# ALASKA WORKERS' COMPENSATION BOARD

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

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| EUGENE VOIGHT,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>ALCAN ELECTRICAL & ENGINEERING,<br><br>Employer,<br>and<br><br>ALASKA INSURANCE GUARANTY ASSOCIATION,<br><br>Insurer,<br>Defendants. | ) | FINAL DECISION AND ORDER<br><br>AWCB Case No. 200024859<br><br>AWCB Decision No. 24-0059<br><br>Filed with AWCB Anchorage, Alaska on October 25, 2024 |

Alcan Electrical & Engineering's (Employer's) July 9, 2024 petition to dismiss and Eugene Voight's (Employee's) June 21, 2024 claim for medical costs were heard on October 16, 2024, in Anchorage, Alaska, a date selected on September 10, 2024. The parties' September 10, 2024 oral stipulation gave rise to this hearing. Employee appeared by telephone, represented himself and testified as the only witness. Attorney Krista Schwarting appeared and represented Employer and its insurer. The record closed at the hearing's conclusion on October 16, 2024.

## ISSUES

Employer contends it properly controverted Employee's claim dated August 4, 2018 (misidentified often as September 4, 2018, the date he filed it). It contends the Workers' Compensation

Division's (Division's) prehearing conference summaries as well as Employer's controversions gave Employee ample notice that he had until "September 25, 2020" to request a hearing by filing an Affidavit of Readiness for Hearing (ARH). Employer further contends that while Employee timely filed an ARH within the two-year period, his former attorney subsequently withdrew that ARH, which started the two-year clock running again. Since Employee did not timely file another ARH on his August 4, 2018 claim, and cannot provide a valid excuse why he could not have done so, Employer contends his August 4, 2018 claim must be denied under AS 23.30.110(c). Employer also contends if §110(c) bars his August 4, 2018 claim, he "cannot revive that barred claim by simply filing a new one for the same benefits." Thus, Employee's June 21, 2024 claim for "the same benefits" should be denied because it "relates back" to the barred August 4, 2018 claim.

Employee states he is not an attorney and is confused by the various legal requirements, which he contends he tried to follow "earnestly" and timely. He blames any failure to file proper paperwork in this case on his former attorney, Robert Rehbock. Employee contends he relied on Rehbock to handle his case, but he "sabotaged" it and ultimately abandoned his cause. He repeatedly called the Division for assistance, and obtained it, because he states Rehbock refused to respond to his numerous calls and letters. Employee contends he did everything he could to move his case forward to prompt resolution. He contends his claims should not be denied.

**1)Should both Employee's August 4, 2018 and June 21, 2024 claims be denied for failure to timely request a hearing on the August 4, 2018 claim?**

Employee contends his migraine headaches began after his December 11, 2000 work injury with Employer. He states that when he settled his case with Rehbock's assistance in December 2002, Employee believed the Compromise & Release (C&R) required Employer to pay for his future work-related medical care. Employee seeks an order requiring Employer to live up to its agreement and pay for his medication, Emgality, which he finds very effective.

Employer contends if his claim for medical care is reached on its merits, it should still be denied. It contends employer medical evaluator (EME) Paul Bauer, MD, opined that Employee needed no further medical treatment for his work-related injury. Moreover, it contends the only medical evidence Employee has connecting his need for migraine treatment to his work injury is

inadmissible because Employer "Smallwooded" that document and Employee did not present the medical provider for cross-examination.

**2)Shall Employee's June 21, 2024 claim for medical care be denied on its merits?**

FINDINGS OF FACT

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

1) On December 11, 2000, Employee slipped on the ice, fell, hit his head and twisted his back while working for Employer as an electrical lineman. (Report of Occupational Injury or Illness, December 11, 2000).

2) On December 19, 2000, Louis Kralick, MD, neurologist, prescribed Neurontin for Employee with no other explanation. His report gave no causation opinion regarding the need or cause for Employee taking Neurontin. (Kralick report, December 20, 2000).

3) On January 22, 2001, in a document dated January 18, 2001, Rehbock entered his appearance as Employee's attorney. (Entry of Appearance, January 18, 2001).

4) On August 15, 2002, Employee had a four-hour physical capacity evaluation (PCE). He did not mention headaches. (Performance-Based Physical Capacity Evaluation, August 15, 2002).

5) On August 20, 2002, David Zucker, MD, physiatrist, saw Employee for an EME. His chief complaints included "general stiffness in back and neck." Employee mentioned having a headache if he "twists" his head, though the headache is "more often in the back." Moreover, "The claimant reports that occasionally he reclines during the day secondary to headache." Dr. Zucker does not mention or address headaches elsewhere in his report. (Zucker report, August 20, 2002).

6) On December 17, 2002, the Board approved a C&R that settled the parties' then-present disputes and waived Employee's rights to receive any benefits under the Alaska Workers' Compensation Act (Act) except for medical care. The C&R stated in relevant part:

> 8. Release of Claim for Further Benefits. . . .
>
> . . . The parties agree that future changes in the law, whether effected by the legislature, Alaska Workers' Compensation Board, or courts, shall have no effect upon this workers' compensation claim or the settlement agreement. It is agreed that the employer and carrier shall be responsible under the terms of the Alaska Workers' Compensation Act for reasonable and necessary medical expenses which, though incurred in the future, are attributable to the condition described herein. . . .

> 9. Release of Future Liability. . . .
>
> . . . Liability for other medical benefits as stated above are not waived under this release. (C&R, at 7-8).

7) Rehbock never withdrew his initial appearance for Employee after the Alaska Workers' Compensation Board (Board) approved the 2002 C&R. (Agency file).

8) There was no activity in this case after December 17, 2002, until 16 years later on May 11, 2018, when Employee called the Division for assistance. (Agency file).

9) On March 3, 2009, Stephen Churchley, MD, saw Employee in an emergency room for abdominal pain. In reviewing his symptoms, Employee indicated no "headache." His neck was "normal." Dr. Churchley diagnosed a hernia. (Churchley report, March 3, 2009).

10) On May 5, 2013, James Wallace, MD, saw Employee in an emergency room for a headache and needing a medication refill. Dr. Wallace recorded a history of, "*Migraines for 12 years, takes Imitrex, ran out*." Nevertheless, Employee's "Past Medical History" in this note included: "*Migraines started 1998*." (Wallace report, May 5, 2013; emphasis in original).

11) On May 6, 2013, Selby Parker, PA, at an emergency room saw Employee for a right leg injury. He recorded: "*Migraines started 1998*" in Employee's history. (Parker report, May 6, 2013; emphasis in original).

12) On May 31, 2013, Dr. Churchley saw Employee in an emergency room for medication and charted: "*Migraines started 1998*." (Churchley report, May 31, 2013; emphasis in original).

13) On May 3, 2014, Dr. Wallace saw Employee in an emergency room for a medication refill. Employee's history included: "*Migraines started 1998*." (Wallace report, May 3, 2014; emphasis in original).

14) On August 10, 2014, Dr. Churchley saw Employee in an emergency room for a migraine headache and a medication refill. Employee described his headache as, "Pretty severe/10." While Employee loudly expressed his social and political views, "He gestures wildly during this semi continuous marginally controlled tirade against humanity, such that the examiner questions just how severe the headache truly is." Employee reported, "*Migraines started 1998*." (Churchley report, August 10, 2014; emphasis in original).

15) On October 28, 2016, Michael Anderson, PA-C, at Jamestown Family Health Clinic recorded that Employee had, "Long history of migraines, gets them about 4-6 a month, uses sumatriptan as an abortive with pretty good success." (Anderson report, October 28, 2016).

16) On January 24, 2017, Employee went to an emergency room and for a cough and shortness of breath for several weeks. Under "Past Medical History," he included: "*Migraines started 1998*." (Wallace report, January 24, 2017; emphasis in original).

17) On May 11, 2018, Employee called the Division and said his doctor felt his then-current treatment was related to his work injury and the doctor did not want to send bills to Medicare. Division staff advised Employee he should contact his adjuster, and provided the number. Because Employee's original file was paper, and his electronic file contained no attorney information from the old paper file, and was not yet digitized, staff did not know that Rehbock had entered an appearance in 2001 and not withdrawn it. Otherwise, had the paper file been digitized, staff would have directed him to speak with Rehbock. (Agency file: Judicial, Communications, Phone Call tabs, May 11, 2018; experience; observations).

18) On July 12, 2018, Dr. Bauer examined Employee in an EME. He diagnosed, among other things, "History of migraines, unrelated to the incident in question." Dr. Bauer further noted, "He does report that he has migraine headaches, which is a problem unrelated to either his surgery or progressive degenerative disease." He stated, in respect to medication management, "The sumatriptan is for his migraine headaches, which are not related to the incident in question or its sequela." In short, Dr. Bauer opined the work injury was not "a substantial factor" in Employee's current need for medical care, including migraine headaches, and he needed no further reasonable or necessary treatment. His conclusions were based on "the progression of degenerative disease, which would occur regardless of his incident in 2000." (Bauer report, July 12, 2018).

19) On July 16, 2018, on a form dated July 12, 2018, Employer controverted medical benefits from two providers, stating there was insufficient medical billing documentation to process payment, and served this on Employee by mail. The notice stated in relevant part:

**TO EMPLOYEE. . . : READ CAREFULLY**

. . . **You must also request a timely hearing before the AWCB (see time limits below). The AWCB provides the "Affidavit Of Readiness For Hearing" form for this purpose. Get forms from the nearest AWCB office listed below**. . . .

. . . .

**TIME LIMITS**

. . . .

2. When must you request a hearing (Affidavit of Readiness for Hearing form)?

> If the insurer/employer filed this controversion notice after you filed a claim, you must request a hearing before the AWCB within two years after the date of this controversion notice. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within two years.
>
> **IF YOU ARE UNSURE WHETHER IT IS TOO LATE TO FILE A CLAIM OR REQUEST A HEARING, CONTACT THE NEAREST AWCB OFFICE**. (Controversion Notice, July 12, 2018; emphasis in original).

20) On July 20, 2018, on a form dated July 19, 2018, Employer denied, "Ongoing medical treatment and disability relating to cervical spine injury of 12/11/00," based on Dr. Bauer's July 7, 2018 EME, and served this on Employee by mail. The notice contained the same "**TO EMPLOYEE. . . .: READ CAREFULLY**" warning set forth above in factual finding 19. (Controversion Notice, July 19, 2018; emphasis in original).

21) On July 24, 2018, Employee called the Division stating he had called Rehbock, but Rehbock had not returned the call "for months" and he wanted to proceed without representation. Staff discussed claim and second independent medical evaluation (SIME) processes and the "two-year time limit" to file a claim. She mailed Employee a packet containing a claim form and "SIME info." (Agency file: Judicial, Communications, Phone Call tabs, July 24, 2018).

22) Staff also sent Employee a letter on July 24, 2018, which stated in relevant part:

> The pamphlet, "Workers' Compensation and You – Information for Injured Workers" contains a lot of information about the process and has a lot of definitions you may find helpful.
> . . . .
>
> 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.
> If you do not have an attorney (and many claimants do not), we will schedule you for a prehearing following your filing of a [claim]. This is done to provide pro se (unrepresented) claimants information and attempt to resolve the parties' disputes.

> It is not necessary for a claimant to be in Alaska and many injured workers participate telephonically in their proceedings.
>
> I am including the attorney list we discussed. The attorneys have expressed an interest in assisting injured Alaska workers. It may take multiple calls to a number of attorneys before you can secure one. There is also no guarantee an attorney will agree to take your case. Alaska workers' compensation statutes and regulations provide for the payment of an attorney if they prevail at a hearing. . . .
> . . . .
>
> Please let me know if you need further assistance. You can also contact any of our offices for assistance – Anchorage (907) 269-4980, Juneau (907) 465-2790, or Fairbanks (907) 451-2889. Your case will be handled by the Anchorage office. (Letter, July 24, 2018).

23) On August 6, 2018, Employee called the Division for assistance completing his claim and other documents. (Agency file: Judicial, Communications, Phone Call tabs, August 6, 2018).

24) On August 7, 2018, Employee called the Division for assistance with his claim-related documents. (Agency file: Judicial, Communications, Phone Call tabs, August 6, 2018).

25) On September 4, 2018, on a form dated August 4, 2018, Employee representing *pro se* claimed an unfair or frivolous controversion, and medical costs totaling approximately $500. He also stated Medicare had declared his subject treatment was work-related. Employee attached to his claim form numerous medical records; some were relevant, and some were not. (Claim for Workers' Compensation Benefits, August 4, 2018; observations).

26) On September 25, 2018, Employer controverted Employee's August 4, 2018 claim, based on Dr. Bauer's report, and served this notice on Employee by mail, and on Rehbock by email. The notice contained the same "**TO EMPLOYEE. . . .: READ CAREFULLY**" warning set forth above in factual finding 19. (Controversion Notice, September 25, 2018; emphasis in original).

27) Two years from September 25, 2018, not including that day, was September 26, 2020, which was a Saturday. The two-year due date for requesting a hearing, or more time to request one, thus became the following Monday, September 28, 2020. Because Employer served the controversion on Rehbock by email, Employee or Rehbock had to file and serve a hearing request, or a request for more time to file a hearing request, by no later than September 28, 2020, as there was no need to add three days for mailing. (Experience; judgment; and inferences drawn from the above).

28) On September 27, 2018, Employee called the Division to follow-up on his claim. Division staff referred him to Rehbock. Employee said he had "still not been able to reach" Rehbock and

felt disadvantaged without an attorney. Staff referred him to the attorney list previously provided and suggested he ask for a prehearing conference to move his case forward. (Agency file: Judicial, Communications, Phone Call tabs, September 27, 2018).

29) On October 17, 2018, Employee called the Division for the next step in his claim process. He reiterated that he had not been able to contact Rehbock who was, in his view, no longer representing him. Staff suggested Employee ask Rehbock to officially withdraw from the case. Staff "Explained that when [Employee] is prepared, he can file ARH to dispute the controversion." (Agency file: Judicial, Communications, Phone Call tabs October 17, 2018).

30) On October 26, 2018, Employee *pro se* filed with the Division an ARH stating he was fully prepared for hearing on the issues in his August 4, 2018 claim. However, because Employee failed to sign and date the proof of service on this form, the Division rejected it. (ARH, undated; rejected on October 26, 2018).

31) On November 2, 2018, Employee called the Division to ask why the Division had rejected his ARH. Staff explained and suggested he file an amended ARH. (Agency file: Judicial, Communications, Phone Call tabs, November 2, 2018).

32) On November 2, 2018, Employee called a different Division office and asked staff why the Division had rejected his ARH. Staff gave him the same information as prior staff had already provided. Employee said Rehbock had not withdrawn from his case and "needs to since he is not representing." Staff suggested Employee let Rehbock know, and Employee declined, stating "he left him a message and didn't get back to him." Staff advised she would contact Rehbock's office. (Agency file: Judicial, Communications, Phone Call tabs, November 2, 2018).

33) On November 2, 2018, Division staff called Rehbock's office to discuss action Employee had been taking *pro se* on his case, such as filing an ARH. She called to clarify if Rehbock was representing Employee. The person to whom she spoke was "not sure" but said she would contact Employee regarding his case. (Agency file: Judicial, Communications, Phone Call tabs, November 2, 2018).

34) On November 13, 2018, in a form dated November 4, 2018, Employee *pro se,* filed an Amended ARH on his August 4, 2018 claim. (Amended ARH, November 4, 2018).

35) As of November 13, 2018, Employee acting *pro se* had fully complied with all requirements under §110(c) in respect to his August 4, 2018 claim. (Experience; judgment).

36) On November 20, 2018, Division staff called Rehbock's office to see if he was still representing Employee. The person to whom staff spoke said she was "unsure," and Rehbock was out of town. This person said she would call Employee who, staff advised, had filed an ARH, of which Rehbock's office was apparently unaware. (Agency file: Judicial, Communications, Phone Call tabs, November 20, 2018).

37) On December 20, 2018, Rehbock appeared on Employee's behalf at a prehearing conference before a Board designee to discuss Employee's claim; Employee did not appear. On the resulting, and on all subsequent prehearing conference summaries, Employee's August 4, 2018 claim was misidentified as a "9/4/2018" claim, which was the filing date, not the document's date. The designee summarized the prehearing conference discussions, stating, "The parties stated that the case is in the early stages of discovery and no further assistance from the Board is required. There being nothing further before the Board, the PH [prehearing] was adjourned." The designee noted Employee's August 4, 2018 claim, and Employer's post-claim September 25, 2018 Controversion Notice. An asterisk next to "September 25, 2018 controversion" referred in smaller print to the right, "(*AS 23.30.110(c) deadlines begin running)." The summary advised:

> **Notice to Claimant:**
>
> AS 23.30.110(c) provides: "If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied." In other words, when Employee files a workers' compensation claim and Employer controverts the claim, to avoid possible dismissal of Employee's claim, Employee must file with the board and serve on all opposing parties an affidavit of readiness for hearing within two years of the controversion. The board has an affidavit of readiness for hearing form Employee can complete and file. If Employee has not completed all discovery and cannot file the affidavit of readiness for hearing within two years of Employer's controversion, but still wants a hearing, Employee should provide written notice to the board and serve the notice upon all opposing parties." (Prehearing Conference Summary, December 20, 2018).

The December 20, 2018 prehearing conference summary did not provide the specific date by which Rehbock or Employee had to either file an ARH, or ask for an extension of time to do so. (Prehearing Conference Summary, December 20, 2018).

38) As far as can be determined from the agency file, the December 20, 2018 prehearing conference marked the beginning of Rehbock's active, post-C&R representation of Employee in this case. (Agency file; observations; and inferences drawn from the above).

39) On January 19, 2019, Employee went to an emergency room for arm pain. In his history, Employee said he had a history of migraines, "*Migraines started 1998*." (Olympic Medical Center Emergency Room Encounter, January 19, 2019; italics in original).

40) On February 13, 2019, Rehbock acting on Employee's behalf, filed a request for an SIME, and a substantially completed SIME form bearing Rehbock's signature, but not a signature from Employer's representative, on the form's built-in stipulation. The petition stated, "NEED FOR MORE TREATMENT AS OPPOSED TO IME DOCTOR NOT RECOMMENDING ADDITIONAL DIAGNOSTIC STUDIES AT THIS TIME." (Petition, February 14 [sic], 2019; emphasis in original; SIME Form, February 13, 2019).

41) Employer's representative never signed the SIME form; there was no written SIME stipulation between the parties. There is no evidence in the agency file suggesting the parties had an oral stipulation for an SIME. (Experience; judgment; observations; agency file).

42) On February 14, 2019, Rehbock again appeared at a prehearing conference; Employee did not appear. The designee noted Employee's claim and petition for an SIME, and Employer's post-claim September 25, 2018 controversion. The prehearing conference summary contained the same asterisk notation and the same "**Notice to Claimant**" language cited above in factual finding 37, above. In addition, the designee stated the parties had ongoing discovery and, "Mr. Rehbock noted that the 11/14/2018 ARH has been verbally withdrawn and another ARH will be filed in the future if necessary." The parties requested another prehearing conference to address the SIME. Again, the designee did not give Rehbock or Employee a specific date by which to file an ARH or request additional time to do so. The designee's summary did not advise Employee or Rehbock the effect, if any, that Rehbock's withdrawal of Employee's ARH had on Employee's case, or provide a new date by which Employee or Rehbock had to file a new ARH, or ask for additional time to do so. (Prehearing Conference Summary, February 14, 2019).

43) No hearing had been scheduled on Employee's August 4, 2018 claim at the time Rehbock orally withdrew Employee's previously filed Amended ARH. (Agency file).

44) Neither party ever challenged the February 14, 2019 prehearing conference summary, nor sought its modification. (Agency file).

45) Assuming for this factual finding that Rehbock's withdrawal of Employee's Amended ARH on February 14, 2019, re-started the §110(c) clock, Employee or Rehbock had until December 28, 2020, to file a new ARH, or ask for additional time to do so. Employee's two-year §110(c) clock began running the day after Employer's September 25, 2018 Controversion Notice. Beginning September 26, 2018, Employee or Rehbock had 731 days (two years, including 2020, a leap-year with one extra day) to ask for a hearing or to seek more time to request one. After his first ARH was rejected because he failed to provide proof of service, Employee tolled the §110(c) clock on November 13, 2018, when he *pro se* re-filed and served his fully compliant Amended ARH. By November 13, 2018, he had used 49 of his 731 days. The §110(c) clock remained tolled until February 14, 2019, when Rehbock verbally withdrew the Amended ARH. Rehbock's ARH withdrawal re-started the clock, and Employee or Rehbock had 682 days left, beginning February 14, 2019, to either request a hearing or seek more time to request one; 682 days from November 14, 2018, was December 27, 2020, which was a Sunday. This moved the due date for Employee or Rehbock to either re-file a new ARH or seek an extension of time, to Monday, December 28, 2020. (Experience; observations; judgment; and inferences drawn from above).

46) Although Employee called the Division 24 times, he made no calls to the Division between February 14, 2019, when Rehbock orally withdrew Employee's Amended ARH, and December 28, 2020, the deadline for him to re-file an ARH or ask for additional time to do so. Similarly, though he sent letters to the Division three times, he made no written inquiry between February 14, 2019, and December 28, 2020. Likewise, although Employee filed numerous documents with the Division, none of these documents requested a hearing or more time to request one between February 14, 2019, and December 28, 2020. (Agency file: Judicial, Communications, Phone Call tab; Letter tab; Evidence Filed tab, May 11, 2018 through October 15, 2024).

47) On April 10, 2019, Rehbock again appeared on Employee's behalf at a prehearing conference to discuss the February 13, 2019 SIME petition; Employee did not appear. The discussion included:

> Parties stated that EE [Employee] is waiting to get some imaging and petition for SIME is held in abeyance until that imaging is done. Both parties agreed that no further prehearings are needed at this point and will submit a request if the need for a prehearing arises. . . .

The summary included the same asterisk notation and the same "**Notice To Claimant**" language cited above in factual finding 37, above. It did not provide a specific date for Employee or Rehbock to re-file an ARH or request more time to do so. The designee's summary did not advise Employee or Rehbock of the effect, if any, that Rehbock's withdrawal of Employee's Amended ARH had on his case or provide a new date by which Employee or Rehbock had to file a new ARH, or ask for additional time to do so. (Prehearing Conference Summary, April 10, 2019).

48) On May 28, 2019, Mary Reif, MD, neurologist, saw Employee who told her:

> He is here about some headaches that have been off and on basically since a fall backwards in December 2000 that injured his neck and he hit the back of his head at that time as well, but the headaches have been particularly bad in the last year and a half. . . . (Reif report, May 28, 2019).

49) On June 19, 2019, Employee gave Dr. Reif a history that included left-sided headaches and hearing loss as well as neck pain "over the years and after a bad injury in 2000 had a fusion from C3-C5." Her impression included headaches that she "would suspect" are "some sort of vascular headaches." Employee's history included migraines, "*Migraines started in 1998*." (Reif report, June 19, 2019; emphasis in original).

50) On April 1, 2020, Dr. Reif spoke with Employee in a telephone encounter in lieu of an office visit during the pandemic. He told her he had "migraines much of his life." Employee had been taking sumatriptan [Imitrex] paid for through Medicare. Dr. Reif diagnosed, "Long-standing migraines and or facetogenic headaches," with migraines more likely. She added, "However[,] the cervical disease can be the driver for migraines." Under "Past Medical History," Dr. Reif included "DDD (degenerative disc disease)" and "Chronic neck pain." Her report did not include a causation opinion connecting the December 11, 2000 work injury to Employee's then-current need for headache medications. Dr. Reif's report did not explain to what "cervical disease" she referred. (Reif report, April 1, 2020).

51) On May 12, 2020, Dr. Reif spoke with Employee again; he "objected to" and complained primarily about her prior medical records concerning his marijuana use and headache history:

> In addition he wants me to point out [sic] to me that his headaches are posttraumatic and only came on after this 2000 injury. I did seem to make that clear in the first time I met with them [sic] and the second time I met with them [sic] but not necessarily in our April visit where I characterize the headaches as "many years." He has been consistent in telling me that these are posttraumatic headaches and

> came on in the year 2000 gradually getting worse in the last year with the frequency of headaches.
>
> From my first visit May 2019:
> He is here about some headaches that have been off and on basically since a fall backwards in December 2000 that injured his neck and he hit the back of his head at that time as well, but the headaches have been particularly bad in the last year and a half.
>
> From June 19, 2019:
> INTERVAL HISTORY: The brain MRI was done because of chronic left-sided headache and hearing loss, and a positive Babinski response. He has had neck pain over the years and after a bad injury in 2000 had a fusion from C3-C5.
>
> From April 1, 2020:
> INTERVAL HISTORY:
> He has had migraines much of his life. He is most bothered by these occipital headaches that go into his left eye. They typically may start to bother him to a light degree before he goes to bed but they will wake him at 3 or 4:00 AM to the point where he cannot ignore them.
> . . . .
>
> IMPRESSION: Posttraumatic migraines. Cervical fusion C3-5 related to same 2000 industrial injury, with chronic neck pain. (Reif report, May 12, 2020).

However, in the Past Medical History section in her same report, Dr. Reif again noted Employee's history of migraines, "*Migraines started 1998*." (Reif report, May 12, 2020; Medical Summary, March 8, 2022; emphasis in original).

52) On November 10, 2020, February 15, 2021 and June 12, 2021, Employee wrote letters to Rehbock regarding his case, copies of which he filed with the Division. Among other things, Employee explained his medical situation and asked Rehbock to, "Please write and explain our end-game." In the last of these letters, Employee explained how his new prescription medication Emgality worked well to control his migraines, and that the manufacturer had been providing it to him for free, but this would not last for long, and Employee said he could not afford the "co-pay." He also explained where Rehbock could obtain medical records to support Employee's claim. There is no evidence Employee served these, or his separate August 31, 2021 letter to the Division and the Alaska Bar Association, referenced below, on Employer's lawyer. (Agency file).

53) On November 16, 2020, Dr. Reif spoke with Employee again by telephone during the pandemic. She again noted in his Past Medical History that Employee had a history of migraines, "*Migraines started 1998*." (Reif report, November 16, 2020; emphasis in original).

54) By December 28, 2020, the §110(c) deadline to re-file an ARH or ask for more time to request a hearing, neither Employee nor Rehbock had asked for a hearing, filed another ARH or made a request seeking additional time to file one. (Agency file).

55) On August 13, 2021, in a letter dated August 10, 2021, Employee sent the Division, and purportedly the Alaska Bar Association, the following:

> Your records should reflect the 2018 refusal of Attorney Robert Rehbock to acknowledge myself or my case until I complained in a letter to you.
>
> Well over a year ago, Mr. Rehbock participated in 2 phone conferences with myself in which he used a strategy of incomprehensible speech with a few intelligible words interspersed. He has put nothing in writing and answered none of my queries.
>
> I accuse Mr. Rehbock of delaying and stonewalling, as if I were the adversary.
>
> Mr. Rehbock has shown no care for my case, even as I have been the party to gather good evidence that my debilitating headaches started immediately after my cervical injury.
>
> I request the AK Bar present my case before AWCB and finalize it with the prevailing settlement I'm entitled to. (Letter, August 10, 2021).

There is no response in Employee's agency file from the Bar to this letter. (Agency file).

56) On February 3, 2021, Dr. Reif spoke with Employee telephonically during the pandemic:

> He is a man that I have known since May 2019 for some frequent headaches that typically bother him at 3 to 4 o'clock in the morning. He got into the Swedish System through a neurosurgeon to look at his neck which relates to an old Alaska Worker's [sic] Compensation claim but currently care in the neuro clinic is through Medicare. He explains that after an ER trip for neck pain in Grants Pass, Oregon a year or so ago Medicare rejected the ER treatment for the neck pain stating it was an industrial claim and started a process to open up his old Alaska claim. The patient feels that his headaches started at about the same time as this claim. He has been having these headaches since about 2004 to 2005. They are always generally left-sided. Reviewing my older note, he put the date of the injury as December 2000 and he told me that he had been using Imitrex ever since about 2000 but the headaches had gotten particularly bad and frequent since about 2017. . . .

Dr. Reif reiterated her opinion that Employee's headaches were "likely vascular." Her report again stated his migraines "*started in 1998*." (Reif report, February 3, 2021; emphasis in original).

57) On May 26, 2021, Employee told Dr. Reif he had been on Emgality since March 24, 2021, and his headaches were "almost nonexistent." "He told his new PCP [personal care provider] Dr. Ben Curran that he only had had 1 headache, but he told me he recorded about 10 days of dull headache that was not enough to even take the sumatriptan." Employee was afraid he could not afford Emgality after his free source ran out. Dr. Reif recorded, "He is hoping attorney cannot [sic] blame his headaches into a labor and industries claim for a large settlement to help find [sic] it." Her report no longer included a migraine start date. (Reif report, May 26, 2021).

58) On September 9, 2021, Employee called the Division to explain that his attorney "hasn't spoken to him in 2 years, only his paralegals." Staff noted that Employee "wants to take his case to hearing ASAP, feels all necessary evidence has been filed." Staff explained that the Division does not get involved with issues between parties and their attorneys, and referred him to the Alaska Bar Association. Employee said he had already contacted them but did not file a complaint. (Agency file: Judicial, Communications, Phone Call tabs, September 9, 2021).

59) On February 8, 2022, Employee called the Division "about similar issues as last time." He was able to reach his attorney who sent him releases, which he returned. He had not decided whether to continue working with Rehbock, get a new lawyer or represent himself. Staff did not offer an opinion but advised Employee that if he wanted to dismiss his attorney it must be in writing and sent to his attorney, Employer's counsel and the Division. Staff mailed him another attorney list. (Agency file: Judicial, Communications, Phone Call tabs, February 8, 2022).

60) On September 29, 2022, Jill Corson, ARNP, neurologist, wrote the following:

> To Whom it May Concern:
>
> [Employee] is a patient of mine in neurology for chronic migraines. He is doing very well on a migraine prevention medication called Emgality and it is my recommendation that it be continued. The cost of the medication can be a barrier for ongoing use. [Employee's] migraines started after a head and neck injury at age 50. He has no family history of migraines and didn't have them prior to the injury, so the injury is the most likely cause for his migraines. (Corson letter, September 29, 2022; Medical Summary, December 28, 2022).

61) On December 28, 2022, Rehbock filed and served ARNP Corson's September 29, 2022 letter on Schwarting electronically. (Medical Summary, December 28, 2022).

62) On January 4, 2023, Employer timely filed and served on Rehbock, a "Smallwood" objection to ARNP Corson's September 29, 2022 "To Whom it May Concern" letter. The request demanded the right for Employer to cross-examine Corson regarding her opinions, the basis for them, the records she reviewed and her qualifications to express her opinion in that letter. (Request for Cross-Examination, January 4, 2023).

63) On November 30, 2023, Employee called the Division stating he was going to fire his lawyer and needed to know how to do it. Staff advised Employee that since he was not able to speak to his attorney by telephone, he could email him and the Division. Employee said he did not use email. (Agency file: Judicial, Communications, Phone Call tabs, November 30, 2023).

64) On December 14, 2023, Employee filed a notice dated December 10, 2023 with the Division, stating he had terminated Rehbock and started representing himself. Employee served this on Rehbock and on Employer's adjuster. (Letter, December 10, 2023).

65) On December 15, 2023, Rehbock filed a "Notice of Withdrawal" as "counsel of record" for Employee in this case. (Notice of Withdrawal, December 15, 2023).

66) As of December 15, 2023, Rehbock, apparently acting in reliance on his January 22, 2001 Entry of Appearance, had actively represented Employee and held himself out as his attorney from December 20, 2018, when he appeared at a prehearing conference on Employee's behalf, until Employee terminated him on December 10, 2023, and he withdrew on December 15, 2023. Rehbock, while representing Employee, took no action apparent from this agency file to preserve Employee's August 4, 2018 claim during the critical period from February 14, 2019, through December 28, 2020. (Experience; judgment; observations; and inferences from above).

67) On December 30, 2023, Employee wrote to the Division stating he was "prepared to proceed" with his case. He asked for necessary forms to request a final hearing. Employee offered to sign any request forms that would give Employer's adjuster's access to all records the Division had in his case. He was also "willing to provide" all pertinent medical records. "Please, without delay, negotiate my path to a final State decision." There was no evidence Employee served this letter on Schwarting. (Letter, December 30, 2023).

68) On April 3, 2024, Employee called the Division with questions on how to complete ARH, Medical Summary and Notice of Intent to Rely forms. (Agency file: Judicial, Communications, Phone Call tabs, April 3, 2024).

69) On April 15, 2024, Employee in a document dated April 10, 2024, filed another ARH. However, he failed to state with specificity the claim upon which he had requested a hearing, and failed to provide proof he served the ARH on Schwarting. Therefore, Division staff called him on April 15, 2024, and advised him how to properly complete his ARH. The Division rejected his April 10, 2024 ARH by letter on April 16, 2024. (ARH, April 10, 2024; agency file: Judicial, Communications, Phone Call tabs, April 15, 2024; letter, April 16, 2024).

70) On April 25, 2024, Employee called the Division to inquire about Employer's intent to depose him. He expressed reluctance to speak to Employer's attorney outside the designee's presence. Staff explained a deposition's purpose and advised he could attend or petition for a protective order. (Agency file: Judicial, Communications, Phone Call tabs, April 25, 2024).

71) On April 29, 2024, Employee, in a document dated April 23, 2024, filed and served on Employer's attorney another ARH on his "9/4/18" [i.e., 8/4/18] claim. (ARH, April 23, 2024).

72) On April 30, 2024, Employee called the Division because he had received a letter from someone stating his case was "closed." He asked the Board to "do something." Employee decided to discuss the matter at his May 29, 2024 prehearing conference. (Agency file: Judicial, Communications, Phone Call tabs, April 30, 2024).

73) On May 13, 2024, Employee called the Division twice to discuss releases Employer had requested. Staff explained releases and the protective order procedure. (Agency file: Judicial, Communications, Phone Call tabs, May 13, 2024).

74) On May 29, 2024, Employee *pro se* attended a prehearing conference alone with Schwarting. The designee noted Employee's August 4, 2018 claim for medical costs and an unfair or frivolous controversion, the November 14, 2018 ARH, which the designee said was "withdrawn," Employee's February 13, 2019 SIME petition and his "9/29/2024 ARH (*inoperable per 110(c) statute*)." The designee also noted Employer's September 25, 2018 post-claim controversion and other pleadings. For the first time, a designee gave Employee specific, albeit incorrect and retroactive, advice concerning his deadline to file and serve an ARH:

> . . . Designee explained the adjudications process noting that once discovery is complete, and if a settlement has not occurred, either party may file an [ARH] form to notify the [Division] that a hearing is necessary. Employee advised that he is seeking medication for headaches that are brought by his work injury. Designee identified a 110(c) deadline of 9/25/2020 regarding Employee's 9/4/2018 [claim] based on the first post-claim controversion filed on 9/25/2018. As such,

> Employee's 9/29/2024 ARH appears inoperable, and Designee suggested that Employee file [an] updated [claim] noting what benefits he feels he is currently owed but not getting and attaching supporting documentation for the same.

The designee provided Employee with *Workers' Compensation and You*, and referenced where it was also available on the Division's website. He advised Employee to seek assistance from a Workers' Compensation Technician at the Division's phone numbers if he had questions. He also gave Employee another attorney list and advised him how to properly serve other parties with documents he filed with the Division. The summary contains the same "**Notice to Claimant**" language cited in factual finding 37, above. (Prehearing Conference Summary, May 29, 2024).

75) On June 7, 2024, Employee called the Division stating he had trouble understanding why his case had not gone to hearing. "He was under the impression they were done filing everything." Staff explained, after reviewing his file, "that he missed the deadline to file an ARH on his 2018" claim, and suggested he file a new claim for his medication. Employee stated he was frustrated because he was not an attorney and felt he was "getting taken advantage of." (Agency file: Judicial, Communications, Phone Call tabs, June 7, 2024).

76) On June 25, 2024, in a claim dated June 21, 2024, Employee sought medical benefits for his work injury. (Claim for Workers' Compensation Benefits, June 21,2024).

77) On July 9, 2024, Employer filed and served on Employee a request to dismiss Employee's August 4, 2018 claim for the following reasons:

> . . . The employee filed a [claim] on August 4, 2018 [sic]. Counsel for the employer and carrier/adjuster answered the claim and controverted it on September 25, 2018. Although the employee filed an [ARH] in November 2018, the parties agreed at a December 20, 2018 prehearing conference that was not ready to be heard since it was in the early stages of discovery. The employee subsequently requested an SIME, further demonstrating that the claim was not ready to be heard. On April 10, 2019, the parties again agreed to proceed without further Board intervention at that time. As such, the employer and carrier/adjuster assert that the November 2018 ARH was inoperative, and the May 29, 2024 prehearing conference summary shows that it was withdrawn. As the employee failed to file an operative, active ARH within two years of his claim being controverted, the employer and carrier/adjuster assert that the claim should be dismissed pursuant to AS 23.30.110(c). (Petition, July 9, 2024).

78) On July 25, 2024, Employee and Schwarting attended a prehearing conference before a Board designee. The designee noted the previous pleadings and stated:

> Employee confirmed that the 6/25/24 [sic] [claim] is for medical costs related to migraine headaches that Employee feels are a result of his work injury (cervical fracture). Employer representative noted that an [ARH] form will be filed on the 7/9/24 Petition to Dismiss shortly. Employer representative also noted the 7/12/24 Answer to Employee's 6/25/24 [sic] [claim] confirming her client's position at the claimed migraine medication should be covered under Medicare. Designee advised Employee to file an [ARH] form on his 6/25/24 [sic] [claim] as soon discovery is complete, and he is ready to schedule a hearing on the same. Designee agreed to forward Employee a copy of a blank [ARH] form with this prehearing conference summary."

The summary also included the same "**Notice to Claimant**" language cited in factual finding 37, above. (Prehearing Conference Summary July 25, 2024).

79) On July 26, 2024, Employer requested a hearing on its July 9, 2024 petition to dismiss. (ARH, July 26, 2024).

80) On July 26, 2024, Division staff called Employee, apparently returning his call, and explained the ARH and other forms, and assisted him in completing them. (Agency file: Judicial, Communications, Phone Call tabs, July 26, 2024).

81) On July 30, 2024, Employer denied Employee's right to all benefits and specifically medical benefits after July 12, 2018. It based this denial on Dr. Bauer's July 12, 2018 EME report in which he stated Employee needed no further treatment. (Controversion Notice, July 30, 2024).

82) On August 8, 2024, Employee called the Division again with questions about filling out the ARH form. The notary had signed the ARH in the wrong spot. Staff advised him that this was acceptable so long as it was notarized and served on the necessary parties. Employee said this was his "second or third try" to submit this paperwork. (Agency file: Judicial, Communications, Phone Call tabs, August 8, 2024).

83) On August 12, 2024, in a document dated August 7, 2024, Employee requested a hearing on his June 21, 2024 claim. (ARH, August 7, 2024).

84) On September 10, 2024, Employee and Schwarting appeared at a prehearing conference before a Board designee. The designee identified the issues for a stipulated October 16, 2024 hearing as Employer's "7/9/2024 petition to dismiss," and Employee's "6/25/2024" [sic] claim for medical costs. Employee's February 13, 2019 SIME petition was still listed as a pending issue, but was not set for hearing. (Prehearing Conference Summary, September 10, 2024).

85) On September 24, 2024, Employee called the Division to inquire how to prepare a "brief" for his upcoming hearing. He was going to submit "the same detailed letter he submitted

previously" and hoped the Board would read it. (Agency file: Judicial, Communications, Phone Call tabs, September 24, 2024).

86) At hearing on October 16, 2024, Employee testified he had an "on and off relationship" with Rehbock whom he described as "misleading" him. Eventually, Employee had to take over and was "earnest and timely" at all times thereafter. When the designated chair tried to explain the attorney-client privilege to Employee in detail, he interrupted and stated there was nothing in the letters he filed with the Division that was protected, in his view. Employee said he had to fire Rehbock when he "sabotaged his case." He stated that "10 times" Rehbock said he would represent him, but according to Employee, his attorney would never "recognize him" when he called or wrote letters. He felt Rehbock had "abandoned" him. Employee said he was not an attorney and did not understand legal filings. However, he understood the 2002 C&R entitled him to medical care from Employer "for life." He wanted his headache medication. (Record).

87) When asked what happened to the August 4, 2018 claim, which was not set for hearing, Employee stated the benefits requested in it were "paid by someone." He thinks it may have been Medicare. Employee testified about his political beliefs and people he disliked, admired and those he considered "heroes." He disparaged Dr. Bauer's evaluation. Employee acknowledged receiving the prehearing conference summaries but could not recall ever having read them, but he said he "probably did." He relied on Rehbock to work on his case and had occasional consultations with his staff. Employee did not understand "any of it." Nevertheless, he averred to be "very well educated." He did not recall Rehbock discussing an SIME with him. Employee specifically recalled getting the February 14, 2019 prehearing conference summary and reading it, but admitted he probably did not understand what it meant to have his prior ARH "withdrawn." Employee never spoke with Rehbock about that. (Record).

88) When asked what he was doing in regard to his case between April 10, 2019, and December 10, 2023, the date he fired Rehbock, Employee said he was "worrying" and trying to contact Rehbock. He "thought [he] had representation," but in his view in retrospect, he did not. Employee said he did everything he could to move his claim along including calling and writing Rehbock and the Division frequently. (Record).

89) When asked if he had medical evidence supporting his claim that his 2000 work injury with Employer was a substantial factor in his need for his previous migraine medication and his current Emgality, Employee said he sent evidence in his pleadings. When asked about a comment in his

medical record stating he had migraine headaches for "much of his life," Employee explained that he never made that statement, but 20 years having these headaches he would consider "much of his life." Employee admitted he asked ARNP Corson to write her September 29, 2022 "To Whom it May Concern Letter." (Record).

90) At hearing, Employee was generally dismissive of the chair's attempt to extract relevant facts upon which to base this decision. He noted several times that he did not want to say anything, and wanted the hearing over quickly, without much participation from him. (Record).

91) Although Employer declined cross-examination, it relied on its hearing brief and closing argument. Employer contended Employee's original claim was "stale," and should be denied. It noted Rehbock entered his appearance in "2002" [sic] and in 2019 withdrew Employee's Amended ARH because discovery was not done. Employer states Employee did not comply with the law and, though he blames Rehbock, the panel must apply the law. It further contends if the missed statute was Rehbock's fault, Employee has "other remedies" against Rehbock. Employer noted that it made a "Smallwood" objection to ARNP Corson's letter on January 4, 2023, and neither Employee nor Rehbock ever provided her for cross-examination. Therefore, it contended that ARNP Corson's letter is not admissible. Employer noted that the Division gave Employee considerable advice, yet neither Rehbock nor Employee made a "meaningful attempt" to comply with the law once Rehbock withdrew Employee's Amended ARH. Lastly, because Employee's June 21, 2024 claim seeks "the same benefits" as his barred August 4, 2018 claim, and relates back to it, the latter claim must be denied under §110(c) as well. (Record).

92) The designated chair reviewed every medical record filed in this case, totaling over 400 pages, and every document Employee filed with the Division, at least twice. Although not all records are cited in this decision, the panel considered all of them, and those deemed relevant or helpful in understanding this case were summarized above. (Observations).

93) When a pleading is "amended," it still exists in its amended form; it does not cease to exist or become inoperable as a pleading. (Experience; judgment; observations).

## PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> . . . .

> (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). A court "is entitled to cite" to Alaska law "in its decision," and "must base its decisions on the law," even when "the parties did not" cite the controlling law. *Barlow v. Thompson*, 221 P.3d 998, 1004 (Alaska 2009).

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

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

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

> 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 23.30.008. Powers and duties of the commission.** (a) The commission shall be the exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter in those matters that have been appealed to the commission, except for an appeal to the Alaska Supreme Court. . . . On any matter taken to the commission, the decision of the commission is final and conclusive, unless appealed to the Alaska Supreme Court, and shall stand in lieu of the order of the board from which the appeal was taken. Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

On the date Employee was injured in 2000, the Act stated:

> **AS 23.30.010. Coverage**. Compensation is payable under this chapter in respect of disability or death of an employee.

Under this previous statute, amended effective 2005, workers' compensation liability was imposed when employment is established as a causal factor in the need for medical care. "Because [the claimant's] injury happened in 1985, the legal standard for causation in this case is "a substantial factor. . . ." *Jespersen v. Tri-City Air*, 547 P.3d 1042, 1047 n. 12 (Alaska 2024).

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

The Board has generally held the SIME process tolls the AS 23.30.110(c) deadline for the period the parties are actively in the SIME process. In *Aune v. Eastwood, Inc.*, AWCB Dec. No. 01-0259 (December 19, 2009), the Board began tolling the two-year time period in §110(c) when the parties stipulated to an SIME and the Board designee ordered an SIME in a prehearing conference, all of which occurred prior to the two-year time period in §110(c).

In *Turpin v. Alaska General Seafoods*, AWCB Dec. No. 09-0054 (March 18, 2009), the Board began tolling the two-year period when the *pro se* claimant filed a claim requesting an SIME. It noted the claimant believed she was participating in the SIME process by agreeing to sign releases and give a deposition. *Turpin* also found the Division did not adequately inform the claimant of the two-year §110(c) period in light of her pending SIME request and the employer was not prejudiced by the employee's actions.

In *McKitrick v. Municipality of Anchorage*, AWCB Dec. No. 10-0081 (May 4, 2010), the Board tolled the §110(c) time period when the employer petitioned for an SIME and the Board designee ordered the SIME in a prehearing conference, until the SIME process was over including any discovery or deposition requested from the SIME physician after the report. *McKitrick* noted it would be illogical to require the employee to file an ARH on the merits of his claims while awaiting an SIME examination, report, deposition, or other discovery related to the SIME.

In *Snow v. Tyler Rental Inc.*, AWCB Dec. No. 11-0015 (February 16, 2011), the Board held the signing of the SIME form, which occurred on the same day the prehearing conference the parties stipulated to an SIME was held, tolled the time period in §110(c) until the SIME report was received. The signed SIME form gave notice the parties needed to request more time to prepare for hearing.

The primary statute in dispute in this case, AS 23.30.110(c), in effect in 2000 stated:

> **AS 23.30.110. Procedure on claims**. . . .
>
> (c) Before a hearing is scheduled, the 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. . . . 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 current §110 includes the following section, not included in 2000:

> (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.

*Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947 (Alaska 1989) held a revised §110(c) version applied retroactively to a claim arising under a prior §110(c) version. Section 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 Co.*, 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. The employer controverted prescriptions and the employee in *Bailey* contested the medication denials and filed three claims for the same pharmacy bills; the employer controverted. After a hearing, the Board dismissed all three claims, finding the later claim "merged" with his earlier claims and held health 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 first claim. *Bailey* affirmed the Board's denial of the first two claims because they requested payment for the same pharmacy bills and the employee failed to request a hearing timely. However, *Bailey* reversed the Board's dismissal of the later claim.

Certain legal grounds might also excuse noncompliance with §110(c), such as lack of mental capacity or incompetence, and equitable estoppel against a governmental agency by a *pro se* claimant. *Tonoian v. Pinkerton Security*, AWCAC Dec. No.029 (January 30, 2007).

Section 110(c)'s objective is not for the claimant to "generally pursue" the claim; it is to bring a claim to the Board for a decision so speed and efficiency goals in Board proceedings are met. But the claimant bears the burden to establish with substantial evidence a legal excuse from the §110(c) statutory deadline. *Providence Health System v. Hessel*, AWCAC Dec. No. 131 (March 24, 2010). A claimant who bears the burden of proof must "induce a belief" in the minds of the factfinders the facts being asserted are probably true *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

*Kim v. Alyeska Seafoods, Inc*., 197 P.3d 193, 197-99 (Alaska 2008) addressing §110(c) said:

> 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). . . .

*Alaska Mechanical, Inc. v. Harkness*, AWCAC Dec. No. 176 (February 12, 2013) stated:

> The evidence shows that Harkness filed his claim on June 8, 2007, and requested a hearing by filing an ARH on July 19, 2007. Shortly thereafter . . . Alaska Mechanical filed its first controversion notice. Subsequently, on September 17, 2007, Wenstrup purportedly withdrew the hearing request. . . . 1) Did that ARH initially toll the running of the two-year time limit within which to request a hearing, as provided in subsection .110(c)? There is no mention in that subsection whether a hearing request, once made, can be withdrawn. 2) Was Wenstrup's withdrawal of the ARH that Harkness had filed legally effective?
> . . . .
>
> The second issue, whether the ARH was effectively withdrawn by Wenstrup, is more complex. Preliminarily, we must consider, factually, whether Wenstrup was acting on behalf of Harkness when he withdrew it. A board regulation, 8 AAC 45.178, requires individuals who represent parties before the board to document that representation by filing appearances and withdrawals with the board. The purpose of the regulation is to prevent a party from later disavowing the acts of his, her, or its representative. . . . Harkness was present at the PHC, expressed no objection to Wenstrup representing him, and acquiesced in the ARH being withdrawn. In our view, these facts constitute substantial evidence that, not only was Wenstrup representing Harkness . . . he had the authority to withdraw the ARH at that time. . . .
>
> Secondarily, the commission must decide whether the purported withdrawal by Wenstrup had any legal effect. According to the board majority it did not, because there is no legal authority for withdrawing an ARH. We disagree. . . . Practically speaking, as provided for in AS 23.30.110(h), the withdrawal had the effect of a request for a continuance of a yet-to-be-calendared hearing. Moreover, the board designee's acknowledgement in the PHC summary that the ARH was withdrawn constituted board approval of the continuance. In the language of AS 23.30.110(h), the granting of the request for a continuance rendered the ARH filed by Harkness "inoperative, and the two-year time period specified in (c) of [AS 23.30.110] continue[d] to run again[.]"
>
> In addition to AS 23.30.110(h), a board regulation also supports the principle that an ARH can be withdrawn at a prehearing. 8 AAC 45.065(a)(2), which covers prehearings, allows the board's designee to amend papers that have been filed, which would necessarily include the ARH. The withdrawal can be viewed as an amendment to the ARH.

> Finally, there is case law authority that an ARH can be withdrawn. . . . In *Jonathan v. Doyon Drilling, Inc.* the ARH filed by the employee was canceled at a PHC. The employee subsequently filed another ARH, which the supreme court recognized as the operative affidavit of readiness. The cancellation of the ARH was tantamount to a withdrawal. Also, there are board decisions which hold that a withdrawn ARH does not continue to toll the AS 23.30.110(c) time limit. It stands to reason that, if a withdrawn ARH does not toll the subsection, an ARH can be withdrawn.
> . . . .
>
> . . . As a matter of law, however, the commission does not agree with the majority's conclusion that, under these facts, the board was required to advise Harkness, while unrepresented, or Harkness *and* Wenstrup, during the existence of the attorney-client relationship between them. Our reasons for doing so are as follows (italics in original).
>
> In . . . *Richard*, the supreme court held "that a workmen's compensation board . . . owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, *so far as it may know them*, and of instructing him on how to pursue that right under the law." Here, focusing on the initial timeframe during which Harkness was unrepresented, he had filed an ARH. Having satisfied the requirement in subsection .110(c) . . . so far as board personnel knew, Harkness had complied with that requirement. There was no need to advise him in that respect. Moreover, at that time, board personnel would have no reason to anticipate that, in the future, the ARH would be withdrawn, and advise Harkness accordingly. While Wenstrup was representing Harkness, board personnel would be justified in presuming that Wenstrup was capable of advising him, eliminating any duty on their part to do so. Thus, board personnel would have no duty to alert Harkness and Wenstrup that some new retriggering event, like withdrawing the ARH Harkness had filed, might require further action to prevent dismissal of the claim (italics in original). . . .
>
> In . . . *Bohlmann*, the claimant was *pro* se . . . . *Bohlmann* also involved the subsection .110(c) two-year time limit for requesting a hearing. The supreme court held: "Because there is no indication in the appellate record that the board or its designee informed Bohlmann of the correct deadline or at least how to determine what the correct deadline was, the board should deem his affidavit of readiness for hearing timely filed. This is the appropriate remedy." Unlike Bohlmann, here, Harkness was represented by counsel. In our view, this distinction makes the holding in *Bohlmann* inapplicable.
>
> Between September 17, 2007, when Wenstrup attended the PHC, and November 27, 2009, when Harkness dismissed him, a period in excess of two years, Harkness was represented. The board was under no obligation to advise either of them regarding the two-year time limit in AS 23.30.110(c).

> Finally, Harkness argued to the commission that the board had a duty to advise him, even while he was represented by Wenstrup, because he dropped in at the board regularly. We reject this argument for several reasons. First, as already stated, we question whether there was any duty on the board's part to advise Harkness while he was represented by counsel. Second, the hearing testimony that supposedly supports this argument is vague as to the timeframe Harkness was referring to when he visited the board. . . .
> . . . .
>
> We have saved for last consideration of Harkness's argument that the two-year time limit in AS 23.30.110(c) was tolled because the SIME process had commenced as of the PHC on October 17, 2007, when, according to the board majority, the parties stipulated to an SIME. . . . In *Snow*, the board concluded that the subsection .110(c) time limit was tolled by the parties' signing and filing the SIME form. In *McKitrick*, the time limit was tolled when the employer petitioned and the board ordered an SIME. The claimant in *Turpin* had extensively discussed an SIME at prehearings, signed medical releases, otherwise cooperated with discovery, and filed a petition for an SIME; the board declined to dismiss her claim. In *Aune*, the parties stipulated that a dispute existed and an SIME was needed, and the prehearing officer ordered an SIME prior to the two-year time limit having passed.
> . . . .
>
> As a matter of fact and law, the board majority erred. First, the finding that the parties stipulated to an SIME was not supported by substantial evidence. . . . Had the form been filed or had the board ordered an SIME, it would probably have constituted substantial evidence that the parties had agreed to an SIME.
>
> Second, for the same reasons, the quantum of evidence was not substantial enough to support the board's finding that the SIME process had commenced. . . . Finally, the board never ordered an SIME.
>
> . . . This case is not comparable, on its facts, to *McKitrick*, where the employer, or *Turpin*, where the claimant, filed petitions for an SIME. *Aune* is distinguishable because, unlike here, the board ordered an SIME before the subsection .110(c) time limit ran. The only somewhat similar case, factually, is *Snow*. However, in that matter, the parties signed and filed the SIME form. That did not occur here. . . .

*Dillard v. Dick Pacific/Ghemm Co., JV*, AWCAC Dec. No. 198 (July 15, 2014) stated:

> We agree with the board's characterization of the evidence. The SIME was abandoned, or at the very least, inexcusably neglected. . . .
> Summarizing, a legal conclusion that the time-bar was tolled in *Harkness* is not warranted, which dispenses with Dillard's argument that we reaffirmed in *Harkness* that an agreement to perform an SIME tolls the statute of limitations. The commission takes the view that, should the supreme court decide to carve out another exception to the two-year time-bar in AS 23.30.110(c), as it did in *Kim*, and

> declare that an agreement to have an SIME performed tolls the statute, so be it. We are not prepared to hand down such a ruling.

*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. Since the parties had stipulated to the SIME, and even though it was completed prior to the two-year statutory limitation period running out, the SIME process still tolled the statute's running. *Narcisse* found, "This comports with a long practice by the Board and with the Court's dislike of dismissing a claim for failure to request a hearing timely."

*Davis v. Wrangell Forest Products*, AWCAC Dec. No. 256 (January 2, 2019) involved a case where the employee's claim was controverted. He requested an SIME. When he did not timely file an ARH on his claim, the Board dismissed it. On appeal, the AWCAC stated:

> . . . He was provided with an ARH form (footnote omitted). However, the prehearing officer did not tell Mr. Davis the date by which he needed to file an ARH.
> . . . .
>
> On June 11, 2015, Mr. Davis requested an SIME, and the Board found this request tolled the requirement in .110(c) for requesting a hearing within two years of the date of controversion following a claim for benefits (footnote omitted). . . .
>
> . . . Nowhere in the record is there any indication anyone at the Board told Mr. Davis of this new deadline. From the prehearing summaries, it also does not appear anyone at the Board told Mr. Davis that the SIME would stop the clock on the time for requesting a hearing nor how many days remained in which to request a hearing once the clock started rolling again (footnote omitted).
>
> . . . Specifically absent from this note is any mention of the fact that Mr. Davis had a right to request a hearing now that the SIME process was complete. Also absent from this note is any mention of the fact that his time for requesting a hearing might be running out. . . .
> . . . .
>
> . . . If the Board, at any time, had given Mr. Davis a firm date by which he needed to request a hearing, and he did not then timely request a hearing, the Board would have fulfilled its obligation to Mr. Davis.

> . . . Mr. Davis never was given a date by which he needed to request a hearing. . . . In the future, the Board could avoid this kind of situation by establishing a practice of advising a claimant at the first prehearing after a claim and controversion have been filed, of the date by which a hearing needed to be requested, absent any extensions of time. It would also be prudent for anyone at the Board assisting a self-represented litigant to know the date by which an ARH needs to be filed. If the date changes for any reason, such as tolling during the SIME process, the new date for requesting a hearing should be clearly communicated to the self-represented litigant. . . .

*Roberge v. ASRC Construction Holding Co*., AWCAC Dec. No. 269 (September 24, 2019) addressed the long-standing debate over how and when the SIME process tolls §110(c). It concluded, "Nonetheless, for purposes of tolling the statute of limitations in .110(c), a bright line for tolling the limitation period in .110(c) is needed. The Commission finds that a stipulation by all parties at a prehearing is the best demarcation for tolling the .110(c) time limitation."

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter; . . . .

Benefits sought by an injured worker are presumed to be compensable and the presumption of compensability is applicable to any claim for compensation under Act. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption application involves a three-step analysis. To attach the presumption, an employee must first establish a "preliminary link" between his or his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). For injuries occurring before the 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence, which demonstrates that the work injury is no longer "a substantial factor" in the need for medical treatment, or the treatment is no longer reasonable or necessary. Because the panel does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985). If the panel finds the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. In the

third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

> **8 AAC 45.052. Medical summary.** . . .
>
> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.
> . . . .
>
> (3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,
> . . . .
> (B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary. . . .

> **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 45.065. Prehearings.** (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on
> . . . .

(2) amending the papers filed or the filing of additional papers; . . .

**8 AAC 45.070. Hearings.** . . .

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

**8 AAC 45.178. Appearances and withdrawals.** (a) A person who seeks to represent a party in a matter pending before the board shall file a written notice of appearance with the board, and shall serve a copy of the notice upon all parties. The notice of appearance must include the representative's name, address, and phone number and must specify whether the representative is an attorney licensed to practice law within the State of Alaska. . . .

(b) A representative of a party may withdraw an appearance by filing with the board a written notice of withdrawal and by serving the notice upon all parties. The withdrawal becomes effective upon receipt by the board.

**8 AAC 45.900. Definitions.** . . .

(11) "Smallwood objection" means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician; see Commercial Union Insurance Companies v. Smallwood, 550 P.2d 1261 (Alaska 1976). . . .

*Frazier v. H.C. Prive/CIRI Construction, JV*, 794 P.2d 103, 106 (Alaska 1990) said in respect to "Smallwood" objections that "cross-examination was to be required only when the written medical report was hearsay." *Frazier* also cited to Alaska Rules of Evidence, Rule 801 and defined "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

## ANALYSIS

**1) Should both Employee's August 4, 2018 and June 21, 2024 claims be denied for failure to timely request a hearing on the August 4, 2018 claim?**

When Employee was injured in 2000, §110 was significantly different than the current version. Nevertheless, §110 is procedural and applies retroactively to Employee's case. *Crouch*. Employee *pro se* filed his August 4, 2018 claim with the Division on September 4, 2018. Employer promptly controverted it on September 25, 2018. This started the §110(c) clock running for Employee to either request a hearing or, if he was not yet ready to schedule one, to ask for more time. *Kim*. Employee, who is not an attorney and is unfamiliar with legal processes and forms, tried to request a hearing on October 26, 2018. He failed to include proof of service of his first ARH on Employer's representative, and the Division rejected it. 8 AAC 45.070(b). Division staff, however, at his request, helped Employee file an Amended ARH, which he did on November 13, 2018. Clearly at this point Employee was vigorously pursuing his claim and had both requested a hearing and asked that one be scheduled. *Kim*. Therefore, effective November 13, 2018, Employee had fully complied with all legal requirements under §110(c) to protect his August 4, 2018 claim. "Substantial compliance" was not even an issue at this point. *Kim*.

Between November 13, 2018, and the first prehearing conference held on December 20, 2018, Rehbock decided to represent Employee. He had previously entered an appearance in 2001 and never withdrew it even after the parties resolved initial issues through a 2002 C&R. Rehbock never filed a new entry of appearance. 8 AAC 45.178(a), (b). Shortly after appearing at the December 20, 2018 prehearing conference on Employee's behalf, Rehbock filed a February 14 [sic], 2019 SIME petition. Most importantly, Rehbock at the February 14, 2019 prehearing conference orally withdrew Employee's November 4, 2018 Amended ARH. The legal effect of these actions is discussed in the following sub- sections:

*A. Employee's August 4, 2018 claim*

Under §110(h), Employee's Amended ARH suspended or "tolled" the two-year §110(c) clock from running. Under the applicable statute and regulations, as interpreted by Commission case law, once Rehbock withdrew Employee's Amended ARH, the §110(c) clock began running again. *Harkness*. Employee's two-year §110(c) clock began running the day after Employer's September

25, 2018 Controversion Notice. 8 AAC 45.063(a). Thus, beginning September 26, 2018, Employee or Rehbock had 731 days (two years, including an extra day for 2020, a leap-year) to ask for a hearing or seek more time to request one. *Kim*. Employee successfully tolled the §110(c) clock on November 13, 2018, when he *pro se* re-filed and served his fully compliant Amended ARH. By November 13, 2018, he had used 49 of his 731 days. The §110(c) clock remained tolled until February 14, 2019, when Rehbock verbally withdrew the Amended ARH. Under *Harkness*, Rehbock's ARH withdrawal re-started the clock. Employee or Rehbock had 682 days left to either request a hearing or seek more time to do it; 682 days from February 14, 2019, was December 27, 2020, which was a Sunday. *Rogers & Babler*. This gave Employee or Rehbock until Monday, December 28, 2020, to either re-file a new ARH or seek more time. 8 AAC 45.063(a); *Kim*.

There is no evidence that Rehbock or Employee ever informally or formally requested a hearing or requested more time to ask for one, between February 14, 2019, the date Rehbock withdrew the Amended ARH, and December 28, 2020, the date the re-started §110(c) clock expired. Employee fired Rehbock effective December 10, 2023, meaning that Employee was represented by an attorney the entire time between Rehbock's appearance at the December 20, 2018 prehearing conference, and December 10, 2023, when Employee terminated him. Employee bears the burden to show why neither he nor Rehbock could have filed a new ARH, sought an extension or at least informally requested a hearing and a subsequent timely request that a hearing be scheduled. *Kim*; *Saxton*. Employee simply stated that he at all times acted "earnestly and timely"; he offered no excuse or explanation for the absence of any timely hearing and scheduling request after Rehbock withdrew his Amended ARH -- other than blaming Rehbock on whom he had relied.

Given Employee's non-attorney *pro se* status, the panel explored all possible excuses and explanations. *Thompson*. The Commission's *Harkness* decision is nearly identical to his case and is precedent, which this decision must follow, unless *Harkness* is overruled by the Commission or reversed by the Alaska Supreme Court. AS 23.30.008(a). Although the legal bases in *Harkness* are questionable in this panel's view, it resolves all possible arguments that could be made to excuse Rehbock's and Employee's failure to timely re-file appropriate hearing and scheduling requests. To be clear, Employee raised none of the following concerns before or at the hearing:

As is the case here, Harkness filed his own claim and timely filed his own ARH. His employer controverted. Subsequently, Harkness' attorney withdrew the hearing request. A panel denied the employer's petition to dismiss under §110(c) on numerous grounds. On the employer's appeal, the Commission addressed questions relevant to this case, and reversed:

(1) Once filed, may an ARH be withdrawn?

*Harkness* noted that §110(c) was silent on whether once filed, an ARH can be withdraw, re-starting the §110(c) clock. However, it further noted that 8 AAC 45.178(a) requires attorneys representing individuals in these cases to file appearances, and §178(b) allows them to file withdrawals, with the Division. This prevents a party from disavowing acts performed by their attorney. Here, Rehbock entered his appearance in 2001 but never withdrew it after the 2002 C&R resolved prior issues. Rehbock, at Employee's request and acquiescence, appeared representing him at the December 20, 2018 prehearing conference, and thereafter. At no time did Employee disavow actions Rehbock took, although he often bitterly complained about his representation. At hearing, Employee said he received all the prehearing conference summaries and probably read them. Each relevant summary stated that Rehbock had appeared on Employee's behalf. Thus, whether or not Employee knew about Rehbock's actions on his behalf, and agreed or disagreed with them, he knew that Rehbock withdrew Employee's Amended ARH at the February 14, 2019 prehearing conference, because the Division served the summary on him, and he admitted he probably read it. Substantial evidence supports the conclusion that Rehbock had authority to act, and was acting on Employee's behalf on February 14, 2019, when he withdrew the Amended ARH.

*Harkness*, citing §110(h), concluded that statutory authority existed to "withdraw" an ARH. Section 110(h) addresses situations where the Division has scheduled a hearing at an employee's request and the employee thereafter requests a hearing continuance, and the request is approved. In those circumstances, the order granting the continuance renders the hearing request inoperative and the two-year clock begins to run again. Although there was no hearing scheduled in *Harkness*, the Commission nonetheless relied on §110(h) to conclude that withdrawing the ARH "had the effect of a request for a continuance of a yet-to-be-calendared hearing," and found the prehearing designee's acknowledgment in the prehearing conference summary that the ARH was withdrawn "constituted board approval of the continuance." *Harkness* reasoned that the ARH was inoperative

and the two-year period started running again. Since a statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it," it is unclear how *Harkness* came to this conclusion. *Tipton*. Nevertheless, *Harkness* is precedent under §008(a).

*Harkness* also relied on *Jonathan* as support for its conclusions, because *Harkness* concluded that *Jonathan* equated "cancelling" an ARH as tantamount to "a withdrawal." However, it is again unclear how *Harkness* came to that conclusion because *Jonathan* merely accepted the parties' stipulation regarding the ARH and accepted the fact that a designee "cancelled" it. *Tipton*. *Jonathan* did not analyze the legal issue of whether an ARH may be withdrawn, once filed, and become "inoperative," and did not discuss any resultant legal effect, because those issues were not raised. *Jonathan* simply distinguished between pre- and post-claim controversions, and defined a "claim" for §110(c) purposes. *Tipton*.

*Harkness* further reasoned that 8 AAC 45.065(a)(2) provided regulatory authority to withdraw an ARH, because that section allows a designee to exercise discretion in making determinations on "(2) amending the papers filed or the filing of additional papers." It added, "The withdrawal can be viewed as an amendment to the ARH." It is unclear how *Harkness* equated "amending" a claim or answer to "withdrawing" an ARH, which could result in a litigation-ending defense under §110(c). *Tipton*. When a pleading is "amended," it still exists in its amended form and is not rendered inoperative; it does not cease to exist. *Rogers & Babler*.

*Harkness* also relied on agency decisions, none of which analyzed the "withdrawal" issue. The cases simply accepted that an ARH could be "withdrawn," and *Harkness* concluded, "It stands to reason that, if a withdrawn ARH does not toll the subsection, an ARH can be withdrawn."

(2) Was Employee's lawyer's ARH "withdrawal" legally effective?

Based upon the above analyses, and based solely on the *Harkness* precedent, Rehbock had authority to withdraw Employee's amended ARH and render it inoperable. Under *Harkness*, this re-started the §110(c) clock. AS 23.30.008(a); AS 23.30.110(h).

(3) Did the Division properly advise Employee?

*Harkness* also addressed the Division's duty to advise a *pro se* claimant and to advise him while that same worker had an attorney. *Harkness*, with facts similar to those here, distinguished *Richard* and *Bohlmann* on grounds that the injured worker had a lawyer. If *Harkness'* reasoning is applied to Employee's case, there was no need for the Division to further counsel Employee regarding the §110(c) deadline, because Employee had fully complied with it while *pro se*. Thus, "There was no need to advise him in that respect," and Division staff would have no way to anticipate that "in the future, the ARH would be withdrawn" and need to advise Employee accordingly. *Harkness*. Further under *Harkness*, once Rehbock withdrew Employee's Amended ARH on February 14, 2019, there would still be no reason for Division staff to advise him because he had an attorney. *Harkness* in a similar situation stated Division staff, "would be justified in presuming that [his attorney] was capable of advising him, eliminating any duty on their part to do so." Similarly, under *Harkness*, Rehbock's presence as Employee's attorney would make the "holding in *Bohlmann* inapplicable." *Harkness* found that from the time Harkness' lawyer first appeared at a prehearing conference and the date Harkness dismissed him, he was represented. In such circumstances, which are present in Employee's case, the Division "was under no obligation to advise either of them regarding the two-year time limit" in §110(c). *Harkness*.

The worker in *Harkness* contended that Division staff had a duty to advise him even when he was represented by an attorney because he "dropped in" at Division offices "regularly." *Harkness* rejected this because the claimant had an attorney and because his hearing testimony was "vague." Employee at hearing referenced letters and phone calls he made to the Division complaining bitterly about Rehbock not responding to his inquiries or pursuing his claim. All these Division contacts occurred either before Rehbock appeared at the first prehearing conference after Employee *pro se* had fully complied with §110(c), or at times when Division staff knew Rehbock was representing Employee, even though he had not filed a new entry of appearance. Based upon the above analyses, and based solely on the *Harkness* precedent, Division staff properly advised Employee under *Richard* and *Bohlmann* concerning his duties under §110(c).

(4) Does the pending SIME petition toll §110(c)?

Rehbock timely filed an SIME petition on Employee's behalf. AS 23.30.095(k). It is still pending. On April 10, 2019, after Rehbock had withdrawn Employee's Amended ARH, Rehbock appeared

at a prehearing conference where the parties agreed the "SIME is held in abeyance" until Employee obtained additional imaging. It is not clear from the record what imaging he needed or whether Employee ever obtained it. Nevertheless, *Harkness* addressed this issue as well, and it is applied here. Employee's case is distinguishable from agency decisions cited in *Harkness* because Employer never signed the SIME form, which includes a built-in stipulation, and the instant parties never otherwise stipulated to an SIME. Similarly, as was the case in *Harkness*, Rehbock's SIME petition was never taken to hearing and there was no SIME ordered. Consequently, *Harkness* distinguished agency decisions *Aune*, *Turpin*, *McKitrick* and *Snow* on their facts. Similar facts distinguish the instant case from those decisions as well under *Harkness*.

Some Commission decisions have held that an SIME request tolled the §110(c) clock because an SIME petition signaled the necessity for more time before the injured worker was prepared to request a hearing. *Narcisse*. However, more recent Commission decisions created a "bright line" rule when this may occur. "The Commission finds that a stipulation by all parties at a prehearing is the best demarcation for tolling the .110(c) time limitation." *Roberge*. As discussed above, the parties in the instant case never stipulated to an SIME. In this case, "The SIME was abandoned, or at the very least, inexcusably neglected." *Dillard*.

Lastly, at least one Commission decision suggested that the Division failed in its duty under *Richard* and *Bohlmann* if it did not give an injured worker the specific date by which he had to file an ARH or potentially lose his benefits under §110(c). *Davis*. However, reading *Harkness* and *Davis* together, *Davis* would not apply in this instance because at all relevant times when action could have been taken to save Employee's August 4, 2018 claim, Rehbock represented him. Employee at hearing offered no other legal reason or excuse for not complying fully with §110(c) after Rehbock withdrew his Amended ARH. *Tonoian*. He had to do more than just "generally pursue" his claim. *Hessel*. He did not. Based upon the above analyses, and based primarily on the *Harkness* precedent, Employee's August 4, 2018 claim will be denied under §110(c).

*B. Employee's June 21, 2024 claim.*

Employer contends Employee's June 21, 2024 claim relates back to his August 4, 2018 claim and should also be denied under §110(c) because he seeks "the same" medical benefits. Employer's

position is contrary to Alaska Supreme Court precedent. *Tipton* held dismissal under §110(c) does not prevent an employee from applying for different benefits, or raising other claims, based upon a given injury. *Wagner* 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* held that "new medical treatment entitles a worker to restart the statute of limitations for medical benefits." *Bailey's* facts are similar to this case. A hearing panel dismissed Bailey's claims, finding a later claim had "merged" with his earlier claims and held all were time-barred under §110(c), because the worker failed to request a hearing within two years of the date the employer controverted the earlier claims. *Bailey* held the worker had reserved his right to seek future medical care through a C&R, and the employer had reserved its right to contest those claims as they were filed. *Bailey* held §110(c) did not bar the later claim, because he had requested the same kind benefits as in the previous claims, but for a different time period.

Employee explained at hearing that he wants Employer to pay for his ongoing medical care, which at this point involves only Emgality medication and appointments necessary for renewed prescriptions. Since it does not appear that Employee was requesting any past benefits, and based on the above case law analyses, Employee's June 21, 2024 claim for ongoing benefits beginning June 21, 2024, will not be denied under §110(c). *Tipton*; *Wagner*; *Egemo*; *Bailey*.

**2)Shall Employee's June 21, 2024 claim for medical care be denied on its merits?**

Because Employee was injured in 2000, a prior AS 23.30.010 version and related case law, including the "a substantial factor" legal standard apply to this case. *Crouch*; *Jespersen*. Since this decision is not denying Employee's June 21, 2024 claim on §110(c).grounds, and because that claim was listed as an issue for the October 16, 2024 hearing, this decision must decide that claim on its merits. AS 23.30.001(2). The hearing was Employee's time to present evidence and argument supporting his June 21, 2024 claim. He contends Employer should pay for his ongoing medication and related appointments as stated in his C&R. Based on Dr. Bauer's EME, Employer contends migraines were not related to Employee's injury and he no longer needs medical care for his work injury. This creates a factual dispute, to which the presumption of compensability applies. AS 23.10.120(a)(1); *Meek*.

Without regard to credibility, Employee raises the statutory presumption with his testimony that his migraine headaches began after his work injury with Employer, and with Dr. Reif's May 12, 2020 report, in which she stated, "IMPRESSION: Posttraumatic migraines. Cervical fusion C3-5 related to same 2000 industrial injury, with chronic neck pain." *Tolbert*. Employer never "Smallwooded" this report. By contrast, ARNP Corson's September 29, 2022 letter, written at Employee's request, is inadmissible as evidence at hearing. Employer "Smallwooded" that letter on January 4, 2023, and Employee never presented ARNP Corson for cross-examination. 8 AAC 45.052(c)(2)(B); 8 AAC 45.900(a)(11). Because the letter was written at Employee's request to support his claim, and he offered it as evidence to prove the truthfulness of the matter asserted in the letter, it is "hearsay" and is not admissible under any recognized exception to the hearsay rule. 8 AAC 45.900(11); *Frazier*. ARNP Corson's opinion will not be considered in this decision.

Without regard to credibility, Employer rebuts the raised presumption with Dr. Bauer's July 12, 2018 EME report. *Wolfer*. Dr. Bauer diagnosed, among other things, "History of migraines, unrelated to the incident in question." He further noted, "He does report that he has migraine headaches, which is a problem unrelated to either his surgery or progressive degenerative disease." Dr. Bauer stated, in respect to medication management, "The sumatriptan is for his migraine headaches, which are not related to the incident in question or its sequela." He opined the work injury was not "a substantial factor" in Employee's need for medical care, including migraine headaches, and he needed no further reasonable or necessary treatment. AS 23.30.010; *Jespersen*. This causes the presumption to drop out and requires Employee to prove his claim by a preponderance of the evidence. *Saxton*. He relies mostly on his medical records.

Dr. Kralick prescribed Neurontin for Employee early on, but never offered a causation opinion about Employee's migraines vis-à-vis his work injury with Employer. Employee's reporting over the years was inconsistent regarding his headaches. For example, on August 15, 2002, Employee had a physical capacity evaluation, testing his limits for four hours. He never mentioned any headaches. Dr. Zucker's 2002 EME report only briefly mentioned Employee having headaches and neither he nor Employee attributed them to his injury. Employee's case was thereafter quiet for many years after the parties' 2002 C&R.

On March 3, 2009, Employee resurfaced, and Dr. Churchley saw him in the emergency room for abdominal pain. Employee did not mention headaches in his symptoms review and Dr. Churchley did not diagnose them. Years later, on May 5, 2013, Dr. Wallace saw Employee who complained of a headache and wanted a medication refill; he recorded a history of, "*Migraines for 12 years, takes Imitrex, ran out*." Nevertheless, Employee's "Past Medical History" in this same note included, "*Migraines started 1998*." This same "*Migraines started 1998*" history was repeated in at least 11 reports over the years in Employee's medical records created by several different providers. However, Employee's work injury with Employer occurred on December 11, 2000, two years *after* the earliest mention in Employee's medical records that he had migraines.

On August 10, 2014, Dr. Churchley saw Employee again in the emergency room. While having a "pretty severe/10" level migraine, Employee loudly expressed his political and social views. His behavior caused Dr. Churchley to record, "He gestures wildly during this semi continuous marginally controlled tirade against humanity, such that the examiner questions just how severe the headache truly is." Employee's credibility was in question.

During Dr. Bauer's July 12, 2018 EME, Employee mentioned migraines, but Employee did not appear to suggest that he thought they were work-related. Dr. Bauer said they were not. In 2019, Employee began treating with Dr. Reif. Her reports record Employee's statements about when his headaches began, but with one exception offered no causation opinion. Dr. Reif suggested the migraines were "vascular," and recorded that Employee said they began in "1998." Though she mentioned "cervical disease" could cause migraines, Dr. Reif's report does not expand upon this. She may have been referring to his work injury, or to his preexisting and continually degenerating cervical disc disease identified by her and numerous other physicians. On April 1, 2020, Employee told Dr. Reif that he had migraines "much of his life." At hearing, Employee explained what he meant by that was he had them for 20 years, which he considered "much of his life."

On May 12, 2020, Dr. Reif spoke with Employee again. He "objected to" and complained about her prior medical records regarding his marijuana use and headache history. Dr. Reif reviewed her various reports since her first visit with him, and, for the first time, gave a causation opinion that he had, "Posttraumatic migraines. Cervical fusion C3-5 related to same 2000 industrial injury,

with chronic neck pain." Employer never "Smallwooded" that report. Dr. Reif never explained how "vascular" migraines, as she previously diagnosed, were "post traumatically" connected to his 2000 injury. However, in the May 12, 2020 report Dr. Reif still stated, "*Migraines started 1998*." This migraine "begin date" continued into 2021 reports.

On May 26, 2021, Dr. Reif noted an inconsistency in Employee's report regarding Emgality's effect. "He told his new [personal care provider] . . . that he only had had 1 headache, but he told me he recorded about 10 days of dull headache that was not enough to even take the sumatriptan." Employee's credibility was again in question. Thereafter, Dr. Reif's reports ceased stating a start date for Employee's migraines. In totality, Employee's medical records and Dr. Reif's opinions based on them lacked credibility, primarily because Employee's migraine reports were inconsistent and not credible. AS 23.30.122; *Smith*. By May 26, 2021, Employee convinced Dr. Reif to remove the "*Migraines started 1998*" language from her subsequent medical records.

Dr. Bauer's EME report is given some weight. AS 23.30.122; *Smith*. Since Employee told numerous physicians his migraines started in 1998, two years before his work injury, substantial evidence in the admissible medical record suggests that his more recent migraine headaches, which appear to have begun in earnest and started increasing around 12 to 14 years post-injury, were associated with a preexisting, as Employee repeated stated to his physicians, a vascular issue as Dr. Reif opined, and are not related to his work injury or its sequela as Dr. Bauer stated. There is no medical evidence suggesting the work injury aggravated, accelerated or combined with the preexisting migraines to make that injury a substantial factor in his need to treat them. *Jespersen*. Absent any other admissible medical evidence, Employee has failed to meet his burden of production and persuasion. *Saxton*. His request for Employer to pay for ongoing migraine medical management will be denied.

## CONCLUSIONS OF LAW

1) Employee's August 4, 2018 claim, but not his June 21, 2024 claim, will be denied for failure to timely request a hearing on the August 4, 2018 claim.
2) Employee's June 21, 2024 claim for medical care will be denied on its merits.

## ORDER

1) Employer's July 9, 2024 petition to dismiss Employee's August 4, 2018 and June 21, 2024 claims is granted in part, and denied in part.
2) Employee's August 4, 2018 claim is denied under AS 23.30.110(c).
3) Employee's June 21, 2024 claim is not denied under AS 23.30.110(c).
4) Employee's June 21, 2024 claim is denied on its merits in accordance with this decision.

Dated in Anchorage, Alaska on October 25, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Marc Stemp, 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 Eugene Voight, employee / claimant v. Alcan Electrical & Engineering, employer; Alaska Insurance Guaranty Association, insurer / defendants; Case No. 200024859; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on October 25, 2024.

/s/
Lisa Clemens, Workers' Compensation Technician