

Case: *Alaska Airlines and Eberle Vivian vs. Melanie Nickerson*, Alaska Workers' Comp. App. Comm'n Dec. No. 040 (April 30, 2007)

Facts: Commission considers case again after it remanded with specific questions for the board to address. (Dec. No. 021.)

The issues before us were whether Nickerson's claim was barred by AS 23.30.110(c) because she had not requested a hearing within two years of the employer's controversion of her claim, or whether the employer had waived the time limits of section 110(c); and whether there was substantial evidence in the record to support the board's finding that Nickerson had a present need for medical care as a result of her work-related injury. Dec. No. 040 at 2.

Board did not take new testimony on remand and accepted a stipulation providing brief answers to two of the commission's three questions. These questions dealt whether Nickerson had notice of the .110(c) time-bar and whether the employer waived the right to enforcement the time-bar. Despite not taking any new testimony, the board found Nickerson to be a credible witness. On the time-bar, the board once again held that Nickerson's claim was not barred, this time on the theory that Nickerson's participation in a second independent medical evaluation (SIME) tolled the running of the section 110(c) time-bar clock and that because Alaska Airlines had requested the SIME it had waived running of the section 110(c) clock during the SIME process. On the need for medical care, the board stated that the record "remains unclear as to what specific medical treatment of her condition is required for the process of recovery from the employment injury." In the face of this inadequate record, the board decided to "await further instruction from the Commission before determining whether to seek further clarification from the medical providers concerning what specific medical treatment of her condition is required for the process of recovery."

Applicable law: AS 23.30.110(c) states: "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."

On whether employer could choose to waive enforcement of time-bar, AS 23.30.001(2) provides that "workers' compensation cases shall be decided on their merits except where otherwise provided by statute[.]" (Thus, operation of the time-bar to prevent a hearing on the merits of a claim is not the favored means of resolving claims.) 8 AAC 45.065(a) requires the board, or its designee, to "exercise discretion in making determinations on . . . (3) accepting stipulations . . . or other documents that may avoid presenting unnecessary evidence at the hearing[.]"

AS 23.30.128(d) provides that the commission may remand matters it determines were "improperly, incompletely, or otherwise insufficiently developed."

AS 23.30.095(a) on medical benefits and *Phillip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727 (Alaska 1999).

Issue: Did board conduct sufficient fact-finding so that the commission can consider its decision on appeal?

Holding/analysis: Commission remanded because board did not provide an adequate response to its questions.

Regarding the stipulation, commission was concerned that it was not included in the board record that the commission received.

We are further troubled that Ms. Nickerson does not appear to have had the stipulation before her at the time of the hearing; that there is no record that she signed it; and, that the board did not explain its significance to her on the record, so as to ensure that she fully understood the stipulation. Dec. No. 040 at 4.

Commission also noted that board had no evidence before it that employer communicated an intent to waive the .110(c) time bar. Finally, commission questioned whether it agreed with board decisions tolling .110(c) clocks during SIMEs, but did not decide this issue since facts were not well enough developed.

We are similarly concerned that the board failed to take any *testimony* from Ms. Nickerson as to the questions we asked to have resolved. Because Ms. Nickerson did not testify, we wonder at the board's finding her to be a credible witness. Moreover, as we explained in our earlier Memorandum Decision and Order[Dec. No. 021 at 16], '[b]ecause medical expenses are not presumed, a claimant has the burden of proving them by a preponderance of the evidence.' For that reason we asked the board to take testimony regarding Ms. Nickerson's medical care since 2002; and its failure to do so leaves us no choice but to return the case to the board once again. Dec. No. 040 at 4-5 (footnotes omitted).