ALASKA WORKERS' COMPENSATION BOARD

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

CHRIS JENKINS, Employee, Claimant, v. RPR, INC. d/b/a RAINPROOF ROOFING., Employer, and ALASKA NATIONAL INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201907141 AWCB Decision No. 22-0058 Filed with AWCB Anchorage, Alaska on September 7, 2022

RPR, Inc's. d/b/a Rainproof Roofing (Employer) petition to dismiss Chris Jenkins' (Employee) claim was heard on August 9, 2022, in Anchorage, Alaska. On June 2, 2022, Employer filed a hearing request that was properly served by certified mail on Employee at the address he provided the Division as well as at his email address. Employee did not appear, and the designated chair attempted to reach him at his provided telephone number; a person that was not Employee answered the phone and relayed that he did not know who Employee was; subsequent calls were unsuccessful. Attorney Martha Tansik appeared and represented Employer and its insurer. The record closed at the hearing's conclusion on August 9, 2022.

ISSUE

Employer contends Employee's claims should be dismissed because he failed to request a hearing or additional time to prepare for a hearing, timely. It contends failing to dismiss would prejudice Employer because it would result in ongoing litigation and discovery costs and negatively impact its insurance rates. Employer contends it would also be prejudiced because Medicare could force it to pay conditional liens if Employee was found eligible for Medicare.

Employee did not file a brief or other pleading setting forth his position on Employer's petition to dismiss his claims. This decision will assume he opposes it.

Should Employer's petition to deny Employee's claims be granted?

FINDINGS OF FACT

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

1) On May 28, 2019, Employee called the Alaska Workers' Compensation Division (Division) to see what he needed to do to file a claim. The Division provided Employee with a Report of Occupational Injury or Illness (ROI), a copy of Workers' Compensation and You (WC&Y), and a Claim for Workers' Compensation Benefits (WCC). (Agency file, May 28, 2019).

2) On May 31, 2019, Employee reported he injured his lower back and right knee while working for Employer on May 16, 2019, when he tripped over a cord and stepped into a drain. (ROI, May 31, 2019).

3) On June 6, 2019, Employee called the Division regarding whether he should answer questions from Employer's adjuster. Division staff explained that Employer is entitled to medical history related to the injury. (Agency file, June 6, 2019).

4) On June 14, 2019, Employee called the Division seeking information on how to prove his past earnings. He further explained that he was receiving workers' compensation benefits during his previous two years' employment, which explained why his earned wages were lower. Employee requested a workers' compensation packet, which staff sent along with a form letter, including:

> **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. (Agency file, June 14, 2019).

5) On July 16, 2019, Employee sought a compensation rate adjustment, attorney fees and costs and reemployment benefits. (WCC, July 16, 2019).

6) On August 6, 2019, Employer filed and served on Employee's attorney by mail a controversion notice advising it denied his claim for a compensation rate adjustment and related attorney fees and costs and said:

> **TO EMPLOYEE . . . READ CAREFULLY**
> . . . .
>
> **TIME LIMITS**
> . . . .
>
> 2. 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 . . . REQUEST A HEARING, CONTACT THE NEAREST AWCB OFFICE**. (Controversion Notice, August 6, 2019).

7) On August 26, 2019, Employee filed a change of address to 240 E. ****** Anchorage, AK 99501. (Change of Address, August 26, 2019).

8) On August 29, 2019, Employee requested a hearing on his July 16, 2019 claim. (Affidavit of Readiness for Hearing (ARH), August 29, 2019).

9) On September 9, 2019, Employer opposed the ARH and contended discovery was incomplete. (Employer's Affidavit in Objection to Employee's Affidavit of Readiness for Hearing Dated 08/29/19, September 9, 2019).

10) On October 16, 2019, the parties attended a prehearing conference to discuss procedural matters. The designee's summary advised:

> **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.

Employee requested a hearing on his July 16, 2019 claim and the designee set one for December 11, 2019, over Employer's objection. (Prehearing Conference Summary, October 16, 2019).

11) On October 23, 2019, Employer filed and served on Employee's attorney by mail notice advising him it denied his right to "Time Loss, PPI . . . Medical" benefits and denied his claim for "Retraining," all "effective 9/3/19." The controversion notice included:

> **TO EMPLOYEE . . . READ CAREFULLY**
> . . . .
>
> **TIME LIMITS**
> . . . .
>
> 2. 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 . . . REQUEST A HEARING, CONTACT THE NEAREST AWCB OFFICE**. (Controversion Notice, October 23, 2019).

12) On November 22, 2019, the parties' attorneys stipulated to continue the December 11, 2019 hearing and agreed Employee's whereabouts were unknown and his testimony would be required at hearing. The parties agreed that the August 29, 2019 ARH was inoperative for "scheduling

another hearing" and that Employee "must file a new ARH" to reschedule the hearing. (Stipulation to Continue December 11, 2019 Hearing for Good Cause, November 21, 2019).

13) On November 27, 2019, the Board approved the stipulation. (Stipulation to Continue December 11, 2019 Hearing for Good Cause, Order of Approval, November 27, 2019).

14) On April 6, 2020, Employee claimed unspecified TTD, permanent partial impairment (PPI) and medical benefits and related transportation costs, interest, and an order requiring the Rehabilitation Benefits Administrator (RBA) to refer him out for an eligibility evaluation. (Claim for Workers' Compensation Benefits, April 6, 2020).

15) On April 28, 2020, Employer served on Employee's attorney by mail a notice advising him it denied, "All benefits to include TTD, PPI, Medical Costs, Transportation, Interest, and Reemployment benefits." The controversion included:

> **TO EMPLOYEE . . . READ CAREFULLY**
> . . . .
>
> **TIME LIMITS**
> . . . .
>
> 2. 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 . . . REQUEST A HEARING, CONTACT THE NEAREST AWCB OFFICE**. (Controversion Notice, April 28, 2020).

16) On February 17, 2021, Employee's attorney withdrew effective June 1, 2020, and waived his right to attorney fees and costs. The filing included Employee's last-known address, phone number and email for future contact. (Notice of Withdrawal, February 17, 2021).

17) On July 26, 2021, the Division served by certified mail a prehearing conference notice on Employee at his address **** 3rd Avenue. Anchorage, Alaska 99501. (Agency file, Judicial, Communications tabs, July 26, 2021).

18) On September 16, 2021, Employee did not appear for a prehearing conference, so the Board designee left a message at Employee's phone number. Employer advised it had no recent contact

with him and requested the designee note the applicable §110(c) deadlines for this case as they related to Employer's August 6, 2019 and April 28, 2020 post-claim controversions. Employer asked the designee to send Employee a blank ARH along with the prehearing conference summary. The Division included a blank ARH form in their notification to Employee. The summary advised:

> **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, September 16, 2019).

19) On October 4, 2021, Employee called the Division from a friend's phone and left a voicemail stating he was sick with COVID, which was why he missed his prehearing conference on September 16, 2021. He inquired about his case status and provided an updated email address to the Division. The Division emailed Employee at the email address he provided. The Division asked Employee to provide his date of injury to confirm the correct email address. Employee responded via email stating "2019,may,16". This was Employee's last contact with the Division. (Agency file, Judicial, Communications tabs, October 4, 2021).

20) On October 6, 2021, the Division sent an email to Employee at his newly provided email address as of October 4, 2021. The email stated:

> Hi Mr. Jenkins:
> You emailed me asking about your case status.
> It looks like you had a **PREHEARING CONF on 9-16-2021** that you did not attend.
> Did you get a copy of your PHC SUMMARY that was mailed to you (at XXX E 3rd Avenue,
> Anchorage, AK 99501)?
> Please read the SUMMARY which advises regarding your ARH / 110(c) deadlines:
> The deadline to file an ARH Form for your 8/6/2019 CONTROVERSION was

> 8/6/2021.
> You must file an ARH Form before 4/28/2022 regarding your 4/28/2020 CONTROVERSION.
> ***When you call us or email us next time – please give us your Case number*** so we can easily find your case.
> Let me know if you have any further questions or need further assistance! (Agency file, Judicial, Communications tabs, October 6, 2021).

21) On May 2, 2022, Employer sought to dismiss Employee's claims stating he had not requested a hearing within two years of its post-claim controversions. The petition was mailed to Employee at his **** 3rd Avenue. Anchorage, Alaska 99501 address. (Petition, May 2, 2022).

22) On May 10, 2022, the Division served by certified mail a prehearing conference notice on Employee at his address **** 3rd Avenue. Anchorage, Alaska 99501. (Agency file, Judicial, Communications tabs, May 2, 2022).

23) On June 2, 2022, Employee did not attend a properly noticed prehearing conference; the designee could not reach him at his provided telephone number. Employer advised it had not been able to contact Employee and would be filing an ARH shortly. Employer requested a follow-up prehearing conference for June 30, 2022. (Prehearing Conference Summary, June 2, 2022).

24) On June 30, 2022, Employee was not present at a properly noticed prehearing conference and the designee again attempted to leave voicemails at Employee's previously provided telephone numbers with no success. Employer advised it had not been able to contact Employee for over a year and requested the hearing notice be served on him at his email address. The designee scheduled an oral hearing on Employer's petition to dismiss for August 9, 2022. A copy of the summary was emailed to Employee. (Prehearing Conference Summary, June 30, 2022).

25) On July 6, 2022, the Division received from the postal service, the postal service's "green card" showing someone at Employee's address of record signed the receipt for Employee's notice for the August 9, 2022 hearing. Though the person's signature is not legible, it does not appear to be signed by Employee. (United States Postal Service Return Receipt, undated; observations).

26) Prior to the August 9, 2022 hearing, Employee did not file another hearing request, request more time to request a hearing or reach out to the Division regarding his case after his last contact on October 4, 2021. (Agency file).

27) On August 9, 2022, Employee did not appear for the hearing. The chair attempted to call him at his previously provided telephone number of record. A person answered the call and stated

he was not Employee and hung up. The chair attempted the number a second time and the call went to voicemail. (Record).

28) Two years from the August 6, 2019 controversion, with three days added for service on Employee by mail was August 9, 2021, which was not a weekend or a holiday a Sunday, making August 9, 2021 the operative date for that one. Two years from the April 28, 2020 controversion, with three days added for service on Employee by mail was May 1, 2022, which was a Sunday, making May 2, 2022 the operative date under 8 AAC 45.063 for that one. (Experience; judgment; observations).

29) Employer contends Employee filed two separate claims and Employer controverted both. It contends the controversions are on the Director-prescribed form, and each gave him a legally sufficient notice and a warning to file a hearing request or a request for more time to file one within two years, or his claims would be dismissed. Employer contends dismissal is mandatory unless Employee's failure can be excused. It contends Employee gave no reason to excuse his failure to timely file a hearing request or an extension. It contends to date Employee failed to give any reason why he has not filed a request for a hearing or subsequently taken any proactive measures to proceed with his case. (Record).

30) Neither party requested a second independent medical evaluation (SIME). There is no evidence Employee lacks mental capacity or is incompetent. The file contains no grounds to claim equitable estoppel against the Division. (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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> . . . .
>
> (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). In *Rockney v. Boslough Construction Co.*, 115

P.3d 1240 (Alaska 2005), the court stated that the statutory presumption of compensability does not apply if there is no factual dispute about an issue.

> **AS 23.30.110. Procedure on claims**. . . .
> . . . .
>
> (c) Before a hearing is scheduled, a party seeking a hearing shall file a request for hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied. . . .
> . . . .
>
> (h) The filing of a hearing request under (c) of this section suspends the running of the two-year time period specified in (c) of this section. However, if the employee subsequently requests a continuance of the hearing and the request is approved by the board, the granting of the continuance renders the request for hearing inoperative, and the two-year time period specified in (c) of this section continues to run again from the date of the board's notice to the employee of the board's granting of the continuance and of its effect. If the employee fails to again request a hearing before the conclusion of the two-year time period in (c) of this section, the claim is denied

Statutes with language similar to AS 23.30.110(c) are referred to by the late Professor Arthur Larson 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*, Sec. 126.13 [4], at 126-81 (2002). The statute's object 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 prosecute his claim in a timely manner once its claim is filed and controverted. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). Only after a claim is filed can the employer file a controversion to start the time limit of AS 23.30.110(c). *Wilson v. Flying Tiger Line, Inc*. AWCB Decision No. 94-0143 (June 17, 1994).

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 §110(c), and to correct the employer's lawyer's incorrect statement that §110(c) had already run on his claim. *Bohlmann* said *Richards* may excuse noncompliance with §110(c) when the Board failed to adequately inform a claimant of the two-year time limitation. Since Bohlmann still had over two weeks to file a hearing request when the employer's lawyer gave wrong information, and the designee did not correct it, the Court reversed the Board's claim 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.

Certain legal grounds may excuse noncompliance with §110(c), such as lack of mental capacity, incompetence or equitable estoppel asserted against a government agency by a self-represented claimant. *Tonoian v. Pinkerton Security,* AWCAC Dec. 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 claimant requested a hearing continuance and more time to prepare for hearing, two days before the §110(c) time limits to request a hearing ran out; the Board denied his claim under §110(c). The 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 also said "we did 'not suggest that a claimant can simply ignore the statutory deadline and fail to file anything.'" *Pruitt* said in respect to the claimant in that case, "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 Dec. No. 19-001 (September 24, 2019) at 8, said, "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."

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

Finally, technical noncompliance with §110(c) may be excused in cases where a claimant has substantially complied with the statute. *Kim v. Alyeska Seafoods, Inc.,* 197 P.3d 193 (Alaska 2008). The Court stated because §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. 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, or a request for additional time to prepare for a hearing. *Denny's of Alaska v. Colrud,* AWCAC Dec. No. 148 (March 10, 2011).

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

> **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 45.050. Pleadings**. (a) A person may start a proceeding before the board by filing a written claim or petition.
> . . . .
>
> (f) **Stipulations**.
>
> (1) If a claim or petition has been filed and the parties agree that there is no dispute as to any material fact and agree to the dismissal of the claim or petition, or to the dismissal of a party, a stipulation of facts signed by all parties may be filed, consenting to the immediate filing of an order based on the stipulation of facts.
>
> (2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.
>
> (3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.
>
> (4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.

The summaries of prehearing conferences, not the pleadings, control the subsequent course of the suit. *Schmidt v. Beeson Plumbing & Heating, Inc*., 869 P.2d 1170, 1176 (Alaska 1994).

> **8 AAC 45.060. Service.** (a) The board will serve a copy of the claim by certified mail, return receipt requested, upon each party or the party's representative of record.
>
> (b) A party shall file a document with the board . . . either personally or by mail; the board will not accept any other form of filing. Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit 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.
>
> (c) A party shall file proof of service with the board. Proof of service may be made by
>
> (1) affidavit of service; if service was electronic or by facsimile, the affidavit must verify successfully sending the document to the party'
>
> (2) written statement, signed by the person making the statement upon the document served, together with proof of successfully sending the document to the party if served by facsimile or electronically; or
>
> (3) letter of transmittal if served by mail.
>
> (d) A proof of service must set out the names of the persons served, method and date of service, place of personal service or the address to which it was mailed or sent by facsimile or electronically, and verification of successful sending if required. The board will, in its discretion, refuse to consider a document when proof of its service does not conform to the requirements of this subsection.
>
> (e) Upon its own motion …the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing…
>
> (f) Immediately upon a change of address for service, a party or party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served on the party at the party's last known address.

> (g) If after due diligence, service cannot be done personally, electronically, by facsimile or by mail, the board will, in its discretion, find a party has been served if service was done by a method of procedure allowed by the Alaska Rules of Civil Procedure.

8 AAC 45.060(f) imposes an obligation upon parties to apprise the board of a change in address for purposes of service, and until the board receives written notice of a change of address, documents must be served upon a party at the party's last known address. Pursuant to 8 AAC 45.060(g), if service cannot be effectuated the board may exercise its discretion to find a party has been served. These procedures are consistent with Alaska Rule of Civil Procedure 5.

ANALYSIS

Should Employer's petition to deny Employee's claims be granted?

Starting with the July 16, 2019 claim Employer contends Employee had to file an ARH within two years after the August 6, 2019 controversion. Employer concedes Employee filed a valid ARH on his original claim on August 29, 2019. It contends that the August 29, 2019 ARH is "inoperative" based on the signed and approved stipulation for continuance prior to the December 11, 2019 hearing. The relevant language in the stipulation states:

> 4. The parties agree to continue the 12/11/19 hearing indefinitely; and agree that the 8/29/19 affidavit of readiness is inoperative for the purposes of scheduling another hearing. Mr. Jenkins must file a new ARH in order to reschedule the hearing.

First, the stipulation plainly states that the ARH is inoperative for purposes of scheduling another hearing, not withdrawn. Second, the December 11, 2019 hearing was to be continued indefinitely. Employee substantially complied with the statute and filed an ARH within the requisite time frame for his July 16, 2019 claim. The stipulation clearly states the ARH is inoperative for the purposes of scheduling another hearing. It is silent as to whether §110(c) is tolled or running for purposes of denying the claim.

Under *Roberge*, the factfinders are obligated to determine whether there is a way around the .110(c) deadline. Nevertheless, §110(h) provides statutory authority to render inoperative an

employee's request for a hearing, allowing the two-year statute at §110(c) to continue to run against the employee's claim. Under §110(h), the filing of an ARH suspends the running of that time, and if the employee requests a continuance of the hearing, the time period begins to run again on the date the continuance is granted.

In *Saad*, the Commission held that simply acquiescing to another party's request for a continuance was not enough to restart the time. The *Saad* parties stipulated to a continuance, wherein both parties agreed it was in their best interests. The employee in *Saad* agreed to the petition because he and his attorney had not had substantive contact and the attorney was having difficulty locating him. The employer in *Saad* agreed to the stipulation due to outstanding discovery issues that required resolution. No petition was filed for a continuance by either party; rather the parties stipulated and agreed to a continuance. This stipulation was approved, and the time continued to run from the date of Employer's controversion.

In the present case, Employee never filed a new ARH to request a hearing within the two-year time frame. He did not attend a subsequent prehearing conference regarding §110(c) deadlines. Employee reached out to the Division leaving a voicemail in which he acknowledged he missed the meeting due to being ill, which would imply he received prior notice of the prehearing conference and knew how to contact the Division if he had any questions. The Employee then provided an updated email address for subsequent service of documents. The Division promptly emailed Employee at the provided email address including a copy of the prehearing conference summary and provided the specific deadlines in accordance with §110(c) for both of his claims. Employee has not filed a hearing request or a request for additional time to file one in either case. *Pruitt*. There are no factual disputes, so the statutory presumption of compensability analysis need not be applied. *Rockney*. The relevant facts are: Employee filed a claim for benefits on July 16, 2019; Employer controverted it on August 6, 2019. Employee filed a second claim on April 6, 2020; Employer controverted that claim on April 28, 2020. Employee had two years to either file a written hearing request or a written request asking for more time to file one. Two years from the first controversion filed on October 16, 2019, with three days added for service by mail under 8 AAC 45.060(b) is October 19, 2021, which is not a weekend or holiday, and two years from the second controversion filed on April 28, 2020, with three days added for service by mail is May 1,

2022, which was a Sunday so May 2, 2022, would be the operative deadline under 8 AAC 45.063. Thus, Employee had to take some action to request a hearing or to preserve his right to request one by no later than October 19, 2021, for the first claim and May 2, 2022, for the second claim. Employee has not filed anything or availed himself to the Division asking for additional time.

Legal grounds, such as lack of mental capacity, incompetence, or equitable estoppel asserted against the Division may excuse his noncompliance with §110(c). A second independent medical evaluation (SIME) process pauses the §110(c) two-year deadline. *Tonoian*. The record does not contain evidence to suggest any of the recognized exceptions to the §110(c) limit apply to the instant case. There is no indication of mental incompetence, nor were the parties awaiting the receipt of an SIME report. There is no evidence Employee requested a hearing or a continuance that would demonstrate substantial compliance with the statute. By contrast, Employer's two controversion notices, and seven relevant prehearing conference summaries repeatedly provided him with sufficient legal notice and warning about the two-year deadline. Further, Employee had spoken to the Division regarding his claim and what he needed to do to advance his claim four times during the relevant period -- May 28, 2019, June 6, 2019, June 14, 2019, and October 4, 2021. *Rogers & Babler*.

The 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*. Neither the law nor the facts need to be strained in this case. 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 claims timely. *Kim*; *Pruitt*. He filed nothing notwithstanding at least four reminders. Cases "shall be" decided on their merits, "except where otherwise provided by statute." AS 23.30.001(2). The relevant statute providing an exception to that general rule is §110(c). It required Employee to prosecute his claim promptly; he has failed to do so.

The Court has 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*. This includes informing him how to preserve his claim under §110(c). *Bohlmann*. Employer and the Division satisfied their duty in

this case by adequately and repeatedly notifying and warning Employee about the two-year deadline to ask for a hearing. He had ample notice through two controversion notices, over four prehearing conference summaries and four personal phone calls with the Division and emails. Employee missed both post-controversion deadlines; he has not contacted the Division or attempted to file anything that could be perceived as justification for the delay or an attempt to reconcile the missed deadlines. Given this analysis and the undisputed facts, Employer's May 2, 2022 petition will be granted and Employee's July 16, 2019 and April 6, 2020 claims will be denied.

CONCLUSION OF LAW

Employer's petition to deny Employee's claims will be granted.

ORDER

1) Employer's May 2, 2022 petition is granted.
2) Employee's July 16, 2019 claim is denied under AS 23.30.110(c).
3) Employee's April 6, 2020 claim is denied under AS 23.30.110(c).

Dated in Anchorage, Alaska on September 7, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kyle Reding, Designated Chair

/s/
Nancy Shaw, Member

/s/
Sara Faulkner, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final

decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Chris M. Jenkins, employee / claimant v. Rainproof Roofing, Inc., employer; Alaska National Insurance Company, insurer / defendants; Case No. 201907141; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail on September 7, 2022.

/s/
Kimberly Weaver, Office Assistant