ALASKA WORKERS' COMPENSATION BOARD

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

TIMOTHY M. GONZALES, Employee, Claimant, v. TRIDENT SEAFOODS CORPORATION, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201806804 AWCB Decision No. 23-0018 Filed with AWCB Anchorage, Alaska on March 22, 2023

Trident Seafoods Corp.'s (Employer) December 5, 2022 petition to dismiss Timothy M. Gonzales' (Employee) two claims was heard on the written record on March 15, 2023, in Anchorage, Alaska, a date selected on January 31, 2023. A January 6, 2023 hearing request gave rise to this hearing. Attorney Jeffrey Holloway represents Employer and its insurer. Employee is self-represented but did not participate in the written record hearing. The record closed at the hearing's conclusion on March 15, 2023.

ISSUE

Employer contends Employee filed claims on February 7 and 8, 2019, and it controverted the claims on February 25, 2019, denying all claimed benefits. It contends Employee had two years, until February 25, 2021, to request a hearing. Employer further contends there is no intervening

action or legal theory tolling the time Employee had to request a hearing on his claims. Since Employee has never requested a hearing on his claims, Employer seeks an order denying them.

Employee did not participate in the written record hearing; he did not file any written arguments or evidence. Therefore, his position on Employer's petition to deny his claim is unknown but is presumed to be in opposition. However, the record shows he filed a petition for a second independent medical evaluation (SIME) seven days before the deadline for him to request a hearing or request more time to ask for one, and his petition included a request for a time extension.

Should the written record hearing be converted to a regular hearing with more evidence?

FINDINGS OF FACT

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

1) On May 3, 2017, Employee reported a March 12, 2017 back injury while working for Employer. He claimed burning and stinging pain from repetitive motion while lifting and pulling heavy fish while bending and twisting. Employee attached a well-written, typed, four-page letter to his claim explaining his injury and subsequent activities. On his injury report, Employee listed his address as (redacted for privacy) "**** W. Madison Avenue, Apt. *, Montebello, California 90640." (Employee Report of Occupational Injury or Illness to Employer, May 3, 2017).

2) On May 16, 2018, Employee called the Workers' Compensation Division (Division) to see if his case had been set up; staff notified him it had. Division staff answered his questions, discussed the litigation process, "and notified of 2 year time limit to file a WCC [workers' compensation claim]." (Agency file, Phone Call event, May 16, 2018).

3) On September 26, 2018, Employee called the Division to say his back was getting worse and needed therapy. After answering his questions, staff told him "there is a 2yr time limit for filing WCC and it is coming up fast." (Agency file, Phone Call event, September 26, 2018).

4) To this point, Division staff was advising Employee about the two-year deadline to request disability benefits after disablement. (Experience; observations; and inferences from the above).

5) On September 26, 2018, Division staff wrote to Employee at his address of record to confirm the information given to him on the phone and to provide additional information. Staff sent Employee the pamphlet "Workers' Compensation & You," a claim form, a list of attorneys and a medical summary form. Staff reminded Employee he had to file a claim for disability benefits within two years after he became disabled, and if he failed to do so he may lose his right to those benefits. More importantly, the letter stated:

> 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. <u>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</u>. (Letter, September 26, 2018; emphasis added).

6) On February 7, 2019, Employee filed and claimed unspecified temporary total disability (TTD) and permanent partial impairment (PPI) benefits; a compensation rate adjustment; medical and related transportation costs; and "other." Under "other," Employee claimed, "reemployment benefits." He listed the same address as in factual finding (1) above. (Claim for Workers' Compensation Benefits, October 16, 2018).

7) On February 7, 2019, Employee filed nine pages of his medical records; there is no evidence he served these on Employer. (Medical Summary, filed February 7, 2019).

8) On February 8, 2019, Employee filed another claim identical to the one filed on February 7, 2019, with an additional exhibit attached -- a 2017 W-2 wage summary form. (Claim for Workers' Compensation Benefits, October 16, 2018).

9) On February 8, 2019, Employee filed 11 pages of his medical records including the nine pages he had filed previously; there is no evidence he served these on Employer. (Medical Summary, filed February 8, 2019).

10) Employee has filed no additional medical records with the Division since February 8, 2019. (Agency file).

11) On February 25, 2019, Employer filed and served on Employee by mail at his address of record a Controversion Notice denying his right to all benefits claimed on his October 16, 2018 claims, filed on February 7 and 8, 2019. The notice stated in relevant part:

> **TO EMPLOYEE . . . : READ CAREFULLY**
>
> . . . **You must also request a timely hearing before the AWCB (see time limits below). The AWCB provides the "affidavit of readiness for hearing" form for this purpose. Get forms from the nearest AWCB office listed below**. . . .
> . . . .
>
> **TIME LIMITS**
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> . . . .
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> 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 FILE A CLAIM OR REQUEST A HEARING, CONTACT THE NEAREST AWCB OFFICE**. (Controversion Notice, February 25, 2019; emphasis in original).

12) Two years from February 25, 2019, was February 25, 2021. Three days added to February 25, 2021, was February 28, 2021, which was a Sunday; the next day following February 28, 2021, which was not a weekend, or a holiday, was March 1, 2021. (Observations).

13) On March 12, 2019, Employee called the Division and asked for a copy of his medical records Employer had "on file." Staff directed him to Holloway's office and provided his phone number. Staff also advised Employee he could request a copy of his file from the Division, but it may not include all his medical records. (Agency file, Phone Call event, March 12, 2019).

14) Employee's agency file has no evidence he ever requested a copy of his file from the Division. (Agency file).

15) On March 12, 2019, Employee called the Division again and asked for his injury date "to find out when his 2 year deadline is over." A staff member "explained that 2 year deadline begins after post claim controversion." The staff member further advised Employee the rule also applied to medical benefits and told him the "post-claim controversion date was 02/25/2019." (Agency file, Phone Call event, March 12, 2019).

16) At this point, Division staff was advising Employee about his post-controversion deadline to request a hearing timely. (Experience; observations; and inferences from the above).

17) On March 27, 2019, both parties attended a prehearing conference before the Board's Designee. The Designee explained discovery and the adjudications process in general. Along with the resultant summary, the Designee provided Employee with the pamphlet "Workers' Compensation & You," and a link to the Division's website, along with the phone number for a Workers' Compensation Technician if Employee had questions. The 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, March 28, 2019; emphasis added).

18) On March 28, 2019, the Division served Employee with the March 27, 2019 prehearing conference summary at his address of record. (Prehearing Conference Summary, March 28, 2019).

19) On April 30, 2019, the parties attended another conference before the Board's Designee. Employer contended Employee failed to appear for his properly scheduled deposition and failed to respond to its discovery requests. "Employee advised that he is seeking representation and therefore, is not interested in cooperating with the discovery process at this time." He agreed to attend an employer's medical evaluation (EME) on May 6, 2019. The Designee granted Employer's petition to compel discovery and ordered Employee to provide all releases and discovery previously served by Employer within 10 days from the summary's service date. The Designee also expressly advised Employee that discovery must be completed, and a hearing requested "prior to 2/25/2021." (Prehearing Conference Summary, May 1, 2019).

20) On May 6, 2019, Joseph Lynch, MD, examined Employee for an EME. Dr. Lynch diagnosed a mid-thoracic strain substantially caused by the work injury. He opined Employee was medically stable and did not need any further "curative treatment." Dr. Lynch stated Employee's need for treatment ceased effective August 1, 2017. He found no objective basis to assign any restrictions on Employee's work and released him to all exertional level work. (Lynch report, May 6, 2019).

21) On May 17, 2019, Employee called the Division with numerous questions; a staff member answered all his questions, many of which concerned releases and his deposition. (Agency file, Phone Call event, May 17, 2019).

22) On May 22, 2019, Employee called the Division with questions about the EME report. A staff member explained how he could obtain the report and explained the SIME process and how he could request one. (Agency file, Phone Call event, May 22, 2019).

23) Thereafter, Employee had no contact with the Division for 21 months. (Agency file).

24) On June 3, 2019, Employer served Dr. Lynch's EME report on Employee by mail at his address of record. (Medical Summary, June 3, 2019).

25) On February 9, 2021, 21 months after his last contact with the Division and 20 months after Employer served Dr. Lynch's EME report on him, Employee called the Division with SIME questions. A staff member discussed the SIME process and, "Discussed upcoming 110(c) deadline on February 25, 2021." She said she would email Employee "110(c) info," an Affidavit of Readiness for Hearing form and SIME forms and information. (Agency file, Phone Call event, February 9, 2021).

26) On February 9, 2021, the staff member emailed Employee twice and gave him Holloway's corrected mailing address. She also provided Employee with paper forms as well as a link to the Division's website in case he chose to use computer forms to request a hearing. The staff member provided detailed information about the SIME process and further advised Employee:

> **DEADLINE TO REQUEST A HEARING: 02/25/2021**
>
> As we discussed, the deadline for you to request a board hearing on your 10/16/18 claim is soon, on February 25, 2021! Per AS 23.30.110(c), you must serve and file an Affidavit of Readiness for Hearing (ARH) form requesting a hearing or written notice you have not completed all discovery but still want a hearing within two years of Employer's February 25, 2019 controversion **to avoid possible dismissal of your claim**. You must file an ARH or written notice you have not

> completed all discovery but still want a hearing by February 25, 2021. When you file your ARH or written notice with the board, you must also serve a complete copy on Jeffrey Holloway, and indicate on the document that you have done so. (Agency file, Email Event, February 9, 2021; bold emphasis in original; underlined emphasis added).

27) On February 23, 2021, Employee electronically filed a petition with the Division for an SIME, using his email address (redacted for privacy) "****13@outlook.com." The mailing address Employee listed on his petition matches the address he gave on his claim in factual finding (1) above. The petition form has numerous blocks one can check to request relief. On his February 11, 2021 petition, filed on February 23, 2021, Employee checked only the "SIME" block and did not check the block for "REQUEST FOR EXTENSION OF TIME TO REQUEST A HEARING UNDER AS 23.30.110(c)." However, in the section reserved for stating a reason for the petition, Employee wrote, "I have not completed all discovery and need a SIME, see attached notice and dispute." Employee also attached an SIME form, medical records and the following statement:

> I am requesting an extension because discovery is not complete. A SIME has not been completed for a fair hearing in order for me to present my most recent medical records discovery. [Employee discussed his post-injury medical situation and the EME report]. Therefore, I am requesting an extension because discovery is not complete. A SIME has not been completed for a fair hearing in order for me to present my most recently discovered medical records. (Petition, February 11, 2021; emphasis added).

28) Employee has filed nothing with the Division since filing his February 11, 2021 petition on February 23, 2021, seven days before his two-year period to request a hearing, or request more time to request one, expired. (Agency file; observations).

29) On March 12, 2021, Employer opposed Employee's SIME petition on grounds the disputes were insufficient to warrant one, and contended he failed to cooperate with discovery, so Employer could not adequately respond to the petition without first obtaining discovery. (Opposition to Petition for SIME, March 12, 2021).

30) On April 7, 2021, Employee failed to attend a properly noticed prehearing conference. The Designee tried to reach him by telephone unsuccessfully. By this time, the March 1, 2021 two-year statutory date for Employee to ask for a hearing, or ask for more time to request one, had already passed. (Prehearing Conference Summary, April 7, 2021).

31) On April 7, 2021, Employee called the Division to state he missed his prehearing conference and to advise he had a new phone number. (Agency file, Phone Call event, April 7, 2021).

32) On May 6, 2021, Employee failed to attend a properly noticed prehearing conference. The Designee again tried to reach him by telephone, unsuccessfully; the Designee took no action. (Prehearing Conference Summary, May 6, 2021).

33) On May 10, 2021, Employee called the Division to state he missed another prehearing conference and wanted to reschedule it. A staff member discussed and explained in detail Employer's right to releases and a deposition and how he could petition for a protective order. Employee "seemed to have understood," but requested another prehearing conference, which would be scheduled. (Agency file, Phone Call event, May 10, 2021).

34) On May 12, 2021, Employee called the Division again to get a prehearing conference. A staff member advised him there was a prehearing conference already set up and gave him the date, time and instructions on how he could attend. (Agency file, Phone Call event, May 12, 2021).

35) On May 21, 2021, Employee called the Division about discovery. A staff member referred him to Holloway's office to address this issue. (Agency file, phone call event, May 21, 2021).

36) On June, 3, 2021, Employee attended a prehearing conference. The Designee explained either party could request a hearing when discovery was completed. The parties discussed "the possibility" of an SIME and requested a follow-up prehearing regarding it. (Prehearing Conference Summary, June 3, 2021).

37) On July 22, 2021, Employee attended another prehearing conference. The parties discussed discovery and the possible SIME; they requested another follow-up prehearing conference to "possibly set SIME deadlines." (Prehearing Conference Summary, July 22, 2021).

38) On September 14, 2021, Employee failed to attend a prehearing conference, but the Designee left a voicemail message for him. Employer disagreed there was a medical dispute between Employee's attending physician and its EME, and objected to an SIME. The Designee advised the parties to request another prehearing conference if necessary. (Prehearing Conference Summary, September 14, 2021).

39) On September 17, 2021, a staff member emailed the parties dates and times for a prehearing conference at Employee's request because he missed the September 14, 2021 conference. (Agency file, Case Notes event, September 17, 2021).

40) On September 17, 2021, Employee called the Division and left a message; staff tried to call him back but could not connect. Division staff set a prehearing conference for the next available date, October 13, 2021, at 9:00 AM, called Employee back and left that information on his voicemail. (Agency file, Phone Call event, September 17, 2021).

41) On September 21, 2021, Employee called the Division to get a prehearing conference; staff advised one was already rescheduled for October 13, 2021, at 9:00 AM. (Agency file, Phone Call event, September 21, 2021).

42) On October 13, 2021, Employee attended a prehearing conference at which the parties did not agree on an SIME. Employer contended the existing medical records did not support a medical dispute warranting an SIME. Employee said he was "still collecting discovery to that end and will be filing the same shortly." The Designee expressly advised Employee:

> Designee explained that an Affidavit of Readiness for Hearing (ARH) form may be filed on Employee's 2/23/2021 Petition which would allow for a Procedural Hearing on the issue to be set with the Alaska Workers' Compensation Board (AWCB). Designee confirmed that the AWCB has the authority to grant or deny Employee's petition. (Prehearing Conference Summary, October 13, 2021).

43) On January 5, 2022, Employee failed to attend a prehearing conference. The Designee attempted but was not able to contact Employee or leave a voicemail message. Employer stated its attorney had no recent contact with Employee, but needed updated releases and had filed a petition to compel Employee to complete them. The Designee granted Employer's petition to compel and ordered Employee to provide the releases to Employer's attorney by January 16, 2022. (Prehearing Conference Summary, January 5, 2022).

44) On January 6, 2022, Employee called the Division and left a message requesting another prehearing conference, stating he missed the last one because he had been "under the weather." (Agency file, Phone Call event, January 6, 2022).

45) On January 21, 2022, Employee emailed the Division and Holloway and advised he had recently lost his identification, which he said prevented him from notarizing the medical releases

Employer had requested. He stated once he got replacement identification he would get the documents notarized and returned to Holloway. (Agency file, Email Event, January 21, 2022).

46) On February 3, 2022, Employee failed to appear for a prehearing conference. The Designee tried to contact him at two phone numbers and was only able to leave a voicemail message on one. Employer's counsel stated his office had been unable to contact Employee and had not received signed discovery releases. (Prehearing Conference Summary, February 3, 2022).

47) On February 17, 2022, Employee emailed Holloway and the Division. He stated he needed more time to complete his medical treatment. Employee mentioned a settlement offer with which he disagreed. He offered to obtain medical records and send them to Holloway in PDF format while he was waiting to get his new identification so he could notarize releases Employer had sent him; he asked for Holloway's patience. Employee also suggested Holloway use his same email address as stated in factual finding (27) above, as his "phone number changes from time to time." (Agency file, Email Event, February 17, 2022).

48) On March 14, 2022, Employee emailed Holloway and the Division to provide a tracking number for releases he said he had sent Holloway. (Agency file, Email Event, March 14, 2022).

49) On March 15, 2022, Employee appeared at a prehearing conference to discuss the releases. The Designee explained "the sooner discovery is completed the sooner a settlement can be reached or a hearing requested." (Prehearing Conference Summary, March 15, 2022).

50) On December 5, 2022, Employer petitioned for an order dismissing Employee's claims for his failure to request a hearing timely under §110(c). It served this petition on Employee at his address of record. (Petition, December 5, 2022).

51) On January 31, 2023, Employee failed to appear for the last prehearing conference in this case. The Designee tried unsuccessfully to contact him, and set a written record hearing for March 15, 2023, solely on Employer's December 5, 2022 petition to dismiss Employee's claims under §110(c). He also advised Employee to file and serve a brief in accordance with the applicable regulations. (Prehearing Conference Summary, January 31, 2023).

52) Employee's agency file has no hearing brief or equivalent from Employee for the March 15, 2023 written record hearing. (Agency file).

53) Employee's agency file contains no formal Affidavit of Readiness for Hearing, and no informal hearing request filed by Employee. (Agency file).

54) The Division mailed 12 prehearing conference notices to Employee, all at his address of record. (Agency file, Prehearing Conference Notice Served events, March 13, 2019; April 5, 2019; March 2, 2021; April 8, 2021; May 10, 2021; June 3, 2021; July 22, 2021; September 20, 2021; December 3, 2021; January 7, 2022; February 15, 2022; and December 13, 2022).

55) Employee's file contains no evidence the United States Postal Service (USPS) returned any mail to the Division that the Division had sent to Employee in this case. (Agency file).

56) Each prehearing conference summary the Division issued after Employee filed his petition for an SIME on February 23, 2021, included only his request for an SIME as an issue raised in that petition. (Observations).

57) Employee missed 50 percent of the prehearing conferences in this case. He gave illness as a reason for missing only one and provided no explanation for missing the rest. (Agency file).

58) Division clerical staff, and the prehearing conference Designee, were unaware Employee's February 11, 2021 petition filed on February 23, 2021, also included a request for an extension of time to ask for a hearing. (Inferences drawn from the above).

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 . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
> >
> > (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> > . . . .
> >
> > (4) hearings in workers' compensation cases shall be impartial and fair to all parties and . . . all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The Board may base its decision 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).

Tobar v. Remington Holdings, LP, 447 P.3d 747 (Alaska 2019) held the Act authorizes the Board to order an SIME when requested under AS 23.30.095(k) and AS 23.30.110(g), and 8 AAC 45.092(g) allows it to order one on its own motion. *Tobar* cited with approval from the *Bah* decision, which said the Board can order an SIME "when there is a significant gap in the medical or scientific evidence," there is a significant medical dispute between the employee's attending physician and the employer's doctor and an opinion by an independent medical examiner or other scientific examination will help the Board in resolving the issue.

> **AS 23.30.110. Procedure on claims**. . . .
> . . . .
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> (c) Before a hearing is scheduled, a party seeking a hearing shall file a request for hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied. . . .

Richard v. Fireman's Fund Insurance Co., 384 P.2d 445, 449 (Alaska, 1963), held the Board owes a duty to every claimant to fully advise him of "all the real facts" that bear upon his right to compensation, and to instruct him on how to pursue that right. *Bohlmann v. Alaska Const. & Engineering,* 205 P.3d 316 (Alaska, 2009), held the Board had a duty to inform a self-represented claimant how to preserve his claim under §110(c), and specifically to correct the employer's lawyer's erroneous prehearing conference statement that the statute of limitations had already run on his claim. Consequently, under *Bohlmann*, *Richard* may be applied to excuse noncompliance with §110(c) when the Board failed to adequately inform a claimant of the two-year time limitation. Since the claimant still had more than two weeks to file a hearing request at the time the employer's lawyer provided erroneous information, and the Board's Designee did not correct it, *Bohlmann* found an abuse of discretion, reversed the Board's claim dismissal and directed it to accept the tardy hearing request as timely. *Bohlmann* presumed the claimant would have timely filed his affidavit of readiness had the Board or staff satisfied its duty to him, because he had consistently filed his own timely pleadings previously.

Certain "legal" grounds may excuse noncompliance with §110(c), such as mental incapacity or incompetence, and equitable estoppel against a governmental agency by a self-represented

claimant. *Tonoian v. Pinkerton Security,* AWCAC Dec. No. 029 (January 30, 2007). *Tonoian* held the Division's "obligation to give notice was satisfied by mailing the Board-approved controversion forms," to the injured worker 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.

AS 23.30.110(c) requires an injured worker to timely prosecute a claim once the employer controverts. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). *Tipton v. ARCO Alaska, Inc.,* 922 P.2d 910, 912-13 (Alaska 1996) noted a statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." Citing *Jonathon, Tipton* also noted dismissal under §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. *Wagner v. Stuckagain Heights*, 926 P.2d 456, 459 n. 7 (Alaska 1996) said *Tipton* distinguished between dismissal of a specific claim from dismissal of the entire case, stating §110(c) is not a comprehensive "no progress rule." 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) held, "new medical treatment entitles a worker to restart the statute of limitations for medical benefits." *Bailey v. Texas Instruments*, 111 P.3d 321 (Alaska 2005) held dismissal of a claim does not necessarily preclude an employee from filing a later claim for medical costs incurred after that dismissal.

AS 23.30.110(c)'s objective is not for the claimant 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). But the claimant bears the burden to establish with substantial evidence a legal excuse from the §110(c) statutory deadline. *Hessel*. A claimant who bears the burden of proof must "induce a belief" in the minds of the factfinders the facts being asserted are probably true *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

Kim v. Alyeska Seafoods, Inc., 197 P.3d 193 (Alaska 2008) 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).

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). *Pruitt v. Providence Extended Care*, 297 P.3d 891, 985 (Alaska 2013), cited *Kim*'s holding, "But we also said that we did 'not suggest that a claimant can simply ignore the statutory deadline and fail to file anything.'" *Roberge v. ASRC Construction Holding Co.*, AWCAC Dec. No. 19-001, at 8 (September 24, 2019), said, in an SIME tolling case, "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."

Narcisse v. Trident Seafoods Corp., AWCAC Dec. No. 242 (January 11, 2018) stated the two-year 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.

Davis v. Wrangell Forest Products, AWCAC Dec. No. 18-007 (January 2, 2019), held since 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 an order on motions for reconsideration, *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).

> **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).

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

> **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.

Dandino, Inc. v. U.S. Dept. of Trans., 729 F.3d 917, 921 (9th Cir. 2013) said, "under the common law Mailbox Rule, proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." This rule is illustrated in 8 AAC 45.060(b).

> **8 AAC 45.063. Computation of time**. (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. . . .

ANALYSIS

Should the written record hearing be converted to a regular hearing with more evidence?

AS 23.30.110(c) states, once an employer controverts a claim on a prescribed controversion notice, if the employee does not request a hearing within two years following the filing of the controversion notice, "the claim is denied." Employee filed his two October 16, 2018 claims on February 7 and 8, 2019; Employer filed a prescribed post-claim controversion on February 25, 2019, and served it on Employee at his address of record on the same day by "US Mail." Because Employer served the Controversion Notice by mail, three days must be added to Employee's two-year filing deadline; if the resultant day is a weekend or holiday, the deadline moves to the next day that is not a weekend or holiday. 8 AAC 45.060(b); 8 AAC 45.063(a).

Employee was required to take some action to request a hearing or to preserve his right to request one by no later than March 1, 2021 (February 25, 2019 + two years = February 25, 2021

+ three days = February 28, 2021, a Sunday + "the next day which is neither . . . a Sunday nor a holiday" = March 1, 2021). *Pruitt*; 8 AAC 45.063(a). Employee to date has never filed a hearing request. Therefore, he failed to comply strictly with §110(c) because he never formally or even informally requested a hearing timely. AS 23.30.110(c); *Rogers & Babler*; *Kim*.

However, "substantial compliance" with §110(c) will avoid claim denial. *Kim*. Employee bears the burden to show he substantially complied with §110(c). *Saxton*; *Hessel*. On February 23, 2021, Employee filed and served on Holloway by email his February 11, 2021 SIME petition. Although substantial compliance does not require filing a formal affidavit, it required Employee to file within two years of the controversion, either a request for a hearing or a request for additional time to prepare for one. *Colrud*. His February 23, 2021 SIME request demonstrated Employee's contention that he needed additional time before a hearing on his claim could be held. *Narcisse*. On closer review, Employee's SIME request and attachments show his request for more time.

On February 9, 2021, Employee contacted the Division for information on how to proceed. The same date, the Division emailed and advised him he had until February 25, 2021, to either file a formal affidavit requesting a hearing or a "written notice [he had] not completed all discovery." *Richard*; *Bohlmann*. In response, on February 23, 2021, Employee filed his SIME petition. On it, he stated "I have not completed all discovery and need a SIME, see attached notice and dispute." On an attachment to his petition, Employee stated, twice, "I am requesting an extension because discovery is not complete." The agency file shows he did exactly what Division staff had repeatedly advised him to do. *Rogers & Babler*. As he filed his petition seven days before the March 1, 2021 deadline to take some action to preserve his claims, Employee's request for a time extension was timely and he substantially complied with §110(c). *Jonathan*; *Colrud*; *Pruitt*.

Moreover, though Division staff did an admirable job explaining Employee's rights to him and giving him what staff considered the exact date on or before which he had to take some action to preserve his claim, staff gave him an incorrect date -- February 25, 2021, not March 1, 2021. *Davis*; *Roberge*. *Bohlmann* said such error could dissuade a worker from requesting a hearing

timely, thinking the deadline had passed. As it turned out, the Division's error was immaterial as Employee substantially and timely complied even before the erroneous deadline had passed.

Notwithstanding the Division's oversight, Employee was not without procedural oversights. The February 11, 2021 petition form has a box expressly so Employee could make a "REQUEST FOR EXTENSION OF TIME TO REQUEST A HEARING UNDER AS 23.30.110(c)." Employee did not check this box; he only checked the box requesting an SIME. Had Employee checked the time extension box, clerical staff and the Designee would have noticed this request and the Designee would have set a hearing on the §110(c) extension request promptly. *Kim*.

As it turned out, because Employee had filed a petition and had no attorney, the Division scheduled a prehearing conference for April 7, 2021; however, Employee did not appear, and the Designee could not reach him by phone. He also failed to appear for a May 6, 2021 prehearing conference, and again the Designee could not reach him. Employee appeared at the June 3, 2021 prehearing conference and the parties discussed the possibility of an SIME; the summary does not disclose any discussion about Employee's request for more time to ask for a hearing, but the Designee reiterated his advice on how Employee could formally request a hearing when he was ready. Employee also attended a July 22, 2021 prehearing conference where the parties again discussed the possibility of an SIME, and the Designee scheduled a follow-up conference for September 14, 2021; again, Employee failed to appear on September 14, 2021, and could not be reached.

On October 13, 2021, Employee attended a prehearing conference where the parties did not agree on an SIME. The Designee explained Employee could file an Affidavit of Readiness for Hearing on his SIME petition and have a procedural hearing on the matter. At that point, the Designee left the matter in Employee's hands. On January 5, 2022, at Employer's request, the Designee held a prehearing conference to address Employer's discovery concerns; again, Employee failed to attend, and the Designee could not contact him. Employee failed to attend a follow-up prehearing conference on February 3, 2022, where Employer's representative stated he had lost contact with Employee and had not received the discovery releases the Designee had

ordered Employee to sign at the January 5, 2022 prehearing conference. The Designee again was unsuccessful contacting Employee at two phone numbers.

On March 15, 2022, Employee attended a prehearing conference regarding Employer's discovery releases. The Designee again advised Employee that discovery needed to proceed, and the sooner it was done the sooner Employee could request a hearing. Later, Employer filed its December 5, 2022 petition to dismiss under §110(c). Finally, on January 31, 2023, Employee missed the last prehearing conference held in this case; as always, the Designee tried but was not able to contact him by phone. The Designee set a written record hearing on Employer's petition to dismiss for March 15, 2023, and advised Employee he could submit evidence and a brief stating his position in accordance with the applicable regulations. The Division need not seek him out and make sure Employee complies with instructions he has already been given. *Tonoian*.

There have been 12 prehearing conferences held in this case; Employee failed to appear for six of them. Except for once stating he was "under the weather," Employee never explained why he missed 50 percent of his prehearing conferences. The Division served Employee by mail with a prehearing conference notice at his address of record for each prehearing conference held in this case. In each prehearing conference summary since Employee filed his February 11, 2021 SIME petition on February 23, 2021, the Designee listed Employee's "2/23/2021 Petition for a Second Independent Medical Evaluation (SIME)" as the only issue listed on that petition; the Designee was understandably unaware Employee had also asked for a time extension under §110(c). *Rogers & Babler*. The Division served each prehearing conference summary on Employee by mail at his address of record. Employee's agency file has no evidence the USPS returned any mail the Division sent to Employee at his address of record. *Dandino*; 8 AAC 45.060(b).

Given the above analysis, this decision will not deny Employee's claims under §110(c) at this time, because he substantially complied with §110(c) when he asked for an extension in his February 11, 2021 petition filed on February 23, 2021. *Kim*. Still, the Division has had no contact with him since the March 15, 2022 prehearing conference. In short, because of the Division's and Employee's oversights described above, Employee has been given an unofficial,

unintentional, time extension for which to request a hearing under §110(c) that has lasted from February 23, 2021, through the present, and is continuing -- a period of well over two years. Thus, Employee's request for an extension of time to request a hearing under §110(c), and the Division's and his failure to act on his request, creates an unusual problem -- his extension request remains.

Because this is a written-record hearing, the panel has not heard from Employee. The Alaska Supreme Court has stated this panel has "discretion to extend the deadline for good cause." *Kim*. Dismissing the benefits Employee claimed to date is a generally disfavored remedy. *Tipton*; *Wagner*; *Egemo*; *Bailey*. Hearing from Employee and his subjection to cross-examination will help the fact-finders in determining whether "good cause" exists for granting him an additional, formal extension above and beyond the two-plus years he has already enjoyed. AS 23.30.001(2), (4). The panel must "fully consider the merits" of Employee's "request for additional time and any resulting prejudice" to Employer. "If in its broad discretion," the panel determines Employee's "reasons for requesting additional time have insufficient merit," or that Employer "would be unduly prejudiced," the panel may decide to dismiss Employee's claims. *Kim*. However, to accord him due process, this decision will reopen the hearing record and order Employee to appear by telephone, Zoom or in person at his option at a hearing before a panel where he can testify under oath, explain his situation and respond to questions from Employer and the panel. AS 23.30.001(2), (4); AS 23.30.135(a).

In accord with *Richard* and *Bohlmann*, Employee is advised the primary issue at the next hearing will be Employee's February 23, 2021 request for an extension of time to request a hearing under §110(c) and Employer's related petition to dismiss under §110(c). The secondary issue will be Employee's SIME request. *Bah*; *Tobar*.

Employee faces a difficult burden at the next hearing. *Hessel*; *Saxton*. He should be prepared to explain among other things why he missed 50 percent of his prehearing conferences; what "additional discovery" he needs and why he has not been able to obtain this discovery since his March 12, 2017 injury; why he waited until February 23, 2021, to request an SIME after Employer served Dr. Lynch's EME report on him on June 3, 2019; why he failed to request a

hearing on his SIME request for over two years and counting; why an SIME would assist the fact-finders in resolving his claims; why he needs even more time to prepare for and request a hearing when he has effectively been given more than two additional years to request one since he filed his February 11, 2021 petition; and why as it appears from the record that he has not even "generally pursued" his claims since February 7, 2019 -- a period now exceeding four years and counting. The panel at that hearing will weigh his credibility. AS 23.30.122(a); *Smith*.

Employer will have an opportunity to question Employee, and to present testimony showing how it has been prejudiced by Employee's action or inaction. AS 23.30.001(4). If Employee successfully presents evidence to convince the panel he has "good cause" to ask for even more time to request a hearing, the panel may require him "to file an affidavit of readiness within" seven days -- "the amount of time remaining before the original two-year period expired." *Kim*. If he cannot successfully convince the panel he has "good cause" for an additional, formal extension of time to request a hearing, and if the panel decides Employer has been "unduly prejudiced," the panel will issue a written decision denying his request for more time to ask for a hearing, his petition for an SIME and his claims. If Employee fails to attend the hearing, the panel will deny his petition and his claims. *Kim*; *Richard*; *Bohlmann*.

Division staff will be directed to serve this Decision and Order on Employee by both certified mail and by email to increase the likelihood he will receive it and read it. AS 23.30.135(a). To expedite this matter in accordance with AS 23.30.001(1), the following 12 dates are available and offered to the parties for the next hearing, which will be limited to two hours:

- April 4, 2023
- April 5, 2023
- April 6, 2023
- April 12, 2023
- April 18, 2023
- April 19, 2023
- April 20, 2023
- April 25, 2023
- April 26, 2023
- April 27, 2023
- May 3, 2023
- May 9, 2023

The parties will be directed to notify the designated chair by email at william.soule@alaska.gov, by no later than Friday, March 24, 2023, which dates they are available for a two-hour regular hearing addressing the issues set forth above. AS 23.30.135(a).

CONCLUSION OF LAW

The written record hearing will be converted to a regular hearing with more evidence.

ORDER

1) Employer's December 5, 2022 petition to dismiss under §110(c) will be held in abeyance in accordance with this decision.
2) The March 15, 2023 written record hearing is converted to a regular hearing and the record is reopened to receive testimony.
3) The parties are directed to notify the designated chair at **william.soule@alaska.gov** and the opposing party by no later than Friday, March 24, 2023, which of the above dates they are available for a two-hour regular hearing addressing (1) Employee's February 23, 2021 request for an extension of time to request a hearing under §110(c), (2) Employer's related petition to dismiss under §110(c) and (3) Employee's SIME request.
4) Upon notification of the parties' availability, the Division will serve the parties with hearing notices for the earliest possible hearing. If a party fails to respond to order (3) in this decision, the Division will select the date.
5) The parties are directed to file any hearing briefs at least five working days before the eventually selected hearing date; Employee is reminded to serve Holloway with any hearing brief Employee files, with proof of service affixed to the brief.
6) The issues set forth in Order (3), above, will be decided on the documentary evidence already in Employee's agency file as of March 15, 2023, and any testimony admitted at the hearing.
7) This Decision & Order will be served on the parties by certified mail and on Employee at his email address of record.

Dated in Anchorage, Alaska on March 22, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Timothy M. Gonzales, employee / claimant v. Trident Seafoods Corporation, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201806804; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on March 22, 2023.

/s/
Rachel Story, Office Assistant