent motion to set aside the default was denied and it petitioned for review. The Court held the trial court abused its discretion in refusing to set aside the default judgment in light of the fact the city's delay was neither long nor prejudicial and the city alleged a meritorious defense. It found good cause to set aside the default because the city's attorney was "justified in expecting" the following principle from *Cook v. Aurora Motors, Inc.*, 503 P.2d 1046, 1049 n. 6 (Alaska 1972) would be observed, "When (a lawyer) knows the identify of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed."

> **Alaska Rules of Civ. Proc., Rule 60. Relief From Judgment or Order.** . . .
>
> (b) **Mistakes -- Inadvertence -- Excusable Neglect -- Newly Discovered Evidence -- Fraud -- Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect
> . . . .
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the date of notice of the judgment or orders as defined in Civil Rule 58.1(c).

In *Conitz v. Alaska State Comm'n for Human Rights*, 325 P.3d 501 (Alaska 2014), the Court heard the employee's untimely appeal of a trial court's dismissal of his administrative appeal because there was reasonable confusion about the law and no prejudice to the opposing party. Appellate Rule 521 allowed relaxation of rules where a strict adherence to them would work surprise or injustice. The employee's attorney was confused about whether the superior court's order was an appealable final judgment and reasonably believed that a motion for reconsideration would terminate his time for appeal. Prior to *Conitz*, the Court had never expressly held that motions for reconsideration filed in the superior court under Appellate Rule 503(h), unlike motions for reconsideration filed under Civil Rule 77(k), do not terminate an appellant's time to file a further appeal. *Id*. at 506-07. The Court also had not yet explicitly stated a separate final judgment is not required before a party may appeal a superior court's appellate decision, which was resolved in *Griswold v. City of Homer*, 252 P.3d 1020 (Alaska 2011) where the court stated it was clarifying a confusing area of the law. *Id*. at 507.

ANALYSIS

Should Employer's petition to dismiss Employee's claim be granted?

AS 23.30.110(c) states once the employer controverts a claim on a 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. Employee filed a claim on January 13, 2019; Employer filed its post-claim controversion on February 28, 2019, and served it by first-class mail on Employee. Because it was served by mail, three days must be added to Employee's two-year filing deadlines. 8 AAC 45.060(b). Therefore, Employee was required to take some action to request a hearing or to preserve his right to request one by no later than Wednesday, March 3, 2021 (February 28, 2019 + 2 years + 3 days = Wednesday, March 3, 2021). Employee filed an ARH on August 17, 2021, five months and 26 days after the deadline. Therefore, he failed to comply strictly with AS 23.30.110(c) because he filed his ARH late. AS 23.30.110(c); *Rogers & Babler*; *Kim*.

Substantial compliance with AS 23.30.110(c) could avoid claim denial. *Kim*. Although substantial compliance does not require filing a formal affidavit, it still requires an employee to

file, within two years of a controversion, either a request for hearing or a request for additional time to prepare for one. *Colrud*. A request for an SIME is a demonstration additional time is needed before a hearing on a claim is held. *Narcisse*. The parties discussed the possibility of conducting an SIME at the November 14, 2019 prehearing conference. However, Employee never requested an SIME. He indicated he wanted to prosecute his claim more than five months after the AS 23.30.110(c) deadline had expired. Employee last filed medical evidence on April 21, 2020, and failed to take any action on his claim until he filed a claim on August 16, 2021 and an ARH on August 17, 2021.

Employee contends Employer's petition should be denied under Civil Procedure Rule 60(b) because his failure to comply with AS 23.30.110(c) was due to "excusable neglect." The AS 23.30.110(c) deadline may be extended for good cause and any failure to comply substantially may be excused if the circumstances as a whole constitute compliance with the statute's requirements sufficient to excuse the failure. *Kim*; *Omar*. Legal grounds, such as lack of mental capacity, incompetence, or equitable estoppel asserted against the Division may excuse noncompliance with AS 23.30.110(c). *Tonoian*. Employee bears the burden of establishing a legal excuse from the AS 23.30.110(c) statutory deadline. *Hessel*. The statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it as the Act prefers deciding cases on their merits except as provided by statute. *Tipton*; AS 23.30.110(c). There is an obligation to determine if there is a way around the running of the AS 23.30.110(c) defense. *Roberge*.

An employee's failure to file a timely request for hearing may be excused when the evidence supports application of equitable relief, such as when the parties are participating in the SIME process. *Kim*; *Tonoian*; *Snow*. Employee submitted no evidence indicating Employer agreed to an SIME and the parties followed through with the stipulation. *Harkness*. The November 14, 2019 prehearing conference only indicated the parties discussed an SIME. The parties last filed evidence on Employee's claim on April 21, 2020, more than ten months before the AS 23.30.110(c) deadline. The only further communication regarding the SIME with Employer was Employee's attorney's June 11, 2021 email sent after the AS 23.30.110(c) deadline. Employee contends Employer obstructed due process by not agreeing to an SIME and by failing to follow

up with his lawyer before requesting dismissal. He cited *Salomon* to contend Employer was required to contact him to inquire about his intention to proceed with his claim before seeking dismissal. Employee's attorney's June 11, 2021 email clearly indicated Employee's intention to proceed with his claim by proposing an SIME and asking for mediation. Two communications between the parties discussing a possible SIME is not sufficient evidence to prove the parties were participating in the SIME process. *Harkness*; *McKitrick*; *Narcisse*. When the parties do not agree to an SIME, the proper procedure is to file a petition requesting an SIME and an SIME form demonstrating the disputes between the parties' physicians. Employee never filed a petition requesting an SIME. *Narcisse*. Discovery ended in April 2020. There is no evidence Employee was waiting for additional discovery related to the SIME process prior to requesting a hearing. *McKitrick*. Employee failed to meet his burden to prove he demonstrated a need for additional time before requesting a hearing; the parties were not participating in the SIME process. *Rogers & Babler*; *Saxton*; *Tonoian*; *Hessel*; *Tipton*; *Roberge*.

Employee contended his attorney was confused about the AS 23.30.110(c) deadline by the August 2, 2021 controversion notice as it led his attorney to believe he had an additional two years to address the August 2, 2021 controversion. He cited *Conitz* to contend his attorney's reasonable confusion excused his untimely hearing request. The August 2, 2021 controversion notice contained the same legal notice and warning as the post-claim controversion, "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." 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." While filing subsequent claims for additional benefits may restart the time limit against the subsequent claims, Employee did not file a subsequent claim prior to Employer's August 2, 2021 controversion notice. *Wicken*. The plain language of the statute says the first controversion notice filed after his claim started the two-year time period. *Wilson*. Therefore, Employee's attorney's confusion was not reasonable and does not constitute good cause to extend the deadline or excuse noncompliance with AS 23.30.110(c). *Rogers & Babler*; *Kim*.

Furthermore, Employer's post-claim controversion notice and the Division's November 14, 2019 prehearing conference summary provided him with sufficient legal notice and warning about the two-year deadline. *Tonoian*; *Richard*. Unlike in *Bohlmann*, Employee is represented by counsel and no incorrect date was provided to him, which the designee failed to correct. The right to competent legal representation applies only in criminal legal proceedings. Alaska Constitution, Art. 1, Sec. 11. Thus, his attorney's mistaken belief that the August 2, 2021 controversion notice extended the AS 23.30.110(c) deadline by another two years does not constitute good cause to excuse his late-filed ARH or extend the deadline. *Rogers & Babler*; *Kim*. Employee also contended his attorney inadvertently failed to keep track of the deadline. Similarly, an attorney's error does not constitute good cause to excuse his noncompliance with AS 23.30.110(c) or extend the deadline. *Rogers & Babler*; *Kim*; Alaska Constitution Art. 1, Sec. 11.

Employee contended his failure to timely request a hearing should be excused because of his wrongful termination lawsuit against Employer, bankruptcy case and COVID-19. His attorney developed COVID-19 after the AS 23.30.110(c) deadline. There was no Division edict relieving a party from AS 23.30.110(c)'s requirements. The bankruptcy documents Employee provided do not a stay preventing Employee from pursuing his claim. It is true the wrongful termination lawsuit will consider some of the same evidence as his workers' compensation claim as evidenced by Employee's March 9, 2021 deposition. But Employee provided no evidence showing the wrongful termination lawsuit, bankruptcy or COVID-19 in any way affected his ability to conduct discovery and pursue his claim, file for and pursue an SIME, request additional time to prepare for a hearing or request a hearing by March 3, 2021. He failed to meet his burden to prove his wrongful termination lawsuit, bankruptcy and COVID-19 are good causes to excuse his failure to request a hearing timely under AS 23.30.110(c) or to extend the deadline. Employee's circumstances as a whole were insufficient to excuse failure to comply with the statute. *Rogers & Babler*; *Kim*; *Omar*.

Employee contends his claim should not be dismissed because Employer was not prejudiced by his delay in filing an ARH since it was aware of the claim, conducted its own investigation, participated in discovery and no evidence was lost. Employer contends it is not required to

demonstrate prejudice and cited *Morrison-Knudson* to contend an employer is presumed prejudiced by a late-filed ARH. However, *Morrison-Knudson* involved the deadline to file a claim under AS 23.30.105 and not AS 23.30.110(c). *Kim* said if the employee's reasons for requesting additional time had "insufficient merit or that the employer would be unduly prejudiced," it could set a hearing or require the employee to file an ARH before the time remaining under AS 23.30.110(c) expired. Unlike *Kim*, there is no time remaining time in the two-year period because Employee filed an ARH more than five months after the deadline. The core purpose of the Act is establishing a quick, efficient and fair system for resolving disputes. AS 23.30.001(1). Excusing the late filing of an ARH by an employee represented by an attorney when the reasons for requesting an extension were found meritless contravenes this purpose. *Rogers & Babler*; *Harkness*. Because Employee failed to strictly or substantially comply with AS 23.30.110(c) since he filed his ARH late and his reasons and circumstances surrounding his request for an extension were found meritless, his January 31, 2019 claim will be dismissed.

Employee asked whether his August 16, 2021 claim filed after Employer's petition survives dismissal. *Res judicata* applies to claims but it is not always applied as rigidly in administrative proceedings as in judicial proceedings. *Robertson*. Dismissal under AS 23.30.110(c) does not prevent an employee from applying for different benefits, later incurred medical costs or raising new claims because AS 23.30.110(c) is not a comprehensive "no progress rule." *Tipton*; *Egemo*; *Wagner*. Employer did not request dismissal of Employee's August 16, 2021 claim in its petition or brief and it was not set as an issue for hearing. Therefore, this decision cannot address whether Employee's August 16, 2021 claim survives dismissal of his January 31, 2019 claim.

CONCLUSION OF LAW

Employer's June 16, 2021 petition to dismiss should be granted.

ORDER

1) Employer's June 16, 2021 petition to dismiss is granted.
2) Employee's January 31, 2019 claim is denied.

Dated in Juneau, Alaska on December 28, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Christina Gilbert, Member

/s/
Bradley Austin, 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 Final Decision and Order in the matter of Jason W. Vanderpool, employee / claimant v. State of Alaska, self-insured employer / defendant; Case No. 201700230; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on December 28, 2021.

/s/
Dani Byers, WC Officer II