ALASKA WORKERS' COMPENSATION BOARD

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

LISA KAWAGLEY, Employee, Claimant, v. YUKON KUSKOKWIM HEALTH CORPORATION, Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 199804661 AWCB Decision No. 23-0062 Filed with AWCB Anchorage, Alaska on November 6, 2023.

Yukon Kuskokwim Health Corporation's July 7, 2023 petition to deny Employee's claim was heard on the written record in Anchorage, Alaska on October 3, 2023, a date selected on August 22, 2023. A July 27, 2023 hearing request gave rise to this hearing. Lisa Kawagley (Employee) was unrepresented. Attorney Vicki Paddock appeared and represented Yukon Kuskokwim Health Corporation and Alaska National Insurance (Employer). The record closed on October 6, 2023.

ISSUES

Employer contends Employee's March 8, 2000 and February 27, 2001 workers' compensation claims should be dismissed pursuant to AS 23.30.110(c) because she failed to request a hearing within two years of Employer's March 15, 2000 post-claim controversion.

Employee did not participate but she is presumed to be in opposition.

1) Shall Employee's March 8, 2000 and February 27, 2001 claims be denied?

Employer contends Employee's June 16, 2022 and September 14, 2022 workers' compensation claims for temporary total disability (TTD) and permanent total disability (PTD) should be dismissed pursuant to AS 23.30.105(a) because she filed her claim more than two years after her last disability payment.

Employee did not participate but she is presumed to be in opposition.

2) Are Employee's June 16, 2022 and September 14, 2022 claims barred?

FINDINGS OF FACT

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

1) On February 23, 1998, Employee reported while working as a custodian for Employer, she injured her lower back muscles from lifting garbage bags into a dumpster 3-4 days a week for Employer. (Report of Occupational Injury or Illness, March 16, 1998).

2) On December 3, 1999, Employee was seen by John Joosse, MD. He noted Employee was seven weeks pregnant and reported having work related back pain since 1998. Employee reported she had no prior back problems and that her pain has steadily increased. Dr. Joosse diagnosed possible low back sprain, possible spina bifida, or a mechanical impingement. (Joosse report, December 3, 1999).

3) On January 3, 2000, Employee reported numbness radiating down her thighs into her calves and low back pain was increasing with her pregnancy. Employee requested a note for bed rest, which Dr. Joosse declined . He did not believe bed rest would be beneficial. Instead, he recommended a continued exercise regimen. (Joosse report, January 1, 2000).

4) On February 11, 2000, Dr. Joosse noted Employee had been attending physical therapy two times per week with no improvement. Employee articulated on her pain diagram a new area of pain different than the pain she experienced from her work injury. Dr. Joosse opined this indicated her previous back pain had resolved, and any ongoing pain was related to Employee's pregnancy. (Joosse report, February 11, 2000).

5) On February 25, 2000, Employer denied Employee's claim. Employer relied on Dr. Joosse's February 11, 2000 note that work was no longer the substantial cause of Employee's need for treatment. Employer also contended Employee had reported numerous falls since her final date of work with Employer on April 28, 1998. (Controversion Notice, February 25, 2000).

6) On March 3, 2000, Employee filed a claim for benefits. She did not check any of the boxes on the claim form. Her reason for filing the claim form was to request her claim be transferred from Anchorage to Fairbanks. She also requested a physician change for physical therapy within walking distance. Employee did not sign the claim form. She filed a request for conference on the same date. (Workers' Compensation Claim and Request for Conference, March 3, 2000, observations).

7) On March 17, 2000, Employer filed a post-claim controversion. Employer reiterated the same basis for denying benefits as articulated in its February 25, 2000 controversion notice. The controversion notice contained the following language:

> **2. When must you request a hearing?**
>
> **Within two years after the date the insurer/employer filed with controversion notice, you must request a hearing before the AWC Board. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within the two years.**
> (Controversion Notice, March 17, 2000).

8) On April 24, 2000, the parties discussed the venue change from Anchorage to Fairbanks, and a change of medical provider. Employee was advised Employer's controversion denied any on-going medical treatment. The parties agreed to change venue to Fairbanks. (Prehearing Conference Summary, April 24, 2000).

9) A July 17, 2000, prehearing conference was rescheduled to September 5, 2000 at Employee's request. Employee informed the Division she was requesting the change for a date after she delivered her baby. No summary was issued. (Agency file, comments, observations).

10) The September 5, 2000 prehearing was cancelled at Employee's request. Employee informed the Division she was requesting the cancellation to seek representation from an attorney, and she had a follow-up doctor's appointment on September 25, 2000. No summary was issued. (Agency file, comments, observations).

11) At a prehearing conference on February 27, 2001, Employee amended her original claim. to include temporary total disability (TTD) from February 1998 through February 2000 and continuing except for periods of employment. Employee requested vocational rehabilitation benefits, on-going medical treatment, and a penalty for improper influencing of a treating physician by Employer. Employee presented a report from Dr. Cobden indicating her work injury may have been an aggravation but not the cause of her current condition. Employer noted that medical releases would be forthcoming with possibly a deposition and independent medical examination. Employee was directed to follow-up with Dr. Cobden after the prehearing's conclusion. Employee noted she had spoken with an attorney who provided a letter that her doctor needed to review and sign. (Prehearing Conference Summary, March 1, 2001).

12) On November 19, 2001, Employee filed an affidavit of readiness for hearing (ARH) on her claim. She requested a one-hour hearing with one witness to be held in Fairbanks. (Affidavit of Readiness for Hearing, November 19, 2001).

13) On November 26, 2001, Employer filed its opposition to Employee's ARH. Employer requested a prehearing conference be held prior to hearing. Employer disputed the compensability of Employee's claim and noted Employee recently changed physicians and updated releases would be forthcoming to gather recent medical information. Employer noted it would be scheduling Employee's deposition and that Employer may need an independent medical examination performed prior to hearing. (Affidavit of Opposition, November 26, 2001).

14) On January 29, 2002, the parties attended a prehearing conference and agreed to a one-hour oral hearing on Employee's claim. The hearing was scheduled for March 14, 2002. (Prehearing Conference Summary, January 29, 2002).

15) On February 21, 2002 Employee provided the Division with the following handwritten letter:

> *To Workman's Comp Board;*
>
> *I would like to postpone the hearing date to seek representation and gather witnesses.*
>
> *Thank you,*
> *Lisa M. Kawagley Claim #199804661*

The Employer's attorney agreed and the parties stipulated to continue the hearing.(Agency file, communications tab, observations, February 21, 2002).

16) On March 18, 2002, Employee was not present at a properly noticed prehearing conference. Employer noted it would be attempting settlement and if not successful the claim should move forward to hearing. No summary issued. (Agency file, communications, comments, observations).

17) On June 12, 2002, Employee was not present at a properly noticed prehearing conference. No summary issued. (Agency file, communications, comments, observations).

18) On February 19, 2003, Employee called the Division to cancel a prehearing conference. The Division staff noted difficulty in getting Employee to understand what she needed to do to progress her claim. Employee accused Division staff of turning her doctors against her and believed the Division staff should be fired. She subsequently hung up. (Agency file, communications tab, comments).

19) Employee's file contains no activity from Employee from the phone call on February 19, 2003 until April 12, 2022. (Agency file, observations).

20) On April 12, 2022, Employee called the Division. Employee stated she was frustrated that she did not receive benefits and would like the Division to "restore her name in good faith." Employee was provided the insurance adjuster's information. She was also provided a claim letter and a Workers' Comp and You packet. (Agency file, communications, comments).

21) On June 12, 2022, Employee filed a claim for benefits. She requested TTD, unfair or frivolous controversion, medical costs, penalty for late paid compensation, and interest. Employee contends she severely ruptured disks in her lower back in 1998 while working for Employer. (Claim for Workers' Compensation Benefits, June 12, 2022).

22) On June 29, 2022, Employer filed a post claim controversion and answer to Employee's claim. In both, Employer denied all benefits Employee requested. Employer raised the following affirmative defenses (1) necessary discovery has yet to be completed, (2) the claim is barred under AS 23.30.110(c), AS 23.30.105(a), or otherwise barred by law or equity, (3) the last injurious exposure rule may be applicable to this claim, (4) Dr. Joose's medical opinion that Employee's work injury would have resolved within 6-12 weeks and Employee's ongoing complaints were unrelated to the work injury, (5) no evidence of time loss due to the work injury, (6) lack of supporting medical documentation from Employee or Employee's providers, and (7) all benefits due to Employee have been paid. (Answer to Employee's Workers' Compensation Claim, June 29, 2022; Controversion Notice, June 30, 2022).

23) On August 18, 2022, the parties were present at a prehearing conference. Employer reiterated its position Employee's most recent claim is barred by statute. Employer would be sending information releases to Employee via certified mail. The designee advised Employee she should sign and return the releases within 14 days or file for a protective order. Employee was provided a list of attorneys, and a request form for a hard-copy of her file. (Prehearing Conference Summary, August 18, 2022).

24) On September 15, 2022, Employee filed another claim for benefits. Employee requested permanent total disability (PTD), a compensation rate adjustment, unfair or frivolous controversion, penalty for late paid compensation, and interest. Employee contends she has spondylolisthesis and a crushed spine. She filed her claim to request help in fixing her injury. (Claim for Workers' Compensation Benefits, September 15, 2022).

25) On October 4, 2022, Employer denied Employee's claim and asserted it is barred under AS 23.30.105(a) and AS 23.30.110(c). Employer relies on Dr. Joosse's February 11, 2000 opinion Employee's ongoing complaints were unrelated to her work injury. Employer noted no evidence of disability due to the work injury. It asserted Employee's compensation rate was calculated correctly in 2000 pursuant to AS 23.30.220(a)(4). Employer contended all benefits due Employee had been paid. (Controversion Notice, October 4, 2022).

26) On October 4, 2022, Employer filed its Answer to Employee's claim. Employer denied all benefits Employee requested. Employer raised the following affirmative defenses (1) necessary discovery has yet to be completed, (2) the claim is barred under AS 23.30.110(c), AS 23.30.105(a), or otherwise barred by law or equity, (3) the last injurious exposure rule may be applicable to this claim, (4) work is not a legal cause of employee's current disability, (5) Dr. Joose's medical opinion that Employee's work injury would have resolved within 6-12 weeks and Employee's ongoing complaints were unrelated to the work injury, (6) no evidence of time loss due to the work injury, (7) employee's compensation rate was correctly calculated in 2000 pursuant to AS 23.30.220(a)(4), (8) all benefits due to Employee have been paid. (Answer to Employee's Workers' Compensation Claim, October 4, 2022).

27) At a prehearing conference on October 11, 2022, Employee stated she was in the process of hiring an attorney. Employer noted the case was in the early discovery phase. Parties requested a follow-up conference on December 12, 2022. (Prehearing Conference Summary, October 11, 2022).

28) On September 23, 2022, Employee testified she injured her back while working as a custodian in 1998 in Bethel, Alaska. Employee struggled to recall any other details of her work history or any previous injuries. Early in her testimony, she did recall a 2001 slip and fall in Fairbanks, Alaska where she was compensated through litigation. The fall she suffered was on pavement and injured her lower back. She said the year after her 1998 injury she slipped on a frozen lake and injured her tailbone and lower back requiring an emergency room visit. Otherwise, Employee was not capable of remembering any specific details of her work history, medical history, or other injuries for the past 20 years. When asked general fact questions such as, "Have you ever been hospitalized?" Employee responded, "I think so, I don't remember." More specifically, "Have you ever stayed in a hospital over night?" Employee responded, "I might have, but I don't have no memory of any kind of visit like that." When asked about her work injury, Employee reported that she was lifting slop bags nonstop for over a week by herself. Employee said she was in excruciating pain after lifting the bags and the pain never subsided. She said, "I almost stopped walking and went to the ER, and I knew just how bad that injury I sustained had been for me. So I live like this." When asked about the difficulty walking after the injury Employee said it lasted, "the rest of my life afterwards." Employee later testified she couldn't remember any slip and falls after her work injury despite her earlier testimony describing falling on a frozen lake and receiving compensation for a 2001 slip and fall in Fairbanks. (Employee's Deposition, September 23, 2022).

29) On December 12, 2022, Employee did not attend a properly noticed prehearing. On December 20, 2022, eight days after her prehearing conference, Employee contacted the Division. She acknowledged she missed her prehearing conference and requested information on scheduling a new conference. (Agency file, communications, comments).

30) On March 3, 2023, Employer she said Employee had not returned releases sent by certified mail. Employee was advised to sign and return releases or file for a protective order. The parties agreed to a future conference on April 18, 2023. (Prehearing Conference Summary, March 3, 2023).

31) On March 17, 2023, Employee requested a protective order from signing the insurance record releases. (Petition, March 17, 2023).

32) On March 28, 2023, Employee did not appear at a prehearing to address her request for a protective order. The designee attempted to reach Employee but was unsuccessful. Employer noted Employee had not signed releases. (Prehearing Conference Summary, March 28, 2023).

33) On April 12, 2023, Employee contacted the Division and inquired about American with Disabilities Act (ADA) accommodations based on the prehearing conference notice she received. She was directed to contact the numbers on the summary if she needed accommodations. Employee asked questions relating to Social Security Disability and other benefits she might be entitled to. Employee was informed Division staff could not answer those questions. Employee inquired how long this process would "drag out." Employee was encouraged to communicate with Employer's attorney if she needed a change in medical care. (Agency file, communications, comments).

34) On April 18, 2023, Employee was ordered by the designee to sign and return releases to Employer no later than April 28, 2023. A follow-up conference was scheduled for May 30, 2023. (Prehearing Conference Summary, April 18, 2023).

35) On April 27, 2023, Employee contacted the Division requesting information for filing a complaint with the Alaska Bar Association against Employer's attorney. Employee requested information pertaining to a Second Independent Medical Examination (SIME). Employee was provided information on the SIME process and advised that dispute is required for an SIME to be ordered. (Agency file, communications, comments).

36) On May 31, 2023, Employee did not appear at a properly noticed prehearing conference. The designee called Employee's number of record. A man answered and provided a new number to reach Employee. Designee attempted the new number but was unsuccessful in reaching Employee. Employer noted it received confirmation Employee received the discovery releases sent via certified mail. (Prehearing Conference Summary, May 31, 2023).

37) On July 7, 2023, Employer filed a petition to deny Employee's claims under AS 23.30.105(a) and AS 23.30.110(c). Employer contends Employee abandoned her original claim for disability, her June 16, 2022 and September 14, 2022 claims were filed more than two years after the last date of disability payment and knowledge of her disability and should be denied under AS 23.30.105(a). Employer requested Employee's March 8, 2000 and February 27, 2001 claims be denied under AS 23.30.110(c) for failure to request a hearing with two years of a post-claim controversion. (Petition, July 7, 2023).

38) Employee did not answer Employer's petition. (Agency file, observations).

39) On July 27, 2023, Employer requested a written record hearing on its July 7, 2023 petition to deny Employee's claims. (Affidavit of Readiness for Hearing, July 27, 2023).

40) On August 22, 2023, Employee did not initially appear for a properly notice prehearing. Designee called Employee and she declined to participate despite being informed a hearing was requested to deny all her claims. Designee scheduled a written record hearing for October 3, 2023. (Prehearing Conference Summary, August 22, 2023).

41) Employer contends Employee failed to file her most recent claims for TTD and PTD benefits within two years of her knowledge of the relationship between her work injury and her claimed disability. Employer is prejudiced by the 20-year gap in which Employee took no action on her claim. Employer relies on Employee's testimony she knew of her work-related disability as of the date she contends she was injured and did not timely file her claim. Employer voluntarily paid Employee TTD payments until March 16, 2000. As to her PTD claim, Employer notes Employee filed for and receives Social Security Disability benefits and she has been out of work for over two years. Employee testified she believes her work injury has limited her ability to walk and perform the activities to which she now claims PTD benefits. Employer contends Employee has never raised a defense or legal excuse for her failure to file either claim within two years of her disability. As to Employee's March 8, 2000 claim and the February 27, 2001 amended claim, Employer relies on Employee's own request for a continuance which rendered her ARH inoperative for purposes of tolling the .110(c) deadline. Employer contends Employee failed to participate in any manner prior to the .110(c) deadline running. It contends Employee "simply ignored the statutory deadline and failed to file anything" during the two years after Employer's March 15, 2000 controversion. Employer requests Employee's claims for TTD and PTD filed in 2022 be denied under AS 23.30.105(a), and Employee's March 8, 2000 and February 27, 2001 amended claim be denied under AS 23.30.110(c). (Employer's Hearing Brief, September 25, 2023).

42) Employee did not file a brief or provide any additional information prior to the October 3, 2023 hearing on the written record. (Observations, judgment).

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 . . . .;

The board may base its decisions not only on direct testimony 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, 533-534 (Alaska 1987).

> **AS 23.30.105. Time for filing of claims.** (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, . . .
>
> (b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard. . . .

The statute of limitations under AS 23.30.105(a) is an affirmative defense which must be raised in response to a claim. *Horton v. Nome Native Community Ent.*, AWCB Decision No. 94-0139 (June 16, 1994). The employer bears the burden to prove the affirmative defense the claimant failed to timely file a claim. *Egemo v. Egemo Construction Co*., 998 P. 2d 434, 438 (Alaska 2000).

The two-year limit provided in §105(a) for filing a disability claim commences from the time of the injury, the time of disablement, or the time of manifestation of latent defects, whichever comes last. The limitations statute begins to run only when the injured worker (1) knows of the disability, (2) knows of its relationship to the employment, and (3) is actually disabled, which is defined as "incapacity because of injury to earn the wages the employee was earning at the time of injury in the same or any other employment. *Egemo* at 441. To apply §105(a), the term "claim" means a "written application for benefits filed with the Board." *Tipton v. Arco Alaska, Inc.*, 922 P.2d 910, 911 (Alaska 1996).

The requirement under § 105(b) to raise the defense "at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard" has been interpreted to apply to the first prehearing conference following a claim's filing. *Nickerson v. Alaska Airlines*, AWCB Decision No. 05-0214 (August 19, 2005).

The purpose of §105(a) is to protect the employer against claims too old to be successfully investigated and defended. *Morrison v. Knudsen Company v. Vereen*, 414 P.2d 536, 538; *Egemo*. As noted by Professor Larson:

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

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

> **AS 23.30.110. Procedure on claims.**
> . . . .
>
> (c) If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.
> . . . .
>
> (h) The filing of a hearing request under (c) of this section suspends the running of the two-year time period specified in (c) of this section. However, if the employee subsequently requests a continuance of the hearing and the request is approved by the board, the granting of the continuance renders the request for hearing inoperative, and the two-year time period specified in (c) of this section continues to run again from the date of the board's notice to the employee of the board's granting of the continuance and of its effect. If the employee fails to again request a hearing before the conclusion of the two-year time period in (c) of this section, the claim is denied.

To avoid dismissal, an employee must pursue his claim in some manner and may not simply fail to take any action. Certain events, however, may relieve an employee from strict compliance with §110(c). The Court held the board owes a duty to every claimant to fully advise him of "all the real facts" that bear upon his right to compensation, and to instruct him on how to pursue that right under law. *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska 1963). *Bohlman*

v. Alaska Const. & Engineering, 205 P.3d 316 (Alaska 2009), held the board has a duty to inform a *pro se* claimant how to preserve his claim under §110(c) with specificity when warranted by the facts, but did not delineate the full extent of the duty. Consequently, *Richard* is applied to excuse noncompliance with §110(c) when the board failed to adequately inform a *pro se* claimant of the two-year time limitation. *Dennis v. Champion Builders*, AWCB Decision No. 08-0151 (August 22, 2008).

In *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 199 (Alaska 2008), the Court held §110 is directory and not mandatory, meaning strict compliance is not required. Nonetheless, *Kim* said an injured worker must do something to stop the time limit in §110(c). *Id.* In *Kim*, the employee filed a petition for a continuance stating his attorney was not ready for a hearing and needed more time. The Board did not act on the petition and the employer then filed a petition to dismiss the claim under §110(c). The employer's petition to dismiss was granted and *Kim* reversed, noting the purpose of §110(c) is to create guidelines for the orderly conduct of public business. *Id.* at 197. The Board has power to excuse a failure to request a hearing on time if the evidence supports relief. *Id.* The Board must analyze the case's circumstances to determine if the evidence is sufficient to excuse a failure to timely request a hearing and this is "consistent with the notion that a statute of limitations defense is disfavored." *Id.* at 198. *Kim* further held a request for an extension of time, whether implicit or explicit, is sufficient to stop the time limit and allows the Board to determine if a request for more time is to be granted. When additional time is granted, the claimant must be told what amount of time remains to request a hearing. *Id.*

Tipton said §110(c) requires an employee to request a hearing within two years of the controversion, or face claim dismissal. However, *Tipton* also said the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Id*. at 913. *Kim* noted drastic and harsh procedural provisions such as §110(c) are disfavored and construed narrowly by the courts and held a timely hearing request definitively and permanently tolls the statute of limitation under §110(c). *Id.*

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .

> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .

Cortay v. Silver Bay Logging, 787 P.2d 103 (Alaska 1990), held disability depends upon a claimant's earning capacity and the concept of disability compensation rests on the premise the primary consideration is not medical impairment but rather loss of earning capacity related to that impairment.

> **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 45.074. Continuances and cancellations**.
> . . . .
>
> (c) Except for a continuance or cancellation granted under (b)(1)(H) of this section,
>
> (1) The affidavit of readiness is inoperative for purposes of scheduling another hearing;
>
> (2) The board or its designee need not set a new hearing date at the time a continuance or cancellation is granted; the continuance may be indefinite; and
>
> (3) A party who wants a hearing after a continuance or cancellation has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070.

ANALYSIS

1) Shall Employee's March 8, 2000 and February 27, 2001 claims be denied?

Starting with Employee's March 8, 2000 claim and its February 27, 2001 amendment that relates back to the original claim, Employer contends Employee had to file an ARH within two years after the March 15, 2000 post claim controversion. Employer concedes Employee filed a valid ARH on her original claim on November 14, 2001. However, it contends when Employee requested a continuance on February 21, 2002, the November 14, 2001 ARH was rendered "inoperative." .

On February 21, 2002, Employee requested a continuance so she could find an attorney and witnesses.

If an employee requests a continuance and it is approved, the employee's hearing request becomes inoperative. AS 23.30.110(h); 8 AAC 45.074(c)(1). When the ARH becomes inoperative the two-year period to request a hearing begins to run again on the date the continuance is granted. Nevertheless, factfinders have an obligation to determine if there is a way around the .110(c) deadline running. *Roberge*.

Employee's ARH became inoperative when she requested, and Employer stipulated, to a continuance and it was approved. It must now be determined if there is a way to excuse Employee's failure to timely file an ARH

Employee did not actively, regularly, or consistently participate in moving her case forward. Employee failed to attend three subsequent prehearings conferences after her request for a continuance in 2002. Employee did not avail herself to the Division for a year until she called to accuse Division staff of turning doctors against her in 2003. Her next contact with the Division, in 2022, was twenty years later and was to inquire about the status of her claim.

Employee filed a claim for benefits on March 8, 2000; Employer controverted that claim on March 15, 2000. Employee had two years to either request a hearing or a written request asking for more time to file one. Employee did not file another ARH until November 14, 2001, which was 609 days after Employer's post claim controversion. When Employee filed her first ARH, her two-year deadline stopped running. However, on February 21, 2002, when Employee's continuance was approved, her ARH was rendered "inoperative", thus, the two-year clock began to run again. Two years is the equivalent of 730 days. When the continuance was approved, Employee had 121 days remaining to file a new ARH. Adding 121 days from the date the continuance was approved, Employee had until June 24, 2002 to file a new ARH. 121 days from February 21, 2002 was Saturday June 22, 2002, with that date falling on a weekend and under 8 AAC 45.063, the new operative deadline to file an ARH was June 24, 2002. Employee had to take some action to request

a hearing or to preserve her right to request no later than June 24, 2002. *Kim*. Employee did not file anything or avail herself to the Division asking for additional time within that timeframe.

Legal grounds, such as lack of mental capacity, incompetence, or equitable estoppel asserted against the Division may excuse noncompliance with .110(c). The record does not contain evidence to suggest any of the recognized exceptions to the .110(c) limit apply to the instant case. There is no indication of mental incompetence. There is no evidence Employee requested a hearing or a continuance that would demonstrate substantial compliance with the statute. By contrast, Employer's two controversion notices, and prehearing conferences with the designee repeatedly provided her with sufficient legal notice and warning about the two-year deadline. Further, Employee had spoken to the Division regarding her claim and what she needed to do to advance her claim four times during the relevant period, in fact, Employee herself cancelled prehearings or her hearing on four separate occasions – July 19, 2000, September 5, 2000, February 21, 2002, and March 18, 2002. *Rogers & Babler*.

AS 23.30.110(c) is likened to a "statute of limitations," which is a generally "disfavored defense" and neither "the law nor the facts should be strained in aid of it." *Tipton*; *Kim*. Neither the law nor the facts need to be strained in this case. And while .110(c) is "directory," and "substantial compliance" with its terms is acceptable action to prevent claim dismissal absent significant prejudice to the other party, Employee still should have filed something to prosecute her claims timely. *Kim*. She filed nothing notwithstanding at least four reminders. Cases "shall be" decided on their merits, "except where otherwise provided by statute." AS 23.30.001(2). The relevant statute providing an exception to that general rule is §110(c). It required Employee to prosecute her claim promptly; she has failed to do so.

The Division has a duty to fully advise an employee of "all the real facts" bearing upon their right to compensation and how to pursue it. *Richard*. This includes informing employees how to preserve a claim under §110(c). *Bohlmann*. Employer and the Division satisfied their duty in this case by adequately and repeatedly notifying and warning Employee about the two-year deadline to request a hearing and how to do so. She had ample notice through two controversion notices, over four prehearing conference summaries, and four personal phone calls with the Division.

Employee, after requesting a hearing continuance in 2002, stopped pursuing her claim until 20 years later. She did not contact the Division, she did not file an ARH, she did not request an extension of time to request a hearing, nor did she attempt to file anything that could be perceived as justification for the delay or an attempt to reconcile the missed deadlines within the time she had remaining to avoid claim denial. Employer's May 2, 2022 petition will be granted and Employee's March 8, 2000 and February 21, 2002 claims will be denied.

2) Are Employee's June 16, 2022 and September 14, 2022 claims barred?

"Disability" is the incapacity to earn wages in the same or other employment an employee was receiving when injured. AS 23.30.395(16); *Cortay.* Employee's right to compensation for disability is barred unless her claim was filed within two years after she had knowledge of the nature of her disability and its relation to her employment after disablement. AS 23.30.105(a). However, if an employer voluntarily pays benefits without an award on account of the injury, a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, AS 23.30.180, AS 23.30.185, AS 23.30.190, AS 23.30.200, or AS 23.30.215. In the instant case, Employer voluntarily paid TTD benefits under AS.23.30.185, with the last payment made on March 16, 2000. Employer must prove its affirmative defense Employee failed to timely file a claim. *Egemo*

Employer properly raised its AS 23.30.105 affirmative defense at the first hearing on Employee's claim and Employee was given an opportunity to respond. AS 23.30.105(b); *Horton*. Employee filed her TTD claim on June 15, 2022. Employee filed her claim for PTD on September 14, 2022. The October 3, 2023 written record hearing on Employer's petition for dismissal of Employee's TTD and PTD claims was the first hearing in this case. Employer also raised its AS 23.30.105 defense in its answer to both claims and at the first post-claim prehearing on September 22, 2023, which was the prehearing held to set the date for the October 3, 2023 hearing. AS 23.30.065; *Nickerson*. Once this requirement has been met, additional questions must be answered to determine if Employer has produced substantial evidence to prove its defense.

The next question is whether a claim was filed within two years of the last disability payment, which was a TTD payment on March 16, 2000. AS 23.30.105. Employee was required to file

her claim for disability benefits by March 16, 2002. *Id*. However, Employee did not file her claims for TTD and PTD until June 15, 2022 and September 14, 2022, respectively, over twenty years after the deadline.

Employee did not dispute, and the record establishes that she has had knowledge of "the nature of her disability" and its "relation to the employment" since the February 23, 1998 work injury. AS 23.30.105(a); *Babler*. Employee filed her injury report on March 16, 1998, less than a month after the injury, stating she had injured her lower back while lifting slop bags. She testified that immediately after her injury she was aware she was injured to the point she had difficulty walking. She expounded further that she just "lives like this" with her low back pain. Employee filed claims immediately after her injury that did not include TTD or PTD. It was not until 24 years after her reported work injury that TTD and PTD claims were filed. Employer's controversions and answers to Employee's 2022 claims raised the AS 23.30.105(a) affirmative defense. Employee was aware of her disability for over two decades prior to filing claims for disability benefits.

The two-year limitation is to protect employers from old claims they will not have a reasonable or timely opportunity to investigate or defend against. *Morrison-Knudsen*. Failure to file a claim within two years from the time Employee knew or should have known the nature of her disability and its relation to her employment carries a conclusive presumption Employer was prejudiced by the filing delay. AS 23.30.001(1), (2), (4); *Larson*.

Employee has never ceased claiming her are related to her February 23, 1998 work injury. AS 23.30.105(a) bars Employee's right to disability benefits after March 16, 2000, and Employer's petitions to dismiss Employee's June 16, 2022 claim for TTD benefits and September 14, 2022 claim for PTD benefits will be granted.

CONCLUSIONS OF LAW

1) Employee's March 8, 2000 and February 27, 2001 claims will be denied.
2) Employee's June 16, 2022 and September 14, 2022 claims are barred.

ORDER

1) Employer's July 7, 2023 petition to deny Employee's March 8, 2000 and February 27, 2001 claims is granted.

2) Employer's July 7, 2023 petition to deny Employee's June 16, 2022 and September 14, 2022 claims is granted.

Dated in Anchorage, Alaska on November 3, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kyle D Reding, Designated Chair

/s/
Sara Faulkner, Member

/s/
Bronson Frye, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of LISA KAWAGLEY, employee / claimant v. YUKON KUSKOKWIM HEALTH CORPORATION, employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 199804661; 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 November 6, 2023.

/s/
Rachel Story, Law Office Assistant I