ALASKA WORKERS' COMPENSATION BOARD

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

ESTATE OF ROBERT MENKE, Deceased Employee, TRACI MENKE, Widow, Claimants, v. PEAK OILFIELD SERVICE COMPANY, LLC, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201801725 AWCB Decision No. 24-0026 Filed with AWCB Fairbanks, Alaska on May 9, 2024

Peak Oilfield Service's request for dismissal of the Estate's pre-death claim and petition for an SIME were heard on the written record in Fairbanks, Alaska on March 28, 2024, a date selected on January 31, 2024. A January 2, 2024, affidavit of readiness gave rise to this hearing. Attorney Richard Harren appeared and represented Estate of Robert Menke and Traci Menke (Claimants). Attorney Jeffrey Holloway appeared and represented Peak Oilfield Service Company, LLC, and American Zurich Insurance Company (Employer). In *Estate of Robert Menke v. Peak Oilfield Services, LLC* , AWCB Dec. No 22-0055, July 27, 2022, a discovery dispute between the parties was reviewed by the Board which granted in part and denied in part certain discovery requests. (*Menke I*). In *Estate of Robert Menke v. Peak Oilfield Services, LLC*,

AWCB Dec. No 23-0039, July 11, 2023, denied Claimants' request for additional time to comply with AS 23.30.110(c). (*Menke II*). The record closed on April 2, 2024, after the panel deliberated.

ISSUES

Employer contends Claimants' March 18, 2020 claim was dismissed as a matter of law because a hearing was not requested prior to the AS 23.30.110(c) April 8, 2022 deadline running.

Claimants contend *Menke II* was vague in its order as to which claims were dismissed, if any, and requests the decision be clarified.

1) Shall Claimants' March 18, 2020 claim be dismissed for failure to request a hearing within two years of Employer's post-claim controversion

Employer contends a second independent medical evaluation (SIME) is warranted because there are conflicting opinions between Claimants' and Employer's physicians related to causation and compensability of Employee's death.

Claimant contends a SIME will delay proceedings and should not be ordered.

2) Shall this decision order an SIME?

FINDINGS OF FACT

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

1) On January 7, 2018, Robert Menke (Employee) fell and sustained a displaced right femoral neck fracture while working for Employer. George Rhyneer, MD, performed a closed reduction and percutaneous pinning with three screws. (Rhyneer Operative Report, January 7, 2018).

2) On January 16, 2018, Employer reported Employee tripped over a duck pond and broke his hip on January 7, 2018. (First Report of Occupational Injury or Illness, January 16, 2018).

3) On June 19, 2018, Employee continued to have severe leg pain and leg shortening because his femoral neck collapsed. A computer tomography (CT) scan showed the fracture had a failed

union. Dr. Rhyneer removed screws and performed a total hip arthroplasty with right hip irrigation and debridement. (Rhyneer Operative Report, June 18, 2019).

4) On July 9, 2018, Robert Bundtzen, MD, was asked to consult because Employee's surgical site drained continuously after surgery, fluid had accumulated within the incision and hip. Employee's medical history included chronic obstructive pulmonary disease, hyperlipidemia, and hypertension. Multiple cultures obtained at surgery grew strep viridans, diphtheriods, alpha hemolytic Streptococcus, and Staphylococcus epidermidis. Dr. Bundtzen diagnosed probable right total hip prosthesis infection and recommended Employee continue vancomycin treatment. (Bundtzen progress notes, July 9, 2018).

5) On October 8, 2019, Shawn Johnston, MD, provided a 16 percent permanent partial impairment rating for Employee's lower back and right hip injury. (Johnston chart note, October 8, 2019).

6) On March 18, 2020, Employee sought temporary total disability (TTD) and permanent total disability (PTD) benefits, medical and transportation costs, interest and attorney fees and costs. (Claim for Workers' Compensation Benefits, March 18, 2020).

7) On April 8, 2020, Employer denied Employee's March 18, 2020 claim, contending it paid all medical costs associated with his work-related conditions. Employer denied ongoing TTD benefits as Dr. Johnston found Employee medically stable on October 1, 2019, and PTD benefits were denied because no physician opined he was permanently precluded from working. Employer contended Employee was unable to raise the presumption of compensability for PTD benefits. (Controversion Notice and Answer, April 8, 2020).

8) On April 15, 2020, Employee was evaluated for generalized weakness and malaise for the past three days and worsening shortness of breath. He was admitted to Mat-Su Regional Medical Center on April 16, 2020, and diagnosed with septic shock and multi-system organ failure likely due to pneumonia. (Mat-Su Regional Medical Center Emergency Department records, April 15, 2020, and April 16, 2020).

9) On April 17, 2020, Employee died, and Claimant Traci Menke requested a post- mortem exam. (Mat-Su Regional Medical Center note, April 17, 2020).

10) On May 8, 2020, Employee's death certificate provided pneumonia as the cause of death. (Certificate of Death, May 8, 2020).

11) On May 11, 2020, Stephan Grigorian, MD, performed an autopsy. The cause of Employee's death was acute myocardial infarction and bilateral pulmonary thromboembolism, significant contributory factors included underlying hypertensive/ischemic heart disease and liver cirrhosis. (Gregorian final autopsy report, May 11, 2020).

12) On February 25, 2021, Claimant sought death benefits, contending Employee "passed away on 4/17/2020 due to medical complication he incurred from work-related injuries." She claimed "80% of the spendable weekly wages of [Employee]. [Employee] had 3 adult children with no duty of child support. This claim is to be combined with [Employee's] pending survival action with [Claimant] substituted as his successor in interest." (Claim for Workers' Compensation Benefits, February 25, 2021).

13) On March 18, 2021, Employer denied Claimant's February 25, 2021 claim in its entirety, contending she had not produced any evidence linking the work injury to Employee's death. (Answer, March 18, 2021; Controversion Notice, March 18, 2021).

14) On May 5, 2021, Claimants were advised, "A post-claim controversion was received by the board on 04/08/20, and therefore a hearing must be requested by 04/08/22." (Prehearing Conference Summary, May 5, 2021).

15) On December 10, 2021, A. Wayne Hurty II, MD, performed an employer's medical evaluation (EME). He provided a summary of medical records from January 7, 2018 through May 11, 2020. Dr. Hurty opined, "Cause of death ultimately would be a combination of acute myocardial infarction and bilateral pulmonary emboli. This is a highly malignant process with association of acute renal failure and contributors of cirrhosis. The significant malignant process here is the bilateral pulmonary emboli. This is what ultimately caused his death." He concluded the January 7, 2018 work injury, subsequent treatment, surgery, and infection were not a substantial cause of Employee's death; rather the most significant cause was Employee's pulmonary embolus. (Hurty EME report, December 10, 2021).

16) On January 4, 2022, Employer denied death benefits, relying on Dr. Hurty's December 10, 2021 EME report. (Controversion Notice, January 4, 2022).

17) On July 27, 2022, *Menke v. Peak Oilfield Service Company LLC*, AWCB Dec. No. 22-0055 (July 27, 2022) granted in part and denied in part Employee's petition to compel production. Employer was ordered to produce correspondence between Employer and Dr. Hurty, including the cover letter, but with all Employer's attorney's mental impressions,

conclusions, opinions, or legal theories redacted. Employer was ordered to provide Dr. Hurty's notes less Employer's attorney's mental impressions, conclusions, opinions, or legal theories. (*Menke I*, July 27, 2022).

18) On October 11, 2022, the parties attended mediation and were unable to resolve their disputes. (Agency file, Event tab, observations, October 11, 2022).

19) On October 31, 2022, Employee's beneficiary, Claimant Traci Menke, filed a petition to compel discovery. Under the form's "other" box Claimant inserted: "Est Date of claim forfeit w/o AOH & atty fee." Under reason for petition Claimant stated, "the PH Sum, Exh 1, page 2 states that the due date to file an AOH might be 4/8/22 re: original claim. EE died soon after Covid and a claim for death benefit was added with controversion 3/18/21. Board order compelling discovery from ER, and & wait for Mediation with J. Wright halted progress. EE's requests a due date to file AOR until April 30, 2023, and for related atty fee/cost." (Petition, October 31, 2022).

20) On November 15, 2022, Employer opposed Employee's petition and asserted the AS 23.30.110(c) deadline for Employee's March 20, 2020 claim had run. Claimants never filed a hearing request for hearing on Employee's claim for TTD and PTD benefits. Employer contends Employee's contentious discovery disputes halted progress in completing discovery are without merit because all discovery disputes resolved with the issuance of *Menke I*. Employer opposed extending any deadlines under AS 23.30.110(c) as Claimants raised no good cause for delay . (Opposition to Petition for Extension, November 15, 2022).

21) On November 16, 2022, Claimants filed an affidavit of readiness for hearing on the October 31, 2022 petition requesting an extension of time to request a hearing. (Affidavit of Readiness for Hearing, November 16, 2022).

22) On November, 23, 2022, Employer opposed Claimant's affidavit. Employer contended discovery is not complete, medical records are outstanding, and depositions may be needed. (Affidavit of Opposition, November 23, 2022).

23) On December 14, 2022, the parties attended a prehearing conference. The issues for hearing were identified as, "Other: Est Date of claim forfeit w/o AOH & atty fee." A hearing on Claimants' petition was scheduled for April 20, 2023. The pre-hearing conference summary notes the Claimants' attorney requested a follow-up prehearing conference be scheduled because

the April hearing date was unacceptable and needed to be set earlier. (Prehearing Conference Summary, December 14, 2022).

24) Employer's request Claimants' pre-death claim be dismissed for failure to request a hearing within two years of Employer's post-claim controversion was not identified as a hearing issue. (Observations.)

25) On July 7, 2023, *Estate of Robert Menke v. Peak Oilfield Service Co. LLC,* AWCB Dec. No 23-0039, July 11, 2023 (*Menke II)* denied Claimant's request to extend the .110(c) deadline, advised Claimant had until November 27, 2023 to file an ARH on her death benefits claim due to tolling of the .110(c) deadline, and denied Claimants' attorney fees and costs request. (*Menke II*).

26) On September 7, 2023, Employer filed an addendum report from Dr. Hurty. He reviewed roughly 700 additional pages of Employee's medical records. Dr. Hurty maintained his previous opinion that Employee's death was not related to his work injury. He said the cause of Employee's death was multifactorial. The bilateral pulmonary emboli and an acute myocardial infarction, both highly malignant, were the primary contributors to Employee's death. Dr. Hurty noted Employee's heart was enlarged, and revealed previous minor infarctions and resulting cardiomyopathy. He also said Employee had emboli and subsequent hemorrhage in the lungs. The emboli, caused by Employee's heart condition, coursed through the right side of his heart and entered his lungs. He contrasted this with an emboli that might appear in a patient's legs after surgery. Employee's work injury pertained to a right hip arthroplasty. Dr. Hurty explained that an embolism that developed as result of surgery could travel from the leg to the heart and cause a similar result. However, based on Employee's enlarged heart, and left ventricle thickening discovered during the autopsy, Dr. Hurty said it was certain the emboli were directly correlated to Employee's heart disease, not his work injury. (Hurty report, July 31, 2023).

27) On November 24, 2023, Claimant filed an ARH requesting an oral hearing for 15 hours, with 12 witnesses and 6 medical witnesses. (Affidavit of Readiness for Hearing, November 24, 2023).

28) On January 30, 2024, Claimants filed a records review evaluation by Employee's treating physician Paul Forman, MD. He reviewed records submitted to him by Claimants' attorney as well as all records he retained from the time he started seeing Employee in 2014, until his death in 2020. Dr. Forman opined individual risk factors increase the

possibility of cardiovascular disease. He stated no one can say with certainty whether Employee would have died from heart disease in April 2020 had he not suffered a fractured hip. Dr. Forman opined Employee had hyperlipidemia, hypertension, depression, tobacco use for 30 years, alcohol use for 30 years, cirrhosis of the liver, and COPD as preexisting conditions. He believed Employee's work injury aggravated his depression and impeded his ability to address his cardiovascular risk factors. Dr. Forman expounded the pain and disability from Employee's hip fracture contributed to his depression. So much so, that Employee could not adequately address his need for tobacco and alcohol cessation. Dr. Forman said the sedentary lifestyle Employee developed post-work injury eliminated any chance he had to address his cardiovascular risk factors. (Forman report, January 30, 2024).

29) On January 31, 2024, Claimants' attorney asserted it was unclear if Claimant's pre-death benefits claim was still viable after *Menke II*. The parties agreed it should be determined if *Menke II* dismissed the pre-death benefits claim and, if not, if Employer's petition for dismissal should be granted. Employer's petition for a SIME was also set to be heard. The designee noted Claimants' attorney considered the death benefits claim an amendment to his original claim. (Prehearing Conference Summary, January 31, 2024).

30) Claimants contend a SIME is unnecessary and would add significant delay to a case that has protracted over many years. Claimants rely on AS 23.30.001's legislative intent that workers' compensation matters should move expeditiously for both parties' benefit. Claimant would prefer to proceed with a merits hearing without obtaining a SIME opinion. (Claimant's Hearing Brief, March 21, 2024).

31) Employer contends a SIME is warranted. It identifies a dispute as to causation and compensability regarding Employee's work injury and his subsequent death. The providers for Claimants and Employer have provided differing opinions as to the cause of Employee's death. The dispute between the parties is significant. Both medical and death benefits are substantial if Claimant were to succeed on her claim. Employer asserts that with differing opinions, an SIME opinion will assist the panel to determine the substantial cause Employee's death. Employer contends that *Menke II* did not grant a .110(c) deadline extension Claimant's pre-death claim. Employer contended Claimants' death benefits claim was tolled procedurally and *Menke II* provided a new date for Claimant to request a hearing on the death benefits claim. Employer relies on the language of AS 23.30.110(c) that if a hearing is not requested within two years

following the filing of a controversion notice, the claim is denied. Employer notes no valid reason Claimants failed to request a hearing and requests Claimants' pre-death benefits claim be dismissed. (Employer's Hearing Brief, March 21, 2024).

32) Any petitions filed after the January 31, 2024 prehearing conference were not considered in this decision. . (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
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> > 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .
> > . . . .
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> > 4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered

The Board may base its decision 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, 533-34 (Alaska 1987).

> **AS 23.30.095. Medical treatments, services, and examinations**. . .
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> (k) In the event of a medical dispute regarding determinations of causation, medical stability . . . degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. . . .

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp.,* AWCAC Decision No. 073 (February 27, 2008) addressed the Board's authority to order

an SIME under §095(k). The AWCAC referred to its decision in *Smith v. Anchorage School District,* AWCAC Decision No. 050 (January 25, 2007), and said, referring to AS 23.30.095(k):

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

The Commission in *Bah* stated when deciding whether to order an SIME, the Board typically considers the following criteria, though the statute does not require it:

> 1) Is there a medical dispute between Employee's physician and an EME?
> 2) Is the dispute significant? and
> 3) Will an SIME physician's opinion assist the board in resolving the disputes?

> **AS 23.30.110. Procedure on claims**. . . .
> . . . .
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> (c) Before a hearing is scheduled, a party seeking a hearing shall file a request for hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response.
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> . . . 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. . . .

The board owes a duty to inform an unrepresented claimant how to preserve his claim for benefits. *Bohlmann v. Alaska Const. & Engineering, Inc.*, 205 P.3d 316 (Alaska 2009).

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 being 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 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.

Providence Health System v. Hessel, AWCAC Dec. No. 131 (March 24, 2010), 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. The claimant bears the burden to establish with substantial evidence a legal excuse from the §110(c) statutory deadline and must "induce a belief" in the factfinders' minds that the facts being asserted are probably true *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

Kim v. Alyeska Seafoods, Inc., 197 P.3d 193, 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:
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> 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). . . .

In *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193 (Alaska 2008), the Alaska Supreme Court held that because §110(c) is a procedural statute, its application is directory rather than mandatory, and substantial compliance is acceptable absent significant prejudice to the other party. *Kim,* 197 P.3d at 196. However, substantial compliance does not mean noncompliance, *id.* at 198, or late compliance, *Providence Health System v. Hessel,* AWCAC Decision No. 131 (March 24, 2010), at 11-12. And, although substantial compliance does not require filing a formal affidavit, it nevertheless still requires a claimant to file, within two years of a controversion, either a request for hearing or a request for additional time to prepare for a hearing. *Denny's of Alaska v. Colrud,* AWCAC Decision No. 148 (March 10, 2011).

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.

> **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.
> . . . .

ANALYSIS

1) Shall Claimant's March 18, 2020 claim be dismissed for failure to request a hearing within two years of Employer's post-claim controversion under AS 23.30.110(c)?

a) Claimant's February 25, 2021 claim.

Menke I issued on July 11, 2023. Explicitly under the order portion, the Claimant's October 31, 2022 petition for extension of time was denied. Claimant was granted 139 days from the date of the decision to file an ARH on specifically the February 25, 2021 death benefits claim.

Claimants, to avoid running afoul of the .110(c) deadline, asked the board on October 31, 2022 for an extension of time. The request for extension could not be heard until after the .110(c) deadline would have run. Therefore, Claimants were granted time from their request' date until the issuance of a decision. There was no extension granted, rather the .110(c) deadline was tolled for the unavoidable delay in getting Claimants' request to hearing. This gave Claimants' 139 additional days to request a hearing on their death benefits claim.

b) Separating the March 18, 2020 and February 25, 2021 claims

On March 18, 2020 Employee filed a claim for TTD, PTD, medical and transportation costs, interest and attorney fees and costs. Employer denied the claim on April 8, 2020 establishing the April 8, 2022 .110(c) deadline. Claimants never filed an ARH on the March 18, 2020 claim, nor did they request an extension prior to April 8, 2022. Instead on October 31, 2022, Claimants requested an extension of the .110(c) deadline, over 7 months after the .110(c) deadline.

Claimant filed a February 25, 2021 claim for death benefits after Employee passed away on April 20, 2020. Employer denied the claim on March 18, 2021 establishing a second .110(c) deadline of March 18, 2023. Having two claims which are separate and distinct, the analysis proffered in *Bailey* applies.

Claimant has two distinct claims and contends the February 25, 2021 claim is an amendment to the original March 18, 2020 claim. 8 AAC 45.050(a). Claimant contends the second 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). If this were so, Claimant's .110(c) deadline for the February 25, 2021 claim would "relate back" to the original claim. 8 AAC 45.050(e); *Bailey*. That would mean the original April 8, 2022 .110(c) deadline for the March 18, 2020 claim, which Claimants missed, would apply to both the pre-death and death benefits claims and resulting in claim dismissal. Despite Claimants' contentions to the contrary, these two claims are distinct and request separate benefits and will be treated as such. *Id.; Wagner*; *Roberge*.

c) Claimant's March 18, 2020 claim.

Employer requests Claimant's March 18, 2020 claim be denied because she failed to request a hearing within two years of Employer's April 8, 2020 controversion. Claimant contends she is entitled to equitable relief and her failure to timely request a hearing should be excused because the parties were engaged in mediation, which justified her hearing request delay. Employer filed a post claim controversion on April 8, 2020, and the .110(c) clock began to run. *Narcisse.* Claimant had two years to file hearing request, or request an extension of time to request a hearing. *Kim; Narcisse; Whiley; Davis*.

Claimant was represented by experienced legal counsel during the entirety of the time spanning from her March 18, 2020 claim, through the post-claim controversion, to present. *Rogers & Babler.*

The duty to advise an unrepresented claimant of the specific deadline to file a hearing request or face possible dismissal under .110(c) does not apply when a claimant is represented by an attorney. *Bohlmann*. Nevertheless, both Claimant and her counsel were advised of the two-year deadline when they received Employer's April 8, 2020 post-claim controversion and in the May 5, 2021 prehearing conference summary. *Rogers & Babler; Hessel.* Both Claimant and her attorney were properly served with the April 8, 2020 controversion notice, and the controversion was listed in the relevant pleadings in the May 5, 2021 prehearing conference

summary. *Id.* The two-year deadline for Claimant to request a hearing, request an additional time, or file something informing the Board of her inability to do so expired on April 8, 2022. AS 23.30.110. On October 31, 2022, Claimant filed a petition to compel discovery and requested a new .110(c) deadline. From April 8, 2022 until October 31, 2022, is six months and twenty-three days (206 days), past the .110(c) deadline. Claimant ignored the requirement she must actively move her claim forward. *Kim*. She did not request a SIME, nor did she request an extension of time to request a hearing, or make a hearing request before the two-year time limit expired. *Jonathan*; *Narcisse*.

Because Claimant failed to request a hearing within two years of Employer's post-claim controversion, she bears the burden of producing persuasive evidence that established a legal excuse for the delay. *Tonian*. Claimant has not met this burden. The parties litigated discovery disputes and attended an agreed upon mediation prior to the March 18, 2020 claim's .110(c) deadline. Claimant attended the prehearing conference where the deadline of April 8, 2022 was established and was aware Employer had controverted the March 18, 2020 claim. *Rogers & Babler*.

Outside of these routine disputes regarding discovery and possible settlement the record is devoid of evidence Claimants in any meaningful way pursued their claims. *Tonoian.* Moreover, no evidence was provided showing Employer expressly led Employee into thinking the time to request a hearing had been tolled or extended. *Davis*. Claimant may not simply ignore the deadline. *Pruitt*; *Kim*.

While a statute of limitations of defense is generally disfavored, *Narcisse*, Claimant's failure to request an extension within two years, file an ARH, or otherwise take action to evidence the claim was being pursued, defeats the Act's quick, fair, and efficient benefits delivery intent at a reasonable cost to Employer. AS 23.30.001; AS 23.30.110(c); *Kim*; *Hessel*.

Claimants' March 18, 2020 claim will be denied. Claimant's February 25, 2021 death benefits claim remains viable.

2) Shall this decision order an SIME?

Employer seeks an SIME. AS 23.30.095(k). The purpose of an SIME is not to assist any party but to assist the factfinders. *Bah.* When there is a medical dispute between an injured worker's attending physician and an EME physician, an SIME may be ordered. AS 23.30.095(k). There are three requirements before an SIME can be ordered. *Bah*.

First, there must be a medical dispute between Employee's attending physician and Employer's EME physician. On December 10, 2021, EME physician Dr. Hurty opined Employee's death was caused by a combination of acute myocardial infarction and bilateral pulmonary emboli. He believed the heart condition, paired with pulmonary emboli, created a fatal condition for Employee. Dr. Hurty found Employee likely had makers of significant heart issues prior to his work injury that were not properly addressed with his primary care provider. On January 30, 2024, Employee's primary care provider, Dr. Forman, opined that Employee's death was multifactorial. He acknowledged Employee had many comorbidities, but believed his work injury exacerbated them and lead to Employee's April 2020 death. Dr. Forman said Employee's depression arose from his work injury and inhibited his ability to properly address his comorbidities thereby resulting in his death. Thus, there is a medical dispute between Employee's attending physician and the EME physician.

Second, the dispute must be significant. Claimant seeks death benefits. Because Claimant's entitlement to those benefits depends on whether the work injury caused his death, the dispute is significant because these benefits may be substantial. *Rogers & Babler*. This justifies the cost of a SIME.

Third, an SIME physician's opinion will assist the factfinders to resolve the parties' disputes. The parties' physicians do not agree on what is the substantial cause of Employee's death. Employee's death is medically complex. His comorbidities, chronic and acute, included high blood pressure, renal failure, worsening urinary output, acidosis, hyperkalemia, pneumonia with chronic deconditioning, malnutrition, chronic obstructive pulmonary disorder, and gastroesophageal reflux disease, liver cirrhosis, significant alcohol and tobacco use, and unrecognized heart disease. Employee had many health issues affecting his body before his

death, as well as a work injury that required more than one hip surgery due to an infection. It is unclear if these prior health issues were exacerbated or aggravated by the work injury. An additional medical opinion will aid the factfinders to resolve the parties' disputes and this decision will order n SIME. AS 23.30.001(1), (4); AS 23.30.095(k); *Bah*.

CONCLUSIONS OF LAW

1) Employee's March 18, 2020 claim shall be dismissed for failure to request a hearing within two years of Employer's post claim controversion.
2) This decision will order an SIME.

ORDER

1) Employee's March 18, 2020 claim is denied.
2) Employer's petition for a SIME is granted.
3) The SIME will address "causation" of Employee's death. The parties may agree to add additional issues to include in the SIME.
4) A cardiologist will conduct the SIME.
5) The designee responsible for obtaining SIME physicians will select a cardiologist from the authorized SIME list and will follow the normal procedure to identify the physician to perform the SIME.
6) Employer is directed to follow the procedure in 8 AAC 45.092(h)(1) and (2) and provide Employee's attorney with a SIME records binder and an affidavit, within 10 days from this decision and order's date.
7) Claimant's attorney is directed to follow the procedure in 8 AAC 45.092(h)(3) and file the binder, additional records, if any, and an affidavit within 10 days of receipt of the binder.
8) Each party, thereafter, is directed to follow the procedures in 8 AAC 45.092(h)(4).
9) The SIME physician will be asked to answer the following questions:
    a. Please identify all the different causes of Employee's death.
    b. Is Employee's January 7, 2018 work injury a contributing cause of Employee's death?
    c. If his work injury was a contributing cause of Employee's death, please provide a detailed explanation of how it contributed to his death.

d. When considering all different causes of Employee's death, which is the substantial cause?

Dated in Fairbanks, Alaska on May 9, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kyle D. Reding, Designated Chair

/s/
Lake Williams, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of ESTATE OF ROBERT MENKE, employee / claimant v. PEAK OILFIELD SERVICE COMPANY, LLC, employer; AMERICAN ZURICH INSURANCE COMPANY, insurer / defendants; Case No. 201801725; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on May 9, 2024.

/s/
Pamela Hardy, Workers Compensation Technician