ALASKA WORKERS' COMPENSATION BOARD

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

FRANK MONTOYA, Employee, Respondent, v. FASTENERS & FIRE EQUIPMENT, Employer, and REPUBLIC INDEMNITY CO. OF AMERICA (RIG), Insurer, Petitioners.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202003740 AWCB Decision No. 23-0025 Filed with AWCB Anchorage, Alaska on May 16, 2023

Fasteners & Fire Equipment's (Employer) August 12, 2022 petition to dismiss was heard on April 26, 2023, in Anchorage, Alaska, a date selected on February 1, 2023. A February 1, 2023 hearing request gave rise to this hearing. Frank Montoya (Employee) appeared, testified and represented himself. Attorney Michelle Meshke appeared and represented Employer and its insurer. The record closed at the hearing's conclusion on April 26, 2023.

ISSUE

Employer contends Employee filed a claim, Employer controverted it and Employee failed to file a hearing request or otherwise request a hearing within two years. It contends Employee's initial claim and all claims that relate back to it should be denied under AS 23.30.110(c).

Employee contends he followed all advice the staff at the Division of Workers' Compensation (Division) gave him. He contends his claims should not be denied.

Should some of 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 or about January 4, 2019, Employee claims he injured his arm working for Employer. (First Report of Injury, March 19, 2020). The Division's injury date assigned to this case is April 4, 2019. (Agency file).

2) On March 10, 2020, Employee walked into the Anchorage Division office and:

> . . . stated that she [sic] received a package last time he came in and was filing his claim for benefits. I briefly explain the process for the claim. I asked EE if he received the WC&U [Workers' Compensation & You], EE's Guide [Employee's Guide to Workers' Compensation], and attorney list and he said he did. I briefly discussed should his claim get controverted, that that would be a good timing to get a lawyer. EE stated that he tried calling lawyers, but they told him the same thing. EE filed his claim and I provided a copy for him. (Judicial, Communications, Walk In tabs, agency file, May 10, 2020).

3) The Workers' Compensation & You pamphlet states in part:

> **C. REQUESTING A HEARING. (**AS 23.30.110(c)) If you file a WCC [Workers' Compensation Claim] and the insurer controverts the claim, you must request a hearing before the Board within two years of the date of the controversion or your right to the benefits will be denied. If you ask for a hearing and then later ask for a continuance of the hearing, the two-year time limit starts to run again from where it stopped when the hearing was originally requested. (Workers' Compensation & You).

4) The Employee's Guide to Workers' Compensation states in part:

> **REQUESTING A HEARING**
> (AS 23.30.110(c)) If you file a WCC and the adjuster controverts the claim, you must request a hearing before the Board within two years of the date of the controversion or your right to the benefits will be denied. To request a hearing, you should file an ARH [Affidavit of Readiness for Hearing], which is a statement you are fully prepared for hearing. Alternatively, you may file a request for additional time to file an ARH. If you request a hearing and then later

> ask for a continuance of the hearing, the two-year time limit starts to run again from where it stopped when the hearing was originally requested. (Employee's Guide to Workers' Compensation).

5) On March 13, 2020, Employee filed a claim for a "01/07/2019" injury, for temporary partial and permanent total disability (TPD and PTD), a penalty for late-paid compensation, interest, and attorney fees and costs; he did not check a box for "Medical Costs" available on the claim form. However, in the narrative section, Employee stated, "Medical still on going for damage to body from accident," which is effectively a claim for medical care. He described his injury as a possible hairline fracture in his right arm; damaged muscles in his upper extremities and shoulders; carpal tunnel; pulled and damaged fingertips; and lost feeling in his right fingertips. Employee contended his boss lied to him about using workers' compensation insurance; he used sick and vacation leave for medical care, and; he lost time, money, dignity and was laid off. (Claim for Workers' Compensation Benefits, March 10, 2020).

6) The only reported injury Employee had with Employer was on January 4, 2019; this decision presumes he had only one injury with Employer, notwithstanding a different injury date on his March 13, 2020 claim. (Agency file).

7) On April 2, 2020, Employer controverted Employee's claim for TPD benefits before March 16, 2020, PTD benefits, a penalty, interest, attorney fees and costs and served a copy on him by mail. Included on this notice was:

> **TO EMPLOYEE . . . READ CAREFULLY**
>
> This notice means the insurer/employer has denied payment of the benefits listed on the front of this form for the reasons given. **If you disagree with the denial, you must file a timely written claim. . . . 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, April 2, 2020; bold in original).

8) On April 21, 2020, the parties attended a prehearing conference before a Board Designee. The Designee's summary states in part, "**04/02/2020 Controversion (post-claim) per 23.30.110(c) deadline's an ARH must be filed by 04/02/2022**." The summary further states:

> The designee explained the adjudications process noting that once discovery is complete, and if a settlement has not occurred, either party may file an Affidavit of Readiness for Hearing (ARH) form. The designee noted that EE's deadline per 23.30.110(c) to file ARH is 04/02/2022.

The summary also included "boilerplate" §110(c) warning language:

> **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.

The Division served this summary on Employee on April 23, 2020, at his correct address, redacted here for privacy, **20 E. 4th Ave., Anchorage, AK 99508. (Prehearing Conference Summary, April 21, 2020; bold in original).

9) On May 19, 2020, the parties attended a prehearing conference. The Designee's summary again states, **". . . per 23.30.110(c) deadline's an ARH must be filed by 04/02/2022**." It contains the same "**Notice to Claimant**" set forth in factual finding #8, above. The Division served the summary on Employee at his correct address. (Prehearing Conference Summary, May 19, 2020).

10) On June 22, 2020, the parties appeared for a recorded, telephonic prehearing conference before the Designated Chair for the instant hearing. Meshke stated Employee was receiving "time loss" confirmed as temporary total disability (TTD) benefits, so those benefits were not controverted; Employee agreed he was receiving TTD benefits. The Designee advised Employee that Employer had controverted "some of the benefits" he claimed; the Designee promised to put a detailed explanation of Employee's claims and Employer's controversions in a prehearing conference summary and encouraged Employee to read it because it was "important information" that he needed to pay "very close attention to" about the claims he made, and the claims Employer controverted, or in simple terms, "denied." The Designee orally advised Employee there was a deadline for him to take "some action" to either ask for a hearing on his controverted claims within two years, or if he was not ready to ask for hearing within two years, to at least ask for more time to request a hearing. The Designee expressly advised Employee if he failed to do one or the other, his controverted claims could be "dismissed and denied" because he failed to ask for a hearing timely. The Designee advised Employee in the written summary:

> ER served the Controversion Notice on EE by mail. "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." 8 AAC 45.060(b). ER filed its Controversion Notice on 4/2/2020. "(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 45.063(a). As of 6/22/2020, EE must either file an Affidavit of Readiness for Hearing *or* file a request for more time to file an Affidavit of Readiness for Hearing by no later than **April 7, 2022** (4/2/2020 not counted = two years from 4/3/2020 = 4/3/2022, which is a Sunday, which moves the date to 4/4/2022 + three days added for ER's service of the Controversion Notice by mail = **4/7/2022**).
>
> EE is hereby advised that some actions or case activity, such as a board-ordered second independent medical evaluation (SIME) may extend the time deadline for EE to request action on his claim to avoid dismissal. (Prehearing Conference Summary, June 22, 2020; bold in original).

11) On July 9, 2020, Employee testified by deposition, in relevant part, as follows: His greatest strength as an employee was, "My mind. Taking care of things, whatever needs to be done, I do it." Employee confirmed January 7, 2019, as his injury date. He had no work injury that was not

reported to Employer. At the time of his deposition, Employee was waiting for physical therapy from Alaska Native Medical Center (ANMC) for both upper extremities. Employee had not worked since February 28, 2020. His March 10, 2020 claim requested PTD benefits, but Employee expected his physicians to tell him what he can do; he may get "back to normal." Employee described his alleged work-related injuries to his bilateral upper extremities, bilateral carpal tunnels, fingertips, bilateral shoulders, neck, back and left knee. (Videotape Deposition of Frank Montoya, July 9, 2020).

12) Employee's deposition testimony about his injury and body parts he alleges were injured is generally consistent with the cumulative information stated on his three claims. (Observations).

13) On July 31, 2020, Employee had a 15-minute phone conversation with Division staff regarding releases. (Judicial, Communications, Phone Call tabs, agency file, July 31, 2020).

14) On August 5, 2020, Employee called the Division and received information about a petition for a protective order. (Judicial, Communications, Phone Call tabs, agency file, August 5, 2020).

15) On August 7, 2020, Employee asked for a protective order and to "compel discovery." Other than checking a box, his pleading makes no mention of a need for him to compel discovery and only addresses his request for a protective order against Employer discovering his past medical records. (Petition, August 6, 2020).

16) On August 10, 2020, Employer denied Employee's claim to all benefits after July 24, 2020, for his work injury. It based its denial on an employer's medical evaluation (EME) report stating the January 7, 2019 work incident caused a right shoulder strain and a knee contusion, "which have long resolved." The notice further stated work was not the substantial cause of Employee's ongoing disability or need for medical treatment and these were related to ongoing degenerative conditions. Employer also contended the EME physician observed "profound symptom magnification," and opined Employee was medically stable, had no ratable impairment, could physically perform jobs from sedentary through heavy work, and any inability to return to work was not the result of the work injury. (Controversion Notice, August 10, 2020).

17) On September 2, 2020, a Board Designee conducted a prehearing conference that Employee did not attend. The subject was Employee's August 7, 2020 petition, which the Designee understood was only for a "protective order," which he denied. In his summary, the Designee reverted to the incorrect "04/02/2022" date for Employee to file an ARH. The

summary included the "boilerplate" warning stated in factual finding #8, above. (Prehearing Conference Summary, September 2, 2020).

18) On September 2, 2020, Employee called the Division to say he had missed that day's prehearing conference, stating he did not get notice. Division staff read the prehearing conference notice to him and reconfirmed his address. Employee then conceded "someone called him," but he did not answer because the call was coming from an Arizona number. The Designee advised, "I encouraged him to participate in his prehearings and check mail." (Judicial, Communications, Phone Call tabs, agency file, September 2, 2020).

19) On October 13, 2020, Employee called the Division, upset because he was not receiving benefits and did not understand why Employer could delve into a past injury. Division staff explained discovery, and Employee said he was speaking to an attorney who wanted him to "hold off Petitioning for SIME [second independent medical evaluation (SIME)]." Employee said his physician did not want to get involved in litigation, whereupon staff explained that Board decisions are based on medical evidence. Division staff further advised that the Board does not act on a case until a pleading is filed, and stated:

> I explained he did not attend the last PH [prehearing] to which he said he was not notified. I gave the date the notice was served and that no returned mail was received and that the officer left a vm [voicemail] at the time of the PH. (Judicial, Communications, Phone Call tabs, agency file, October 13, 2020).

20) On February 25, 2021, Employee called the Division to discuss attorneys and his medical situation. Division staff advised him to submit and file medical records on medical summaries. "Also informed EE about parties' rights to file a petition for SIME if dispute exists between his physician's opinion and IME's opinion. Explained petition form, SIME form and its process and overall adjudications process. . . . Mailed form letter, petition, SIME form, medical summary and atty list." (Judicial, Communications, Phone Call tabs, agency file, February 25, 2021).

21) On April 7, 2022, Employee's time to request a hearing, ask for more time to request one, or file an ARH on his March 10, 2020 claim expired. Employee has never requested a hearing orally or in writing; to date he has not filed a petition asking for more time to request one, or filed an ARH. (Agency file).

22) On July 8, 2022, Employee walked into the Anchorage Division office "because he was controverted" and wanted "to file a claim." Employee also wanted "to see one of the Board's

doctors for another opinion." Division staff gave Employee claim and petition forms and assisted him in copying and serving his petition on Meshke. There was no discussion regarding §110(c) deadlines. (Judicial, Communications, Walk In tabs, agency file, July 8, 2022).

23) On July 8, 2022, Employee amended his March 10, 2020 claim, again asked for PTD benefits, and added an "unfair or frivolous controversion" finding request. In the narrative section, Employee gave additional details about his work injury and again mentioned his left arm issues; carpal tunnel; micro-tears in his shoulders, biceps and elbow, and; said he could no longer carry anything over "5 to 10 pounds" without pain. He added, "Can no longer work due to injury controverted 06/10/2020." Employee did not check the "Medical Costs" box on the form, nor did he implicitly request medical benefits. (Claim for Workers' Compensation Benefits, July 8, 2022).

24) On July 8, 2022, Employee also requested an SIME. (Petition, July 8, 2022).

25) On August 12, 2022, Employer petitioned for an order dismissing Employee's claims under AS 23.30.110(c). It contended, "The employee has not filed an affidavit of readiness for hearing or otherwise requested a hearing on his 3/10/20 claim within two years of the employer's 4/2/20 post-claim controversion." (Petition, August 12, 2022).

26) On September 1, 2022, nearly five months after Employee's time to request a hearing, or ask for more time to request one, had expired, the parties attended a prehearing conference and discussed Employee's July 8, 2022 and Employer's August 12, 2022 petitions. The Designee advised either party could file an ARH on their petition to alert the Board that a hearing was necessary. The Designee explained the SIME process and advised the Board had authority to order an SIME as well as to dismiss Employee's claim. "Employee advised that he will [sic] gather the documentation supporting his petition for a [sic] SIME and file the same as soon as possible." (Prehearing Conference Summary, September 1, 2022).

27) On August 12, 2022, Employer asked for an order dismissing Employee's March 10, 2020 and July 8, 2022 claims on grounds he failed to file an ARH "or otherwise" request a hearing within two years of Employer's April 2, 2020 post-claim controversion notice. It contended the Board should deny the March 10, 2020 and July 8, 2022 claims because his July 2, 2022 claim "relates back" to his March 10, 2020 claim. Employer contended Employee never filed an ARH, requested a hearing or filed anything with the Division to demonstrate he intended to pursue his March 10, 2020 claim. It conceded that while strict compliance is not necessary, Employee

could not "simply ignore the statutory deadline and fail to file anything." Employer contended he demonstrated no lack of mental capacity, incompetence or any basis to assert equitable estoppel against the Division. Moreover, it contended that while an SIME may toll the statute's timeline from running, there must be a timely SIME stipulation, and in this case there was not. Employer contended that during the two years after its April 2, 2020 controversion, Employee filed nothing that could be construed as a hearing request or an indication he intended to pursue his claim timely. It contended Employee failed to comply with the statute substantially, and simply ignored the deadline. Employer contended the language on the controversion notices was sufficient to inform Employee of his duties under §110(c). Moreover, it contended when Employee ultimately petitioned for an SIME on July 8, 2022, it was four months after the two-year period had ended. Since, in Employer's view, nothing tolled the deadline for requesting a hearing and there were no legal grounds to excuse Employee, his claims should be denied under §110(c). (Memorandum of Law in Support of Petition to Dismiss Pursuant to AS 23.30.110(c), August 12, 2022).

28) On October 20, 2022, Employee called the Division to get an update on his case. Division staff told him there was no update since his September 1, 2022 prehearing conference; she reviewed the summary from that conference with him. The staff member, "Informed EE his rights and responsibilities," and offered to send him another Workers' Compensation & You packet, Employee Guide, flowchart, an entry of appearance and an attorney's list in case he found someone to represent him. She verified his mailing address remained correct. (Judicial, Communications, Phone Call tabs, agency file, October 20, 2022).

29) On December 5, 2022, Employee called the Division about his case's status. Among other things, "He said he had petitioned to see an SIME doctor and still hasn't heard anything about that." (Judicial, Communications, Phone Call tabs, agency file, December 5, 2022).

30) On December 9, 2022, Employee again amended his March 10, 2020 claim, again asked for PTD benefits, an unfair or frivolous controversion finding, a penalty and interest, and added transportation costs. He did not check the "Medical Costs" box. In the narrative section, Employee repeated and expanded his injuries including bilateral carpal tunnel; arm and hand nerve damage; and micro-tears in bilateral shoulders, biceps, elbows and kneecaps. Employee gave greater detail for his work injury and said he was forced to move several tons of washers, nuts and bolts at work and was picking up a box of nuts when his arms popped, and he fell,

hitting his head and knees. He added that he could no longer work and could not lift anything without pain. Employee said he had received multiple injections in his shoulders, elbows and wrists but nothing had helped, and he was still in pain. He had applied for and received Social Security disability benefits. Employee believed he had received an SIME examination and contended Employer owed him disability benefits, penalties, interest, and transportation costs to and from his doctors' appointments. (Claim for Workers' Compensation Benefits, December 9, 2022).

31) Employer contends Employee filed claims and Employer controverted them. The controversion notices are on the prescribed form and each gave him a legally sufficient notice and warning to file a hearing request or a request for more time to file one within two years, or his claims would be denied. It contends denial is mandatory unless Employee's failure can be excused. Employer contends Employee gave no reason to excuse his failure to timely file a hearing request or an extension. It contends Employee's subsequent claims all "relate back" to his initial controverted claim and all should be denied. Moreover, Employer contends Employee's SIME petition does nothing to toll the statute's running because he filed it months after the deadline to request a hearing or request more time to request one had passed. It relies on Alaska Supreme Court (Court), Alaska Workers' Compensation Appeals Commission (Commission) and Alaska Workers' Compensation Board (Board) precedent to support its position. (Employer's Hearing Brief in Support of Petition to Dismiss, April 19, 2023).

32) At hearing on April 26, 2023, Employee testified he was born in Denver, Colorado and has lived in Anchorage since 1982. He did not graduate from high school and has no general education diploma (GED). Employee attended Job Corps for carpentry school but did not finish. He has worked as a truck driver, head of security at Holiday Inn for 10 years, security guard for Guardian Security for five years (working at the Dimond Center, Sears and on patrol), ran a janitorial business, was a cashier on base, a navigator in the United States Navy, worked as a chef and was in outside sales for Employer for 18 years. Employee demonstrated good reading, writing and comprehension skills in his pleadings and at hearing. (Employee; observations).

33) Employee wrote all his own pleadings and has no mental health issues. (Employee).

34) Employee testified he filed a claim on March 13, 2020, and said he talked to an unidentified Division technician about a controversion and his deadline to request a hearing and was told "don't worry about it," because he was being paid at the time. Thereafter, he applied

for Social Security disability benefits and has been working on getting those benefits for about three years. Employee said he saw the same physicians for both his Social Security and workers' compensation cases. Meshke clarified and said Employee called and told her he had seen the SIME report, and said "so pay up." However, Meshke disputed that an SIME would have occurred without her knowledge, and Employee agreed it was not an SIME report he saw; it was a Social Security physician's report, but according to him they were the "same doctors." After Meshke informed him about the difference, Employee said he then asked for an SIME. (Employee)

35) Employee acknowledged he received the April 2, 2020 controversion. He had no attorney when he filed his claim; he said he tried to find one but was unsuccessful. (Employee).

36) Employee goes to ANMC to obtain his medical care. In his view, "everything" wrong with him is caused by his work injury with Employer. The Veterans' Administration (VA) also paid some bills Employee contends are work-related. (Employee).

37) When asked what he had been doing between April 2, 2020 and April 2, 2022, Employee said he had been seeing doctors and had been at home "trying to take care of life." Employee had not been jailed or hospitalized at any relevant time. (Employee).

38) Discussing surveillance photos of him unloading his truck at the dump, Employee said this caused him upper extremity pain from which it took three days to recover. When asked if there was any reason why he could not have filed a hearing request, or more time to request one, over two years, Employee testified he called the Division, and an unidentified person again told him "don't worry about the first controversion"; they said he should worry about the August 2022 controversion. When asked again why he did not file a written hearing request with the Division, Employee admitted he had not and said he did not understand the procedures. (Employee).

39) Employee agreed he got the Workers' Compensation & You pamphlet and the Employee's Guide. He recalled a February 25, 2021 telephone discussion with Division staff who informed him about requesting an SIME. Employee said he wanted an SIME and stated an unidentified person told him to wait and someone would give him a call to make an appointment; that is when he got a call from a doctor who told him that Meshke would have to pay him. It was not clear from Employee's testimony if all this happened on February 25, 2021, or later. Employee testified that someone eventually called him about seeing a doctor; he said it was "the same guy" that makes appointments for the Social Security doctor. (Employee).

40) The Division does not make appointments for injured workers to see physicians for Social Security disability benefits. (Experience).

41) When asked directly if he ever requested a hearing within the applicable two-year period after the controversion notice, Employee said, "well . . . yes." When asked "when," he said, "I . . . thought when I got that controversion in August, . . . I . . . talked to the technician, and they said you've got two years to go from there." He said he had previously asked about the controversion he got in "March or April," and "they" told him "don't worry about that if they're paying you." He testified he thought he had two years from the August 10, 2020 controversion to request a hearing. Employee testified he came to the Division offices in July 2022 and petitioned to see an SIME physician before the two-year period ran out from the August 2020 controversion. When asked directly if he ever requested a hearing in writing, Employee said "no," and then said he just "filled out the paperwork" for "hearing and a second opinion doctor" at the Division offices. Employee said he understood the paperwork he completed when he came to the Division offices in July 2022 was requesting an SIME and initially stated he understood his SIME request was not requesting a hearing but was simply asking to see the Board's doctor. When asked again if he understood the difference between the two, he said "not really." (Employee).

42) Employee said he reads well and read all the prehearing conference summaries, including the warning language on each. When asked why, after he read all the prehearing conference summaries, each of which gave him a particular date by which to file a hearing request, he did not do so, Employee testified that after having a discussion with an unidentified Division staff member, on an unspecified date, who told him he only needed to worry about the "second controversion" filed August 10, 2020, he determined he had until August 10, 2022 to request a hearing. He again testified that when he filed his SIME petition on July 8, 2022, he was only asking for an SIME. Employee was aware of the ARH form and admitted he never filed an ARH because he said he did not know he had to file one. Questioned about the SIME, he admitted he never pursued it and was "waiting for the call" from the Division, and that is when he got a call from "some guy" that told him they had already seen him for Social Security. (Employee).

43) Asked why the panel should not dismiss his claim, Employee said he had been doing everything he could to get better; it was hard to find doctors, though he was trying to get his "body back"; that was his goal. He thought August 2022 was his deadline and he was doing everything "correctly." Since he got hurt at work, Employee thought Employer should pay for

his medical bills. When asked directly why all his issues with Employer and other entities not related to workers' compensation would interfere with filling out a piece of paper asking for a hearing, Employee contradicted his previous testimony and said, "That's what I thought, I turned it in on time upstairs," referring to the SIME request. (Employee).

44) It is inconceivable Employee would not have known he had to file an ARH to schedule his claims for a hearing. (Experience, judgment, and inferences from the above).

45) Employer renewed its arguments from its brief. It contended the agency file does not support his account that an unknown person at the Division gave wrong information. Employer contends Employee's lacks credibility in all respects, and his apparent confusion about things is not a legal basis to excuse him from failing to file a hearing request timely. (Record).

46) Employee contends he did what he was "told." He wants his body back; in his view, his physicians made "mistakes." Employee had consulted with a workers' compensation attorney who eventually "disappeared." He agreed he had been given a fair hearing. (Record).

47) The Division keeps an electronic file for each injury and, when an injured worker communicates with the Division about his or her claim by any means, the staff person handling the communication summarizes it in the injured worker's electronic file. (Observations).

48) The communications summarized in Employee's agency file do not agree with his testimony concerning what an unidentified technician or other Division staff person allegedly told him on an unspecified date. There is no evidence in his agency file that any Division staff ever advised Employee "don't worry" about the AS 23.30.110(c) deadline, and no evidence staff told him he had until August 10, 2022 to ask for more time to request a hearing, or to request one, on his previously controverted claims. (Communications tab, agency file).

49) On May 5, 2023, Employee filed, without proof of service on Meshke, paperwork he advised the hearing officer had requested. (Judicial, Communications, Walk In agency file, May 5, 2023).

50) As of May 11, 2023, Employee's agency file contains no evidence Employee ever requested a hearing, orally or in writing on his claims or SIME petition, filed an ARH on any claim or petition or took any further action on his July 8, 2022 SIME request. (Judicial; SIME tabs, 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. . . .
> >
> > (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute; . . .

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

In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316, 319-21 (Alaska 2009), the employer at a prehearing conference provided a §110(c) deadline that was about two weeks earlier than the accurate date. Division staff failed to correct this error. The Court found the uncorrected error may have dissuaded the injured worker to file a hearing request timely, thinking the deadline had already passed when it had not. *Bohlmann* stated based on the record, had the Division corrected this wrong date, the injured worker likely would have filed a hearing request timely as he had done with his other pleadings. The Court said:

> 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 23.30.095. 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. . . .
>
> **AS 23.30.110. Procedure on claims**. . . .
> . . . .

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

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* held dismissal under §110(c) does not prevent the employee from applying for different benefits, or raising other claims, based upon a given injury. *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."

In *Bailey v. Texas Instruments*, 111 P.3d 321 (Alaska 2005), the parties reached a settlement, but left the employee's right to claim, and the employer's right to contest, future medical claims unsettled. Following the settlement, the employer continued paying for the employee's medical care and medication for years. Eventually, several pharmacies submitted bills to the employer for the employee's prescriptions. The employer controverted those prescriptions relying on an EME physician who opined the employee no longer needed certain medications.

The employee in *Bailey* contested the medication denials and filed his first relevant claim in 1997 for these medications; his employer controverted it. Not quite two years after the controversion, the employee filed another claim for the same 1997 pharmacy bills; the employer controverted the second claim in October 1999. In May 2001, the employee filed his third claim, this time for medical expenses incurred since 1997; the employer controverted this claim as well. Fourteen months later in July 2002, the employee requested a hearing. After a hearing, the Board dismissed all three claims, finding the 1999 and 2001 claims "merged" with his 1997 claim and held all three time-barred under §110(c), because the employee failed to request a hearing within two years of the date the employer controverted the 1997 claim.

Bailey affirmed the Board's denial of the 1997 and 1999 claims because they requested payment for the same pharmacy bills from 1997 and the employee failed to request a hearing timely even after given additional time. However, as to the third claim, *Bailey* stated:

> Bailey's 2001 claim, in contrast, should not have been dismissed. The 2001 claim sought compensation for medical expenses -- physician services and prescription medications -- that were incurred after Bailey filed his 1997 claim. Bailey did not simply re-file the 1997 claim in 2001; rather, he sought compensation for different expenses. Because the 2001 claim was independent of the 1997 and 1999 claim, and because Bailey requested a hearing less than two years after Geophysical controverted his 2001 claim, the claim is not time-barred. (*Id*. at 324-25).

Bailey noted the employee sought the same type of medication in each claim. It also noted the EME physician on which the employer had relied to controvert the medications never stated the employee's medications were "categorically inappropriate" or that the employee would "never again need to use them in the future." *Bailey* held dismissal under a AS 23.30.110(c) "might have a preclusive effect in some situations." Nonetheless, it held the employer's success in controverting the 1997 pharmacy bills did not preclude the employee from filing a later claim for medical costs incurred after that dismissal. He had reserved his right to seek future medical care through his previous settlement agreement, and the employer had reserved its right to contest those claims as they were filed. (*Id*. at 325).

In *Providence Health System v. Hessel*, AWCAC Dec. No. 131 (March 24, 2010), the Commission held §110(c)'s objective is not for a claimant to "generally pursue" a claim; it is to bring it to a hearing 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. A claimant who bears the burden of proof must "induce a belief" in the minds of the factfinders that the facts being asserted are probably true *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

The Court 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). . . .
>
> . . . 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.
> . . . .
>
> 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.
> . . . .
>
> 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). . . .

Pruitt v. Providence Extended Care, 297 P.3d 891, 985 (Alaska 2013), cited *Kim*'s holding, but also said "we did 'not suggest that a claimant can simply ignore the statutory deadline and fail to file anything.'" *Pruitt* said the claimant in that case "did not file anything indicating she wanted to prosecute the 2005 written claim until August 2009, well after the statutory deadline expired." *Roberge v. ASRC Construction Holding Co.*, AWCAC Dec. No. 19-001 (September 24, 2019) said, "the idea of a hearing not being held on the merits of a claim is strongly disfavored by the Court and the Board has an obligation to determine if there is a way around the running of the .110(c) defense." *Narcisse v. Trident Seafoods Corp.*, AWCAC Dec. No. 242 (January 11, 2018) stated the two-year period is tolled when "some action" by the employee shows a need for additional

time before requesting a hearing, and a request for an SIME is a demonstration that additional time is needed.

> **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 . . . is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The Board's credibility findings are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **8 AAC 45.050. Pleadings.** (a) A person may start a proceeding before the board by filing a written claim or petition.
> . . . .
>
> (e) **Amendments**. A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading. . . .

> **8 AAC 45.060. Service**. . . .
> . . . .
>
> (b) . . . 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.

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

ANALYSIS

Should some of Employee's claims be denied for failure to request a hearing timely?

A) Employee did not strictly comply with AS 23.30.110(c).

This decision addresses Employer's request to deny Employee's three claims. Based on Employee's testimony and on his agency file, it is undisputed that to date he has not orally or in

writing requested a hearing, requested more time to request one or filed an ARH on any claim. Therefore, he has not "strictly" complied with his duty to request a hearing timely or ask for more time to request one after Employer controverted his first claim. AS 23.30.110(c); *Kim*.

B) Employee did not substantially comply with AS 23.30.110(c).

As *Kim* made clear, strict compliance is not necessary under AS 23.30.110(c). "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.'" In other words, an ARH is not required to "request a hearing" and toll the time-bar. Requesting a hearing, and signing an affidavit stating a party is ready to schedule an immediate hearing, are two different acts. *Kim*. On the other hand, Employee could not simply "ignore the statutory deadline and fail to file anything," but could substantially comply with §110(c) by simply requesting a hearing, without signing an affidavit stating he was ready for immediate scheduling. *Pruitt*; *Kim*. If Employee was not ready for an immediate hearing, his duty was to advise "of the reasons for the inability to do so and request additional time to prepare for the hearing." *Kim*. Stated differently, the two-year period was tolled only if Employee took "some action" showing his need for additional time before requesting a hearing. *Narcisse*.

The law required Employee to prosecute his claim timely once Employer controverted it. *Jonathan*. Statute of limitations-style defenses are "generally disfavored," and neither the law nor the facts should be twisted to aid them. *Tipton*; *Roberge*. Cases are decided on their merits, "except where otherwise provided by statute." AS 23.30.001(2). However, AS 23.30.110(c) is one of those exceptions "otherwise provided by statute." Employee had to do more than "generally pursue" his claim; he had to prepare it and bring it to hearing for a decision, so speed and efficiency goals in these proceedings were met. AS 23.30.001(1). Now Employee has the burden to establish with substantial evidence a legal excuse from the §110(c) statutory deadline. *Hessel*. His main contentions are (i) he either did not understand the process and did not know he had to request a hearing, (ii) Division staff told him he had until August 2022 to request a hearing on all his claims, or (iii) he requested a hearing when he filed his petition requesting an SIME. He must "induce a belief" in the factfinders' minds that the facts he asserted are probably true. *Saxton*. This decision will address these contentions in the applicable sections, below.

(i) Employee knew or should have known he had to request a hearing.

The relevant facts are mostly undisputed. On March 10, 2020, before he had even filed his first claim, Employee came to Division offices and a staff member explained the claim "process." She confirmed Employee had received the Workers' Compensation & You pamphlet, and the Employee's Guide to Workers' Compensation. The pamphlet states:

> **C. REQUESTING A HEARING. (**AS 23.30.110(c)) If you file a WCC and the insurer controverts the claim, you must request a hearing before the Board within two years of the date of the controversion or your right to the benefits will be denied. If you ask for a hearing and then later ask for a continuance of the hearing, the two-year time limit starts to run again from where it stopped when the hearing was originally requested.

The Employee's Guide states:

> **REQUESTING A HEARING**
> (AS 23.30.110(c)) If you file a WCC and the adjuster controverts the claim, you must request a hearing before the Board within two years of the date of the controversion or your right to the benefits will be denied. To request a hearing, you should file an ARH, which is a statement you are fully prepared for hearing. Alternatively, you may file a request for additional time to file an ARH. If you request a hearing and then later ask for a continuance of the hearing, the two-year time limit starts to run again from where it stopped when the hearing was originally requested.

Prior to and at hearing, Employee demonstrated good reading, writing and comprehension skills. *Rogers & Babler*. At deposition, he testified his "mind" was his strength; he added "whatever needs to be done, I do it." It was his responsibility to read the materials given to him about §110(c) and do something about it. On March 13, 2020, Employee filed a claim for TPD, PTD, an unspecified penalty for late-paid compensation, interest, and attorney fees and costs. On April 2, 2020, Employer controverted Employee's claim and mailed the Controversion Notice to his correct address. The parties thereafter attended four prehearing conferences during the relevant two-year period. The Division served each prehearing conference summary on Employee at his correct address; at hearing, he testified he had read them. Each summary stated with specificity a date by which Employee had to file an ARH. The June 22, 2020 prehearing conference summary provided a different date, adding three days to his time limit to account for

Employer's service of the Controversion Notice on Employee by mail. He had until April 7, 2022, to either ask for a hearing, request more time to ask for one or file an ARH. AS 23.30.110(c); *Kim*; 8 AAC 45.060(b); 8 AAC 45.063(a). Alternately, he had to take "some action" reasonably suggesting Employee needed more time to request a hearing. *Narcisse*.

On August 7, 2020, Employee petitioned for a "protective order" and to "compel discovery." His petition shows Employee was only seeking a protective order against Employer discovering past medical records; he was not seeking to compel discovery from Employer. The Designee understood this and denied Employee's "protective order" petition on September 9, 2020. The August 7, 2020 petition was not "some action" implying Employee needed more time to prepare for a hearing. *Narcisse*. He filed nothing with the Division suggesting he needed more time to prepare for a hearing until July 8, 2022, when he requested an SIME; he did not request a hearing, and failed to file an ARH stating he was ready to schedule one immediately. *Narcisse*.

Employee knew how to seek help from the Division; he did so frequently. He called the Division six times between July 31, 2020 and April 7, 2022. On one of those occasions, February 23, 2021, he only left a message requesting a call-back; the other five times, July 31, 2020, August 5, 2020, September 2, 2020, October 13, 2020, and February 25, 2021, Employee did not request a hearing, did not state he was not ready to request one and did not request additional time to request a hearing. In fact, on October 13, 2020, Employee stated an attorney with whom he was dealing wanted him to "hold off [p]etitioning for a SIME." The Designee on that occasion told Employee the Division would take no action until "a pleading is filed." Employee apparently followed the attorney's advice and did not request an SIME until July 8, 2022, nearly three months after his §110(c) statutory deadline had passed for the March 10, 2020 claim. Given the above analysis, it is inconceivable Employee did not know he had to request a hearing; his testimony to the contrary is not credible. AS 23.30.122; *Smith*. In summary, Employee did nothing on or before April 7, 2022, to either request a hearing or ask for more time to request one. He did not substantially comply with §110(c); he was noncompliant. *Kim*; *Pruitt*.

C) No legal grounds excuse Employee's noncompliance with AS 23.30.110(c).

Certain "legal" grounds may excuse noncompliance with §110(c), including (1) mental incapacity, (2) incompetence, or (3) equitable estoppel against the Division. *Tonoian*.

(1) Employee testified he has no mental health issues; nothing in the record demonstrates otherwise. He also said he was not hospitalized or institutionalized during the relevant §110(c) period. (2) Similarly, nothing in the record suggests Employee was incompetent. Neither mental incapacity nor incompetence will excuse Employee's noncompliance with§110(c). *Tonoian*.

> (ii) Division staff did not tell Employee he had until August 2022 to request a hearing on all his claims.

Since Employee was not incapacitated or incompetent during any relevant period, that leaves (3), equitable estoppel against the Division, which he did not raise by name, but implied. This ground turns on Employee's hearing testimony in which he alleged an unknown Division staff person on an unidentified date told him he had until August 10, 2022, to request a hearing, based on the "second controversion" he received dated August 10, 2020. Upon this information, he testified he had relied. There are several problems with this position that cut against Employee's implied equitable estoppel argument:

First, Employee missed a prehearing conference and told Division staff he had not received notice. However, his agency file shows the Division sent notice for that prehearing conference to his correct address and the USPS did not return that notice to the Division. His statement that he did not receive the prehearing conference notice is not credible. AS 23.30.122; *Smith*.

Second, at hearing Employee testified that when he filed his SIME petition, (albeit too late to toll §110(c) for his first claim), he understood he was only seeking an SIME and was not requesting a hearing. Later at hearing, when it became apparent to him through the panel's questioning that he had done nothing to request a hearing, Employee flip-flopped and said he thought he had requested a hearing when he filed his SIME petition. This too is not credible. AS 23.30.122; *Smith*.

Third, Employee testified he did not file an ARH because he did not understand procedures and did not know he had to. Given explicit words in the pamphlet, guide, controversion notices, and prehearing conference summaries Employee said he received and read, and ample discussions with Division staff, it is inconceivable he would not know he had to file an ARH to schedule his claims for a hearing. *Rogers & Babler*. Again, this is not credible. AS 23.30.122; *Smith*. The Division satisfied its duty to Employee and amply informed him how to preserve his claims. *Bohlmann*.

Fourth, nothing in his agency file supports Employee's testimony that an unidentified "someone" at the Division on an unknown date told him to not worry about the first controversion and said he had until August 10, 2022, to ask for a hearing on all his claims. None of Employee's telephone conversations with Division staff prior to April 7, 2022 mention a controversion, much less the August 10, 2020 controversion that arguably could have led to advice for him to act by August 10, 2022. Had someone at the Division told him that *before* April 7, 2022, when his §110(c) deadline expired on his first claim, his July 8, 2022 SIME petition would have tolled §110(c)'s running because Employee could have reasonably relied upon that advice and thought he had until August 10, 2022, to take "some action" indicating he needed more time to request a hearing, and requesting an SIME would have shown that need. *Bohlmann*; *Narcisse*. Nonetheless, the only time Division staff discussed Employee's post-claim controversion was on July 8, 2022, months after the April 7, 2022 deadline expired. Nothing in that walk-in conversation mentions the §110(c) deadline. His testimony on this point was also not credible. AS 23.30.122; *Smith*. In summary, Employee's testimony on these four points was not credible and is given no weight. AS 23.30.122; *Smith*.

Although Employee did not mention it, Division staff provided Employee with two different dates for his §110(c) deadline -- April 2, and April 7, 2022. But at hearing he stated the alleged advice unknown Division staff gave him stating he had until August 10, 2022 to request a hearing superseded the written advice from prehearing conference summaries. In other words, he said he did not rely on those prehearing conference summary dates. Conceivably, receiving inconsistent dates from the Division by which to request a hearing could be confusing. *Bohlmann*. However, Employee never raised this as an issue or stated he was confused by the

April 2022 dates, nor did he seek clarification from the Division notwithstanding six telephone conversations with Division staff and four prehearing conferences during the relevant time. Moreover, Employee's testimony and agency file show it was unlikely these two dates misled him, or that but for the April 2022 dates, he would have otherwise requested a hearing, or requested more time to ask for one, because he has yet to do so. Nor would he have filed an SIME petition timely, because he did not do so. *Bohlmann*. Thus, Employee failed to strictly comply with §110(c), failed to substantially comply with it, and failed to show a legal reason to excuse his noncompliance. *Tonoian*; *Saxton*.

(iii) Employee did not request a hearing when he filed his petition for an SIME.

At hearing, Employee testified he thought he had requested a hearing when he filed his petition for an SIME. As a matter of law, he did not. Employee failed to explain why he thought the SIME petition was the legal equivalent of a hearing request. Nothing on his July 8, 2022 petition suggests or implies a hearing request. Employee filed the SIME petition on the same day he filed another claim for benefits. If anything, the July 8, 2022 claim and petition suggest Employee was not ready for hearing and was not asking for one. Given the above analyses, there was no reason for him to think his July 8, 2022 petition for an SIME was a hearing request, and his related testimony was not credible. AS 23.30.095(k); AS 23.30.122; *Smith*. The only issue remaining is which claims are denied under AS 23.30.110(c) and related decisional law. *Wagner*.

(D) Employee's March 10, 2020 claims will be denied under §110(c).

The above analyses are incorporated here by reference. Employee filed his March 10, 2020 claim on March 13, 2020. Employer controverted it on April 2, 2020. By law, Employee had until April 7, 2022, to request a hearing, request more time to ask for one, or file an ARH. He took none of these actions before April 7, 2022, either explicitly or by implication. Further, he failed to meet his burden to produce evidence showing a legal excuse for his noncompliance. *Saxton*. Employee never explicitly checked the "medical costs" box on this claim. However, in his March 10, 2020 claim, he stated, "Medical still on going for damage to body from accident." Using the panel's experience, judgment and inferences drawn from all the above, Employee implicitly requested medical care, given his narrative discussion. His medical benefit claim is

further evidenced by his request for medical transportation costs in his December 9, 2022 claim. *Rogers & Babler*. Presumably, his March 10, 2020 claim seeks past and ongoing benefits in each category. Therefore, his claims for TPD and PTD benefits, a penalty, interest, attorney fees, costs, and implied medical care will be denied, through April 7, 2022, pursuant to AS 23.30.110(c). *Pruitt*.

> *(E) Some of Employee's July 8 and December 9, 2022 claims will be denied under §110(c).*

But Employee filed two more claims. 8 AAC 45.050(a). Employer contends each claim "relates back" to the first, because the claims arose out of the same "conduct, transaction, or occurrence set out or attempted to be set out in the original pleading." 8 AAC 45.050(e). It contends since the first claim must be denied so too must the subsequent claims. Notwithstanding his first claim, which contained a different injury date, all three claims arose from the same January 4, 2019 injury while working for Employer; his agency files show no other injury with Employer. *Rogers & Babler*. He testified in deposition he never had an injury with Employer that he did not report; the Division's database records only one injury he had with Employer -- on January 4, 2019.

In each successive claim, Employee gave new details about his injury and provided new contentions. No claim explicitly states it was for past benefits, ongoing benefits or both; no claim states it amends a previous claim. Unlike in *Bailey*, Employer never controverted a pre-claim bill, prompting Employee to file his first claim. Employee's March 10, 2020 claim requested TPD, PTD, attorney fees and costs, a penalty, interest and implied medical benefits. The second claim on July 8, 2022 reiterated the PTD and implied medical benefits claims and added only a request for an unfair or frivolous controversion finding, which is not a benefit to Employee. The third claim on December 9, 2022, reiterated PTD benefits, the unfair or frivolous controversions finding, a penalty, interest and implied medical benefits and added only a medical transportation request. Employee's July 8 and December 9, 2022 claims renewed some claims he made in his March 10, 2020 claim. The lack of Employee's specificity on his claims makes it difficult to apply *Bailey's* analyses and determine if the claims are independent of each other.

In *Bailey*, the claimant also filed three claims; he filed his first claim to contest his employer's refusal to pay pharmacy bills submitted to the employer by the pharmacies. *Bailey* found the claimant's second claim simply renewed the first claim; in other words, it sought the same benefits because the employer still had not paid them. The claimant's third claim, according to *Bailey*, sought medical benefits incurred *after* he had filed his first claim that had sought payment for the 1997 prescriptions. *Bailey* held the claimant could not have requested the medical benefits in the third claim any sooner because he had not yet incurred them. In other words, the employee's third claim was independent of the first two because it requested different benefits. *Bailey*.

As best as can be determined from the evidence, parts of Employee's July 8 and December 19, 2022 claims relate back to his March 10, 2020 claim. 8 AAC 45.050(e). All three claims requested PTD benefits; the PTD benefit claims were not independent of each other. *Bailey*. Therefore, Employee's claims for past PTD benefits will be denied under AS 23.30.110(c) because they are the same claims and latter claims relate back to the first claim, which will be his denied under §110(c). His claims for PTD benefits will be denied through December 9, 2022, the date of his third claim. If Employee wants to claim ongoing PTD benefits, he may file a new claim specifying that he seeks PTD benefits from December 10, 2022, and continuing. *Egemo*; *Bailey*. Likewise, Employee's December 9, 2022 claim for a penalty and interest relate back to his March 10, 2020 claim and will be denied under §110(c). In the event he files a new claim for benefits beginning December 10, 2022, he may claim a penalty and interest on those benefits. *Egemo*; *Bailey*.

Although an unfair or frivolous controversions finding is not a "benefit" to Employee, he made a request for it on his July 8, 2022 claim. This was a "new claim" not relating back to the March 10, 2020 claim and not subject to the April 2or August 10, 2020 controversions. Thus, the unfair or frivolous controversion finding request will not be denied under §110(c). Under the August 3, 2022 controversion, Employee has until August 7, 2024, to request a hearing or request more time to request one on that part of his July 8, 2022 claim (date of event August 3, 2022 not counted = August 4, 2022 +2 years = August 4, 2024 +3 days for service by mail = August 7, 2024).

Similarly, his December 9, 2022 claim for transportation costs was a "new claim" not relating back to the first claim and not subject to the April 2, 2020, August 10, 2020, or August 3, 2022 controversion notices. Employee's transportation cost claim will not be denied under §110(c). The December 9, 2022 claim for transportation costs falls under the December 30, 2022 controversion; he has until January 2, 2025, to request a hearing or request more time to request one on that part of his December 9, 2022 claim (date of event December 30, 2022 not counted = December 31, 2022 +2 years = December 31, 2024 +3 days for service by mail = January 3, 2025).

In summary, Employee's March 10, 2020 claim for TPD benefits and his March 10, 2020, July 8 and December 9, 2022 claims for PTD benefits will be denied through December 9, 2022. His July 8 and December 9, 2022 implied claims for medical care and his requests for an unfair or frivolous controversion finding will not be denied under §110(c). Employee's December 9, 2022 claim for medical transportation costs will not be denied under§110(c). This result best comports with the Act's mandates. AS 23.30.001(1); *Wagner*; *Bailey*.

CONCLUSION OF LAW

Some of Employee's claims will be denied for failure to request a hearing timely.

ORDER

1) Employee's March 10, 2020 claim for past TPD and his March 10, 2020, July 8 and December 9, 2022 claims for past PTD benefits, a penalty, interest, attorney fees, costs, and implied medical care are denied through December 9, 2022, pursuant to AS 23.30.110(c).
2) Employee's July 8 and December 9, 2022 implied claims for medical care and requests for an unfair or frivolous controversion finding will not be denied under §110(c).
3) Employee's December 9, 2022 claim for medical transportation costs will not be denied under §110(c).

Dated in Anchorage, Alaska on May 16 , 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 accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Frank Montoya, employee / claimant v. Fasteners & Fire Equipment, employer; Republic Indemnity Co. of America (RIG), insurer / defendants; Case No. 202003740; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on May 16, 2023.

/s/
Kimberly Weaver, Office Assistant