

**Case:** *Providence Health System and Sedgwick CMS vs. John W. Hessel, and Trena Heikes, in her official capacity as Director of the Division of Workers' Compensation, Amicus*, Alaska Workers' Comp. App. Comm'n Dec. No. 131 (March 24, 2010)

**Facts:** Providence Health System (Providence) sought to dismiss John Hessel's (Hessel) claims for failure to request a hearing within two years of controversion. Hessel filed his claim on November 6, 2005, seeking a variety of benefits. Providence controverted on December 12, 2005, and amended its controversion of Hessel's claims on March 16, 2006, after receiving more information about Hessel's condition from his second treating physician, and the dates for which he was claiming temporary total disability (TTD). After an employer medical evaluation was conducted, Providence supplemented its controversion, on November 7, 2006. Finally, Providence controverted all of Hessel's benefits again after receiving an addendum medical report on December 7, 2006. All four controversions were on the board-prescribed controversion form with language on the back warning the claimant about deadlines for requesting a hearing and filing a claim. All were served on Hessel by mail and he acknowledged receiving them. On December 12, 2007, the two-year time limit for requesting a hearing expired. On May 7, 2008, Hessel requested a hearing. Providence filed a petition to dismiss Hessel's claims as time-barred.

Hessel testified that he misunderstood the language on the controversion notices and believed that he had complied with any deadlines when he filed his claim on November 7, 2006. He believed filing the claim complied with the deadlines. The board decided that the controversion notices were ineffective to warn Hessel of his duty to request a hearing under AS 23.30.110(c) because of his misunderstanding. The board also found that it and the division failed in their duty to provide assistance to Hessel as a pro se claimant. Thus, Hessel was "legally excused" from compliance due to a lack of notice. In the alternative, the board decided that Hessel substantially complied with the hearing request requirement by filing a claim for benefits. Providence appealed.

**Applicable law:** AS 23.30.110(c) provides in relevant part: "the party seeking a hearing shall file a request for a hearing together with an affidavit stating 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."

In *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193 (Alaska 2008), the Alaska Supreme Court permitted substantial compliance with the affidavit requirement of § .110(c). The court permitted the claimant to file a hearing request and a request for additional time to prepare for hearing, rather than an affidavit of readiness for hearing, before the deadline expired. "[W]e do not suggest that a claimant can simply ignore the statutory deadline and fail to file anything."

*Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963) held that the board "owes to every applicant for compensation that duty of fully advising him as to all

the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.”

In *Bohlmann v. Alaska Construction & Engineering, Inc.*, 205 P.3d 316, 319-20 (Alaska 2009) the Alaska Supreme Court held that the board owed a duty to either correct an employer’s erroneous assertion at a prehearing conference that the AS 23.30.110(c) time-bar had run or explain to the claimant how to determine whether the deadline had passed.

In *Tonoian v. Pinkerton Security*, Alaska Workers’ Comp. App. Comm’n Dec. No. 029 at 11, the commission held that claimants may be legally excused from a statutory deadline for reasons such as “lack of mental capacity or incompetence; lack of notice of the time-bar to a pro se litigant, and equitable estoppel against a governmental agency by pro se litigant.” The claimant bears the burden of establishing one of these legal excuses.

**Issues:** Did Hessel receive sufficient notice of the deadline from the controversion notices with board-prescribed warnings? Did Hessel substantially comply with AS 23.30.110(c) by filing a claim? Did the board exceed its authority by imposing duties on division staff?

**Holding/analysis:** The commission concluded that the board erred as a matter of law in finding substantial compliance. Hessel did not substantially comply because he did not file anything before the deadline; he was almost five months late. Moreover, filing a claim did not substantially comply with a requirement to request a hearing. “It defies logic to conclude that filing a claim *before* a controversion complies with a requirement to request a hearing *after* a claim is filed and then controverted. . . . Moreover, the plain language on the back of the controversion notice that Hessel received informed him about the separate requirements and distinctly different time limits to file a claim and request a hearing in two places.” Dec. No. 131 at 14.

The commission concluded that there was not substantial evidence in the record to support a legal excuse from complying with the deadline. Hessel’s misunderstanding of the form did not demonstrate legal incompetence because he understood the form upon re-reading it and no guardian or conservator was ever appointed to manage his affairs.

He did not prove he lacked notice because he received the board-prescribed controversion notices with the warnings. Unlike *Bohlmann*, the board never gave Hessel misleading or incorrect information, or failed to correct the misleading statements of others. The board faulted the division for not informing Hessel about the availability of assistance from a workers’ compensation technician. But Hessel already knew about the technicians because one had helped him with his claim. The board did not fail in its *Richard* duty because it had no reason to know of Hessel’s misunderstanding. Moreover, no verbal warning about the deadline was required because the controversion notices were sufficient warnings. Lastly, the commission concluded that a single board panel lacked the authority to impose *Richard* duties on all division staff.

The controversion notices provided Hessel with sufficient notice of the deadline. A single board panel lacks the authority to invalidate notice specifically required by a regulation. Hessel did not argue he lacked the mental capacity or English language skills to understand the notice, but rather asserted a reasonable misunderstanding. Even if the panel had such authority, the language in the controversion notice is presumed reasonable because it was implemented in conjunction with a regulation requiring use of that particular form. The board lacked substantial evidence to overcome this presumption of reasonableness.