Alaska Workers' Compensation Appeals Commission

Jesus Perez, Appellant, vs. Westward Seafoods, Inc. and Ace American Insurance Company, Appellees.	Final Decision Decision No. 286 April 26, 2021 AWCAC Appeal No. 20-012 AWCB Decision No. 20-0051 AWCB Case No. 201505882

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 20-0051, issued at Anchorage, Alaska, on June 26, 2020, by southcentral panel members William Soule, Chair, Nancy Shaw, Member for Labor, and Sara Faulkner, Member for Industry.

Appearances: Jesus Perez, self-represented appellant; Jeffrey D. Holloway, Babcock Holloway Caldwell & Stires, PC, for appellees, Westward Seafoods, Inc. and Ace American Insurance Company.

Commission proceedings: Appeal filed July 24, 2020; briefing completed January 8, 2021; oral argument held on February 8, 2021.

Commissioners: James N. Rhodes, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Jesus Perez sustained an injury to his right foot while working for Westward Seafoods, Inc. (insured by Ace American Insurance Company)(collectively, Westward) in the spring of 2015. Mr. Perez filed his first request for a hearing by means of a petition filed with the Alaska Workers' Compensation Board (Board) on November 21, 2019. Westward opposed the petition on December 11, 2019, and filed a petition to dismiss Mr. Perez's claim pursuant to AS 23.30.110(c) on March 5, 2020. The Board heard the matter on June 25, 2020, and dismissed his claim on June 26, 2020, for failure to timely

request a hearing pursuant to AS 23.30.110(c).[1] Mr. Perez timely appealed this decision on July 21, 2020, to the Alaska Workers' Compensation Appeals Commission (Commission). The Commission heard oral argument on February 8, 2021. The Commission now affirms the Board's decision.

2. Factual background and proceedings.[2]

Jesus Perez sustained an injury to his right foot while working for Westward in the spring of 2015.[3] Both Westward's and Mr. Perez's Reports of Injury are dated April 13, 2015, and both refer to a right foot contusion.[4] Westward paid medical and time loss benefits through July 5, 2015.[5] Arthur Amanfo, PA-C, on June 11, 2015, stated Mr. Perez would be released to full-duty by June 25, 2015.[6]

The Board's record is devoid of any activity by Mr. Perez until April 3, 2017, when he filed with the Board a notice changing his mailing address to 69 W. ***** Street, Heber, CA 92249.[7] At hearing, he confirmed this mailing address was correct at all times relevant to the current issues.[8]

Then, on April 4, 2017, Mr. Perez filed a Workers' Compensation Claim seeking benefits related to his right foot and his left clavicular-sternum joint. The latter injury he stated arose from "multiple repetitions of lifting the heavy pans."[9] The Board's record does not contain a Report of Injury for the left clavicular-sternum joint.

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1 *Perez v. Westward Seafoods, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 20-0051 (June 26, 2020)(*Perez*).

2 We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

3 Exc. 005.

4 Exc. 005, 009.

5 R. 32.

6 Exc. 019.

7 *Perez* at 2, No. 1. The Board redacted his address to protect his privacy.

8 *Id.*; Hr'g Tr. at 14:12-20, Jun3 25, 2020.

9 Exc. 020-21.

On April 24, 2017, Westward served on Mr. Perez, by mail at his correct address, a notice advising him it denied, "All benefits to include TTD, PPI, Medical Costs, Transportation, Compensation Rate, Penalty, Interest, Unfair or frivolous controvert."[10]

On May 15, 2017, Westward filed and served on Mr. Perez, by mail at his correct address, a notice advising Mr. Perez that Westward denied his right to any benefits related to a left shoulder condition, right foot plantar fasciitis, and right great toe diabetic ulcer. It denied Mr. Perez's claim for temporary total disability benefits from June 14, 2015, and continuing, permanent partial impairment benefits, medical costs that are not reasonable, necessary, related to the work injury or not supported by a required treatment plan, or not otherwise in compliance with the Alaska medical fee schedule, or not timely filed under the Act. Westward denied medical-related transportation expenses for unreasonable medical care or expenses not properly documented. It also denied a compensation rate adjustment and penalty, interest, and an unfair or frivolous controversion finding.[11]

On May 15, 2017, Westward propounded written discovery requests and interrogatories to Mr. Perez at his correct mailing address.[12]

On May 16, 2017, the parties met telephonically at conference with a Board designee to discuss Mr. Perez's case; a Spanish interpreter also participated. The Board's designee recorded:

> Designee explained the adjudications process noting that once discovery is complete, and a settlement has not occurred, either party may file an Affidavit of Readiness for Hearing (ARH) form to notify the Alaska Workers Compensation Board (AWCB) that a Hearing is necessary.

The summary also contained the following standard language:

> **Notice to Claimant:**
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> 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

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10 Exc. 022-24.

11 Exc. 025-26.

12 Exc. 047-54.

> 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 summary does not record that Mr. Perez requested a hearing orally.[13]

On June 13, 2017, Westward filed and served on Mr. Perez, by mail at his correct address, a notice advising him it denied his claim for "All Benefits."[14]

The Board noted that Westward's three controversions all included the following language:

> **TO EMPLOYEE . . . READ CAREFULLY**
>
> . . . .
>
> **TIME LIMITS**
>
> . . . .
>
> 2. When must you request a hearing (Affidavit of Readiness for Hearing Form)?
>
> If the insurer/employer filed this controversion notice after you filed a claim, you must request a hearing before the AWCB within two years after the date of this controversion notice. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within two years.
>
> **IF YOU ARE UNSURE WHETHER IT IS TOO LATE TO . . . REQUEST A HEARING, CONTACT THE NEAREST AWCB OFFICE**.[15]

On July 13, 2017, the parties met again telephonically at conference with a Board designee and a Spanish interpreter to discuss Mr. Perez's case. The Board designee's summary again advised:

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[13] *Perez* at 3, No. 7.

[14] Exc. 027-28.

[15] Exc. 022-24, 025-26, and 027-28 (emphasis in originals).

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 summary does not record that Mr. Perez requested a hearing orally. The Board found this was the last prehearing conference the parties attended until January 8, 2020.[16]

The Board served the May 16, 2017, and July 13, 2017, conference summaries by mail on Mr. Perez at his address of record.[17]

The Board's record reflected that on April 17, 2018, Mr. Perez called the Board and spoke to Spanish-speaking staff member, Elizabeth Pleitez, who summarized the conversation and recorded:

> EE wants to move forward with case and would like to send some medical evidence as well as a file for an ARH -- emailed a Medical Summary cover sheet & ARH -- discussed attorney list but was not interested.[18]

At hearing, Mr. Perez recalled the April 17, 2018, teleconference, acknowledged the note was accurate, and agreed Ms. Pleitez emailed him the Affidavit of Readiness for Hearing (ARH); but he stated there was a problem with his email and he could not open it. Ms. Pleitez always spoke Spanish to Mr. Perez and he understood her. He said he called Ms. Pleitez, but did not say if she ever returned his calls.[19]

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16 *Perez* at 4-5, No. 10.

17 *Id.* at 5, No. 11.

18 *Id.*, No. 12.

19 *Id.*, No. 13; Hr'g Tr. at 10:9 – 11:20, 14:25 – 15:8.

On January 10, 2019, Mr. Perez called Ms. Pleitez. She summarized the call and recorded:

> *Spanish EE call to find out if I can assist him with the status of his case. I went over our last conversation and he recalled that he needs to follow up with an ARH and submitting some additional medical evidence. I went over the adj. process again and offered him a list of attorneys which he declined stating he already had one. Sent EE attached email including parties[']email addressed [sic] per his request.[20]

At hearing, Mr. Perez agreed Ms. Pleitez's January 10, 2019, note was accurate; he confirmed that she sent him the requested email addresses for Mr. Holloway and the Board by email and by hardcopy. By at least as early as January 10, 2019, Mr. Perez's email was working and he had the Board's electronic filing address.[21]

Ms. Pleitez's January 10, 2019, email, written in Spanish, to Mr. Perez stated:

> Buenos Dias Mr. Perez,
>
> Aqui tiene la forma que me ah [sic] pedido. Abajo de estas palabras esta la informacion de emails donde puede mandar al abogado de la asegurnsa [sic].
>
> Jeffrey Holloway: bhcsservice@bhclaw.com
>
> Workers[']Compensation: workerscomp@alaska.gov
>
> Cualquier pregunta mi telefono directo esta en mi firma.
>
> Gracias.
>
> Elizabeth Pleitez.[22]

The Board found that other than Mr. Perez's April 17, 2018, and January 10, 2019, telephone calls and his participation at the May 16, 2017, and July 13, 2017, prehearing conferences, there was no communication from him from April 26, 2017, through November 13, 2019.[23]

The Board further found that on November 13, 2019, Mr. Perez called Ms. Pleitez again, who summarized and recorded:

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[20] *Perez* at 5, No. 14.

[21] *Id.*, No. 15; Hr'g Tr. at 13:22 – 14:1.

[22] *Perez* at 5-6, No. 16.

[23] *Id.* at 6, No. 17.

> *Spanish, EE call [sic] to find out status of claim. EE stated that he wants to be done with this case. I explained the time to request a hearing under AS 23.30.110(c). I explained the petition to extend time since EE past [sic] the time to file an ARH. EE requested for me to email the petition to him.[24]

On November 22, 2019, Mr. Perez filed a request for an extension of time to request a hearing under .110(c). He stated, "I didn't know I had a time limit to request a hearing to finish defining the case."[25]

The Board assumed that Mr. Perez's November 22, 2019, petition could be considered his first request for a hearing, and found that it came 2 years and 210 days after Westward's April 26, 2017, controversion, 2 years and 191 days after its May 15, 2017, controversion, and 2 years and 162 days after its June 13, 2017, controversion. The Board held this petition did not substantially comply with .110(c).[26]

On February 24, 2020, Mr. Perez notified the Division of Workers' Compensation that he changed his mailing address to 1100 ***** Dr., Apt. ***, Imperial, CA 92251.[27]

On February 24, 2020, Mr. Perez filed his only formal hearing request. The Board held this hearing request came 2 years and 300 days after Westward's April 26, 2017, controversion, 2 years and 281 days after its May 15, 2017, controversion, and 2 years and 252 days after its June 13, 2017, controversion. The Board further held this request did not substantially comply with .110(c).[28]

On February 26, 2020, Mr. Perez filed various documents with a cover email written in Spanish. The documents appear to be his responses to Westward's May 15, 2017, requests for production and interrogatories.[29]

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[24] *Perez* at 6, No. 18.

[25] *Id.*, No. 19.

[26] *Id.*, No. 20.

[27] *Id.*, No. 21. The Board redacted part of the address to protect Mr. Perez's privacy).

[28] *Id.* at 6-7, No. 22.

[29] *Id.* at 7, No. 23.

At hearing on June 25, 2020, Mr. Perez testified he did not need more time to request a hearing; he just wanted his case heard; he did not know there was a time limitation. He reads English with some help needed and is not "a hundred percent." His written English is "not so good," but his English-speaking is about "70 to 80 percent"; while working in Alaska, Mr. Perez could speak English with Filipino co-workers. Between April 26, 2017, and April 29, 2019, Mr. Perez was not incarcerated or mentally disabled, but was hospitalized for approximately one month, total. Between those dates, he left the country to visit family in Mexico perhaps 40 days, total. When he was younger, Mr. Perez attended school, finished college, and is a licensed dental surgeon in Mexico. He received the prehearing conference summaries, but did not recall if he read them. When Mr. Perez has questions about something he reads in English, he gets help from his children who speak English "perfectly." Mr. Perez admitted he did not file a hearing request or ask for additional time to file one before April 29, 2019. When asked if there was anything the Board could have done better to prevent him from missing his deadline, Mr. Perez said "a reminder." He also said it might be helpful if the Board's forms were provided in Spanish. Mr. Perez has a smartphone with a calendar function. He wanted a decision in his favor.[30]

Westward contended Mr. Perez filed a claim and Westward controverted it three times. The controversion notices were on the Director-prescribed form and each gave him a legally sufficient notice and a warning to file a hearing request or a request for more time to file one within two years, or his claim would be dismissed. It contended dismissal is mandatory unless Mr. Perez's failure could be excused. Westward contended Mr. Perez gave no reason to excuse his failure to timely file a hearing request or an extension. It relied on Alaska Supreme Court (Court) and Commission precedent to support its position. Westward faulted Mr. Perez for not reading the prehearing conference summaries and suggested by not reading them he had a "lack of knowledge" not a "lack of notice." It also relied primarily on Mr. Perez's uncontradicted testimony as

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[30] Hr'g Tr. at 5:19-23; 18:4-13; 16:19 – 17:15; 17:22 – 18:3; 20:21 – 21:4; 22:7-11; 21:5 – 22:6.

factual support for its request to deny his petition for more time and to grant its petition to dismiss.[31]

The Board analyzed AS 23.10.110(c) and reviewed various Court decisions including *Bohlmann v. Alaska Constr. & Eng'g, Inc.* and *Kim v. Alyeska Seafoods, Inc.*[32] The Board noted that in *Bohlmann*, the Court held the Board has an obligation to advise fully a claimant of the means for pursuing a claim, including the obligation to request a hearing within two years of an employer's controversion. The Board found that Mr. Perez had been adequately notified of his obligation on several occasions. The Board stated that in *Kim*, the Court held that substantial compliance with the requirements of AS 23.30.110(c) is sufficient to preclude dismissal without a hearing on the merits. The Board found that Mr. Perez had not timely filed any documents with the Board indicating he desired a hearing and, thus, did not meet the substantial compliance test. The Court, in *Pruitt v. Providence Extended Care*, stated that a claimant cannot ignore the statutory deadlines and must timely file something.[33] The Board found Mr. Perez did not file anything in a timely fashion.

The Board also reviewed the Commission's decision in *Tonoian v. Pinkerton Security* and agreed that noncompliance with AS 23.30.110(c) may be excused on certain grounds such as lack of mental capacity, incompetence, and equitable estoppel.[34] However, the Board found that none of these conditions applied to Mr. Perez. In *Roberge v. ASRC Constr. Holding Co.*, the Board noted that the Commission has advised the Board

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[31] Hr'g Tr. at 25:12 – 26:13; 27:21 – 28:16.

[32] *Bohlmann v. Alaska Constr. & Eng'g, Inc.*, 205 P.3d 316 (Alaska 2009); *Kim v. Alyeska Seafoods, Inc.,* 197 P.3d 193 (Alaska 2008)(*Kim*).

[33] *Pruitt v. Providence Extended Care*, 297 P.3d 891, 895 (Alaska 2013)(*Pruitt*).

[34] *Tonoian v. Pinkerton Security*, Alaska Workers' Comp. App. Comm'n Dec. No. 029 (Jan. 30, 2007)(*Tonoian*).

of its obligation to determine if there is an alternative to dismissal for failure to comply with AS 23.30.110(c).[35]

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.[36] Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion.[37] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[38] On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment.[39]

However, the Board's conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine the credibility of witnesses.[40] The weight given to the witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.[41]

4. Discussion.

Mr. Perez seeks an opportunity to have the merits of his workers' compensation claim heard by the Board. The Board dismissed his claim because he failed to timely request a hearing pursuant to AS 23.30.110(c). Westward contends the Board correctly

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[35] *Roberge v. ASRC Constr. Holding Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 269 (Sept. 24, 2019).

[36] AS 23.30.128(b).

[37] *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[38] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-1189 (Alaska 1984).

[39] AS 23.30.128(b).

[40] AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013).

[41] AS 23.30.122.

dismissed his claim because Mr. Perez did not timely pursue his claim, and filed no documentation with the Board between 2017 and 2020 indicating in any fashion he was ready for a hearing. AS 23.30.110(c) provides a time frame for moving claims forward in order to fulfill the Legislative mandate that "this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. . . ."[42] AS 23.30.110(c) states, in full:

> (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. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. After completion of the hearing the board shall close the hearing record. If a settlement agreement is reached by the parties less than 14 days before the hearing, the parties shall appear at the time of the scheduled hearing to state the terms of the settlement agreement. Within 30 days after the hearing record closes, the board shall file its decision. If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

The pertinent part at issue here is the final sentence which requires an employee to file a request for hearing within two years of the date of an employer's controversion notice. If the employee does not comply, the "claim is denied." The Court and the Commission have addressed over the years what kind of notice is to be given to the employee and what an employee needs to do to comply with this section to avoid having a claim dismissed.

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[42] AS 23.30.001(1).

In 1996, the Court, in *Tipton v. ARCO Alaska, Inc.*, held that the defense of a statute of limitations is generally disfavored.[43] The Court found that the two-year provision above is essentially a statute of limitations. Mr. Tipton requested a hearing within two years of the controversion, but the hearing was cancelled. ARCO argued that Mr. Tipton needed to file another ARH when he was ready for hearing because the first ARH was voided by the hearing cancellation. The Court held there was nothing in the statute implying or otherwise indicating that more than one ARH was required to be filed by an employee. It is noteworthy that in *Tipton*, the employee had actually filed a request for hearing. Here, Mr. Perez did not file an actual request for hearing until 2020 even though the claim had been controverted in 2017.

In *Kim*, the Court, in 2008, stated that substantial compliance with the statute was sufficient.[44] The Court noted that it had found AS 23.30.110(c) to be directory and not mandatory and, therefore, strict compliance is unnecessary.[45] The Court then stated, "we do not suggest that a claimant can simply ignore the statutory deadline and fail to file anything."[46] In *Kim*, the claimant had filed a request for an extension of time in which to file the necessary ARH asserting he could not swear he was ready for hearing. The Court noted that Mr. Kim had taken some action, actually prudent action, to move his case forward and that was all AS 23.30.110(c) required. The Court relied on legislative history that the purpose of requiring an ARH was "to create guidelines for the orderly conduct of public business."[47]

In *Pruitt*, the Court again looked at the implementation of AS 23.30.110(c) to deny an employee's claim for benefits.[48] Ms. Pruitt failed to file any request for hearing or any other documents with the Board within the allotted time. Moreover, the Board found

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43 *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912-913 (Alaska 1996).

44 *Kim*, 197 P.3d 193, 198 (Alaska 2008).

45 *Id.* at 197.

46 *Id.* at 198.

47 *Id.* at 197.

48 *Pruitt*, 297 P.3d 891, 895.

Ms. Pruitt not credible in her assertions that she did not know that she had to request hearing within two years. The record showed that she had been told by the Board staff to contact it for assistance in filing an ARH and warned her that she needed to do so within two years of the employer's controversion. The Board also pointed to the warning on the back of the employer's controversions. Yet, Ms. Pruitt filed nothing for over three years. The Board's finding that Ms. Pruitt was not credible negated any arguments that her failure to file timely for a hearing should be excused because of lack of understanding. Furthermore, Providence Extended Care had provided evidence to the Board indicating that Ms. Pruitt was, in fact, competent during the course of the Board's proceedings, including chart notes from a psychologist and a mini mental health status exam.[49]

The Commission, in *Tonoian*, held first that an employee bears the burden of demonstrating why a late filing should be excused and then discussed several reasons why a late filing should be excused.[50] The Commission stated that among the possible reasons to excuse a late filing of an ARH are mental incompetence, lack of notice of the time-bar to the claimant, and equitable estoppel against the Board. In *Tonoian*, the claimant was unable to establish any of these defenses. The Commission then affirmed the Board's decision dismissing Ms. Tonoian's claim.

The Commission reversed the Board in *Providence Health Sys. v. Hessel*, finding the Board abused its discretion in finding the employee had substantially complied with the requirements of AS 23.30.110(c).[51] The Board had dismissed as sufficient notice the Board prescribed language on the Board approved controversion notices. The Board held that Mr. Hessel was legally excused because, although he received four controversion notices, he contended he had not understood the language, and concluded the Board staff had not sufficiently advised Mr. Hessel of the need for ARH. Instead of filing an ARH, Mr. Hessel filed a claim and contended that should have satisfied the statutory

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[49] *Pruitt*, 297 P.3d 891, 895.

[50] *Tonoian*, App. Comm'n Dec. 029.

[51] *Providence Health Sys. v. Hessel*, Alaska Workers' Comp. App. Comm'n Dec. No. 131 (Mar. 24, 2010).

requirements. A controversion is a form which all employers are required to use, which is prescribed by the Director to comply with the statutes. The Commission held that the language on the controversion notices was essentially a regulation and the language is sufficient to advise a claimant of its duties. The Commission also held that a single Board panel lacked the authority to impose additional duties on Board staff, authority which belonged to the whole Board, and there was no duty to advise Mr. Hessel orally of the need to file an ARH within two years of the controversion.

More recently, the Commission suggested to the Board that in cases involving self-represented litigants, especially where the .110(c) deadline becomes a moving target, it would be helpful at the first pre-hearing to advise of the specific date by which an ARH is due following the first controversion.[52] Here, the Board dismissed the claim of Mr. Davis for a late-filed ARH. However, the procedural posture of the case was somewhat complex, including a request for and the scheduling of a Second Independent Medical Evaluation (SIME), and then another request for an additional SIME. The Board held a hearing on the request after the time limitation for an ARH had expired. The Commission found Mr. Davis was substantially complying with the time limitation in that he had not neglected his claim and had consistently filed documents to move his claim forward. In addition, after the first SIME report was received, he contacted the Board to inquire what he needed to do next. Instead of being told to request a hearing he was advised to contact the employer's attorney. The Commission found substantial compliance with .110(c) as suggested by the Court in *Kim* and remanded the matter for a hearing on the merits.

The Commission's task is to review the Board's decision to see if it conforms to the law and is supported by substantial evidence in the record as a whole. The Board carefully reviewed the sequence of events, reviewed the law as provided by the Court and the Commission, and found Mr. Perez not credible in his statement that he did not know there

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[52] *Davis v. Wrangell Forest Products*, Alaska Workers' Comp. App. Comm'n Dec. No. 256 (Jan. 2, 2019).

was a time limitation for requesting a hearing.[53] The Board noted that "at hearing [Mr. Perez] admitted he knew there was a deadline and through his own mistake failed to file anything timely."[54] This credibility finding is binding on the Commission.

It is supported by the evidence in the record. Mr. Perez admitted to the Board that he did not file a request for hearing until 2020, on February 24, 2020, to be specific. Mr. Perez has a history of long delays in pursuing benefits for his injury in 2015. Mr. Perez filed his first claim for benefits on April 4, 2017. This claim was more than two years after his injury. Westward controverted his claim for benefits on April 24, 2017. Mr. Perez attended the telephonic prehearing on his claim on May 16, 2017, at which time the Board designee informed him of the need for an ARH. The summary of the prehearing also contained language notifying Mr. Perez that an ARH would need to be filed within two years of the employer's controversion. Westward controverted Mr. Perez's first claim of benefits on April 24, 2017. An ARH, thus, would need to have been filed by April 27, 2019.

Mr. Perez attended another prehearing on July 13, 2017, at which time he was again notified that he needed to request a hearing within two years of the employer's controversion, although no specific date was provided to Mr. Perez. Mr. Perez testified at hearing that he had received the prehearing conference summaries and that the Board had his correct mailing address. The next action undertaken by Mr. Perez was on April 17, 2018, when he spoke to Board staff member Elizabeth Pleitez, who speaks Spanish and who spoke in Spanish to Mr. Perez, which is his native language. Mr. Perez testified that he received the email from Ms. Pleitez who had enclosed an ARH, as well as telling him that he needed to file any new medical records. She spoke in Spanish to Mr. Perez again on January 10, 2019. These conversations were within the time for filing an ARH. Ms. Pleitez next spoke with Mr. Perez on November 13, 2019, at which time she explained to him of the need to request a hearing under AS 23.30.110(c) and also told him that the time to request a hearing had passed. He now needed to file a petition asking the Board

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53 *Perez* at 12.

54 *Id.*; Hr'g Tr. at 21:10-15; 23:22-25.

to give him additional time and she emailed the petition to him. He filed a petition requesting an extension of time on November 22, 2019, stating "I didn't know I had a time limit to request a hearing to finish defining the case."

The Board found that if it construed the November 22, 2019, petition to be a request for a hearing, it was untimely. The Board found that this petition was filed 2 years and 210 days after Westward's first controversion on April 26, 2017, 2 years and 191 days after Westward's May 15, 2017, controversion, and 2 years and 162 days after Westward's June 13, 2017, controversion. The Board concluded that Mr. Perez's petition did not substantially comply with the provisions of AS 23.30.110(c).

The facts as found by the Board are substantial evidence Mr. Perez knew, or should have known, of the time for requesting a hearing. Unlike the employee in *Kim*, Mr. Perez failed to file any document before the two-year statute of limitation ran indicating he needed more time to prepare for hearing. He did not substantially comply with AS 23.30.110(c). Mr. Perez filed no documents at all. He did not orally ask for a hearing at the prehearings. He did not tell Ms. Pleitez that he did not understand how to file an ARH and he filed a petition when notified he had missed the deadline. At hearing his only suggestions were for the Board to send him a reminder which is beyond the duty of the Board to advise a claimant on how to pursue his claim. He also suggested that the forms be provided in Spanish, but Mr. Perez is an intelligent man who was well-educated in Mexico and who admitted he read English, although not perfectly, and would seek help from his children when he did not understand something. Here, the Board provided him with the information he needed and he simply failed to follow through.

Mr. Perez's actions comport with those of the claimant in *Pruitt* who also failed to file any documents with the Board. Ms. Pruitt was also not credible in her assertions she did not understand the time limitation for asking for a hearing. Mr. Perez also produced no evidence of any legal impediment such as those the Commission identified in *Tonoian.* There was no evidence that Mr. Perez had a mental impairment, was confused about the time frame for requesting a hearing, was incompetent, or physically absent or incapable of filing a request for a hearing. There is no evidence anyone gave Mr. Perez a wrong

date for requesting a hearing. There was no SIME which would have changed the date by which he needed to file an ARH.

Although no one at the Board ever provided Mr. Perez with an actual date by which he should have requested a hearing, in this case, providing him with an actual date would have been of little value. His claim was controverted on April 24, 2017, and both the controversion and the prehearing summaries advised him he had two years from the date of the controversion to request a hearing. Mr. Perez is an intelligent man and should have been able to discern that two years from April 24, 2017, would be April 24, 2019, (the date was actually April 27, 2019, due to three additional days for the mailing of the controversion). He was told many times of the need to request a hearing and he did nothing. He failed to provide discovery and failed to file any documents with the Board within the two years from April 24, 2017, indicating he wanted a hearing. All of the evidence points to his failure to take any timely action in support of his claim. This is substantial evidence in the record as a whole.

The Board correctly denied his petition and dismissed his claim for failure to comply with AS 23.30.110(c). The Board's decision is supported by the law and substantial evidence in the record as a whole.

5. Conclusion.

The Board's decision is AFFIRMED.

Date: *26th April 2021* Alaska Workers' Compensation Appeals Commission

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme

Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 286, issued in the matter of *Jesus Perez v. Westward Seafoods, Inc. and Ace American Insurance Company*, AWCAC Appeal No. 20-012, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on April 26, 2021.

Date: *April 29, 2021*

Signed

K. Morrison, Appeals Commission Clerk