Alaska Workers' Compensation Appeals Commission

Chris Dillard, Appellant, vs. Dick Pacific/Ghemm Company J.V. and Liberty Mutual Insurance Group, Appellees.	<u>Final Decision</u> Decision No. 198 July 15, 2014 AWCAC Appeal No. 13-010 AWCB Decision No. 13-0045 AWCB Case No. 200517782

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 13-0045, issued at Fairbanks, Alaska, on April 30, 2013, by northern panel members Robert Vollmer, Chair, and Krista Lord, Member for Industry.

Appearances: Jason A. Weiner, Gazewood & Weiner, PC, for appellant, Chris Dillard; Martha T. Tansik, Burr, Pease & Kurtz, PC, for appellees, Dick Pacific/Ghemm Company J.V. and Liberty Mutual Insurance Group.

Commission proceedings: Appeal filed June 28, 2013; briefing completed March 10, 2014; oral argument held on July 10, 2014.

Commissioners: James N. Rhodes, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Factual background and proceedings.

On October 19, 2005, Chris Dillard (Dillard) reported twisting his back the day before while lifting a bucket of concrete mix while working for Dick Pacific/Ghemm Company J.V.[1] Attorney John Franich filed a claim on Dillard's behalf dated December 14, 2005, seeking temporary total disability (TTD) benefits from October 18, 2005, and ongoing, penalty, interest, and attorney fees and costs.[2] The claim was later

[1] Exc. 0001. We will refer to the employer as Pacific/Ghemm in this decision.

[2] Exc. 0002-03.

amended to request permanent partial impairment (PPI), reemployment benefits, and a compensation rate adjustment.[3]

On January 5, 2006, Pacific/Ghemm controverted Dillard's claim, asserting that he was released to light-duty work and Pacific/Ghemm accommodated his restrictions until firing him on November 10, 2005, for other reasons.[4] Pacific/Ghemm filed additional controversions on May 8, and September 11, 2006.[5]

Two prehearing conferences (PHC) were held in May and July 2006.[6] On September 13, 2006, Dillard filed an affidavit of readiness for hearing (ARH) on his December 14, 2005, claim for "TTD, penalty, interest/atty fees/costs."[7] On September 25, 2006, Pacific/Ghemm filed its opposition to a hearing, asserting that discovery was not complete because an employer medical evaluation (EME) was scheduled for October, Dillard had not filed a medical record recommending surgery, and Dillard had not followed up with a referral to a neurosurgeon.[8]

At a PHC held a few weeks later, on October 13, 2006, the parties stipulated to a second independent medical evaluation (SIME).[9] A month later, the parties agreed that the SIME examiner should be an orthopedic surgeon and set deadlines at another PHC held on November 17, 2006. The parties were instructed to submit up to two questions per disputed issue by December 15, 2006, for review by the board designee and possible inclusion in the SIME letter. Dillard's attorney, Mr. Franich, agreed to prepare the SIME form and send the medical binders to Pacific/Ghemm by December 4, 2006.

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[3] Exc. 0049.

[4] Exc. 0004.

[5] Exc. 0007-08.

[6] Exc. 0257-60.

[7] Exc. 0009.

[8] Exc. 0010-12.

[9] Exc. 0013.

Pacific/Ghemm's attorney, Constance Livsey, had until December 15, 2006, to review the binders, prepare supplemental binders if needed, and submit them to the board.[10]

Also at that PHC, the parties agreed to set "this matter" for hearing on February 15, 2007.[11] Ms. Livsey wrote a letter on December 4, 2006, asking to correct the November 17, 2006, summary to state that the parties did not agree to set all issues for hearing, but only TTD benefits and the weekly rate at which TTD would be paid.[12] Her letter stated: "Indeed, given the early stage of the SIME process it would be difficult if not impossible for Mr. Franich and me to prepare to try all issues in dispute, including issues pertaining to PPI and reemployment benefits."[13]

On February 15, 2007, the board heard Dillard's claim for TTD benefits from October 18, 2005, and continuing, and a compensation rate adjustment.[14] The board denied and dismissed Dillard's claim for TTD, a compensation rate adjustment, penalties, interest, and attorney fees and costs in *Dillard I,* concluding that Dillard had voluntarily taken himself out of the work force and was therefore not entitled to TTD.[15] The decision clarified the issues that were not decided:

> All of the physicians who have seen the employee concur that the October 18, 2005[,] injury is a significant contributing factor to his back pain. Whether the employee is medically stable and, if so, whether he should receive a permanent partial impairment (PPI) rating and what that rating should be are not at issue at this hearing. The parties stipulated to pursue a second independent medical evaluation (SIME) in an effort to resolve those issues.[16]

On April 23, 2007, Ms. Livsey wrote the board reporting the parties had completed the medical binder exchange, but Pacific/Ghemm had not yet received the SIME form

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[10] Exc. 0016-18

[11] Exc. 0018.

[12] Exc. 0019, 0261.

[13] Exc. 0019.

[14] *See Dillard v. Dick Pacific Ghemm, J.V.*, Alaska Workers' Comp. Bd. Dec. No. 07-0086 (Apr. 13, 2007)(*Dillard I*).

[15] *Id*. at 6-7.

[16] *Id.* at 2.

from Mr. Franich. The letter acknowledged *Dillard I* had denied Dillard's claims for TTD and a compensation rate adjustment, but wrote "it is my understanding that the employee wishes to proceed on other issues. If so, an SIME probably remains necessary." She concluded: "I do not believe that any additional prehearing conferences will be productive until a proposed SIME form is circulated and signed by the parties."[17] The letter was also sent to Mr. Franich. A copy of the letter in the board's file bears a handwritten notation stating: "4/23/07 per Franich – offices are working out details on SIME form. MK."[18]

There is no further correspondence in the board record for more than two years. On December 2, 2009, Mr. Franich withdrew as Dillard's attorney.[19]

At Dillard's request, a PHC was held on January 26, 2010.[20] The summary refers to the parties' SIME stipulation in November 2006, but Pacific/Ghemm's new attorney, Darryl Jacquot, was unsure whether an SIME was necessary because he had not yet reviewed the complete file.[21] The summary stated that Dillard "was incarcerated from 10/07 until recently, which explains the stagnancy of the claim." The summary noted that the employer was "preserving all previously asserted defenses."[22]

The next PHC was held on March 5, 2010. The summary stated, "There is no active claim on file. [Dillard] intends to file a new claim. . . . A prehearing conference will be set once [Dillard] files his claim." The summary also noted that Dillard intended to hire attorney Jason Weiner to represent him.[23] Five days later, Mr. Jacquot wrote the board seeking an amendment to this summary. He stated, "Although it was discussed and recognized that no active claim's [sic] are presently on file, . . . I have raised the

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[17] Exc. 0043.

[18] R. 1072. R. 1071 appears to be the original letter with a handwritten notation "as of 8/7 no SIME form. MK."

[19] Exc. 0044.

[20] Exc. 0045.

[21] Exc. 0045-46.

[22] Exc. 0045.

[23] Exc. 0048.

required statute of limitations defenses on behalf of the employer at both the January 26, 2010[,] and the March 5, 2010[,] prehearings."[24]

On March 31, 2010, Mr. Weiner filed a claim on behalf of Dillard seeking TTD, temporary partial disability (TPD), PPI, medical and transportation costs, and attorney fees and costs.[25] On April 23, 2010, Pacific/Ghemm controverted all benefits and answered Dillard's claim, denying all benefits.[26] The controversion stated in part, "[t]he employee's claims may be barred under AS 23.30.110(c)."[27] The answer also stated, "The claim may be barred under . . . AS 23.30.110(c) or otherwise barred by law or equity."[28]

Prehearing conferences were held on July 6, 2010, and September 15, 2010, at Mr. Weiner's request.[29] The summaries noted that the parties were in the discovery process and were gathering medical records. Neither summary mentioned an SIME or any agreements concerning an SIME.[30]

On May 20, 2011, a PHC was held at Mr. Weiner's request to "check the status of this case." The summary stated:

> It appears that the parties had agreed to an SIME several years ago and it was never completed. The board designee told the parties that the SIME binders are in the file but that an SIME has never been scheduled.
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> [Mr. Weiner] stated that his client is currently incarcerated and he is unsure when he is being released. [Mr. Jacquot] stated he is in the process of gathering the medical records from the prison system.[31]

The summary noted that the parties requested a follow-up PHC that was scheduled and held two months later.

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[24] Exc. 0262-63.

[25] Exc. 0049.

[26] Exc. 0052-55.

[27] Exc. 0052.

[28] Exc. 0054.

[29] Exc. 0057-58.

[30] Exc. 0057-58.

[31] Exc. 0059.

At the PHC on July 21, 2011, Mr. Weiner reported that Dillard was still incarcerated. Mr. Jacquot advised that he had received signed releases from the Fairbanks Correctional Facility but they were incomplete. The summary did not mention an SIME. Once again, the parties requested a follow-up PHC in 60 to 90 days.[32]

On October 19, 2011, another PHC was held. The purpose of the conference "was a follow up to see if Employee was out of prison." Dillard was still incarcerated. Mr. Jacquot advised that he "had just received prison records and will need some time to follow up with Mr. Weiner regarding these." The next PHC was set for December 14, 2011.[33]

At the December PHC, Dillard called in from prison, and Messrs. Weiner and Jacquot also participated. Dillard stated that he was to be released on October 20, 2012. Mr. Weiner asserted that Dillard "needs more treatment than they are providing in prison" and that Dillard "would like to keep the case moving." Mr. Jacquot stated that altercations in prison may be relevant to Dillard's claim but that the prison medical records were "unorderly." The summary also stated: "Some discussion occurred on performing an [employer medical evaluation] in prison, but the parties concluded circumstances made it unlikely." Mr. Weiner requested a PHC to be set after Dillard's release and one was scheduled for October 30, 2012.[34]

Both the October 2011 and December 2011 summaries included a warning to Dillard regarding the AS 23.30.110(c) requirement to file an ARH within two years of an employer's controversion. The summaries further advised that Dillard should file "written notice to the board" and serve it on the other parties if the employee still wanted a hearing but had not completed all discovery and could not file the affidavit within the two-year timeframe.[35]

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[32] Exc. 0060.

[33] Exc. 0061.

[34] Exc. 0141-42.

[35] Exc. 0140, 0142.

In June 2012, Mr. Jacquot died. On September 21, 2012, attorney Martha Tansik, who worked for the same law firm as Mr. Jacquot, took over the representation of Pacific/Ghemm on Dillard's claim.[36]

On November 1, 2012, Pacific/Ghemm filed a petition to dismiss Dillard's March 2010 claim based on AS 23.30.110(c). It contended that Dillard failed to file an ARH within two years of his claims being controverted. Pacific/Ghemm asserted that the §.110(c) filing deadline ran on Dillard's first claim, filed in December 2005, in 2009, and ran on his second claim, filed in April 2010, on April 24, 2012.[37]

Dillard opposed Pacific/Ghemm's petition to dismiss, contending that the parties understood that Dillard's case could not proceed until he was released from prison and that this understanding was reflected in the prehearing summaries. He argued that Pacific/Ghemm was unable to perform an EME while Dillard was in jail and that Dillard could not truthfully swear he was ready for hearing.[38] Dillard also argued that the SIME process tolled any requirement to file an ARH.[39] "Employer and the Board have already been notified about the issues that are causing delay in this case, and have agreed to allow this case to continue (with the scheduling of the October 30, 2012[,] prehearing conference) until Mr. Dillard is released from custody."[40]

The board heard the petition to dismiss Dillard's claims on February 28, 2013.[41] Mr. Franich, Dillard, and Mr. Weiner testified at the hearing. The board concluded that Mr. Franich and Dillard were credible, but that Mr. Weiner was not.[42]

Mr. Franich testified about his representation of Dillard on his 2005 claim. He stated the parties had agreed to perform an SIME and the TTD issue was heard separate

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36 Exc. 0065.

37 Exc. 0084-089. The second claim was *dated* March 30, 2010. Exc. 0049.

38 Exc. 0089-93.

39 Exc. 0093.

40 Exc. 0094.

41 *Dillard v. Dick Pacific/Ghemm Co., J.V.,* Alaska Workers' Comp. Bd. Dec. No. 13-0045, 1 (Apr. 30, 2013)(*Dillard II*).

42 *Id.* at 11, 13.

from other issues in order to "try to put some money in the . . . employee's pocket."[43] Mr. Franich could not remember whether he filed an SIME form,[44] but recalled that Dillard was in and out of jail at the time.[45] He explained that Dillard could not see any medical providers, either his own or Pacific/Ghemm's, and that the case was "on hold" because no one could move forward.[46] "[I]t seemed to me we all understood that nothing could happen while he was in jail . . . as a practical matter, nothing can happen when a person is in jail, so everything just sort of freezes in place," Mr. Franich said.[47] He acknowledged that the problem in moving forward with filing the SIME form and the binders was that the medical information was "going to be awfully stale by the time he was actually going to see a physician. We wanted to sort of get the most recent medical records and then do the form."[48] When asked if there was any documented evidence that the parties had agreed to extend time, Mr. Franich stated, "I think the record speaks for itself."[49]

Dillard testified about his periods of incarceration. He testified that he could not remember when he was released in 2006, but he thought that he was not incarcerated for "a little bit less than a year" from sometime in 2006 to October 2007.[50] He testified that during that time, he was on probation or parole and could not leave the Fairbanks area, but he was unsure if he was on probation or parole during that entire period.[51] He

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43 Hr'g Tr. 22:15-18, 23:25–24:8, February 28, 2013.

44 Hr'g Tr. 24:22-25.

45 Hr'g Tr. 25:10. He could not recall Dillard's specific dates of incarceration. Hr'g Tr. 29:9-25.

46 Hr'g Tr. 25:25–26:23.

47 Hr'g Tr. 27:2-12.

48 Hr'g Tr. 28:2-5.

49 Hr'g Tr. 31:22.

50 Hr'g Tr. 38:16-17, 39:9-17.

51 Hr'g Tr. 40:12–41:25, 42:8-20.

was incarcerated from October 2007 until January 2010, and again from late 2010 to November 2012.[52]

Mr. Weiner testified about his representation of Dillard on the 2010 claim. He testified that, in conversations with Mr. Jacquot, the parties agreed to continue the case by attending periodic prehearing conferences with the understanding that "we couldn't do anything because Mr. Dillard was in custody."[53] He explained that the parties' actions in requesting and scheduling future prehearing conferences constituted an agreement "on the record" to continue the claim.[54]

> I asked for prehearing conferences. I didn't put down – specifically it was about 110(c). We always had agreements as to what we were going to do and how we were going to do it with Mr. Jacquot. And we put it on the record every time exactly how we were doing it, why we couldn't do things and everything else.[55]

He also stated, "I think there are plenty of things that are understood that don't need to be said."[56] He explained: "Any affidavit of readiness would have been completely a lie. Any need for a continuance doesn't make any sense, because we agreed to it on the record. You just don't file paperwork just to file paperwork, especially in workers' comp where, to some degree, there's some flexibility."[57] However, Mr. Weiner acknowledged that he was familiar with the provisions of §.110(c)[58] and agreed that some of the summaries included the board's "standard 110(c) explanation,"[59] which advised what employees should do when they want a hearing but are not ready for one within the two-year timeframe.[60]

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52 Hr'g Tr. 37:6-12.

53 Hr'g Tr. 46:10-22.

54 Hr'g Tr. 56:5-25.

55 Hr'g Tr. 51:4-11.

56 Hr'g Tr. 57:3-4.

57 Hr'g Tr. 48:4-9.

58 Hr'g Tr. 65:22.

59 Hr'g Tr. 65:11-13.

60 Exc. 140, 142.

In terms of the SIME, Mr. Weiner testified that he did not file an SIME form because the agreement had already been made and he was waiting for the employer to perform the EME. The EME could not be done because Dillard was in custody, but it would have provided the updated medical records necessary for an SIME.[61] Mr. Weiner testified that even when the PHC summaries made no explicit mention of an SIME, an SIME may have been discussed.[62] Further, he believed that one could infer from many of the summaries that an SIME discussion occurred:

> Does the word "SIME" come in there? No. But I do think that in these discussions as we're talking about it needing to do discovery and getting prepared for everything that we are referring to the fact that if we're going to do any SIMEs, we need to get updated information for the doctor . . . to review. . . . I think that is the record of the discussion of an SIME.[63]

He also stated, "I do not believe that there is any technical thing saying you got to put the word 'SIME' in there where you're obviously preparing to get some medical evaluations done so that we can move forward with the case. . . . And I think that the prehearing conference summaries are pretty clear on that, if not perfectly clear."[64]

The board concluded that AS 23.30.110(c) barred both Dillard's 2005 and 2010 claims.[65] On his 2005 claim, the board concluded that Dillard did not substantially comply with the statute's requirement that he request a hearing and that he abandoned the claim because Mr. Franich never submitted the SIME form and did nothing for more than two years before withdrawing.[66] On Dillard's 2010 claim, the board noted:

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[61] Hr'g Tr. 49:11–50:25.

[62] Hr'g Tr. 58:11-13 (testifying, "It doesn't say – it doesn't say "SIME," but "[i]t doesn't mean it wasn't said" when asked whether a September 15, 2010, summary said "SIME").

[63] Hr'g Tr. 59:8-18 (testifying about the September 15, 2010 summary). He also testified that an SIME was "implicit" in the October 21, 2011, summary, Hr'g Tr. 61:10-15.

[64] Hr'g Tr. 67:20–68:5.

[65] *See Dillard II*, Bd. Dec. No. 13-0045 at 18-19, 20-22.

[66] *See id*. at 19.

> It is entirely possible Messrs[.] Jacquot and Weiner just "understood" there was an agreement that "nothing was going to happen" until [Dillard's] release. Although the totality of the circumstances as set forth in the summaries might create an inference of an unwritten agreement between the parties, nowhere is such an agreement explicitly stated. A possible inference is not substantial evidence upon which to base a conclusion. Additionally, while [Dillard] repeatedly explained why he was not ready to proceed with a hearing – because he was incarcerated, nowhere did he explicitly request additional time to prepare.[67]

Also, in terms of Pacific/Ghemm's desire to conduct an EME, the board observed: "The fact [Pacific/Ghemm] was still conducting discovery and may not have been ready to proceed to hearing itself does not reli[e]ve [Dillard] of his statutory obligation to request one."[68]

The board also concluded that Dillard's claim for TTD from October 18, 2005, and ongoing was precluded under his 2005 claim because that claim was denied in *Dillard I*. However, the board rejected Pacific/Ghemm's arguments that Dillard's claims for other benefits were barred under res judicata because they were litigated or could have been litigated in the 2005 claim.[69]

Dillard appeals, arguing that AS 23.30.110(c) does not bar his March 2010 claim, that he did not abandon his December 2005 claim, and that the board erred in finding Mr. Weiner not credible. He did not address in his briefing on appeal the board's holding that *Dillard I* precluded his claim for TTD from October 18, 2005, and ongoing.[70]

2. Standard of review.

The commission must accept the board's credibility determinations and the board's assignment of weight to the evidence.[71] Our role is to evaluate whether

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67 *Dillard II*, Bd. Dec. No. 13-0045 at 21.

68 *Id.*

69 *See id.* at 19-20.

70 Therefore, we consider this issue abandoned for lack of adequate briefing. *See Coppe v. Bleicher*, 318 P.3d 369, 378-379 (Alaska 2014).

71 *See* AS 23.30.122; AS 23.30.128(b).

substantial evidence in light of the whole record supports the board's findings of fact.[72] Application of the statutory deadline in AS 23.30.110(c) is a question of law to which the commission applies its independent judgment.[73]

3. Applicable law.

a. Statutes.

AS 23.30.110. Procedure on claims.

> (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability following an injury, or at any time after death, and the board may hear and determine all questions in respect to the claim.
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> . . . .
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> (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.
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[72] AS 23.30.128(b).

[73] *See Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 195 (Alaska 2008) ("Proper application of a statute of limitations presents a question of law. . ."); AS 23.30.128(b).

(h) The filing of a hearing request under (c) of this section suspends the running of the two-year time period specified in (c) of this section. However, if the employee subsequently requests a continuance of the hearing and the request is approved by the board, the granting of the continuance renders the request for hearing inoperative, and the two-year time period specified in (c) of this section continues to run again from the date of the board's notice to the employee of the board's granting of the continuance and of its effect. If the employee fails to again request a hearing before the conclusion of the two-year time period in (c) of this section, the claim is denied.

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.

AS 23.30.128. Commission proceedings.

. . . .

(b) The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

. . . .

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. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.

. . . .

b. Principles of statutory construction.

"The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."[74] A statute is interpreted according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose.[75] Statutes dealing with the same subject are *in pari materia* and are to be construed together.[76] "[A]ll sections of an act are to be construed together so that all have meaning and no section conflicts with another."[77] If one statutory "section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict, the specific section will control over the general."[78] Statutes which cause forfeiture are not favored and are narrowly construed.[79]

c. The application of AS 23.30.110(c).

The Alaska Supreme Court (supreme court) has relatively recently addressed the operation of AS 23.30.110(c).

> 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. We construe subsection .110(c) to require filing a request for hearing within two years of the date of the employer's controversion of a claim. If within that two-year period the claimant is unable to file a truthful affidavit stating that he or she actually is ready for an immediate hearing, as was the case here, the claimant must inform the Board of the reasons for the inability to do so and request additional time to prepare for the hearing. Filing the hearing request and the request for additional time to

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[74] *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).

[75] *See Municipality of Anchorage v. Adamson*, 301 P.3d 569, 575 (Alaska 2013)(*Adamson*).

[76] *See Benner v. Wichman*, 874 P.2d 949, 958, n.18 (Alaska 1994).

[77] *In re Hutchinson's Estate,* 577 P.2d 1074, 1075 (Alaska 1978).

[78] *Id*.

[79] *Forest v. Safeway Stores, Inc.*, 830 P.2d 778, 782, n.10 (Alaska 1992).

> prepare for the hearing constitutes substantial compliance and tolls the time-bar until the Board decides whether to give the claimant more time to pursue the claim. If the Board agrees to give the claimant more time, it must specify the amount of time granted to the claimant. If the Board denies the request for more time, the two-year time limit begins to run again, and the claimant has only the remainder of that time period to file the paperwork necessary to request an immediate hearing.[80]

In *Kim*, the supreme court held that Kim's motion for a continuance within the two-year deadline in AS 23.30.110(c) constituted substantial compliance with the statute and was consistent with the statutory framework governing continuances of scheduled hearings and the running of the time-bar.[81] Additionally, the court commented on the predicament in which a claimant and/or his attorney might find themselves when confronted with the choice between, on the one hand, requesting a hearing, even though they cannot truthfully state in an affidavit that they are ready for a hearing, and on the other, allowing the two-year time-bar to run.

> It is not clear to us that a method the Board has apparently used to resolve this tension – permitting the filing of an affidavit of readiness on any issue no matter how small or inconsequential – solves the problem a party or attorney may face. Nor is it clear when the Board permits less orthodox pleadings to toll the subsection .110(c) time-bar. For example, the Board decided in one case that an affidavit of readiness for hearing on a request for extension of time for a hearing was sufficient to toll the time-bar of subsection .110(c) permanently. Although Kim's request was titled differently, he too requested an extension of time for a hearing. The Board never ruled on the merits of Kim's request, presumably because he did not file an affidavit of readiness with the motion for continuance. If so, this seems to place form over substance (especially when the motion was discussed at the pre-hearing conference).[82]

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80 *See Kim*, 197 P.3d 193, 198 (footnotes omitted).

81 *See Kim*, 197 P.3d at 198, n.24 and n.25.

82 *Kim*, 197 P.3d at 198-199 (footnotes omitted).

4. *Discussion.*

a. *Did the board err in holding that Dillard abandoned his SIME and December 14, 2005, claim, and dismissing the claim?*

The board dismissed Dillard's December 2005 claim, for having failed to substantially comply with AS 23.30.110(c).[83] It considered the claim to have been abandoned by virtue of Mr. Franich's failure to follow through and prepare the SIME form.

> The parties agreed to perform an SIME at the November 17, 2006[,] prehearing conference. [Dillard's] attorney agreed to prepare the SIME form and the [board's] designee set [b]inder exchange deadlines. [Dillard's] attorney then transmitted the medical binder to [Pacific/Ghemm]; however, he never submitted the SIME form. Although substantial compliance is acceptable absent significant prejudice to the other party, substantial compliance does not mean noncompliance. *Kim*. A party cannot simply do nothing and substantially comply. *Id*. Following the February 15, 2007[,] hearing, [Dillard] and his attorney literally did nothing else until [Dillard's] attorney withdrew nearly two years after agreeing to prepare the SIME form. . . . Not only did [Dillard] abandon the SIME, he abandoned his claim.[84]

We agree with the board's characterization of the evidence: The SIME was abandoned, or at the very least, inexcusably neglected. Since the SIME was pivotal to development of the claim, the failure to follow through with the arrangements for an SIME, coupled with Mr. Franich having done nothing else on Dillard's behalf for years, manifested an abandonment of the underlying claim. The board's finding to that effect is supported by substantial evidence which is referenced in its decision.[85]

Nevertheless, Dillard argues in briefing that a commission decision,[86] "reaffirmed that a pending SIME tolls the statute of limitations."[87] *Harkness* is similar to this case in two respects. The parties agreed to an SIME and the employee's attorney agreed but

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[83] *See Dillard II*, Bd. Dec. No. 13-0045 at 18-19.

[84] *Dillard II*, Bd. Dec. No. 13-0045 at 19.

[85] *See id.*

[86] *See Alaska Mechanical, Inc. v. Harkness*, Alaska Workers' Comp. App. Comm'n Dec. No. 176 (Feb. 12, 2013) (*Harkness*).

[87] Appellant Br. at 21.

failed to prepare the SIME form. Otherwise, it does not support the principle Dillard attributes to it.

In the first place, as the commission pointed out in *Harkness*,[88] there is no legal authority, other than distinguishable board decisions,[89] holding that in certain circumstances the SIME process tolls the §.110(c) time-bar. Second, the *Harkness* decision itself does not hold that an agreement that an SIME should be performed tolls the running of the §.110(c) time-bar. The most that can be said for it is that the decision acknowledges the aforementioned distinguishable board decisions, while not necessarily following them, and concludes:

> [E]ven if we were to accept the board majority's finding that the parties stipulated to an SIME, in terms of [the board decisions] cited above, without more, that finding would not warrant its legal conclusion that the time limit in subsection .110(c) was tolled. This case is not comparable, on its facts, to *McKitrick*, where the employer, or *Turpin*, where the claimant, filed petitions for an SIME. *Aune* is distinguishable because, unlike here, the board ordered an SIME before the subsection .110(c) time limit ran. The only somewhat similar case, factually, is *Snow*. However, in that matter, the parties signed and filed the SIME form. That did not occur here.[90]

Summarizing, a legal conclusion that the time-bar was tolled in *Harkness* is not warranted, which dispenses with Dillard's argument that we reaffirmed in *Harkness* that an agreement to perform an SIME tolls the statute of limitations. The commission takes the view that, should the supreme court decide to carve out another exception to the two-year time-bar in AS 23.30.110(c), as it did in *Kim*, and declare that an agreement to have an SIME performed tolls the statute, so be it. We are not prepared to hand down such a ruling.

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[88] *See Harkness*, App. Comm'n Dec. No. 176 at 21, n.98.

[89] Board decisions are precedent for the board, not the commission. *See Alaska Public Interest Research Group v. State*, 167 P.3d 27, 42 (Alaska 2007).

[90] *Harkness*, Dec. No. 176 at 22 (footnote omitted).

b. Did the board err in dismissing Dillard's March 31, 2010, claim pursuant to the provisions of AS 23.30.110(c)?

Dillard's March 31, 2010, claim was controverted on April 23, 2010, therefore, under §.110(c), he had to request a hearing within two years, that is, no later than April 23, 2012, or move for and be granted a continuance of the hearing, as happened in *Kim*.[91] Dillard maintains that he substantially complied with the statute,[92] apparently relying on the assumption that Mr. Weiner and Mr. Jacquot had agreed to a continuance of a yet-to-be-calendared hearing.[93] Thus, we must decide whether Dillard substantially complied with §.110(c) in the circumstances of this case.

First, the board analyzed, from a factual standpoint, whether substantial evidence supported a finding that the parties agreed to continue any hearing. Several prehearing conferences were held subsequent to the filing of Dillard's March 2010 claim. None of the summaries indicate that Mr. Weiner had filed an ARH or motion for a continuance. Unlike *Kim*, although it cannot be said that Mr. Weiner failed to file anything, the record reflects that three documents[94] were filed with the board prior to Mr. Weiner filing an ARH on December 12, 2012.[95] In our view, none of these three

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[91] *See Kim*, 197 P.3d at 199.

[92] Appellant Br. at 18-20.

[93] In his arguments, whether in briefing or at oral argument, Mr. Weiner intimated that the §.110(c) time-bar had also been tolled by Dillard's incarceration and the purported agreement that an SIME be performed. Despite Dillard's assertions that his imprisonment precluded progress on his claim, Appellant Br. at 19-20, it did not toll the running of the §.110(c) time-bar. *See Yurioff v. American Honda Motor Company, Inc.*, 803 P.2d 386, 390 (Alaska 1990) and *Tipton v. ARCO Alaska, Inc.,* 922 P.2d 910, 912 n. 4 (Alaska 1996) (citing *Jonathan v. Doyon Drilling, Inc.,* 890 P.2d 1121, 1122 (Alaska 1995)). Furthermore, extending this principle to the circumstances of this case, we conclude that Dillard's incarceration would not excuse substantial compliance with the statutory subsection, especially when he had counsel representing him on his claim during almost the entire time he was imprisoned. As for the SIME process tolling the statute, that argument was addressed in Part 4(a), *supra*.

[94] The documents consisted of two Requests for Conference, Exc. 0056 and 0063, which requested prehearing conferences, and Dillard's opposition to Pacific/Ghemm's petition to dismiss. Exc. 0089-95.

[95] Exc. 0097.

documents are filings that would satisfy the supreme court's insistence in *Kim* that the claimant substantially comply with the requirements of §.110(c), because the documents have no relevance to that issue.

Second, the board found that Mr. Weiner was not a credible witness, a finding we affirm.[96] Similar to the supreme court's ruling in *Pruitt v. Providence Extended Care*,[97] we believe this credibility finding is critical to our analysis whether there was substantial evidence to support a finding that the parties agreed to a continuance. Pruitt maintained that she thought her attorney, who had withdrawn from representing her, had filed the paperwork necessary to preserve her claim. Nevertheless, the supreme court held: "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."[98] Ultimately, the court ruled that she had not substantially complied with AS 23.30.110(c).[99] Here, with its credibility finding, the board determined that Mr. Weiner was not truthful in asserting that there was an agreement to a continuance.

Third, building on its finding that Mr. Weiner was not credible, the board expressed skepticism that there was an actual oral agreement to continue the hearing, and acknowledged that no written agreement or request for a continuance existed. "It is entirely possible Messrs[.] Jacquot and Weiner just 'understood' there was an agreement that 'nothing was going to happen' until [Dillard's] release. Although the totality of the circumstances as set forth in the summaries might create an inference of an unwritten agreement between the parties, nowhere is such an agreement explicitly stated."[100] We agree with the board that an understanding that nothing was going to

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96 *See* discussion in Part 4(c), *infra*.

97 297 P.3d 891 (Alaska 2013).

98 *Pruitt*, 297 P.3d at 895.

99 *See id*. at 895-96.

100 *Dillard II*, Bd. Dec. No. 13-0045 at 21.

happen on Dillard's claim until he got out of jail is not tantamount to an agreement to continue any hearing. Moreover, as the board found, a possible inference that the parties orally agreed to a continuance is not substantial evidence that they did.[101]

In terms of a legal analysis, as opposed to a factual one, we turn our attention to construing AS 23.30.110(c). Again, a statute is interpreted according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose.[102] The supreme court has stated that, "[a]lthough its *legislative history* is silent, the *purpose* of AS 23.30.110(c) is arguably to reduce the possibility that loss of evidence or the loss of recollection on the part of witnesses would hinder employers in their ability to effectively defend against workers' claims."[103] Stated otherwise, the purpose of §.110(c) is to limit the time within which a claimant can ask for a hearing. As for the statutory subsection's language, it is silent in terms of any exceptions to its two-year time-bar on claims. Given the statutory language, it appears to us that in *Kim*, the supreme court introduced a narrow exception to the statute, the timely filing of a motion for a continuance within the two-year deadline. The reason for the exception presumably was to relieve a claimant from having to file an *affidavit* of readiness for hearing that would falsely represent that he "has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing."[104]

Summarizing, Dillard did not request a hearing within two years of the controversion of his March 2010 claim, did not move for a continuance in that timeframe, and the parties did not agree to a continuance. Therefore, we conclude that here, the purported agreement to a continuance did not satisfy the statutory requirement that Dillard file an ARH within two years of the controversion of his March 2010 claim, or in the alternative, did not relieve him from having to comply with the

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[101] *See Dillard II*, Bd. Dec. No. 13-0045 at 21.

[102] *See Adamson*, 301 P.3d at 575.

[103] *Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947, 951 (Alaska 1989)(italics added).

[104] AS 23.30.110(c).

judicially-recognized exception to the statute, the filing of a motion for a continuance within the two-year deadline for requesting a hearing.

c. The commission must defer to the board's credibility findings.

Dillard argues that the board erred in finding Mr. Weiner was not credible.[105] According to Dillard, the board attributed statements to Mr. Weiner that he never made or were inaccurately paraphrased by the board in its decision.[106] Specifically, he maintains that "[w]ithout any basis to support the board's credibility finding, that credibility finding must be vacated."[107] Thus, we must decide whether the commission should recognize an exception to the operation of AS 23.30.122 and AS 23.30.128(b) when there is, as Dillard argues, no basis for the board's credibility finding.

Our analysis begins and ends by examining the language in AS 23.30.122 and 23.30.128(b). One provides that 1) "[t]he board has the *sole* power to determine the credibility of a witness[;][108] and the other that 2) "[t]he board's findings regarding the credibility of testimony of a witness before the board are *binding* on the commission."[109] Given this language, it seems to us that there is no latitude in terms of the verbiage in either statute which would allow the commission to read any exceptions into their operation, including an exception such as Dillard is requesting here. Moreover, had the Alaska legislature intended there to be exceptions, we assume they would have been stated in the statute or elsewhere. None were.

Consequently, the commission declines to vacate and otherwise affirms the board's credibility finding with respect to Mr. Weiner.

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105 Appellant Br. at 21-23.

106 *See* Appellant Br. at 22.

107 Appellant Br. at 22.

108 AS 23.30.122 (italics added).

109 AS 23.30.128(b)(italics added).

5. Conclusion.

The commission AFFIRMS the board's conclusions that 1) Dillard's 2005 claim was abandoned and subject to dismissal, 2) Dillard's March 2010 claim is dismissed pursuant to AS 23.30.110(c), and 3) Mr. Weiner was not credible.

Date: *15 July 2014* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).[110] For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[111] and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

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[110] A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

[111] *See id.*

You may wish to consider consulting with legal counsel before filing an appeal. 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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. 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 this is a full and correct copy of Final Decision No. 198 issued in the matter of *Chris Dillard vs. Dick Pacific/Ghemm Company J.V. and Liberty Mutual Insurance Group*, AWCAC Appeal No. 13-010, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 15, 2014.

Date: *July 16, 2014*

Signed

K. Morrison, Appeals Commission Clerk