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. 23-0023 Filed with AWCB Anchorage, Alaska on May 4, 2023

Trident Seafoods Corp.'s (Employer) December 5, 2022 petition to dismiss Timothy M. Gonzales' (Employee) two claims was initially heard on the written record on March 15, 2023. *Gonzales v. Trident Seafoods Corp*., AWCB Dec. No. 23-0018 (March 22, 2023) (*Gonzales I*) held Employer's petition to dismiss in abeyance and reopened the hearing record to allow Employee to testify at hearing and to allow Employer to show how Employee's actions or inaction have prejudiced it. *Gonzales I* also set Employee's February 23, 2021 petition for a second independent medical evaluation (SIME) for hearing. *Gonzales I* gave the parties 12 hearing dates from which to choose for the hearing to complete this process. Employee did not select a date, but Employer gave two dates it was available (reserving its objections to the process) to complete the hearing. Given Employer's response, on March 28, 2023, *Gonzales I* selected April 27, 2023 for the hearing.

Attorney Jeffrey Holloway represented Employer and its insurer. Employee is self-represented and testified. Both parties appeared telephonically. The record closed at the hearing's conclusion on April 27, 2023. *Gonzales I* is incorporated into this decision by reference.

ISSUES

Employer contended the second hearing should not occur because no legal authority exists for it, and cited other objections to the process, contending: (a) *Gonzales I* and the current panel erred by relying on the agency file, which contains communications between Employee and Division staff responding to his case inquiries -- Employer referred to these technicians as Employee's "BFFs," and contended it requested the entire agency file but never received communications between Employee and the Division; (b) *Gonzales I* abused its discretion by changing the March 15, 2023 written record hearing to an oral hearing; and (c) *Gonzales I* abused its discretion by adding Employee's request for additional time and for an SIME as issues for the hearing, because Employee never filed an Affidavit of Readiness For Hearing (ARH) on any petition or claim.

Employee did not directly respond to these objections, but this decision presumes he was not opposed to the second hearing proceeding as it did.

1) Did *Gonzales I* properly schedule an oral hearing?

(a) Did Gonzales I and the current panel properly rely on Employee's agency file?
(b) Did Gonzales I properly convert the written record hearing to an oral hearing?
(c) Did Gonzales I properly add issues to the hearing?

Employee contends he needs more time for discovery. He contends he is not yet ready to schedule a hearing.

Employer contends Employee never requested more time to request a hearing. It contends he effectively abandoned his February 11, 2021 petition by not seeking a prehearing conference summary correction to add or clarify that he was asking for an extension of time rather than just an SIME, and by never pursuing his petition or requesting a hearing on it.

2) Is Employee entitled to more than six days to prepare for and request a hearing?

Employee contends medical disputes exist between his attending physician and Employer's medical evaluator (EME). He requests an SIME.

Employer contends Employee's request for an SIME was untimely. Alternately, it contends there are no significant medical disputes warranting an SIME.

3) Should there be an SIME?

Employer contends Employee filed claims on February 7 and 8, 2019, and it controverted them 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 fact 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 contends he did everything Workers' Compensation Division (Division) staff told him to do. He contends he had until December 2023 to request a hearing per the Division technician.

4) Should Employee's claims be denied for failure to request a hearing timely?

FINDINGS OF FACT

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

1) On March 19 and April 9, 2017, Bill Newberry, PA-C restricted Employee from work. (Newman off-work notes, March 19 and April 9, 2017).

2) 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).

3) On August 17, 2017, Daniel Welborn, PA-C, examined Employee for "depression screening." The report states in the history section Employee, "was working in Alaska doing fish processing which ended in April 2017. Has not stopped hurting. Mostly on the left side, always there.

Doesn't radiate into the legs. Hasn't been working since then. Hasn't been lifting anything." There is no medical opinion in this report linking Employee's symptoms on this occasion with his work for Employer. (Welborn report, August 17, 2017).

4) On December 11, 2017, Roseanne Garrison, PA-C, examined Employee for upper back pain that he said had lasted for about eight months. Her report states, "Pt thinks pain started after working on the fishing boat in Alaska, constant repetitive motion working 16 hours a day from January through April." Her assessment included dorsalgia, chronic pain and soft tissue mass, but there is no causation opinion linking Employee's symptoms or diagnoses to his work for Employer. (Garrison report, December 11, 2017).

5) On May 15, 2018, the Division established a file in Employee's case as required by law. (Injury; Miscellaneous tabs, agency file, May 15, 2018).

6) On May 16, 2018, Employee called the 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]." (Phone Call tab, agency file, May 16, 2018).

7) 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." (Phone Call tab, agency file, September 26, 2018).

8) 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).

9) 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. 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. (Letter, September 26, 2018).

10) On February 7, 2019, Employee timely 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 attached a separation notice and listed the same address as in factual finding (1) above. (Claim for Workers' Compensation Benefits, October 16, 2018).

11) 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).

12) 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).

13) Employee provided no explanation for why he signed his two claims on October 16, 2018, but never filed them until February 7 and 8, 2019. (Employee; agency file).

14) 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).

15) To this point, Employee had filed no additional medical records with the Division since his 2017 injury. (Agency file).

16) 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**

> . . . .
>
> 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; bold in original).

17) 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).

18) 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. (Phone Call tab, agency file, March 12, 2019).

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

20) On March 12, 2019, Employee called the Division "to find out when his 2 year deadline is over." Staff "explained that 2 year deadline begins after post claim controversion." Staff further advised Employee the rule also applied to medical benefits and told him the "post-claim controversion date was 02/25/2019." (Phone Call tab, agency file March 12, 2019).

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

22) On March 27, 2019, both parties attended a prehearing conference. The Designee explained discovery and adjudication 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).

23) 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).

24) On April 30, 2019, the parties attended another conference. 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 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).

25) On May 6, 2019, Joseph Lynch, MD, saw Employee for an EME and diagnosed a mid-thoracic strain caused by the work injury. Employee said his condition had not changed for two years. If, as Employee stated, his thoracic magnetic resonance imaging (MRI) was normal, there would be no objective basis for further treatment. He opined Employee was medically stable and did not need 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).

26) Employee's agency file has no MRI report from prior to May 6, 2019. (Agency file).

27) On May 17, 2019, Employee called the Division with numerous questions; staff answered his questions, many of which concerned releases and his deposition. (Phone Call tab, agency file, May 17, 2019).

28) On May 22, 2019, Employee called the Division with questions about Dr. Lynch's EME report. Staff explained how he could obtain the report and explained the SIME process and how he could request one. (Phone Call tab, agency file, May 22, 2019).

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

30) On May 24, 2019, Employer emailed the Division requesting "a complete copy of the print out screen listing the party names and case numbers" in its possession concerning Employee "**per the attached release**" (emphasis in original). The attached release did not request a copy of Employee's case file, but rather requested "Other" and stated, "Please forward a complete case listing & copies upon request. Also any & all re: back." (Letter; State of Alaska Division of Workers' Compensation Request for Release of Information, May 29, 2019).

31) 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).

32) 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. Staff discussed the SIME process and, "Discussed upcoming 110(c) deadline on February 25, 2021"; staff would email him "110(c) info," an Affidavit of Readiness for Hearing (ARH) form and SIME forms and information. (Phone Call tab, agency file, February 9, 2021).

33) On February 9, 2021, staff emailed Employee twice and gave him Holloway's corrected mailing address. Staff 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 <u>or written notice you have not completed all discovery but still want a hearing by February 25, 2021</u>. 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. (Email tab, agency file, February 9, 2021; bold in original; underline added).

34) On February 23, 2021, Employee electronically filed a February 11, 2021 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). The petition has blocks one can check to request relief. On his February 11, 2021 petition, Employee checked the "SIME" block but 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 [sic] SIME, see attached notice and dispute." Employee also attached a completed 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).

35) Employee filed nothing with the Division between filing his February 11, 2021 petition on February 23, 2021, six days before his two-year period to request a hearing or request more time to request one expired on March 1, 2021, and the March 15, 2023 hearing giving rise to *Gonzales I*. He filed some documents post-hearings, discussed below. (Agency file).

36) 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).

37) 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 request a hearing or ask for more time to request one, had already passed. (Prehearing Conference Summary, April 7, 2021).

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

39) 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).

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

41) On May 12, 2021, Employee called the Division again to get a prehearing conference. Staff advised him there was a prehearing conference already set up and gave him the date, time and instructions on how he could attend. (Phone Call tab, agency file, May 12, 2021).

42) On May 21, 2021, Employee called the Division about discovery. Staff referred him to Holloway's office to address this issue. (Phone Call tab, agency file, May 21, 2021).

43) On June, 3, 2021, both parties 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).

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

45) 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).

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

47) On September 17, 2021, Employee called the Division and left a message; staff tried to call him back but could not connect. 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. (Phone Call tab, agency file, September 17, 2021).

48) 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. (Phone Call tab, agency file, September 21, 2021).

49) On October 13, 2021, parties attended a prehearing conference at which they 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).

50) On November 30, 2021, Employee had a full spine MRI. Findings included issues in the cervical spine, a possible mild strain in the paraspinal muscles in the thoracic spine at T3-T6 but no other significant abnormality, and mild issues with the lumbar spine. The MRI report includes no medical opinion linking any MRI findings to Employee's work with Employer or his work injury. (Montebello Advanced Imaging report, November 30, 2021).

51) 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).

52) 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." (Phone Call tab, agency file, January 6, 2022).

53) 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).

54) On February 17, 2022, Employee emailed Holloway and the Division, and stated he needed more time to complete his medical treatment. He suggested Holloway use his same email address as stated in factual finding (33) above, as his "phone number changes from time to time." (Email Event, agency file, February 17, 2022).

55) On March 15, 2022, the parties attended a prehearing conference to discuss 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).

56) 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).

57) On January 31, 2023, Employee failed to appear for the last prehearing conference held 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).

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

59) Employee's agency file contains no formal ARH, and no informal oral or written hearing request made or filed by Employee. (Agency file).

60) As of March 22, 2023, the Division had mailed 12 prehearing conference notices to Employee, all at his address of record. (Prehearing Conference Notice Served tabs, agency file, 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).

61) Employee's file contains no evidence the United States Postal Service (USPS) returned any mail that the Division had sent to Employee's address of record. (Agency file).

62) On March 23, 2023, Employer emailed the Division a file copy request stating, "**Please forward a complete copy of ICER information in your possession concerning [Employee], per the attached release**" (emphasis in original). The attached release again did not request a

complete copy of Employee's case file, but requested "Other" and stated, "Please forward a complete case listing & copies upon request. Also any & all re: back." (Letter; State of Alaska Division of Workers' Compensation Request for Release of Information, March 23, 2023).

63) Each prehearing conference summary the Division issued after Employee filed his February 11, 2021 petition for an SIME on February 23, 2021, included only his request for an SIME as an issue raised in that petition. (Prehearing Conference Summaries, April 7, 2021; May 6, 2021; June 3, 2021; July 22, 2021; September 14, 2021; October 13, 2021; January 1, 2022; February 3, 2022; March 16, 2022; January 31, 2023).

64) 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, until hearing when he testified he did not receive notice of several. (Agency file; Employee).

65) 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).

66) On March 15, 2023, a Board hearing panel heard Employer's December 5, 2022 petition to dismiss on the written record. (Hearing tab, agency file, March 15, 2023).

67) On March 22, 2023, *Gonzales I* issued. It determined Employee had to take some action to request a hearing or to preserve his right to request one by no later than March 1, 2021, or his claims would be denied under AS 23.30.110(c). *Gonzales I* found Employee to that point had never filed a formal or informal hearing request. Therefore, it found he failed to comply strictly with §110(c). *Gonzales I* found Employee's February 23, 2021 SIME request, unbeknownst to Division staff placing it in his electronic file, showed he timely asked for more time to request a hearing -- six days before the correct time limit for him to act expired. It found Division staff had given him an incorrect date, which was several days too early, and this may have been confusing. *Gonzales I* determined that because Employee had not checked a box on his February 11, 2021 petition seeking more time to request a hearing, Division staff did not recognize his extension request embedded elsewhere in his petition. Nonetheless, the Division scheduled several prehearing conferences thereafter, and while Employee appeared for at least two, the Designee did not discuss his request for more time, because he was unaware of it. *Gonzales I* found that when Employee failed to appear for a prehearing conference on January 31, 2023, the Designee set a March 15, 2023 written record hearing at Employer's request to address only its petition to dismiss.

Given these findings and the Board's analysis, *Gonzales I* declined to deny Employee's claims under §110(c) until Employee had an opportunity to be heard. It further found although Employee timely requested a time extension in his February 11, 2021 petition, the Division had no contact with him since the March 15, 2022 prehearing conference. *Gonzales I* found, "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." Since the Board had never ruled on his extension request, *Gonzales I* found "his extension request remains." Therefore, *Gonzales I* reopened the hearing record and ordered Employee to appear by whatever means at an oral hearing where he could be subject to cross-examination under oath, explain his situation, and respond to questions from Employer and the panel, and so Employer could present evidence of how it was prejudiced by Employee's action or inaction. It further warned Employee that if he "fails to attend the hearing, the panel will deny his petition and his claims." Division staff served *Gonzales I* on Employee and Holloway by email and certified mail. To expedite this matter to conclusion, *Gonzales I* offered the parties 12 dates for the next hearing ranging from April 4, 2023 through May 9, 2023, and gave them two days to check their calendars and respond. Issues identified in *Gonzales I* for the subsequent hearing included (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. *Gonzales I* directed the parties to file any hearing briefs at least five working days before the eventually scheduled hearing date and froze the documentary evidence for the next hearing to that "already in Employee's agency file as of March 15, 2023, and any testimony admitted at the hearing." (*Gonzales I*).

68) On March 23, 2023, Holloway emailed the Division with various objections to *Gonzales I's* request that he check his calendar for an available hearing date, but notified the Division:

> In order to comply with the exceptionally rushed order from the hearing panel reportedly representing the Alaska Workers' Compensation Board, which mandates the parties provide availability for an oral hearing in this case on less than 2 business days' notice via email to the designated hearing chair, the employer informs the designated hearing chair that the *only* two dates the employer is available for an oral hearing, of those listed on page 21 of the decision and order, our 4/27/23 or 5/9/23 (emphasis in original).

Employer provided no proof it served this on Employee. (Email tab, agency file, March 23, 2023).

69) On March 23, 2023, Staff called Employee at four phone numbers he used in the past, to advise him to check his email promptly. Staff was unable to connect with him or leave a message on any of these numbers. (Phone Call tab, agency file, March 23, 2023).

70) By March 28, 2023, Employee had not responded to the hearing dates offered in *Gonzales I*, so the Division set an April 27, 2023 hearing on the issues identified in *Gonzales I*. (Prehearings and Hearings; Hearing Notice Served tab, agency file, March 28, 2023).

71) On April 6, 2023, Employee called the Division and "wanted to know if he can still continue receiving benefits." Staff advised it could not confirm if he was eligible for benefits but told him to submit medical evidence on a medical summary form. Staff also advised Employee about the "2 year to file WCC [workers' compensation claim] from contro [controversion]," to which Employee responded he was controverted because he did not sign releases, "which he states he is not ready to sign." Employee updated his telephone number, and staff emailed Holloway the new number and sent Employee a medical summary form. (Communications; Phone Call tab, agency file, April 6, 2023).

72) On April 10, 2023, Employee emailed the Division, without proof of service on Holloway:

> Greetings,
>
> Just today, April 6, 2023, I was given by my medical provider my results of my MRI performed on my entire spine on November 30, 2021. I think the emergency COVID 19 pandemic had their system backed up preventing them from providing me with these results. Attached are 6 pages results showing my injury from working in Akutan Alaska.

Attached was the November 30, 2021 MRI report from Montebello Advanced Imaging. (Email tab, agency file, April 10, 2023).

73) On April 19, 2023, Employer reiterated arguments from its initial hearing brief and added that *Gonzales I* abused its power when it refused to close the record on March 15, 2023. It contended *Gonzales I* had no statutory or regulatory authority to convert the written record hearing into an oral hearing. Employer objected to *Gonzales I* and this decision relying on information contained only in the Division's electronic file, which it considered a "breathtaking violation of due process." It contended Employee's February 11, 2021 petition was not a request for more

time to request a hearing and was merely a request for an SIME. Employer contended Employee "abandoned" his February 11, 2021 petition because he (1) never corrected the prehearing conference summaries that characterized his petition only as one for an SIME, and (2) never pursued the petition by requesting a hearing on it even though he was instructed to, multiple times. It also contended Employee's SIME petition was untimely because he failed to file it within 60 days after he received medical reports, which he contended reflected a medical dispute. Employer contended Employee had yet to obtain a doctor's contrary opinion since Dr. Lynch's May 6, 2019 EME report. It contended merely asking for an SIME, absent a stipulation between the parties, did not toll §110(c), especially when Employee did not pursue his petition. Employer contended Employee "sat on his rights" for four years and had not actively pursued his claim. Moreover, it contended he missed half his prehearing conferences and refused to cooperate with discovery. It contended Employee has no valid excuse for not pursuing his claim. Employer contended Employee's lack of prosecution results in a "stale case," which prejudiced Employer with unnecessary costs continuing more than five years since the original injury. Employer contended the Board should grant no additional time, deny the SIME request and grant its petition to dismiss. (Supplemental Hearing Brief of Trident Seafoods Corporation, April 19, 2023).

74) On April 24, 2023, Employee called the Division asking how to file a petition for a protective order, stating "he just got his results for an MRI." Staff suggested Employee file this on a medical summary, and emailed him both a petition and the medical summary form. (Communications; Phone Call; Email tabs, agency file, April 24, 2023).

75) Employee's MRI report was neither filed with the Division nor served on Employer within 20 days before either the March 15 or April 27, 2023 hearings. (Agency file).

76) Employee filed no hearing brief for the April 27, 2023 hearing. (Agency file).

77) At hearing on April 27, 2023, Employee testified he is a high school graduate and attended college to study finance and banking. English is his only language. He said he had psychiatric issues including depression and anxiety, which he added made it difficult for him to focus. Nevertheless, Employee said since his work injury he held several jobs including one full-time position for about a year. Employee admitted he did not read *Gonzales I*; he did not read Holloway's brief because all it talked about was "dismissal." He thought he had until December 2023 to request a hearing on his claims and contended Division staff so advised him. When asked about his February 11, 2021 petition, Employee said he could not recall what he meant by

"extension," but he thought he asked for that because Employer controverted his claim, and his time was running out. When asked what he had done since February 23, 2021, to move his case toward a hearing, he said he had been reading self-help and health books, working on nutrition, staying healthy during the COVID-19 pandemic, and working for various employers. When asked to clarify what he had done to obtain evidence to move his claim forward, Employee said he had "just" gotten his MRI records from a provider a week prior. He explained that when he had his November 30, 2021 MRI, the radiologist said they would send him the results within two weeks. Employee admitted he did not receive the results and did nothing to follow-up with obtaining them because he speculated the MRI "didn't find anything." He said by happenstance when he was at his primary care doctor's office, the MRI report was discovered in his file, and he got a copy from his physician in April 2023. Employee said a Division technician emailed him some forms which he completed, but did not file because he was too busy with his other activities, like obtaining medical care and feeding himself. He conceded he had no medical record from a physician supporting his claim. When asked why he needed more time to request a hearing, Employee said so he could "heal" from all his spinal issues; he later added that he needed more time for discovery, wanted an attorney and thought he had until December 2023 to ask for a hearing. Employee admitted he became aware there was a medical dispute when he filed his February 8, 2019 medical summary. When asked why it took him over two years to file an SIME petition, Employee stated he was not aware he could do it, was unaware of his rights and privileges, and was angry, frustrated and anxious. He admitted receiving the Workers' Compensation & You pamphlet and "got a lot of help" from Division technicians. Employee said he did not understand forms and legal language. He testified he did not want to participate in discovery because he did not trust Holloway. When asked why he missed 50 percent of his prehearing conferences, Employee said because he often lost his phone, or he was unaware there was a prehearing conference scheduled. When asked directly, Employee agreed that to date he had not asked for a hearing on his claims. In his defense, Employee said he did not "go to law school." Employee stated Division technicians would interpret the law for him, but he still did not understand what to do. He stated he filed many medical records in 2017 and 2018. Employee has seen his physician "countless" times and said it is the physician's duty to bring the MRI report to his attention, though he admitted never asking anyone for it. His recollection on many issues was "a little blurry" in his memory because, as Employee stated, "it's been so long." (Employee).

78) At hearing, Employer contended Employee's testimony is not credible. It asked the Board to not "indulge procrastination." Employer added that if Employee lacked understanding, it was because he refused to read anything that would have provided understanding. Addressing prejudice, Employer contended it has wasted considerable time and financial resources trying to obtain discovery from Employee, was required to continue with delayed litigation, and its premiums were affected by an open claim from a 2017 injury. It noted Employee was able to work at several jobs and could have progressed his claim to hearing had he wanted to. Employer objected to the panel considering notes and comments in the agency file between Employee and Division technicians, which it referred to as his "BFFs" and contended it requested complete copies of Employee's agency file but was not privy to the referenced communications. (Record).

79) Post-hearing on April 28, 2023, Employee untimely filed and served the November 30, 2021 MRI report he discussed at hearing. (Medical Summary, April 28, 2023).

80) Post-hearing on May 1, 2023, Employee untimely filed, and on April 28, 2023, served additional medical records from 2021 and 2023. (Medical Summary, April 28, 2023).

81) Employee has explicitly and implicitly resisted Employer's discovery in this case since 2019, requiring Employer to file numerous petitions to compel or to dismiss. (Petitions, April 4, 2019; May 11, 2021; May 11, 2021 (second one); December 1, 2021; and February 11, 2022).

82) The Division's ARH, Form 07-6107, contains instructions including, "Before you complete and submit this form, read carefully. . . ." It further states, "Do not submit this form unless you are fully prepared for a hearing." The form includes sections for general information to identify the case, and serves two primary functions: (1) In block 12, a party states, "Having first been duly sworn, I state that I have completed necessary discovery, obtained necessary evidence, and am fully prepared for a hearing on the issues set forth in the," and includes spaces to identify the claim or petition on which the person swears they are ready for a hearing; and (2) In block 13, a party asks the Division to schedule an "oral," "record," or "record with briefs" hearing. The form also includes an area for a Notary Public to verify the person's affidavit. (ARH, Form 07-6017).

83) Employee's agency file shows he has never informally or formally, orally or in writing, "requested a hearing" on his claims or petition. Similarly, Employee has never filed an ARH on any claim or petition. (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
>
> (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. . . .
> . . . .
>
> (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).

In *Richard v. Fireman's Fund*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court (Court) said:

> We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316, 319-21 (Alaska 2009), the Court addressed this same issue and said:

> A central issue inherent to Bohlmann's appeal is the extent to which the board must inform a *pro se* claimant of the steps he must follow to preserve his claim. . . .
>
> In *Richard* . . . we held that the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation (footnote omitted). We have not considered the extent of the board's duty to advise claimants. . . .
> . . . .
>
> Here, the board at a minimum should have informed Bohlmann how to preserve his claim. . . . Its failure to recognize that it had to do so in this case was an abuse of discretion (footnote omitted). . . .

> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

The Alaska Workers' Compensation Appeals Commission (Commission) in *Bah v. Trident Seafoods Corp.,* AWCAC Dec. No. 073 (February 27, 2008) addressed the Board's authority to order an SIME. *Bah* stated in *dicta*, that before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition. *Bah* said when deciding whether to order an SIME, the Board considers three criteria, though the statute does not require it:

1) Is there a medical dispute between Employee's physician and an EME?
2) Is the dispute significant? and
3) Will an SIME physician's opinion assist the Board in resolving the disputes? (*Id.*).

> **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. . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. . . . 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. . . .

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).

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*. *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 so speed and efficiency goals in Board proceedings are met. But the claimant bears the burden to establish with substantial evidence a legal excuse from the §110(c) statutory deadline. *Providence Health System v. Hessel*, AWCAC Dec. No. 131 (March 24, 2010). 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).

The Court's discussion in *Kim v. Alyeska Seafoods, Inc*., 197 P.3d 193, 196-99 (Alaska 2008) said:

> The first and last sentences of AS 23.30.110(c) govern the manner by which hearings are requested before the Board and the consequences of failure to prosecute a claim:
>
> Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing.... 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 (citation omitted)

The first sentence of the subsection sets out prerequisites for scheduling a hearing: a party must submit a request for hearing with an affidavit swearing that the party is prepared for a hearing (citation omitted). The last sentence of the subsection specifies when a claim is denied for failure to prosecute: if "the employee does not request a hearing within two years" of controversion, "the claim is denied" (citation omitted). The Commission recognized that "[t]he lack of reference to the affidavit in the last sentence of section 110(c), coupled with the use of the verb 'request,' hints that filing a hearing request without an affidavit will toll the time-bar." The Commission nonetheless held that a Board regulation requiring an affidavit to request a hearing was a reasonable interpretation of subsection .110(c) and that the Board could reasonably require an affidavit to toll the time-bar of subsection .110(c) (footnote omitted). But because a statutory dismissal results from failing to *request* a hearing, rather than from failing to *schedule* one, it was error to conclude that an affidavit of readiness was required to request a hearing and toll the time-bar (italics in original). We conclude that strict compliance with the affidavit requirement is unnecessary because subsection .110(c) is directory, not mandatory.

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" (citation omitted). 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" (citation omitted). . . .

We conclude that the language of subsection .110(c) satisfies these criteria and hold its provisions are directory. First, the language of subsection .110(c) is affirmative, not prohibitive (footnote omitted). The first sentence of the statute directs a party to file a request for a hearing with an affidavit of readiness to schedule a hearing, but it does not say what a party or the Board should not do. The last sentence of the subsection also gives an affirmative directive, rather than a prohibition, simply stating that a claim is denied if the employee does not request a hearing within two years following a notice of controversion.

Second, the legislature added the affidavit requirement to create procedural guidelines for the orderly conduct of public business. Although the last sentence of subsection .110(c) imposes a penalty on a claimant for failing to meet the deadline to request a hearing, legislative history supports the conclusion that the primary purpose of requiring an affidavit was to create guidelines for the orderly conduct of public business (footnote omitted). The House Judiciary Committee's sectional analysis of the legislation reenacting subsection .110(c) to include an affidavit requirement stated that this subsection was meant to address delays in getting disputed cases before the Board and "the [B]oard's problems in timely docketing cases for hearing" (footnote omitted).

Finally, this case aptly demonstrates the serious consequences of a conclusion that the affidavit requirement is a mandatory component of a request for a future hearing

-- a party who wants to request a future hearing, but is for legitimate reasons unable to truthfully state readiness for an immediate hearing, faces denial of workers' compensation benefits.

Alyeska argues that construing the statute to toll the time-bar when a hearing request is filed without an affidavit of readiness will make subsection .110(c) ineffective by not requiring claimants to prosecute their claims in a timely manner. Alyeska suggests a claimant could request a hearing to toll the time-bar and then simply never schedule one, thus rendering the statute meaningless. The Commission similarly expressed concern that construing the statute in this manner would undermine the statutory purpose of requiring claimants to prosecute their claims promptly.

Yet the Commission has noted that "the [B]oard is not without power to excuse failure to file a request for hearing on time when the evidence supports application of a recognized form of equitable relief" (citation omitted). In *Tonoian v. Pinkerton Security,* the Commission suggested several "legal reasons" why delay by a pro se litigant might be excused (citation omitted). And in *Omar v. Unisea, Inc.,* the Commission remanded the case to the Board to consider whether, among other things, the "circumstances as a whole constitute compliance with the requirements of [AS] 23.30.110(c) sufficient to excuse any failures . . . to comply with the statute" (citation omitted). From these decisions, it appears that the Commission and the Board already exercise some discretion and do not always strictly apply the statutory requirements. This approach is consistent with the notion that a statute of limitations defense is disfavored (citation omitted).

In holding that subsection .110(c) is directory, we do not suggest that a claimant can simply ignore the statutory deadline and fail to file anything (footnote omitted). A determination that a statute is directory instead permits substantial compliance with statutory requirements, rather than strict compliance (footnote omitted). We construe subsection .110(c) to require filing a request for hearing within two years of the date of the employer's controversion of a claim. If within that two-year period the claimant is unable to file a truthful affidavit stating that he or she actually is ready for an immediate hearing, as was the case here, the claimant must inform the Board of the reasons for the inability to do so and request additional time to prepare for the hearing. Filing the hearing request and the request for additional time to prepare for the hearing constitutes substantial compliance and tolls the time-bar until the Board decides whether to give the claimant more time to pursue the claim (footnote omitted). If the Board agrees to give the claimant more time, it must specify the amount of time granted to the claimant. If the Board denies the request for more time, the two-year time limit begins to run again, and the claimant has only the remainder of that time period to file the paperwork necessary to request an immediate hearing (footnote omitted).

We are troubled by Alyeska's assertion at oral argument that it is not uncommon for a party to sign an affidavit of readiness despite not actually being ready and that

> the solution for a claimant in Kim's predicament is to file an affidavit of readiness for hearing and then request a continuance of the scheduled hearing. The lack of a Board regulation to deal with exceptional circumstances, and the myriad reasons why a party might not be able to swear truthfully that the claimant is prepared for an immediate hearing despite conducting discovery and obtaining evidence, make strict adherence to an affidavit requirement problematic. A party or attorney should not be in a position of having to choose between perjury and relinquishing a valid claim.
>
> It is not clear to us that a method the Board has apparently used to resolve this tension -- permitting the filing of an affidavit of readiness on any issue no matter how small or inconsequential (citation omitted) -- solves the problem a party or attorney may face. Nor is it clear when the Board permits less orthodox pleadings to toll the subsection .110(c) time-bar. For example, the Board decided in one case that an affidavit of readiness for hearing on a request for extension of time for a hearing was sufficient to toll the time-bar of subsection .110(c) permanently (citation omitted). Although Kim's request was titled differently, he too requested an extension of time for a hearing. The Board never ruled on the merits of Kim's request, presumably because he did not file an affidavit of readiness with the motion for continuance (footnote omitted). If so, this seems to place form over substance (especially when the motion was discussed at the pre-hearing conference) (footnote omitted).
>
> 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.

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.

> **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. . . .

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the Board had used its ICERS database to gather information related to an attorney's experience in other cases to judge his eligibility for an attorney fee award in the case before it. The Court determined the Board's use of "extra-record information" without providing parties an opportunity to see and respond to it before the Board made its decision violated due process.

> **8 AAC 45.032. Files.** (a) Upon receiving written notice of an injury, the division will
>
> (1) establish an injury number;
> (2) set up a case file in a format prescribed by the director, using the injury number;
> (3) notify the employee or beneficiary, the employer, and the insurer in writing in a format prescribed by the director of the injury number;
> (4) put the written notice of the injury in the case file together with documents or anything relating to the employee's injury that is filed with the division or board; and
> (5) use the injury number as the claim number if a claim is filed. . . .

> **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."

> **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. . . .

8 AAC 45.070. Hearings. . . .

(b) Except as provided in (1)(A) of this subsection and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.

(1) A hearing is requested by using the following procedures:

. . . .

(B) . . . If the board determines additional evidence or written arguments are needed to decide a claim or petition, the board will schedule an in-person hearing or will direct the parties to file additional evidence or arguments.

. . . .

(3) If the board or designee determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing, the board or designee will give notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e).

. . . .

(j) If the hearing is not completed on the scheduled hearing date and the board determines that good cause exists to continue the hearing for further evidence, legal memoranda, or oral arguments, the board will set a date for the completion of the hearing.

8 AAC 45.092. Second independent medical evaluation. . . .

(g) If there exists a medical dispute under AS 23.30.095(k),

. . . .

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

> **8 AAC 45.110. Record of proceedings.** (a) Evidence, exhibits, or other things received in evidence at a hearing or otherwise placed in the record by board order and any thing filed in the case file established in accordance with 8 AAC 45.032 is the written record at a hearing before the board. A person may see or get a copy of the written record in accordance with this subsection and after completing and giving the division a written request, providing identification, and paying the fee, if required under 8 AAC 45.030.
>
> **8 AAC 45.120. Evidence**. . . .
>
> (f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. . . .

ANALYSIS

1) Did *Gonzales I* properly schedule an oral hearing?

As a preliminary matter, Employer objected to the April 27, 2023 hearing on several grounds:

(a) Did Gonzales I and this decision properly rely on Employee's agency file?

Employer contended *Gonzales I* violated Employer's rights to due process, and contends the panel continues to do so in this decision, by relying on notes from Employee's agency file summarizing contacts between Employee and the Division. Employer implied, but did not expressly contend, that this amounts to the panel relying on "extra-record information" without prior notice. *Rusch*. The fact-finders in *Rusch* used the Division's ICERS database to search for an attorney's name in other cases where he represented an injured worker in those cases, to use as evidence of his experience justifying his attorney fee award in *Rusch*, without giving him an opportunity to review and respond to the information in that database. *Rusch* said this violated due process. The instant case is distinguishable from *Rusch*, for the following reasons:

The Division is required to establish an ICERS file for each injury. 8 AAC 45.032(a). The Division established a file in Employee's case. *Rogers & Babler*. "Any thing filed in the case file established in accordance with 8 AAC 45.032 is the written record at a hearing. . . ." 8 AAC 45.110(a). Division staff put emails, letters and summaries of conversations between Employee

and staff in his file, as it did for communications between Holloway's office and the Division. Therefore, by definition, such communications are not "extra-record information," because they are all in Employee's agency file. There is no evidence or suggestion the fact-finders in the instant case looked outside Employee's ICERS file for evidence upon which they relied in this matter.

Further, the Division "owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law." *Richard*. Reiterating that premise, *Bohlmann* stated, "Here, the board at a minimum should have informed Bohlmann how to preserve his claim. . . . Its failure to recognize that it had to do so in this case was an abuse of discretion." Employee over the years called the Division for procedural advice on how to pursue and preserve his claim. Division technicians preserved their advice in summary fashion in the "Communications" tab in Employee's agency file. This did not constitute *ex parte* or otherwise improper communication because Division technicians are not decision-makers and were giving Employee procedural, not strategic advice. By doing this, the Division satisfied its duty to Employee as a self-represented litigant. *Richard*; *Bohlmann*.

A party to a claim may obtain a copy of the agency file after completing the Division's request form and paying copying fees. 8 AAC 45.110(a). Employer submitted file copy requests on May 24, 2019, which the Division completed on June 26, 2019, and again on March 23, 2023, which the Division accomplished on March 29, 2023. Contrary to its assertions at hearing, Employer did not request a complete copy of Employee's agency file with either request. Both requests were contingent upon the "attached release," which limited the material Employer requested. If Employer did not receive Employee's complete agency file, it was only because it did not ask for it, or its requests were contradictory or unclear. For all the above reasons, *Gonzales I* and the instant decision appropriately relied on communications between Employee and the Division.

(b) Did Gonzales I properly convert the written record hearing to an oral hearing?

Employer contends *Gonzales I* had no authority to convert the March 15, 2023 written record hearing into an oral hearing on April 27, 2023. Employer is incorrect. The legislature granted authority for this panel to make an investigation or inquiry or conduct its hearing "in the manner

by which it may best ascertain the rights of the parties." AS 23.30.135(a). Further, as *Gonzales I* noted, this case is unusual because Employee did not check the box on his February 11, 2021 petition filed on February 23, 2021, which would have clearly indicated his request for an extension of time under §110(c), and Division staff did not notice his otherwise obvious request for an extension included in and attached to his petition. The oversights by Employee and Division staff resulted in his extension request lying fallow and undecided. Had *Gonzales I* denied Employee's claims because he failed to check a box on a petition form, while at the same time attaching an express request for an extension of time, denial would have epitomized "form over substance," and probably would have resulted in a swift reversal, because Employee indisputably requested his extension before the two-year deadline expired. *Kim*. Moreover, his SIME petition alone constituted "some action" indicating he needed more time. *Narcisse*.

Employer contended *Gonzales I* should not have scheduled a second hearing because Employee never filed an ARH or otherwise requested a hearing on his petitions or claims. Employer is incorrect. *Gonzales I* determined "additional evidence or written arguments are needed to decide a claim or petition," so it could "schedule an in-person hearing" and "direct the parties to file additional evidence or arguments"; it did so. 8 AAC 45.070(b)(1)(B). Moreover, *Gonzales I* determined "a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing," and gave the parties "notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e)." 8 AAC 45.070(b)(3).

Employer also contended *Gonzales I* violated its due process rights by only giving it two business days' to advise the Division which, of the 12 future hearing dates *Gonzales I* provided, Employer was available to complete this hearing. Employer is incorrect. *Gonzales I* proceeded in this fashion to expedite this matter since Employer was understandably anxious to resolve this case, and to accord Employee due process. AS 23.30.001(1), (4). Its objection to the way *Gonzales I* obtained the second hearing date is perplexing, since surely Holloway could check his calendar to see if he was available on the 12 dates provided, within two business days. Had he not been available, Holloway could have so stated, and the Division would have provided later, alternate dates. Further, *Gonzales I* had express authority for "good cause" to continue the first hearing for "further evidence, legal memoranda, or oral arguments" and to "set a date for the completion of

the hearing." 8 AAC 45.070(j). *Gonzales I* expressly delineated the issues for the second hearing -- there were no secrets. On March 28, 2023, the Division noticed the parties for the subsequent April 27, 2023 hearing. The parties had far more than the required 10-days' notice for the second hearing -- no rights were violated. AS 23.30.110(c). No matter what term is used, *Gonzales I* properly continued, converted, or reopened the record and properly scheduled the second hearing to promptly resolve this case. AS 23.30.001(1); AS 23.30.135(a).

(c) Did Gonzales I properly add issues to the hearing?

Gonzales I did not make up the additional issues for hearing; Employee raised them in his prior pleadings. His petition for an SIME and for an extension are intertwined with Employer's petition to dismiss under §110(c). *Narcisse*. To ensure quickness, efficiency, and fairness at a reasonable cost to Employer, to ensure all parties' due process, and to make this process as summary and simple as possible, it makes sense to hear them together. AS 23.30.001(1), (4); AS 23.30.005(h).

2) Is Employee entitled to more than six days to prepare for and request a hearing?

At hearing, Employee said he graduated from high school and pursued some college, including banking and finance courses. English is his only language. As *Gonzales I* noted, Employee has filed well-written, typed letters explaining his situation. Though he stated he had psychiatric issues including anxiety and depression and said this interferes with his focus, the record shows Employee contacted the Division to find out when he needed to take action to protect his claims. There is no evidence he was institutionalized. He followed advice Division technicians gave him, although he did not properly complete the February 11, 2021 petition. There is no medical evidence suggesting Employee has a mental health condition sufficient to prevent him from following instructions and timely pursuing his claim. Nothing in the record suggests Employee suffers from mental incapacity or incompetence that would prevent him from timely moving forward with his case.

Moreover, there is no estoppel against the Division because even though it gave him an incorrect date by which to take action to preserve his claim, Employee timely filed his February 11, 2021 petition with six days left to do so. *Tonoian*; *Bohlmann*. Further, his testimony that he thought he had until December 2023 to ask for a hearing is not credible, and is irrelevant, because the evidence

shows he understood Employer controverted his case in December 2021 because he previously failed to sign and return discovery releases. AS 23.30.122; *Smith*. That issue has nothing to do with the earlier controversion upon which Employer relies for its petition to dismiss his claims, and as stated in *Gonzales I* and above, Employee timely requested more time to request a hearing before the relevant deadline had passed.

Employee admitted he did not read *Gonzales I*. It is likely he failed to read prehearing conference summaries as well; he failed to appear for half the prehearing conferences. He testified he did not attend some prehearings because he never got the notices. Employee's testimony is not credible because his mailing address has remained consistent throughout this case and the USPS has not returned any mail sent to him at that address. Moreover, Employee never stated prior to hearing that he did not receive notice of prehearing conferences. AS 23.30.122; *Smith*. The Division properly served notices of all prehearing conferences on Employee at his address of record, and he is presumed to have received them. 8 AAC 45.060(b); *Dandino*.

Employee admitted he did not read Employer's briefs. At one point, 21 months passed with no contact between him and the Division. Employee has the duty to timely prosecute his claim once Employer controverted it. *Jonathan*. He has not "actively pursued" his claim and has barely even "generally" pursued it. *Hessel*. There is one notable example; Employee had a whole-spine MRI on November 30, 2021, and stated the facility told him it would send him the results within two weeks. Employee never received them and never called the facility to inquire or asked his doctor for a copy of the report. By happenstance, in early April 2023, while at a medical appointment, which he attended "countless" times, Employee learned of the November 30, 2021 MRI report in his file. Then, and only then, did Employee obtain a copy, which he filed in his case but did not put on a medical summary or serve on Employer prior to hearing. He blamed his medical provider for not bringing the MRI report to his attention. Further, though this decision cannot rely on the report because it was not timely filed, the MRI report contains no medical opinion linking its findings to Employee's work with Employer. 8 AAC 45.120(f).

When specifically asked what he had been doing since he filed his petition on February 23, 2021 to move his case forward, Employee was nonresponsive and said he had been reading self-help

and health books, watching his nutrition, trying to avoid COVID-19 and had held several jobs. When a clarification question asked what he had been doing since February 23, 2021, to obtain and provide evidence to move his case forward, Employee referenced the MRI report and otherwise could think of nothing else he had done because he was "too busy" doing other things like receiving medical care, seeing his psychiatrist, and feeding himself. When asked why he thought he needed more time to request a hearing, Employee said he needed to "heal" from all his spinal issues; he later added that he wanted an attorney and needed time for more discovery.

His injury occurred on March 12, 2017. Employee has done nothing to move his case forward since his injury and since he filed his February 11, 2021 petition requesting an extension of time on February 23, 2021. Employee did not file an injury report until May 3, 2017; he had two months during that time to obtain medical evidence. He frequently contacted the Division to find out how much time he had to file a claim; Employee then had nearly two years from March 12, 2017 until February 7, 2019, when he first filed his claim to obtain evidence supporting it. Employee filed one medical summary containing 11 pages in February 2019, and filed no additional medical records before the hearing. Medical summaries he filed after the April 27, 2023 hearing cannot be considered for this decision because they were not timely filed. Even if considered, the medical records thereon similarly provide no causation opinion supporting his claims. 8 AAC 45.120(f).

On February 25, 2019, Employer controverted Employee's claim. Adding three days to the two-year time limit, because Employer served the controversion on Employee by mail, he had until March 1, 2021 to request a hearing. AS 23.30.110(c); 8 AAC 45.060(b); 8 AAC 45.063(a). Effective March 1, 2021, Employee already had nearly four years since his injury to obtain evidence and prepare for hearing. On February 23, 2021, with six days left in his two-year deadline, he timely filed his February 11, 2021 petition requesting an SIME and a time extension to complete discovery. In other words, he did something to salvage his case. *Kim*. Unfortunately, since February 23, 2021, he has done nothing to move his case any closer to a hearing and only obtained an MRI report by chance when his provider mentioned it at an April 2023 appointment. Therefore, there is no reason why Employee is entitled to additional time to prepare for and request a hearing; he has failed to present substantial evidence supporting his request and his request for additional time will be denied. *Saxton*; *Kim*.

3) Should this decision order an SIME?

Employee's February 11, 2021 petition also requested an SIME; that too was filed on February 23, 2021, prior to his two-year §110(c) deadline expiring. AS 23.30.095(k); 8 AAC 092(g)(2). He completed an SIME form and on it listed PA-C Garrison as his physician and compared her opinions from December 11, 2017 through June 29, 2018, to EME Dr. Lynch's May 6, 2019 report. Employee listed "treatment" and "medical stability" as the issues in dispute for the SIME. On an attachment, he contended PA-C Garrison's opinions that he needed more medical care did not agree with Dr. Lynch's opinion that he was medically stable. But her records did not offer a causation opinion for the need for additional medical care.

PA-C Newberry restricted Employee from work on March 19, 2017 and again on April 9, 2017. That was two years before Dr. Lynch gave his opinions stating Employee was medically stable and needed no further medical care. While two early medical reports suggest Employee "thinks" his pain started after working on a fishing boat in Alaska, there is no medical report in his agency file (including those he filed post-hearing, which this decision cannot consider) making a causal connection for any ongoing need for medical treatment, disability or any other benefits to which he could be entitled under the Act. No medical evidence supports his request for an SIME.

Employer correctly contends Employee admitted he thought there was an alleged medical dispute in 2018, and failed to request an SIME until 2021, far past than the 60 days he had to request one before waiving his right to do so. 8 AAC 45.092(g)(2). There is no significant medical dispute; Employee waived his right to request an SIME by not timely requesting one; an SIME at this point is not likely to assist the fact-finders in resolving this case because he worked for numerous employers since his work injury; and Employee's request for an SIME will be denied. *Bah*.

4) Should Employee's claims be denied for failure to request a hearing timely?

Gonzales I and this decision found Employee timely requested more time to request a hearing in his February 11, 2021 petition. The problem is, the instant decision also found he has done nothing to move his case forward since he filed his petition and has already had more than two years' extension to gather evidence, complete his discovery and request and schedule a hearing. It is

undisputed Employee has never orally or in writing requested a hearing; similarly, the record is clear he has never filed an ARH. He clearly testified under oath at the April 27, 2023 hearing that he is not ready for hearing.

Nevertheless, Employer's petition to dismiss Employee's claims for failure to timely request a hearing remains to be decided. But for Employee's last-minute petition for more time, Employer's petition to dismiss would have been a proverbial "slam-dunk." But the fact remains Employee timely requested more time to request a hearing. *Kim*. Here, the analysis becomes murky because a careful reading of *Kim* suggests that in 2008, the Alaska Supreme Court separated the concept of filing "a request for a hearing" from the concept of filing "an affidavit of readiness to schedule a hearing." In other words, a person may want a hearing but may not be ready to sign an affidavit to schedule one immediately. *Kim*.

Kim noted AS 23.30.110(c) has separate requirements in the first and last lines. The first line states, "Before a hearing is *scheduled*, the party seeking a hearing *shall file a request for hearing* <u>together with</u> *an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing*" (emphasis added). By contrast, the last line states, "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" (emphasis added). *Kim* stated an ARH is not required to "request a hearing and toll the time-bar." In other words, if a person wants a hearing and is ready, they may file two requests concurrently: (1) a request for hearing, and (2) an affidavit stating they are ready for a hearing to be scheduled immediately. If on the other hand a party wants a hearing but is not able to truthfully sign an affidavit stating they are ready for an immediately scheduled one, all they must do is file a "request for hearing" to toll §110(c)'s running. *Kim* further stated:

> We construe subsection .110(c) to *require filing a request for hearing within two years of the date of the employer's controversion of a claim.* If within that two-year period the claimant is unable to file a truthful affidavit stating that he or she actually is ready for an immediate hearing, as was the case here, *the claimant must inform the board of the reasons for the inability to do so and request additional time to prepare for the hearing. Filing the hearing request* <u>and</u> *the request for additional time to prepare for the hearing constitutes substantial compliance and tolls the time-bar* until the board decides whether to give the claimant more time to

> pursue the claim (footnote omitted). If the board agrees to give the claimant more time, it must specify the amount of time granted to the claimant. If the board denies the request for more time, the two-year time limit begins to run again, and the claimant has only the remainder of that time period to file the paperwork necessary to request an immediate hearing (footnote omitted) (emphasis added).

The agency file and the record show Employee has never uttered the words "I want a hearing" or their equivalent nor has he written them down or stated them at a prehearing conference, and had them recorded in a prehearing conference summary. Taking *Kim's* comments in context, and applying them strictly to this case would result in Employee's claims being denied under §110(c), as construed in *Kim*, because to date he has never filed, orally or in writing, "a request for hearing within two years of the date of the employer's controversion of a claim." All he requested was an extension of time, which is only one-half of what *Kim* said he had to do.

However, *Kim* read in context raises an additional problem that neither the Division nor Employee, to this point, recognized. The Division's ARH form gives instructions including, "Do not submit this form unless you are fully prepared for a hearing." The form serves two functions: (1) In block 12, a party states, "Having first been duly sworn, I state that I have completed necessary discovery, obtained necessary evidence, and am fully prepared for a hearing on the issues set forth in. . . ," and includes spaces to identify the claim or petition on which the person swears they are ready for hearing. (2) In block 13, a party asks the Division to schedule hearing. The form also includes an area for a Notary Public to verify the person's affidavit. In theory, a party could complete part of the ARH to just request a hearing but not complete the affidavit part stating he is ready for one to be scheduled immediately. This, combined with a petition requesting an extension of time to file an affidavit to schedule the hearing would suffice under *Kim* to toll the running of §110(c). Unfortunately, the Division will "return an affidavit of readiness for hearing" if among other things, "the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing." 8 AAC 45.070(b). The Division does not require a party to use the ARH form, but it is available for use and is what the Division suggested Employee use in this case, though he never filed it or any other hearing request.

This case highlights a flaw in the Division's regulations and its ARH form. The panel suggests the Division revise its regulations as *Kim* suggested. This case also points to the need for

clarification of *Kim*, which construes §110(c) in a way that causes confusion in the instant case. The panel welcomes and invites clarification of *Kim* from the Commission or the Court.

Kim noted the lack of an administrative regulation to deal with "exceptional circumstances," and the many reasons why a party might not be able to swear truthfully that he is ready for an immediate hearing. *Kim* aptly noted, "A party or attorney should not be in a position of having to choose between perjury and relinquishing a valid claim." Finally, *Kim* directed:

> On remand, the Board should fully consider the merits of [the employees] request for additional time and any resulting prejudice to [the employer]. If in its broad discretion the Board determines that [the employee's] reasons for requesting additional time have insufficient merit, or that [the employer] would be unduly prejudiced, the Board can set a hearing of its own accord or require [the employee] to file an affidavit of readiness within two days -- the amount of time remaining before the original two-year period expired.

The instant decision fully considered Employee's request for additional time and any resulting prejudice to Employer. It determined he is not entitled to more than six days to request a hearing because he has done nothing to prepare for one in at least four years -- his request has insufficient merit. *Saxton*; *Kim*. This decision also found Employer is wasting its time and money waiting for Employee to do something to move his case forward and its premiums are suffering from an open 2017 injury claim -- Employer is unduly prejudiced. *Kim*.

However, *Kim's* remedies when applied to this case are troubling. Knowing that Employee is not ready for a hearing because he has no evidence, it is unclear why this decision should "set a hearing on its own accord" now. *Kim*. While AS 23.30.001(1), AS 23.30.005(h); AS 23.30.135(a), 8 AAC 45.070(b)(1)(B) and 8 AAC 45.070(b)(3) allow this decision to set a hearing, under this case's facts, this panel sees no reason to as Employer put it, "indulge procrastination" and take upon itself Employee's burden to prosecute his claim timely. *Hessel*. Were this decision to schedule a hearing under these facts, Employer would have to expend additional money bringing its EME physician up to speed on recently provided medical records and would require additional, costly preparation for hearing in a case where Employee has made no preparation for years.

The second remedy *Kim* provided, applied to this case, would be to require Employee "to file an affidavit of readiness" within six days -- "the amount of time remaining before the original two-year period expired." *Kim*. That remedy is equally troubling because Employee testified on April 27, 2023, he was not ready for hearing for various reasons. This decision is not inclined to require Employee to commit "perjury" by ordering him to file an ARH simply to comply with §110(c) as construed by *Kim*. To this panel's way of thinking, the only way to reconcile *Kim* with the facts in this case would be to interpret *Kim's* second remedy to mean that Employee has six days remaining to *both* obtain necessary evidence *and* complete an ARH swearing he is ready for hearing and asking the Division to schedule a hearing on his claims.

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*. In short, because of the Division's and Employee's oversights described in *Gonzales I*, and the uncertainty about how *Kim's* remedies apply to this case, Employee will be given six days from the date this decision is issued and emailed to him, to obtain any necessary discovery and file a completed ARH. *Kim*. If Employee follows these orders, the Designee will be directed to schedule an oral hearing on Employee's claims at the earliest possible hearing date that Employer is available. If Employee fails to follow these orders, the panel will dismiss his current claims. *Tipton*; *Wagner*; *Egemo*; *Bailey*. Division staff will be directed to serve this decision 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).

CONCLUSIONS OF LAW

1) *Gonzales I* properly scheduled an oral hearing.
   (a) *Gonzales I* and this decision properly relied on Employee's agency file.
   (b) *Gonzales I* properly converted the written record hearing to an oral hearing.
   (c) *Gonzales I* properly added issues to the hearing.
2) Employee is not entitled to more than six days to request a hearing.
3) This decision will not order an SIME.
4) Employee's claims will not be denied for failure to request a hearing timely.

ORDER

1) Employer's December 5, 2022 petition to dismiss under §110(c) will be held in abeyance in accordance with this decision.

2) Employee has six calendar days, until no later than **May 10, 2023**, to complete all necessary discovery, file it with the Division and serve it on Holloway, and to fully complete, file with the Division and serve on Holloway an ARH swearing Employee is fully prepared for hearing, and requesting a hearing be scheduled on his claims.

3) If Employee follows these orders, the Designee will be directed to schedule an oral hearing on Employee's claims, with no less than 10 days' notice, at the earliest possible hearing date Employer is available.

4) If Employee fails to follow these orders, the panel will dismiss his current claims.

5) Division staff shall serve this decision on the parties by certified mail, and to the parties' email addresses of record.

Dated in Anchorage, Alaska on May 4, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Randy Beltz, 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, and by email on May 4, 2023.

/s/
Kimberly Weaver, Office Assistant