ALASKA WORKERS' COMPENSATION BOARD

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

YOLANDA GAROUTTE, Employee, Claimant, v. STATE OF ALASKA, Self-Insured Employer, Defendant.	)))))))))))	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201812920 AWCB Decision No. 25-0027 Filed with AWCB Anchorage, Alaska on April 18, 2025

The State of Alaska's (Employer) January 23, 2025, petition to dismiss was heard on April 15, 2025, in Anchorage, Alaska, a date selected on February 25, 2025. A February 25, 2025 stipulated hearing date gave rise to this hearing. Non-attorney Yolanda Garoutte (Employee) appeared by Zoom, represented herself and testified. Asst. Attorney Gen. Justin Tapp appeared and represented Employer. The record closed at the hearing's conclusion on April 15, 2025.

ISSUES

Employer contends that Employee failed to file a claim timely after she had knowledge of the nature of her disability and its relationship to her employment and after disablement. It contends that under Alaska Supreme Court (Court) precedent, her claim for permanent partial impairment (PPI) and medical benefits comes under the same statute of limitations just as other benefits. Employer seeks an order barring Employee's claim under AS 23.30.105(a).

Employee stated her "claim" had been denied and an adjuster told her she had no proof that her deafness arose out of her exposure at work. As a Physician's Assistant (PA) treating inmates in

the correctional system, Employee said she had been sued "numerous times," so she is not litigious. Employee admitted she never contacted the Workers' Compensation Division (Division) for years after her incident because she did not think she could do anything about her alleged injury.

1) Should Employee's March 27, 2022, claim in its entirety be barred under §105(a)?

Employer also contends that Employee failed to request a hearing, or request more time to request one, timely within two years after the date it controverted her claim. It seeks an order denying her claim under AS 23.30.110(c).

Employee concedes she never formally or informally requested a hearing, nor did she request more time to ask for one. She said she felt she would lose because she could not prove that her hearing loss arose from the illness, she believes she contracted while at work.

2) Should Employee's March 27, 2022, claim be denied under §110(c)?

FINDINGS OF FACT

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

1) Beginning around August 1, 2018, Employee alleges she was treating sick inmates, and after many days' exposure she developed a viral illness. Subsequently, on or about August 15, 2018, she experienced sudden deafness in her left ear, which she attributed to her exposure to viruses at work. (First Report of Injury, September 5, 2018; record).

2) On August 22, 2018, Jeffrey Kim, MD, examined Employee for hearing loss in her left ear, vertigo, and vomiting with head movements for five days. Her baseline tinnitus had not changed, and she had no headache or ear pain. There is no mention that Employee attributed this to her work for Employer. She reported a cold the previous week before her symptoms began. Dr. Kim diagnosed a likely viral infection and "vertiginous syndrome." He made recommendations and prescribed medication but did not offer a causal opinion relating Employee's symptoms to her work for Employer. (Kim report, August 22, 2018).

3) On August 28, 2018, Dr. Kim saw Employee again. She reported ongoing left-ear hearing loss, dizziness that came and went, and balance issues but no vertigo. Employee said her left-ear hearing loss was complete, and she had a "rushing sound" constantly in that ear. An audiogram the

previous day confirmed her hearing loss. Oral steroids had improved her vertigo. Employee denied a previous history of ear or vertigo problems. Dr. Kim referred her to Creed Mamikunian, MD, an ears, nose and throat (ENT) specialist. (Kim report, August 28, 2018).

4) On September 5, 2018, Employee reported her injury in writing to Employer, as stated in factual finding (1), above. (First Report of Injury, September 5, 2018).

5) Two years from September 5, 2018, was September 5, 2020, which was a Saturday. The following Monday, September 7, 2020, was Labor Day, a state holiday. The next day, that was neither a weekend nor a holiday, was Tuesday, September 8, 2020. (Observations).

6) On September 6, 2018, the Division sent Employee at her record address a letter to **** Fairbanks St., Anchorage, AK, 99503 (address redacted for privacy) as follows:

> We have established a file concerning your injury. In all correspondence about your injury, please refer to your AWCB Number: 201812920.
>
> The publication "*Workers' Compensation and You"* is available for review and download online at http://labor.alaska.gov/wc/wc-and-you.htm; or can be obtained from the nearest Alaska Workers' Compensation Division Office. If you have any questions, please contact the claim administrator at (907) 313-7650. If you need further assistance after speaking with the claim administrator, contact the nearest Alaska Workers' Compensation Division Office listed at http://labor.alaska.gov/wc/.
>
> If the information listed below is incomplete or incorrect, please contact the claims administrator and the nearest Workers' Compensation office.

Employer	**Claim Administrator**	**Date of Injury**
State Of Alaska PO Box 241148 Juneau, AK 99811-0218	Penser North America Inc. PO Box 110218 Anchorage, AK 99524-1148	08/15/2018

7) On September 25, 2018, Employer denied Employee's right to all benefits, stating:

> The cause of the employee's condition is a highly complex medical issue requiring the production of medical evidence linking the cause of the employee's condition to her employment in order to attach the presumption of compensability. *Burgess Construction Company v. Smallwood*, 623 P.2d 312 (Alaska 1981); AS 23.30.120. No medical evidence has been produced demonstrating the employee's work activities on or before 08/15/2018 were the substantial cause of his [sic] condition. (Controversion Notice, September 25, 2018).

8) Employer certified that it served its September 25, 2018, Controversion Notice on Employee by mail at her record address **** Fairbanks St., Anchorage, AK 99503. The controversion included the following information:

TO EMPLOYEE. . . . : READ CAREFULLY

> This notice means the insurer/employer has denied payment of the benefits listed on the front of this form for the reasons given. **If you disagree with the denial, you must file a timely written claim (see time limits below). The Alaska Workers' Compensation Board (AWCB) provides the "Workers' Compensation Claim" form for this purpose. 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

1. When must you file a written claim (Workers' Compensation Claim form)?

   a. Compensation Payments.

   > You will lose your right to compensation payments unless you file a claim within two years of the date you know the nature of your disability and its connection with your employment and after disablement. If the insurer/employer voluntarily paid compensation, you must file a written claim within two years of the last payment.

   . . . .

   c. Medical Benefits.

   > There is no time limit for filing a claim for medical benefits. If the insurer/employer stops medical payments, and if you believe you need more treatment, you must make a written claim to request additional medical payments. The law permits the insurer/employer to stop medical payments two years after your injury date, but the AWCB can authorize additional medical payments if treatment is needed for the process of recovery.

2. When must you request a hearing?

   > Within two years after the date the insurer/employer filed this controversion notice, you must request a hearing before the AWC Board. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within the two years. Before requesting a hearing, you should file a written claim.

IF YOU ARE UNSURE WHETHER IT IS TOO LATE TO FILE A CLAIM OR REQUEST A HEARING, CONTACT THE NEAREST AWCB OFFICE

The Controversion Notice lists Division offices in Anchorage, Fairbanks and Juneau, and includes the addresses and phone numbers for each. (Controversion Notice, September 25, 2018).

9) On October 2, 2018, Penser North America (Penser), Employer's adjuster, received Dr. Kim's August 22 and 28, 2018 chart notes for Employee's visits. (Kim reports, August 22 and 28, 2018, date-stamped October 2, 2018).

10) Employee had no contact with the Division between her alleged August 15, 2018, injury and March 23, 2022. (Agency file; observations).

11) On March 23, 2022, Employee sent an email to the Division after business hours, which was considered received the next day, March 24, 2022, which said:

> While working as a Physician assistant at the Anchorage Correctional Facility caring for inmates, I lost my hearing abruptly. I filed a workers[‘] compensation claim, that was initially denied. I underwent a review of the claim, never received information regarding the review. The claim was filed in 2019. I did undergo treatment and was told that my hearing might return, even a year after treatment, however my hearing has never returned. Could someone look into this please, I realize the time delay may exclude my case. (Employee email, March 23, 2022).

12) On March 24, 2022, a Division Workers' Compensation Technician responded to Employee's March 23, 2022, email:

> It looks like a controversion (denial) notice was filed back on 9/25/2018. Per AS 23.30.105, if the insurer denies benefits, you must file a written claim with the Board within two years after the date you knew the nature of your disability and its connection with your work and after disablement. A claim operates to formally commence an action against the insurer for benefits. If you fail to file a claim within two years, you may lose your right to benefits. I wouldn't be able to give you an answer on whether or not filing a claim will be denied or accepted. If you are interested in going that route, I am attaching a Workers' Compensation Claim (WCC) form, as well as a Medical Summary form. Once you file the WCC, your employer[‘]s insurance company (Eberle Vivian, Inc.) will have 23 days to answer the claim. The Medical Summary form will be for medical evidence (any documentation provided from medical providers) related to your work injury. It is your responsibility to serve both forms to Eberle Vivian, Inc. and complete proof of service on the forms.
>
> 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 WCC. 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 also including the attorney list. 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. If an attorney representing you does not prevail at a hearing, the attorney is precluded by regulation from charging more than $300 total in attorney's fees for representation of you, plus necessary costs, such as postage, copies and deposition expenses. Most attorneys on the Board's list do not charge an initial consultation fee or waive the fee if injured workers are unable to pay.
>
> The pamphlet, "Workers' Compensation and You -- Information for Injured Workers" contains information about the Workers' Compensation process, the different benefit types, and a helpful glossary of terms.
>
> You may file your documents electronically at workerscomp@alaska.gov. All documents filed electronically must be sent as attachments in .pdf format and state in the subject line the AWCB case number (or date of injury if an AWCB case number hasn't been established) and a brief description of the document to be filed. Attachments may not exceed 10 MB.
> . . . .
>
> **Disclosure Notice:** *I can only provide general information on the policies, procedures, and processes of the Alaska Workers' Compensation Act* [Act]. *If you need legal advice, please consult with an attorney.* (Staff email, March 24, 2022).

13) On March 25, 2022, the same Division technician emailed Employee with a correction to his March 24, 2022, email:

> In the previous email, below, I stated that your employer[']s insurance company is Eberle Vivian, Inc. I was incorrect, your employer[']s insurance company is Penser

> North America. I apologize for the inconvenience. . . . (Division staff email, March 25, 2022).

14) On March 29, 2022, in an email to the Division dated March 28, 2022, Employee said:

> I contracted a viral illness in Aug. 2018 that caused me to lose hearing in the left ear, while working at Anchorage Correctional Complesas [sic] a provider. The claim was denied, I realize this claim is beyond the time limitations, however please see the following. I received treatment into 2019 hoping for a miracle cure. I was informed by Dr. Mamikunian, that there was a remote possibility of improved hearing up to a year after treatment. I caught employment elsewhere, due to the high risk nature of the ACC, and my decreased ability to be aware of my surroundings. This employment began in 2020, right when Covid shut the world down. I then contracted Covid, and was ill for more than 30 days. I am filing, even though the time limit has passed in the hope that the claim be re[-]examined. Thank you for your consideration. . . .

Attached to the above email was Employee's March 27, 2022, claim. On it, she described how the alleged injury occurred:

> During my 80 hour work week, 8/1-8/8/2018, at Anchorage Correctional Facility, I examined inmates with a viral illness-heads [sentence cut off]. 1 week later, on 8/13/2018, I became ill with similar symptoms, and hearing loss of the left ear. I attributed this to fluid in the [sentence cut off].

Employee also explained why she filed her claim:

> [C]omplete loss of hearing and resultant tinnitus after a viral illness, I believe I contracted my previous work week. I received injections into the inner ear, and was told there was a possibility of resolution of the deafness up to a year after the last injection, which occurred in 2019. However, I remain deaf in the left ear. The loss of hearing, put me at risk with inmate population, I took another job in WA. [T]hen Covid hit, which delayed my filing.

Employee claimed PPI benefits and an unfair or frivolous controversion. (Email, March 28, 2022; Claim for Workers' Compensation Benefits, March 27, 2022).

15) On March 29, 2022, Employee gave the Division her new address, **** NW Airport Rd., Silverdale, WA 98383. (Agency file: Judicial, Communications, Change of Contact Info tabs, March 29, 2022).

16) On March 30, 2022, Employee filed a Medical Summary dated March 27, 2022, that included a box she checked with an "X" before the phrase, "Please mark with an 'X' here if you

have no medical records in your possession of this date." The Medical Summary in Employee's agency file shows service on "Penser North America," but there is no signature in the "Proof of Service" box on the form. However, Employee identified the following medical records by date, provider and a brief description:

- 8/27/18; Medical Park Family Clinic; "hearing loss of left ear after viral infection caught while caring for sick inmates."
- 8/27/2018; Medical Park audiogram; "audiogram screening."
- 8/27/2018; AK Regional Hospital; "MRI of brain with/without contrast."
- 9/4/2018; Creed Mamikunian, MD; "consultation regarding acute hearing loss series of injections."
- 9/11/2018; Northern Hearing Services; "audiogram."
- 10/09/2018; Northern Hearing Services; "audiogram after procedures."
- 10/10/2018; Dr. Mamikunian; "discussed results injection."
- 11/16/18; Dr. Mamikunian; "results."
- 3/7/19; Northern Hearing Services; "audiogram."
- 3/8/2019; Dr. Mamikunian; "discussed results."
- 3/26/2019; Northern Hearing Services; "fitting hearing aid."
- 3/24/2019; Northern Hearing Services; "hearing aid."
- 5/8/2019; Northern Hearing Services; "hearing aid."
- 5/30/2019; Northern Hearing Services; "hearing aid." (Medical Summary, March 27, 2022).

17) There are 14 medical records listed on the March 27, 2022, Medical Summary; none were attached to it. Because neither Employee nor anyone on her behalf signed the March 27, 2022, Medical Summary, there was no proof it was served on Employer. (Observations). However, at the April 15, 2025, hearing, Employer admitted it had received the Medical Summary and the records. Tapp said he would file them on a Medical Summary with the Division. (Record).

18) On April 1, 2022, Employee re-filed her March 27, 2022, Medical Summary. Unlike the previous one, Employee signed this summary, showing proof of service and again showed service on Penser. Although Employee still checked a box with an "X" before the phrase, "Please mark

with an 'X' here if you have no medical records in your possession of this date," she nonetheless attached to this Medical Summary only the following medical records:

- Dr. Mamikunian's September 12, 2018, chart note;
- Dr. Mamikunian's October 10, 2018, chart note;
- Dr. Mamikunian's November 16, 2018, chart note;
- Dr. Mamikunian's March 18, 2019, chart note;

While most of the above four chart notes list Employee's symptoms, treatments, procedures performed and her subjective results, only the November16, 2018 assessment note offers a hint at causation: "[Left] sudden idiopathic SNHL [believed to be an abbreviation for sensorineural hearing loss] 8/20/18." (Medical Summary, March 27, 2022; attachments).

19) On April 6, 2022, Matt Murphy with Alaska Legal Copy presumably on Employer's behalf, filed with the Division and served on Employee by mail Dr. Kim's August 22 and 28, 2018 chart notes, which Penser had received on October 2, 2018. (Medical Summary, April 6, 2022).

20) On April 18, 2022, Employer answered Employee's claim and denied all benefits. It defended on §105 grounds, which could bar her claim if she failed to file it within two years of the date, she had knowledge of the nature of her disability and its relation to her employment and after disablement. Employer also stated that Employee failed to present medical evidence, in what it considered a case based on highly technical medical considerations. Therefore, it contended Employee failed to raise and attach the presumption of compensability. Employer asked for an order dismissing Employee's claim. (Employer's Answer, April 18, 2022).

21) On May 3, 2022, the parties attended a prehearing conference before a Board designee. Employee verbally amended her March 27, 2018, claim to include medical costs. Among other things, Employee stated that her late claim "was due to Covid," but she would like to proceed with it and asked how to move it forward. The designee explained how she could file an Affidavit of Readiness for Hearing (ARH), and suggested Employee call the Division's Workers' Compensation Technicians with any general questions. The summary from this conference included an ARH form and referred Employee to the "Employee's Guide to Workers' Compensation" on the Division's website. It also provided an attorney list, and stated:

Notice to Claimant:

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

The designee's summary did not provide Employee with the specific date upon which she had to file her ARH or ask for more time to file one, and did not explain how Employee could calculate this date herself. (Prehearing Conference Summary, May 3, 2022).

22) On May 10, 2022, Employer controverted Employee's claim and defended under §105. It contended Employee's claim was barred because she did not file it timely. The adjuster certified that she served the controversion on Employee at her record address **** NW Apex Airport Rd., Silverdale, WA 98383 on May 10, 2022. Employer further contended she failed to present medical evidence in a "highly complex medical" case and therefore did not raise the presumption of compensability. The notice stated:

TIME LIMITS

. . . .

2. When must you request a hearing?

> 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 benefit 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

The controversion included addresses and phone numbers for the three Division offices. Employer served the controversion on Employee by mail. (Controversion Notice, May 10, 2022).

23) On May 11, 2022, the Division served a prehearing conference notice on Employee at her record address, **** NW Apex Airport Rd., Silverdale, WA 98383 for a June 9, 2022, prehearing conference. (Prehearing Conference Notice, May 11, 2022).

24) On June 9, 2022, Employer's attorney appeared at a prehearing conference, but Employee did not appear; the designee tried to contact her by phone unsuccessfully. The designee modified the May 3, 2022, conference summary to correct a misunderstanding, took no further action and did not provide a specific date for Employee to request a hearing or seek more time to request one. (Prehearing Conference Summary, June 9, 2022).

25) On June 21, 2022, Employee requested a prehearing conference. The reason given was she "would like to request a PPI." (Request for Conference, June 21, 2022).

26) On June 29, 2022, at Employee's request, a scheduled July 7, 2022, prehearing conference was rescheduled to July 22, 2022. The Division served this rescheduled notice on Employee by mail at her record address. (Rescheduled Prehearing Notice, June 29, 2022).

27) On July 22, 2022, Employer's attorney appeared for a prehearing conference, but Employee did not appear. Employer stated it had sent Employee record releases "months ago," but she had not returned them. The designee advised the parties that if discovery was complete and a settlement had not occurred, either party could file an ARH form and request a hearing. The summary again stated the following advice to Employee:

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

The designee's summary did not provide Employee with the specific date upon which she had to file her ARH or ask for more time to file one, and did not explain how Employee could calculate this date herself. (Prehearing Conference Summary, July 22, 2022).

28) On January 23, 2025, Employer filed and served on Employee a petition to "DISMISS CLAIM." It contended Employee had failed to file an ARH or a request an extension of time to file one, within the two-year statutory period prescribed in §110(c). It attached Dr. Kim's August 22 and 28, 2018 reports, and referred the Board to Employer's attached brief. In its memorandum, Employer set forth Employee's alleged exposure history. Employer noted Dr. Kim had referred Employee to an ENT specialist for further evaluation and added, "the results of this ENT evaluation are unknown to Employer as no medical records were provided after the August 28, 2018 follow up appointment with Dr. Kim." Further, Employer referenced its September 25, 2018 controversion with the attached notice to Employee about time limits for filing a claim and seeking a hearing. It alleged that Employee, three years and seven months after she reported the injury, filed a claim alleging an unfair or frivolous controversion and requesting a PPI "rating." Employer cited its April 18, 2022, answer denying responsibility for any benefits because Employee had provided no medical evidence establishing a preliminary link between her condition and her work with Employer. It also cited Employee's failure to attend two prehearing conferences and alleged she had done nothing to progress her case. Employer expanded its request to dismiss to §§105(a) and 110(c). It stated Employer satisfied all elements of both statutes entitling it to an order barring and dismissing Employee's claims. Employer cited *Murphy*, which held that PPI benefits are subject to the two-year statute of limitations under §105(a). It cited *Settje* for the notion that once a PPI claim is "ripe for adjudication," and not merely hypothetical, the injured worker must obtain a rating and present it at a hearing to obtain a PPI award. As for its §110(c) defense, Employer noted it controverted Employee's claim on May 10, 2022, and she failed to file a hearing request or request additional time to file one, by the "statutory deadline" of "May 10, 2024." Employer urged the Board to follow *Pruitt* and *Kim* and dismiss Employee's claim for failure to prosecute timely pursuant to the applicable statutes. It attached to its memorandum Matt Murphy's April 6, 2022, Medical Summary with Dr. Kim's August 22 and 28, 2018 chart notes. (Memorandum in Support of Employer's Petition to Dismiss Claim, January 23, 2025).

29) On February 25, 2025, the parties appeared before a Board designee for a prehearing conference. The parties stipulated to a hearing on April 15, 2025, on Employer's January 23, 2025, petition to dismiss. The designee summarized and recorded the following discussion:

> The [Employee] stated that she assumed there was nothing she could do in her case since she could not prove that her hearing loss was work-related; she was also told

> by the previous [Employer] attorney that she could do nothing. The [Employee] stated that her treating doctor referred her to a specialist, and she said that she is deaf in her left ear and there is no treatment for that. The [Employee] stated that the nerve was affected by the virus. The doctor said it was probably due to the virus but that it was a rare occurrence. The [Employee] stated that she believed it was the virus that she got while working that was the cause of her left ear deafness, but she would like a second opinion so that she could get an IME.
>
> The [Employer] noted that the case had just been transferred to him, and the controversion was due to a complex medical issue. More information was needed, and nothing was filed. In addition, it was denied due to the two-year deadline for requesting a hearing since the claim was controverted. The [Employee] noted that after filing, Covid hit, and there was not much she could do.

The designee set filing deadlines for evidence, witness lists and briefs. She also provided the parties with general information about filing evidence, how to write a brief and how to prepare a witness list. (Prehearing Conference Summary, February 25, 2025).

30) On April 8, 2025, Employer filed and served its hearing brief for the April 15, 2025, hearing. For the most part, this reiterated the arguments set forth in Employer's January 23, 2025, petition to dismiss and attached memorandum. Employer summarized the reasons it contended Employee's "case" should be dismissed: (1) Employee in a "complex" case failed to raise the presumption of compensability for her injury by presenting expert medical opinion linking her hearing loss to her work exposure; (2) she failed to file a claim timely under §105(a), prejudicing Employer's ability to investigate and defend against it; and (3) Employee failed to file an ARH or request more time to file one within two years of its post-claim controversion under §110(c). (Employer's Hearing Brief, April 8, 2025).

31) Employer's brief cited case law regarding expert medical evidence necessary to raise the statutory presumption of compensability. It contended "hearing loss is a complex medical issue" requiring medical evidence to raise the presumption. Employer cited Board decisions stating that hearing loss is "more medically complex," and requires greater evidence to raise the presumption. Since in its view Employee did not provide any expert medical evidence to support causation, Employer contended she cannot raise the statutory presumption, and the law allows a dismissal order since she "cannot prove her claim." (Employer's Hearing Brief, April 8, 2025).

32) Employer's brief next contended that Employee failed to provide any evidence linking her hearing loss to her alleged work exposure. Far more than two years had passed since Employer controverted Employee's right to benefits and she failed to file a claim for benefits within two

years as required under §105(a). Likewise, Employee had not obtained a PPI rating for her hearing loss. Therefore, Employer contended it is "presumptively prejudiced" in its ability to prepare a defense by "this delay of almost four years." It encouraged the Board to follow *Murphy* and find her claims barred under §105(a). (Employer's Hearing Brief, April 8, 2025).

33) Lastly, Employer's brief cited *Pruitt* and *Kim* and contended Employee's claim should be denied for failure to prosecute it timely once filed under §110(c). It further contended that if Employee was unable to file a truthful ARH within the two-year statutory period, she could and should have asked the Board for more time to file one. Employer contended she did neither. It alleged Employee failed to prosecute her claim at all by making no effort to move it forward. Accordingly, Employer contended the Board should follow *Pruitt* and *Kim* and dismiss Employee's claim under §110(c). (Employer's Hearing Brief, April 8, 2025).

34) Employee's agency file contains no letter, email, phone call or other communication, or an ARH or petition from Employee asking for a hearing on her claim, or seeking an extension of time to request a hearing on it. No Prehearing Conference Summary, other than her reference to wanting a "second opinion" on February 25, 2025, records Employee ever stating that she wanted a hearing on her claim but was not ready to schedule one. (Agency file: all applicable tabs).

35) Sudden, subjective hearing loss is immediately noticeable. (Experience; observations).

36) At hearing on April 15, 2025, Employee first testified that she wanted to "give up." She felt she could not prove her claim even though her ENT physician had stated that her left-ear hearing loss was probably caused by the virus she contracted while caring for prisoners in August 2018. The Chair advised her that there was no evidence from her ENT giving such opinion and Employee stated she thought it was in a medical record from her first visit, prior to the earliest record the Chair identified from that physician in her agency file. The Chair informed Employee about the statutory presumption of compensability and how medical evidence showing a preliminary link between her work exposure and her deafness could cause the presumption to attach to her claim and shift the burden of production to Employer. Employer would have to rebut the raised presumption with substantial evidence to the contrary, or she would win on the raised but unrebutted presumption. Following this brief explanation and other discussion, Employee decided to move forward with the scheduled hearing. (Record).

37) Employee described her formal education to become a PA at University of Texas ending in approximately 2001, her licensure as a PA in three states and her work history. She explained that

while working several days in a row for Employer in August 2018, Employee was caring for sick inmates at a correctional facility. They had sinus infections, sore throats and general malaise. A few days thereafter, Employee said she became sick, and her left ear felt like it was full of fluid. Soon, she developed extreme vertigo and vomiting. She went to Medical Park Family Clinic for examination and had a magnetic resonance imaging (MRI) scan. The MRI disclosed no tumor or stroke that could cause her left-ear deafness. (Record).

38) Employee testified that the August 15, 2018, administrative injury date was probably the day she lost her left-ear hearing. When the Chair advised Employee that her agency file included minimal medical records and none for audiograms or an MRI, Employee stated that she had sent those records on a Medical Summary to the Division and Employer. When the Chair advised that the Division had the Medical Summary, but the listed medical records were not attached, Employee admitted she must have sent the records to Employer but neglected to file them with the Division. Tapp stated he had the records and would file them with the Division. (Record).

39) Employee candidly and credibly testified that she became aware that she had lost her left-ear hearing on August 15, 2018, and attributed it to her work with Employer the days prior. She admitted she never asked her doctor for a PPI rating because "I knew I was deaf," and she was unaware what a PPI rating was. Employee also conceded that she knew her left-ear hearing loss was permanent by March 8, 2019, after she had at least two injections and oral steroids, with no improvement, and her ENT stated there was nothing more he could do. She explained that there had been no improvement in her left-ear hearing since 2018, hearing aids did not improve her hearing in that ear, and she is totally deaf in the left ear except for constant tinnitus. In Employee's view, her hearing loss is permanent in that ear. Her health care insurance paid Employee's medical bills related to her alleged injury, less deductibles and co-pays. (Record).

40) When asked why Employee made no contact with the Division between August 15, 2018, and March 23, 2022, when she sent an email, Employee stated her "claim" had been denied. An adjuster had spoken to her and said she had no proof. Employee candidly conceded she had not read the "Workers' Compensation & You" pamphlet in hard-copy or online. When asked why she did not contact the Division, Employee said she is not litigious, because she had been sued by inmates' numerous times and was not excited about litigating this case. Moreover, she did not think she could "do anything" to prevail in her case. When asked about her March 23, 2022, email to the Division, Employee clarified that when she used the word "claim" she actually meant "injury

report" and did not understand the technical difference between those terms. Employee clarified that her actual claim was filed in 2018, not 2019 as stated in her email. (Record).

41) Employee recalled receiving Employer's September 25, 2018, Controversion Notice and understood that it stated Employer's position on her case. She understood that Employer denied her benefits based on its contention that she had "no proof." By September 25, 2018, Employee knew and understood that Employer was not going to pay any benefits for her alleged work injury. She knew this based upon the September 25, 2018, Controversion Notice. (Record).

42) Employee admitted she had never asked for a hearing on her March 27, 2022, claim either formally or informally and had not asked for more time to request one. When asked why, Employee said she felt she would lose because she had no causation proof. Employee stated no one at the Division ever told her she had no claim or tried to dissuade her from moving forward. Employer never paid Employee any workers' compensation benefits in this case. At all relevant times, Employee was neither a minor, nor deemed mentally incompetent, nor had a guardian or conservator. (Record).

43) Employee was never disabled from work because of her left-ear infection or ultimate hearing loss. She continued to work notwithstanding these issues. (Record).

44) When the Chair asked hypothetically if someone at the Division, either in response to an email or in a prehearing conference, had told her the specific date on which she had to file a request for a hearing on her claim, or request more time to file one, she believed she probably would have timely filed a hearing request by that date, or asked for more time to request one, Employee without hesitation answered "yes." Given Employee's "track record" the Chair asked why the panel should believe her testimony on this point; Employee stated she had "no reason to lie." She just believed she had "no leg to stand on" as she had been told by the adjuster and by Employer's previous attorney. (Record).

45) On cross-examination, Employee stated she did not handle workers' compensation claims and had never filled out related paperwork for injured workers in her PA career. During her ordinary shifts, on her off days, Employee would sleep, perform regular housekeeping and eat out. However, during this particular shift in 2018 during which she became ill, Employee did not go out because she was "too sick." To her knowledge, the precise virus that the inmates had was never identified because the prison system had limited resources and many tests that could have

been used were simply not available. Employee knew that the inmates did not have the flu, and their infections were not bacterial. She did not explain how she knew that. (Record).

46) In its closing argument, Employer mostly reiterated its hearing brief contentions and citations. It clarified Employer's position that §105(a) should bar Employee's PPI claim, while §110(c) should bar her claim for medical costs and an unfair or frivolous controversion. Employer contended Employee "did nothing" and her inaction prejudiced it in its ability to defend against her claim because she was getting no treatment and provided few medical records so Employer could hire an employer's medical evaluator (EME) to review the matter. (Record).

47) Employee had nothing to add but clarified that she had no additional medical care after she last saw Dr. Mamikunian on March 8, 2019, simply because there was nothing further that could be done to correct her left-ear hearing loss. For example, she noted her auditory nerve was damaged and there was no medical procedure for an auditory-nerve transplant. (Record).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . ;
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . . .
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and . . . all parties shall be afforded due process . . . an opportunity to be heard . . . and . . . their arguments and evidence . . . fairly considered.

The Board may base its decision on direct testimony, medical findings, tangible evidence and on the Board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.005. Alaska Workers' Compensation Board. . . .

> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible.

> **AS 23.30.008. Powers and duties of the commission.** (a) . . . 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.

> **AS 23.30.010. Coverage**. (a) . . . [C]ompensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. . . .

Summers v. Korobkin Constr., 814 P.2d 1369, 1372 (Alaska 1991) held in a case where an injured worker had received medical care but had no current treatment that he "should have the right to a prospective determination of compensability." The Court reasoned that injured workers must weigh many variables before deciding to pursue a certain course of medical treatment or procedures, and a salient factor will be whether the treatment is compensable under the Act.

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

The former §105(a) version applicable to Employee's alleged August 15, 2018, injury stated:

> **AS 23.30.105. Time for filing of claims**. (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. . . . [E]xcept that if payment of compensation has been made without an award on account of the injury . . . a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215. . . .

Morrison-Knudsen Co. v. Vereen, 414 P.2d 536 (Alaska 1966) said §105's purpose is to ensure employers have reasonable, timely opportunity to investigate and defend against claims. *W.R. Grasle Co. v. Alaska Workmen's Compensation Board*, 517 P.2d 999, 1002 (Alaska 1974) held:

> A disability which becomes apparent immediately upon the occurrence of some mishap will be more quickly barred by the two-year limitation; . . .

Hammer v. City of Fairbanks, 953 P.2d 500, 505 (Alaska 1998) held the word "knowledge" was not a "term of art." In context, it meant no more than "awareness, information, or notice of the injury. . . ." *Egemo v. Egemo Constr. Co.*, 998 P.2d 434 (Alaska 2000) concluded, "In order for the statute of limitations under former AS 23.30.105(a) to begin running, the claimant must know of the disability and its relationship to employment and must actually be disabled by that disability." *Collins v. Arctic Builders, Inc*., 31 P.3d 1286, 1289 (Alaska 2001) noted §105 required a claimant to file his claim within two years of his actual or chargeable knowledge of his disability and its relationship to his employment. *Collins* held the injured worker had actual knowledge of his work-related asbestos injury when a physician told him his work-related asbestos exposure with his employer was probably the cause of his disease.

Murphy v. Fairbanks North Star Borough, 494 P.3d 556, 563 (Alaska 2021) held, "Considering the statutory text in its entirety, the legislative history, and the policies underlying the Act, we conclude that the legislature intended the limitations period in AS 23.30.105(a) to apply to impairment claims, just as it applies to claims for other 'indemnity benefits' -- cash benefits that compensate employees for losses and expenses other than the cost of medical treatment." The Court reasoned that §105(a) applies to indemnity benefits, PPI benefits are in the indemnity category, and the legislature thus intended PPI benefits to be subject to the same statute of limitations for filing a claim as other indemnity benefits. Moreover, *Murphy* continued:

> Claims for medical treatment are governed by a different limitations framework. AS 23.30.095(a); *see also Egemo v. Egemo Constr. Co.*, 998 P.2d 434, 440 (Alaska 2000) ("[N]ew medical treatment entitles a worker to restart the statute of limitations for medical benefits."). New medical treatment that results in wage loss allows a new disability claim that restarts the statute of limitations in AS 23.30.105(a). *Id.* at 439.

In *Larson's Workers' Compensation Law*, Prof. Larson discussed issues to consider in determining whether a limitations statute for filing a workers' compensation claim has begun to run:

> The time period for notice of claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury or disease. (7 Arthur Larson & Lex Larson, *Larson's Worker's Compensation Law* §126.05[1], at 126-18 (2001)).

> **AS 23.30.110. Procedure on claims**. . . .
>
> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

Richard v. Fireman's Fund, 384 P.2d 445, 449 (Alaska 1963) held:

> 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.

Bohlmann v. Alaska Construction & Engineering, 205 P.2d 316, 319-21 (Alaska 2009) said:

> A central issue inherent to Bohlmann's appeal is the extent to which the board must inform a *pro se* claimant of the steps he must follow to preserve his claim. . . .
>
> In *Richard* . . . we held that the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation. We have not considered the extent of the board's duty to advise claimants. . . .
>
> . . . Alternatively, the designee or the board should at least have told Bohlmann specifically how to determine whether, as AC&E asserted, the [§110(c)] deadline had already run and how to determine the actual deadline. This minimal information would have made it clear to the claimant both the correct deadline and that he still had more than two weeks in which to submit the required affidavit.
> . . . .
>
> Given AC&E's incorrect statement about the timeliness of the . . . claim and Bohlmann's request to include a . . . claim in the later claim, the prehearing officer should have told Bohlmann in more than general terms how he might still preserve

> the claim. . . . This requirement is similar to our holdings about the duty a court owes to a pro se litigant.
>
> We have held that a trial court has a duty to inform a pro se litigant of the "necessity of opposing a summary judgment motion with affidavits or by amending the complaint." We likewise have held that a trial court must tell a pro se litigant that he needs an expert affidavit in a medical malpractice case and must inform him of deficiencies in his appellate paperwork, giving him an opportunity to correct them. When a pro se litigant alerted a trial court that the opposing party had not complied with her discovery requests, we held that the court should have informed her of the basic steps she could take, including the option of filing a motion to compel discovery. In evaluating the accuracy of notice of procedural rights by an opposing party, we have noted that pro se litigants are not always able to distinguish between "what is indeed correct and what is merely wishful advocacy dressed in robes of certitude." The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants.
>
> 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. . . .
>
> . . . 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 because the board's finding that Bohlmann "had proved himself capable of filing claims and petitions even absent having counsel" is consistent with a presumption that Bohlmann would have filed a timely affidavit of readiness had the board or staff satisfied its duty to him.

Certain "legal" grounds may excuse noncompliance with §110(c), such as mental incapacity or incompetence, and equitable estoppel against a governmental agency by a self-represented claimant. *Tonoian v. Pinkerton Security*, AWCAC Dec. No. 029 (January 30, 2007). *Tonoian* held the Division's "obligation to give notice was satisfied by mailing the Board-approved controversion forms," to the injured worker and "[t]he obligation to inform and instruct self-represented litigants on how to pursue their claims did not require division staff to seek out [the claimant] and urge her to file paperwork on time or to volunteer information that it may have reasonably assumed she has been told." *Id.* at 12, 14.

AS 23.30.110(c) requires an injured worker to timely prosecute a claim once the employer controverts. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912-13 (Alaska 1996) noted a statute of limitations defense is

"generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." *Wagner v. Stuckagain Heights*, 926 P.2d 456, 459 n. 7 (Alaska 1996) noted that over the lifetime of a workers' compensation case, many claims may be filed as new disablements or medical treatments occur. *Egemo v. Egemo Constr. Co.*, 998 P.2d 434, 440 (Alaska 2000) held "new medical treatment entitles a worker to restart the statute of limitations for medical benefits."

AS 23.30.110(c)'s objective is not for a claimant to "generally pursue" the claim; it is to bring a claim to the Board for a decision quickly so speed and efficiency in Board proceedings are met. The claimant bears the burden to establish with substantial evidence a legal excuse from the §110(c) 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 factfinders' minds that facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

In *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 197-98 (Alaska 2008), an injured worker filed a claim for benefits, which his employer controverted in December 2003. Two days before the "second anniversary" of the controversion, the employee through counsel filed a motion for a continuance supported by his lawyer's declaration stating he was not ready for hearing and needed more time to prepare. In early 2006 the employer petitioned to deny the employee's claim under §110(c). In response to the employer's petition, the employee answered explaining his attorney could not honestly sign an ARH because he was not ready and asked for his continuance request to be considered a "constructive hearing request." The Board denied the claim under §110(c).

On appeal, the Alaska Workers' Compensation Appeals Commission (Commission) affirmed, finding §110(c) required claim denial, and finding substantial evidence supported the Board's implicit finding that the employee failed to present evidence justifying "equitable relief." The employee appealed again.

The Court construing §110(c) stated in *Kim*:

> But because a statutory dismissal results from failing to *request* a hearing, rather than from failing to *schedule* one, it was error to conclude that an affidavit of readiness was required to request a hearing and toll the time-bar. We conclude that

> strict compliance with the affidavit requirement is unnecessary because subsection .110(c) is directory, not mandatory (*id*. at 196). . . .
> . . . .
>
> Subsection .110(c) is a procedural statute that 'sets up the legal machinery through which a right is processed' and 'directs the claimant to take certain action following controversion.' A party must strictly comply with a procedural statute only if its provisions are mandatory; if they are directory, then 'substantial compliance is acceptable absent significant prejudice to the other party.'

Rejecting arguments about situations that could render §110(c) null and void, *Kim* said:

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

In *Pruitt v. Providence Extended Care*, 207 P.3d 891 (Alaska 2013), an injured worker's attorney filed a claim on her behalf. The attorney withdrew and mailed his withdrawal notice to the injured worker. The employee later confirmed the mailing address on the withdrawal notice's service certificate was her mailing address. Subsequently, her employer filed and served on the employee a controversion denying all benefits. A prehearing conference summary said, "The chair directed Ms. Pruitt to call our office and make an appointment with a Workers' Compensation Technician for assistance in filing an ARH, if she decides that she wants to continue with the case." The summary also advised the employee she had to file an affidavit requesting a hearing within §110(c)'s time limits; the statute's relevant part was cut and pasted into the prehearing conference summary. The Division served the summary on the employee in 2006; she failed to file a hearing request within two years of the insurer's controversion; the employer petitioned to dismiss.

At hearing on the employer's petition to dismiss, the employee testified she had not received her prior attorney's withdrawal notice. She then said she thought her attorney would submit or had submitted a hearing request. The employee disavowed having ever received notice about the

necessity of filing an ARH, and denied she ever received prehearing conference summaries. The Board found the employee had tried to resurrect her workers' compensation claim only because her long-term disability benefits expired in 2008. It noted many inconsistencies in her testimony and determined she was not credible. Finding the claimant had no legal excuse for failing to file a timely ARH, the Board denied her claim. The Commission affirmed, and she appealed.

On appeal, *Pruitt* reviewed prior decisions addressing §110(c) and stated:

> Here, Pruitt failed to file anything within the allotted time. She filed a written application for benefits in February 2005. Providence filed two controversions: one in February 2005, shortly after she filed her written application, and one in July 2005, after her deposition. Pruitt needed to request a hearing by July 1, 2007, at the latest, to avoid the time bar of AS 23.30.110(c). She did not file anything indicating she wanted to prosecute the 2005 written claim until August 2009, well after the statutory deadline expired. *Id*. at 985.
> . . . .
>
> The Board found that Pruitt's "assertion she was unaware her attorney withdrew and was relying upon him to file the necessary paperwork lacks credibility." The Board "has the sole power to determine the credibility of a witness." Its credibility findings are binding on the Commission. The Board's credibility determination disposes of Pruitt's argument that her reliance on her attorney excused her from complying with the statute. If Pruitt was not truthful in asserting that she relied on her attorney to file the affidavit of readiness for hearing, this purported reliance cannot excuse her noncompliance. The Commission thus correctly concluded that substantial evidence in the record supported the Board's determination that Pruitt did not substantially comply with AS 23.30.110(c). *Id*.

Roberge v. ASRC Constr. Holding Co., AWCAC Dec. No. 19-001 (September 24, 2019) (*reversed on other grounds, Roberge v. ASRC Construction Holding Co*., 503 P.3d 102 (Alaska 2022)), held the Board is obliged to find a way around the §110(c) deadline because statute of limitations defenses are generally disfavored.

In *Davis v. Wrangell Forest Products*, AWCAC Dec. No. 256 (January 2, 2019), the employee's claim was controverted. He requested a second independent medical evaluation (SIME). He did not timely file an ARH and the Board dismissed his claim. On appeal the AWCAC stated:

> . . . He was provided with an ARH form. However, the prehearing officer did not tell Mr. Davis the date by which he needed to file an ARH.

> . . . .
>
> . . . 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. . . .

After *Davis* issued, the Division Director filed a notice to intervene and a petition for reconsideration. In its petition, the Division argued that the Commission had failed to properly consider a relevant Court case as well as conclusions the Commission had reached in one of its own prior §110(c) decisions. Subsequently, the employer also petitioned for reconsideration to correct "misapplications of law" among other things.

In the Commission's subsequent order in *Davis v. Wrangell Forest Products*, AWCAC Order on Motions for Reconsideration (Order), (March 1, 2019), the Commission stated:

> The Board's decision itself is strong evidence as to the difficulty for anyone, not just a *pro se* claimant, to calculate the precise date by which a hearing must be requested or face the possibility of the claim being dismissed for lack of prosecution.
>
> [The employer] is likewise correct that the Alaska Supreme Court (Court) has never held the Board has an obligation to inform a claimant of the exact date by which an affidavit of readiness for hearing (ARH) is required. [The employer] further contends the Court specifically declined to do so in *Bohlmann*. . . . However, the Court, in *Bohlmann*, declined to decide whether the Board had a duty to inform the claimant of an exact date for an ARH because it did not need to do so, choosing to decide *Bohlmann* on the failure of the Board to correct a misstatement of the date by which an ARH was due. . . .

Citing extensively from *Bohlmann*, the *Davis* Order stated:

> It may be arguable in such a case that the board had a duty to tell the claimant that the two-year period was running; it may also be arguable that it had a duty to tell him when the period began running, or even the specific date on which the deadline would expire. But we do not need to consider the full extent of the duty here. (Emphasis in original). . . .
> . . . .
>
> In holding that subsection .110(c) is directory, we do not suggest that a claimant can simply ignore the statutory deadline and fail to file anything. A determination that a statute is directory instead permits substantial compliance with statutory requirements, rather than strict compliance.
> . . . .
>
> As noted above, the Court, in *Bohlmann*, raised the proposition the Board has a duty to advise a *pro se* claimant of an actual date by which to file an ARH, although it declined to decide that issue at that time. . . .

After noting that the claimant in *Davis* had not been "sitting on his hands" but pursuing his claim, the *Davis* Order held:

> The Commission, following the reasoning raised by the Court in *Bohlmann*, now holds that in cases involving a *pro se* claimant, the Board shall advise the claimant at the first prehearing, following a WCC [Workers' Compensation Claim], employer's answer, and employer's controversion, when and how to request a hearing. The Board designee in the first prehearing needs not only to advise the *pro se* claimant as to how to calculate the timeline in AS 23.30.110(c) for requesting a hearing but must also provide the claimant with an actual date by which an ARH must be filed in order to preserve the claim. . . .
>
> . . . Informing a *pro se* claimant of the date for requesting a hearing at the first prehearing provides the *pro se* claimant with the tools needed to pursue the claim and meets the requirements of the process being "quick, efficient, fair, and predictable" as well as "impartial and fair to all." Such a requirement at the first prehearing is not onerous to the Board designee and will help ensure that all parties are on a more even playing field.

Neither *Davis* nor the *Davis* Order addressed administrative regulations for adding days to a prescribed period to act when a document was served by mail, or otherwise computing time prescribed by the Act or in the administrative regulations.

> **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; . . .

Commercial Union Companies v. Smallwood, 550 P.2d 1261, 1267 (Alaska 1981) stated:

> The claim in this case is based on highly technical medical considerations pertaining to the cause of the claimant's renal failure. While valid awards can stand in the absence of definite medical diagnosis, this would appear to be the type of case in which it is impossible to form a judgment on the relation of the employment to the disability without medical analysis. . . .

On the other hand, lay evidence in relatively uncomplicated cases is adequate to raise the presumption and rebut it. If an injured worker raises the presumption and the employer fails to rebut it, the Board may rely on the injured workers' uncontradicted testimony. *VECO, Inc. v. Wolfer*, 693 P.2d 858 (Alaska 1985).

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

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **AS 23.30.155. Payment of compensation**. . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> **AS 23.30.190. Compensation for permanent partial impairment**. . . .

> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the . . . [AMA] Guides to the Evaluation of Permanent Impairment. . . .

In *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC Dec. No. 153 (June 14, 2011), an injured worker claimed PPI benefits. At hearing she presented no PPI rating from a physician. *Settje* held, "Stated simply, a PPI rating is necessary to obtaining an award of PPI benefits."

> **AS 23.30.395. Definitions**. In this chapter, . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
>
> **8 AAC 45.060. Service**. . . .
>
> (b) . . . If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail. . . .
>
> **8 AAC 45.063. Computation of time**. (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the day which is neither a Saturday, Sunday nor a holiday.
>
> **8 AAC 45.065. Prehearings**. . . .
>
> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.
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> **8 AAC 45.070. Hearings**. . . .
>
> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

The American Medical Association *Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2024) (*Guides*) is used to rate impairment under the Act, and states at page 5:

> **1.3d Operational Definitions: Impairment, Disability, Handicap**
> For purposes of the *AMA Guides,* the following operational definitions and disclaimer apply:
>
> ***Impairment:*** a significant deviation, loss, or loss of use of any body structure or body function in an individual with a health condition, disorder, or disease.
> . . . .
>
> ***Impairment rating:*** consensus-derived percentage estimate of loss of activity reflecting severity for a given health condition, and the degree of associated limitations in terms of ADLs.
>
> Impairment rating enables the physician to render a quantitative estimate of losses to the individual as a result of their health condition, disorder, or disease. Impairment ratings are defined by anatomic, structural, functional, and diagnostic criteria; physicians are generally familiar with these criteria, based on their broader training and clinical experience. . . . Impairment rating is a physician-driven first approximation of a process that attempts to link impairment with a quantitative estimate of functional losses in one's personal sphere of activity. As a result, the operational impairment rating defined above will continue to apply.
> . . . .
>
> **Chapter 11 Ear, Nose, Throat, and Related Structures**
> . . . .
>
> **11.2 Hearing and Tinnitus**
> . . . .
>
> **11.2a Evaluation of Hearing Impairment**
> . . . .

ANALYSIS

This decision does not address Employee's claim on its merits; it addresses only Employer's petition to dismiss her claim on procedural grounds as was stated in the controlling February 25, 2025, prehearing conference summary. 8 AAC 45.065(c); 8 AAC 45.070(g). Therefore, Employer's argument that Employee's claim should be denied because she failed to present medical evidence to raise the statutory presumption of compensability is irrelevant at this time and will not be addressed in this decision. AS 23.30.120(a)(1); *Smallwood*; *Wolfer*.

This nuanced case involves several regulations, statutes and statutory construction. It is undisputed that Employer never paid Employee any benefits arising from her alleged August 15, 2018, work

injury. This was never an accepted case in which benefits were paid and then stopped. Thus, the second sentence in §105(a) is irrelevant to this analysis because there never was a "date of the last payment of benefits" under any Act provision that tolled the time running under §105(a). Moreover, Employer defends not only on §105(a), but also on §110(c). To make this case more unique, Employee to date has claimed only one "indemnity" benefit -- PPI. She also requested an unfair or frivolous controversion finding, which accords her no benefit under the Act, and medical costs, which pursuant to §105(a) as interpreted by *Murphy* are not covered by the two-year claim-filing deadline in §105(a). These issues are analyzed separately.

1) Should Employee's March 27, 2022, claim be barred in its entirety under §105(a)?

a) Employee's claim for PPI benefits will be barred under §105(a).

AS 23.30.105(a) acts as a "bar" to a claim for compensation for "disability" unless a claim for it is filed within two years after Employee had knowledge of the nature of her disability, its relationship to her employment, and "after disablement." Employer correctly noted that pursuant to *Murphy*, PPI benefits are also covered by the §105(a) statute of limitations because they, like disability payments, are considered "indemnity benefits." This section insures that employers have a reasonable, timely opportunity to investigate and defend against claims. *Vereen*.

The first step in determining if Employee's PPI benefit claim is barred under §105(a) is to determine when the two-year clock began to run. Employee's March 27, 2022, claim alleges she became ill while at work sometime between August 1 through August 8, 2018, while caring for sick prisoners at a correctional facility, while working for Employer. She stated that about one week later on or about August 13, 2018, she had issues in her left ear. Employee testified that August 15, 2018, was the date she believes she lost the hearing in her left ear. The impairment for which she seeks PPI benefits is her hearing loss. AS 23.30.190(b).

"Disability" is a term of art in workers' compensation law. It means incapacity due to injury to earn the wages which she was receiving when she was allegedly injured. AS 23.30.395(16). Employee testified she never became "disabled" by her illness or her hearing loss, so it becomes questionable how the "after disablement" phrase in §105(a) should be applied here, where the

indemnity benefit sought is "impairment," not "disability." In disability claims, it is usually easy to pick a date when a person began to be "disabled" by her work injury; it is often the date on which a physician restricted her from working. But in Employee's case there was no "disability," only alleged "impairment." The Act does not define "impairment." But the Act does reference the *Guides*, which separately define "impairment," and "impairment rating." *Guides* §1.3d. There are no physician opinions in the agency file stating Employee has a "permanent" partial impairment much less a "rated" permanent partial impairment for her left ear. How §105(a) applies in this situation appears to be a case of first impression.

Logically, it makes sense to substitute the words "after impairment" in §105(a) for the words "after disablement." *Murphy*. But Employee's unusual factual circumstances beg some questions: Since in a "disability" claim the §105(a) statute of limitations only begins to run "after disablement," does that mean that in an "impairment" claim the statute only begins to run "after impairment"? And when does impairment begin? Does the impairment simply have to exist subjectively, or does it have to be "rated" by a physician under the *Guides* to actually be a "permanent" albeit partial "impairment"? There does not appear to be any law addressing these questions. However, the *Guides* make a distinction between "impairment" and "impairment rating." An "impairment," is "a significant deviation, loss, or loss of use of any body structure or body function in an individual with a health condition, disorder, or disease." By contrast, an "impairment rating" is a "percentage estimate of loss of activity reflecting severity for a given health condition, and the degree of associated limitations in terms of ADLs [Activities of Daily Living]" *Guides* §1.3d.

Clearly, an "impairment" may exist before it is rated, and hearing loss is subject to a PPI rating under the *Guides*. *Guides* Ch. 11, §§11.2, 11.2a. While an actual PPI rating is required before Employee could be awarded PPI benefits, nothing in the Act, regulations or decisional law suggests that she could not *claim* PPI benefits without having a PPI rating. *Settje*. And this hearing is not about the merits of her claim; it is about a petition to bar her claims procedurally.

The few medical records in Employee's agency file suggest she had audiograms; none are in the file. These would presumably show hearing loss. Employee's left-ear hearing loss has not improved since it started on or about August 15, 2018. Unlike some injuries, sudden hearing loss

is immediately apparent to the affected person; one day Employee could hear normally and a few days later she could not. *W. R. Grasle*. Given this analysis, because August 15, 2018, is the day Employee first noticed her sudden onset left-ear hearing loss, and it never improved, then the §105(a) statute of limitations for her PPI benefit claim began to run on August 15, 2018. On that date, Employee by her own testimony had "knowledge" of the "nature" of Employee's impairment, its "relation to the employment," and her subjective deafness on August 15, 2018, provided the "after impairment" date under §105(a). "Knowledge" is not a "term of art," and means no more than "awareness, information, or notice" of an injury. *Hammer*.

For the statute in §105(a) to begin running, Employee had to know of her impairment, its relationship to her employment and she had to be impaired. *Egemo*. She had to file her PPI claim within two years of "actual" or "chargeable knowledge" of her impairment and its relationship to her employment. *Collins*. Employee's sudden hearing loss was subjectively noticeable to her immediately. *Rogers & Babler*. To Employee's recollection, August 15, 2018, was the date she noticed her left-ear deafness, which she attributed to an infection she obtained while at work a week or so prior while attending to sick inmates. An impairment "which becomes apparent immediately upon the occurrence of some mishap will be more quickly barred by the two-year limitation" in §105(a). *W. R. Grasle*. Employee lost her hearing suddenly and immediately after becoming sick after working long hours caring for ill inmates. Not only is Employee a "reasonable person," she is a medical professional who should have recognized the "nature, seriousness and probable compensable character" of her left-ear hearing loss. *Larson's Worker's Compensation Law* §126.05. She had chargeable knowledge on August 15, 2018. *Hammer*; *Collins*.

However, that is not the end of the inquiry. "In computing any time period prescribed by the Act" or administrative regulations, "the day of the act" or "event" "after which the designated period of time begins to run is not to be included." The last day is included. 8 AAC 45.063(a). Thus, counting for the §105(a) limitations statute begins on August 16, 2018, the day after her hearing loss became noticeable on August 15, 2018. Two years from August 16, 2018, was Sunday, August 16, 2020. *Rogers & Babler*. Because this date was on a weekend, an additional day would tack on the end of the two-year period under §105(a), moving Employee's deadline to Monday, August 17, 2020. 8 AAC 45.063(a). Employee had to file her claim for PPI benefits by no later

than August 17, 2020, to avoid having her PPI claim barred by §105(a). It is undisputed that she filed her March 27, 2022, claim on March 29, 2022, long after the §105(a) statute of limitations expired on August 17, 2020. Employee had the burden to prove some reason excusing her delay. She provided no reasonable excuse why she could not have filed her claim for PPI benefits in time. *Saxton*. Therefore, her March 27, 2022, claim for PPI benefits will be barred under §105(a).

A lingering question remains over whether Employee had to know her impairment was "permanent," before §105(a) started to run. In fairness, Employee hoped her hearing loss would recover as Dr. Mamikunian suggested it might following his treatments. Her curative treatments ended on March 8, 2019, when she last saw him. Therefore, in the alternative, assuming for argument's sake that Employee did not have to file a claim for PPI benefits until she understood that her left-ear hearing impairment was "permanent," then by March 8, 2019, Employee knew or should have known that it was not going to get better. She admitted this at hearing. Beginning with the day after she knew her hearing loss was "permanent," and following the above analysis for counting time: Two years from March 9, 2019, was Tuesday March 9, 2021, which was not a weekend or a holiday. 8 AAC 45.063(a). Under this alternate analysis, Employee had to file her claim for PPI benefits by no later than March 9, 2021, to avoid having it barred by §105(a). Since she did not file her PPI claim until March 29, 2022, it would still be barred under §105(a).

Lastly, it would make no logical sense to toll §105(a)'s two-year statute of limitations until Employee obtained a formal PPI "rating" from a physician. Employee never obtained a PPI rating. If requiring an actual PPI rating was the rule under §105(a) to start the statute of limitations running for "impairment" claims, the nonsensical result would be that the §105(a) statute has still not begun to run in this case making it even more difficult for Employer to properly investigate her PPI claim. *Vereen*. Moreover, unlike some conditions where a person may feel pain but ultimately end up with no ratable impairment, it is clear to a person who has total deafness in one ear that she has suffered an impairment, formally rated or not. Given these analyses, Employee's March 27, 2022, claim for PPI benefits will be barred under §105(a).

b) Employee's claims for an unfair or frivolous controversion finding and for medical benefits will not be barred under §105(a).

Murphy applied §105(a) only to "indemnity benefits." It expressly stated that §105(a) does not apply to medical benefits: "Claims for medical treatment are governed by a different limitations framework." Therefore, there is no legal basis to apply §105(a) to Employee's claim for medical benefits. Thus, Employer's petition to bar Employee's medical benefit claim under §105(a) will be denied. Likewise, Employee's March 27, 2022 "claim" that Employer made an unfair or frivolous controversion confers no monetary benefit under the Act upon Employee and is not an "indemnity benefit." Hypothetically, if a hearing panel someday finds Employer "frivolously or unfairly controverted compensation due" under the Act, such finding would not result in Employee obtaining any indemnity benefits, and she has claimed an associated penalty. *Murphy*. That finding would result only in the Division Director "promptly" notifying "the division of insurance" of such finding. AS 23.30.155(o). Thus, since a finding under §155(o) is not an "indemnity benefit," §105(a) does not apply and Employee's "unfair or frivolous controversion" claim will not be barred under that statute.

2) Should Employee's claim be denied under §110(c)?

Employer contends Employee's claims should also be denied under §110(c) because it controverted her claim on May 10, 2022, and she did not informally or formally request a hearing, or request more time, within two years. Employee had to timely prosecute her claim once Employer controverted it. *Jonathan*. On the other hand, statute of limitation defenses are "generally disfavored." *Tipton*; *Kim*. It is not enough for Employee to "generally pursue" her claim; the goal under §110(c) is to bring a claim to hearing for decision quickly. AS 23.30.001(1); *Hessel*. She bears the burden to prove with substantial evidence a legal excuse for missing the §110(c) statutory deadline. *Hessel*; *Saxton*.

It is undisputed that Employee filed her claim on March 29, 2022. Likewise, Employer through its adjuster controverted that claim on a prescribed form and served it on Employee at her record address on May 10, 2022. In counting time, the day of the triggering event, May 10, 2022, is not included. 8 AAC 45.063(a). Two years from May 11, 2022, was Saturday May 11, 2024. One day is tacked onto the time period, because Saturday is on a weekend. That moves Employee's deadline to Monday, May 13, 2024, which was not a holiday. Adding three days to the two-year statute under §110(c) because the adjuster mailed the controversion to Employee, results in her

due date for requesting a hearing or more time to request one, moving to Thursday May 16, 2024, which was also not a holiday. 8 AAC 45.060(b). She had to request a hearing or seek more time by May 16, 2024, to avoid dismissal under §110(c).

Employee testified that to date she has not made an informal or formal hearing request, nor has she asked for more time to make one. At a prehearing conference on February 25, 2025, after the §110(c) deadline had already passed, she mentioned requesting an "IME." It is unclear from the prehearing summary what she meant, but if she was requesting an SIME, it was too late to toll §110(c). Ordinarily, this analysis would likely result in all benefits and other relief in her claim being denied under §110(c). But in all the instructions from the Division including the Workers' Compensation Technician's March 24 and 25, 2022 emails, the Division's Controversion Notice forms that Employer used to deny her claim, and all the Prehearing Conference Summaries in this case, whether she intended the prehearing conferences or not, the Division staff and the prehearing conference designee never told Employee the specific date by which she had to either file a hearing request, or ask for more time to file one. The Division's or designee's failure to advise Employee how to preserve her claim was an "abuse of discretion." *Richard*; *Bohlmann*; *Kim*; *Davis*.

While some Court and Commission decisions Employer cited state that simply advising an injured worker on a Controversion Notice or in a Prehearing Conference Summary that she must request a hearing "within two years" from the controversion filing and service date constitutes adequate notice, those cases were decided before the Commission's *Davis* decision and its later Order. *Tonoian*; *Pruitt*. *Murphy* came after *Davis*, but *Murphy* did not involve time calculations. *Davis*, which issued on January 2, 2019, was not appealed to the Court; the same is true for *Davis*' March 1, 2019 Order. The "specific date" upon which Employee had to either request a hearing or more time to request one, has not been addressed to date in any Court or Commission opinion. Pursuant to AS 23.30.008(a), Commission decisions are "final and conclusive, unless appealed to the Alaska Supreme Court." *Davis* and its Order were final and conclusive. Unless a Commission decision is reversed by the Court, "decisions of the commission have the force of legal precedent." Thus, *Davis* and the *Davis* Order are legal precedents.

The *Davis* Order expressly stated that the Commission "now holds that in cases involving a *pro se* claimant, the Board shall advise the claimant at the first prehearing, following a WCC, employer's answer, and employer's controversion, when and how to request a hearing." Moreover, the designee at the first prehearing must not only advise the *pro se* claimant how to calculate the timeline under §110(c), the designee "must also provide the claimant with an actual date" by which a hearing must be requested "to preserve the claim." Ironically, on May 3, 2022, the parties attended the first prehearing conference in this case. Employee specifically stated she "would like to proceed" with her claim and asked the designee "how to move it forward." Unlike the claimant in *Pruitt*, Employee did not sit on her hands; she made a reasonable inquiry. The prehearing conference summary states that the designee explained how she could file an ARH but failed to follow *Davis'* legally binding precedent and failed to give her the specific filing date.

At hearing on April 15, 2025, when asked if she would have requested a hearing or more time to request one had someone at the Division told her the specific deadline date, she said without hesitation "yes." Given Employee's remarkable candidness in all other answers at hearing, as well as statements made in her emails and at prehearing conferences that were clearly against her own best interest, her "yes" answer was credible. AS 23.30.122; *Smith*. While this case at first glance seems akin to *Pruitt*, where the injured worker filed nothing during the relevant two-year period, there are differences. The claimant in *Pruitt* blamed everyone but herself for failing to actively pursue her case and then gave non-credible testimony in an effort to preserve her claim. Here, Employee has been painfully honest and often wrote, spoke or testified against her interests. She believed statements from the adjuster and Employer's prior attorney telling her she had "no proof," and "no leg to stand on," and accepted her adversary's "wishful advocacy dressed in robes of certitude." *Bohlmann*. In *Pruitt*, it is unlikely the injured worker would have timely requested a hearing or asked for more time to request one even if the Division had given her a specific deadline for doing so, because she was found "not credible." That claimant had an attorney during at least part of the relevant period; Employee did not. Employee's testimony that she would have either timely requested a hearing or asked for more time was credible. AS 23.30.122; *Smith*. *Pruitt* did not address regulations for time calculations and did not have the benefit of *Davis*.

Moreover, there is clear tension between prior Court and Commission decisions on what an injured worker must do, and what constitutes adequate notice from the Division to a claimant under §110(c), versus the Commission's *Davis* decision and its *Davis* Order. *Tonoian*; *Jonathan*; *Hessel*; *Kim*; *Pruitt*. The Commission in *Roberge* held that hearing panels are obligated to find a "way around" the §110(c) deadline. Though the Court reversed *Roberge* on other grounds, the Court did not disturb that holding. Further, the instant panel cannot ignore *Davis*, and its subsequent Order, which are precedent. AS 23.30.008(a). In short, the Division did not fulfill its obligation to Employee as a self-represented litigant under *Richard*, *Bohlmann*, and *Davis*. Because the Division gave Employee no specific date by which she had to request a hearing or more time to request one, and given her refreshing honesty, and because it is probable that Employee would have requested a hearing timely had she been properly advised with a specific deadline date, Employer's petition to dismiss her March 27, 2022, claim for medical benefits and an unfair or frivolous controversion finding will be denied pursuant to *Davis*. However, her claim for PPI benefits is barred as addressed above, pursuant to §105(a).

This decision raises further questions: Now what? And how much time does Employee have to request a hearing on her pending March 27, 2022, claim, since the entire two-year period has already expired? This also appears to be a case of first impression. There is no statute, regulation or case law directly on point. Accordingly, in fairness to both parties and to ensure efficiency, allow this case to be decided on its merits, afford due process, make this process as summary and simple as possible and to best ascertain the parties' respective rights, this decision will give her 90 days, until 5:00 PM Alaska time on July 17, 2025, to request a hearing on her March 27, 2022 claim. AS 23.30.001(1), (2), (4); AS 23.30.005(h); AS 23.30.135(a). If Employer needs more time to respond to Employee's evidence, it may request that the hearing be set after Employer has sufficient time to rebut her evidence. A prehearing designee will exercise his or her discretion in scheduling an actual hearing date, if Employee requests a hearing timely.

A merits hearing on Employee's March 27, 2022, claim will necessarily require a panel to determine if Employee's left-ear deafness arose out of and in the course of her employment with Employer. In other words, a hearing will decide the question: was Employee's work with

Employer in August 2018 "the substantial cause" of her left-ear deafness? AS 23.30.010(a). At that hearing, the statutory presumption analysis under AS 23.30.120(a) will be applied.

Employee testified that she has had no medical treatment since March 8, 2019, when she last saw Dr. Mamikunian. She stated a hearing aid does not help her, and there is no medical procedure to repair a damaged auditory nerve. Nevertheless, while medical science currently may have no cure for her left-ear deafness, someday that may change. *Egemo*. Therefore, even though Employee may not have any significant past medical benefits at stake (for example, deductibles and co-pays not covered by her health insurance), or those expenses may not be readily identifiable, a merits hearing may still be important to her. Were she to prevail at hearing on "causation," she could be entitled to medical care in the future for her left-ear deafness, should it become available. If causation is established at a hearing on Employee's March 27, 2022, claim, "It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review" at a future hearing. AS 23.30.095(a); *Murphy*. In summary, Employee has the right to a hearing on causation and "prospective determination of compensability" for her left-ear hearing loss. *Summers*.

At a hearing on her March 27, 2022, claim, Employee should be prepared to present medical opinions from a sufficiently qualified medical provider to support her claim. She is reminded to file any medical records or medical literature upon which she wants to rely on at a hearing with the Division on a Medical Summary (for medical records), or on a notice of Intent to Rely form available on the Division's website under "Forms" (for medical literature) and serve an identical copy on Employer's attorney, well before the deadline to request a hearing. Likewise, Employee may pursue her request for an unfair or frivolous controversion finding at the same hearing. She should be prepared to explain why she thinks Employer's controversion was unfair or frivolous.

Employee is encouraged to review the "Workers' Compensation & You" pamphlet available online at the Division's website. The addresses and phone numbers for Division offices are also listed on that website. If she has any questions about how to do this, Employee is encouraged to call Division offices and speak to a Workers' Compensation Technician. She may also obtain from the Division a list of attorneys who represent injured workers in Alaska in workers'

compensation cases, and she may contact an attorney for assistance, likely at no charge. The Anchorage Division's office main number is (907) 269-4980.

CONCLUSIONS OF LAW

1) Employee's March 27, 2022, claim will not be barred in its entirety under §105(a).
2) Employee's March 27, 2022, claim will not be denied under §110(c).

ORDER

1) Employee's March 27, 2022, claim for PPI benefits is barred under §105(a).
2) Employee's March 27, 2022, claim for medical costs and an unfair or frivolous controversion finding are not barred under §105(a).
3) Employee's March 27, 2022, claim for medical costs and an unfair or frivolous controversion finding are not denied under §110(c).
4) Employer's January 23, 2025, petition to dismiss is granted in part and denied in part in accordance with this decision and order.
5) **Employee has until 5:00 PM Alaska time on July 17, 2025, to ask the Division to schedule a hearing on her March 27, 2022, claim. An ARH form is available on the Division website.**
6) Employer is directed to file and serve on Employee all medical records for this case in its possession, custody or control, within 14 days of this decision's date.

Dated in Anchorage, Alaska on April 18, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

/s/
Brian Zematis, 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 Interlocutory Decision and Order in the matter of Yolanda Garoutte, employee / claimant v. State of Alaska, self-insured employer; defendants; Case No. 201812920; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on April 18, 2025.

/s/
Rochelle Comer, Workers' Compensation Technician