Alaska Workers' Compensation Appeals Commission

Nghi Kim,
Appellant,

vs.

Alyeska Seafoods, Inc. and Alaska National Insurance Co.,
Appellees.

Final Decision
Decision No. 042 May 22, 2007

AWCAC Appeal No. 06-026
AWCB Decision Nos. 06-0202, 06-0227
AWCB Case No. 200215576

Appeal from Alaska Workers' Compensation Board Decision No. 06-0202, issued July 21, 2006, by the southcentral panel at Anchorage, Rebecca Pauli, Chair, and S. T. Hagedorn,[1] Member for Industry, and Decision No. 06-0227 on reconsideration, issued August 16, 2006, by the southcentral panel at Anchorage, Rebecca Pauli, Chair, and S. T. Hagedorn, Member for Industry.

Appearances: Thaddeus D. Sikes, Law Offices of James R. Walsh, for appellant Nghi Kim. Kara Heikkila, Holmes Weddle & Barcott, P.C., for appellees Alyeska Seafoods, Inc., and Alaska National Insurance Co.

Commissioners: Philip Ulmer, Jim Robison, and Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

The issue presented by this appeal is whether a claimant's attorney requested a hearing so as to toll the two-year time-bar of AS 23.30.110(c). Nghi Kim's workers' compensation claim was controverted by his employer on December 17, 2003. His attorney, James R. Walsh, did not file a request for hearing. Instead, his associate, Mr. Sikes, faxed the board for a "continuance under AS 23.30.110 for the purposes of further discovery and preparation of this case" two days before the AS 23.30.110(c)

[1] Member Hagedorn was appointed to the Commission March 1, 2007. He took no part in deliberations in this case.

time-bar expired December 17, 2005. Alyeska Seafoods, Kim's employer, petitioned the board to dismiss Kim's claim on January 3, 2006 and filed a request for hearing on its petition on January 24, 2006. The board granted the employer's petition, holding that Kim's motion for continuance was insufficient to constitute a timely request for hearing. On reconsideration, it affirmed its prior decision. We agree that the request for continuance was not sufficient to be a timely request a hearing. We therefore affirm the board's decisions.

Factual background and board proceedings.

Kim reported on August 2, 2002 that he injured his back while working at a processing plant in Unalaska on February 25, 2002.[2] He filed his report of injury with the Washington Department of Labor and Industries, which denied his claim.[3] However, his employer, Alyeska Seafoods, filed a notice of occupational injury with the Alaska Workers' Compensation Board on August 29, 2002.[4] Alyeska Seafoods issued a controversion of all benefits on the grounds that the alleged injury had not been reported within 30 days and that Kim had voluntarily left his employment without informing Alyeska Seafoods of an injury.[5] All benefits were again controverted on October 23, 2003, on the grounds that compensation was barred under AS 23.30.100 for failure to report an injury, and that Kim did not seek treatment for back pain until April 22, 2003, more than 30 days after he left his employment.[6]

Kim, who lives in Washington, obtained an attorney who filed a claim with the Alaska Workers' Compensation Board on his behalf on November 21, 2003.[7] He sought

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[2] R. 0036.

[3] R. 0037.

[4] R. 0001. AS 23.30.070(a) requires an employer to give notice to the board if the employer has knowledge of an injury "alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment."

[5] R. 0002.

[6] R. 0003.

[7] R. 0012.

temporary disability compensation from February 26, 2002, permanent partial impairment compensation, medical costs, transportation, penalty, interest, determination of unfair controversion, and attorney fees and costs.[8] The claim was promptly answered[9] and controverted[10] on December 17, 2003. The controversion recited that all benefits were controverted on grounds that compensation was barred under AS 23.30.100 for failure to report an injury, that Kim did not complain of or seek treatment for back pain until April 22, 2003, that no medical documentation had been received supporting disability, and, there was no evidence of a permanent impairment rating.[11]

On February 11, 2004 a pre-hearing conference was conducted by workers' compensation officer Gaal.[12] Kim's attorney, James Walsh, attended by telephone.[13] Officer Gaal specifically undertook to mail Mr. Walsh a form, referred to as an "ARH," to request a hearing. Mr. Walsh agreed to provide further information regarding the claim. However, the record contains no further communication by Mr. Walsh or his firm with the board or workers' compensation division until December 15, 2005. The record contains no medical summary forms[14] with medical records filed by Mr. Walsh in the

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[8] R. 0013.

[9] R. 0015.

[10] R. 0005.

[11] R. 0005.

[12] R. 0481-2.

[13] The record contains no copy of an authorization for representation by a person who is not licensed to practice law within the State of Alaska as required by 8 AAC 45.178(a). We note also that the record contains no copy of a petition to appear *pro hac vice,* or association of local counsel. Whether an appearance before the Alaska Workers' Compensation Board, a state adjudicative body, constitutes an appearance requiring compliance with Alaska Rule of Civil Procedure 81(a)(2) is a matter outside our authority to decide.

[14] 8 AAC 45.052 (a) requires filing of a medical summary form listing each medical report in the claimant's possession with the claim. 8 AAC 45.052 (d) requires a

interim between February 11, 2004 and December 15, 2005. Almost all of the medical records contained in the record were filed by Alyeska Seafoods.[15]

On December 15, 2005, Kim's attorney faxed a "Motion for Continuance, Declaration in Support of Claimant's Motion for Continuance, and Certificate of Service/Mailing" to the division.[16] The Motion for Continuance requested the board to grant a "continuance pursuant to AS 23.30.110 for the purpose of further discovery and preparation of this case."[17] In his affidavit, Kim's attorney said, "The Claimant is not ready for hearing and needs more time to prepare his case."[18]

On January 3, 2006, the attorney for Alyeska Seafoods filed a petition to dismiss Kim's claim under AS 23.30.110(c).[19] In its supporting memorandum[20] Alyeska Seafoods objected to the "Motion for Continuance" as "procedurally improper," outside the plain meaning of the statute, and "contrary to its purpose."[21] Kim's attorney responded by a faxed letter to the board on January 23, 2006, stating that Kim was not ready for hearing for a number of reasons and that the board should "toll the 2-year

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party to filed an updated medical summary shortly after receiving a medical report, with a copy of the report, and serve it on all parties. Service of the medical summary triggers the period in which a party may request cross-examination of the authors of medical reports. 8 AAC 45.052(c)(2). The exchange of all medical reports in possession of the parties on the filing of a claim is an important feature of the Alaska Workers' Compensation Act. AS 23.30.095(h).

[15] R. 0155 through R. 0469 consists of medical records filed by Alyeska Seafoods between December 17, 2003 and September 19, 2005.

[16] R. 0484. The documents referred to in the cover sheet at R. 0484 are contained in the un-numbered portion of the record. The original documents were received on December 19, 2005, and are found at R. 0019-0022.

[17] R. 0020.

[18] R. 0021.

[19] R. 0023-4.

[20] R. 0025-53.

[21] R. 0028.

time-bar and provide additional time for Mr. Kim to prepare his case."[22] Alyeska Seafoods filed an affidavit of readiness for hearing on its petition.[23] In a March 16, 2006 pre-hearing conference, the parties agreed to a May 3, 2007 hearing on the written record on the petition to dismiss;[24] however, on June 1, 2007 the board requested oral argument.[25]

Arguments presented to the board.

At oral argument, the board questioned Mr. Sikes, the associate of James R. Walsh who appeared telephonically at the hearing as Kim's attorney. The board asked Mr. Sikes if he had filed an affidavit of readiness [for hearing] on his motion for a continuance and he responded that he had not.[26] The board asked Mr. Sikes if he had opposed the petition to dismiss, and he responded that the letter titled "Claimant's Hearing Brief on Motion to Continue"[27] was his response. Mr. Sikes stated he wished the motion to continue to be treated as "a constructive request for a hearing."[28]

Alyeska Seafoods argued that Kim failed to participate in discovery, failed to make progress in his claim, and failed to file a request for hearing within two years of the employer's controversion of his claim. Alyeska argued that the excuses presented by Kim's attorney amount to a general lack of readiness to proceed; an excuse rejected in *Tipton v. ARCO Alaska, Inc.*[29] Because the point of Kim's Motion for Continuance is that he does not want a hearing and is not ready for one, Alyeska argued, it cannot be

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[22] R. 0487.

[23] R. 0054.

[24] R. 0493.

[25] R. 0499.

[26] Tr. 2.

[27] Tr. 3.

[28] Tr. 5.

[29] 922 P.2d 910, 913 n.5 (Alaska 1996). The court described, without approval or disapproval, the board's regulation at 8 AAC 45.070(c).

reasonably construed as a request for a hearing. Therefore, under AS 23.30.110(c), Kim's claim should be dismissed.

Kim argued that the motion to continue was a "constructive request" for a hearing; a writing that should be interpreted as a request for a hearing because it is a request to continue the process of preparing for a hearing. Kim argued that the regulation requiring an affidavit of readiness for hearing as the means of requesting a hearing made compliance with section 110(c) impossible, if the affiant could not swear that he was ready. Therefore, his claim should not be dismissed and, instead, he should be given more time to prepare.

The board decisions.

The board found that the record was clear that the employee failed to file an affidavit of readiness or to otherwise request a hearing within the two-year time limit.[30] The board rejected the request to treat the motion to continue as a request for hearing.[31] The board noted that the statute requires "timely prosecution" of the claim and that it did not have discretion to excuse the employee from failure to file a request for hearing.[32] The board concluded that Kim's claim was barred and must be dismissed.[33]

Kim filed a motion for reconsideration, to which the board responded:

> First, the Board finds the employee has presented no new argument or fact in support of his opposition to the employer's motion to dismiss under AS 23.30.110(c). The Board finds the employee is simply rearguing the issues argued at the June 21, 2006 hearing, and believes he can get a better result arguing the issues a second time. The Board finds the totality of the record supports our conclusion in Kim I, that the employee failed to timely prosecute his claim. The employee argues that the

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[30] *Nghi Kim v. Alyeska Seafoods, Inc.,* AWCB Dec. No. 06-0202, 4 (July 21, 2006).

[31] *Id.*

[32] *Id.* at 5.

[33] *Id.*

> filing of a motion to continue toll's AS 23.30.110(c). On the record before the Board it finds that were it to agree with the employee's argument, the Board would be removing any statutory meaning or substance provided by the legislature when it enacted a statute of limitation.[34]

The motion for reconsideration was denied and Kim's November 17, 2003 claim was denied and dismissed.[35] This appeal followed.

Discussion.

1. Our standard of review.

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[36] The commission is required to exercise its independent judgment on questions of law and procedure within the scope of the Alaska Workers' Compensation Act.[37] If we must exercise our

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[34] *Nghi Kim v. Alyeska Seafoods, Inc.,* AWCB Dec. No. 06-0227, 6 (August 14, 2006).

[35] *Id.*

[36] AS 23.30.128(b).

[37] AS 23.30.128(b). The commission's authority to interpret the Act derives from AS 23.30.008(a). The commission's decisions are binding upon the board in the case appealed and have the force of legal precedent upon the commission and board, but they have no such value to any other body, judicial or quasi-judicial. We believe the words "force of legal precedent" were used in the last sentence of AS 23.30.008(a) to mean that commission's decisions do not *create or establish* legal precedent but that the commission's decisions *have similar weight* to legal precedent on the board and commission. In the absence of guidance from the Supreme Court, the commission's interpretations of the workers' compensation statutes and regulations guide the board and commission. Even within AS 23.30 the commission's jurisdiction is limited: it may exercise its independent judgment only on a question of law or procedure arising under AS 23.30, provided that the question arises in an appeal from a decision by the board and that it is not otherwise excluded from the commission's jurisdiction. Thus, if the commission uses contract law to interpret a question regarding validity of a settlement under AS 23.30.012, its decision has no impact on the law of contracts because the commission's decisions do not *create* legal precedent. The decision will guide the board and commission's future application of AS 23.30.012 because, within the commission's narrow jurisdiction, it has similar weight. Because this provision requires the

independent judgment to interpret the Act, where it has not been addressed by the Alaska Supreme Court, we draw upon the specialized knowledge and experience of this commission in workers' compensation,[38] and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[39]

2. AS 23.30.110(c) requires a party to request a hearing by filing an affidavit indicating the requester is ready for the hearing.

Kim argues that his December 15, 2005 motion for a continuance constituted a "constructive request" for a hearing, because he sought a continuance so that he could have more time to prepare for a hearing, thus expressing an implied wish to have a hearing at some point in the future. He argues that his constructive request for hearing is sufficient to toll the statute because the statute does not require that he file an affidavit of readiness for hearing to "request" a hearing. Alyeska Seafoods counters that it is illogical to ask to continue what was never requested or scheduled, so that the motion for a continuance cannot constitute a specific request for a hearing. Alyeska Seafoods argues that it is "mandatory" that an employee file an affidavit of readiness within two years; failure to file an affidavit of readiness for hearing during the two years after December 17, 2003 means that Kim's claim is time-barred.

AS 23.30.110(c) provides that "[b]efore 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."(Emphasis added). In the last sentence of section 110(c), it provides that if the employer controverts the claim on a board controversion notice form, "and the employee does not request a hearing within two years following the filing of the

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commission to respect its own past decisions in deciding each new appeal, the commission is designed to develop a principled, stable, and informed body of administrative decisions.

[38] *See Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

[39] *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

controversion notice, the claim is denied." AS 23.30.110(c) is clear that to schedule a hearing a party must file a request for hearing together with an affidavit, but Kim's appeal rests on the argument that a claimant may toll the time-bar by filing only a request for hearing. The board in 8 AAC 45.070(b)[40] provides that an affidavit of

[40] 8 AAC 45.074 provides in pertinent part:

> (b) Except as provided in this section and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.
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> > (1) A hearing is requested by using the following procedures:
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> > > (A) For review of an administrator's decision . . . .
> > >
> > > (B) On the written arguments and evidence in the board's case file regarding a claim or petition . . . .
> > >
> > > (C) For an appearance in-person at the hearing, except for a venue determination, a party must file an affidavit of readiness in accordance with (2) of this subsection requesting an in-person hearing.
> > >
> > > (D) On a venue dispute . . . .
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> > > (E) For default under AS 23.30.170 . . . .
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> > (2) Except as provided in (1) of this subsection, a party may not file an affidavit of readiness for hearing until after the opposing party files an answer under 8 AAC 45.050 to a claim or petition or 20 days after the service of the claim or petition, whichever occurs first. If an affidavit is filed before the time set by this paragraph,
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> > > (A) action will not be taken by the board or designee on the claim or petition; and

readiness is the method of requesting a hearing under AS 23.30.110(c). In effect, Kim challenges the board's authority for the regulation and Alyeska Seafoods argues the board was correct to enforce the regulation. Thus, we are asked to decide if the board's regulation in 8 AAC 45.070(b)(1)(C) providing that an affidavit of readiness is

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> (B) the party must file another affidavit after the time set by this paragraph.
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> (3) If the board or designee determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing, the board or designee will give notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e).
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> (c) To oppose a hearing, a party must file an affidavit of opposition in accordance with this subsection. If an affidavit of opposition to a hearing on a claim for compensation or medical benefits is filed in accordance with this subsection, the board or its designee will, within 30 days after the filing of the affidavit of opposition, hold a prehearing conference. In the prehearing conference the board or its designee will schedule a hearing date within 60 days or, in the discretion of the board or its designee, schedule a hearing under (a) of this section on a date stipulated by all the parties. If the affidavit of opposition is not in accordance with this subsection, and unless the parties stipulate to the contrary, the board or its designee will schedule a hearing within 60 days, and will exercise discretion in holding a prehearing conference before scheduling a hearing. An affidavit of opposition that is filed under this subsection must
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> (1) be filed with the board's office nearest the requested hearing location;
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> (2) be filed within 10 days after the filing of the affidavit of readiness for hearing that is being opposed;
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> (3) have proof of service upon the other parties;
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> (4) list the parties' names and the date of the affidavit of readiness for hearing that is being opposed; and
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> (5) state the specific reason, and not a general allegation, that the case should not be heard, that a party is not ready, or why a hearing is not appropriate.

the method for a party to request an in-person hearing is based on a reasonable interpretation of section 110(c).

We begin with the language of AS 23.30.110(c). The Supreme Court in *Bailey v. Texas Instruments, Inc.*,[41] said this statute requires no expertise in workers' compensation to interpret, but, like statutes of limitation, is within the specialized knowledge of the Court. In that case, the Court rejected the assertion "that requiring employees to prosecute their claims within a specified time frame is arbitrary, serves no rational purpose, and arbitrarily discriminates against claimants. . . . The law commonly imposes a burden of proceeding on a claimant."[42] The Court spoke specifically to the purposes of section 110(c):

> Once an employer controverts a claim, the burden shifts to the employee to prosecute the claim promptly. When viewed as a whole, these requirements are rational because they promote the core purpose of the workers' compensation act: to establish a quick, efficient, and fair system for resolving disputes. Ch. 79, § 1, SLA 1988. In the context of the system as a whole, it is hardly unreasonable to impose the burden of proceeding on a claimant after the employer has filed a formal controversion.[43]

Therefore, to the extent that the board's regulation requires the employee to "prosecute the claim promptly," it serves the purposes of AS 23.30.110(c).

We turn next to whether the regulation imposes a greater "burden of proceeding" on the claimant than the statute. The department is authorized to adopt rules for all board panels, with the approval of the board,[44] but the rules may not insert "additional restrictions into the statutes."[45] The Court has also instructed us that

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41 111 P.3d 321 (Alaska 2005).

42 *Id.* at 325 n. 10.

43 *Id.*

44 AS 23.30.005(h), .005(l).

45 *London v. Fairbanks Municipal Utilities,* 473 P.2d 639, 642 (Alaska 1970).

AS 23.30.110(c) should not be read broadly,[46] and that provisions not in the statute should not be read into it.[47]

The first sentence of AS 23.30.110(c) says that a party must file "a request for hearing together with an affidavit" before a hearing is scheduled. It does not say "a request for hearing by an affidavit" or "a request for hearing consisting of an affidavit," which would clearly indicate that the request and the affidavit are the same document. However, it is clear that "request" is used as a noun, and the "request for hearing" is something *filed*, which we understand to mean a document that asks the board to schedule a hearing.[48] Similarly, "hearing request" is used as a noun indicating a document filed in the second and third sentences of subsection 110(c), and in the first sentence of subsection 110(h).

A hearing will not be scheduled unless a party files a request for hearing together with an affidavit. The phrase "together with an affidavit"[49] in the first

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[46] *Tipton v. ARCO Alaska, Inc.,* 922 P.2d 910, 912 (Alaska 1996).

[47] *Id.* at 913.

[48] *Compare Jonathan v. Doyon Drilling, Inc.,* 890 P.2d 1121, 1123-24 (Alaska 1995) (construing "claim" in AS 23.30.110(c) to mean a written pleading that is filed because it is consistent with the way "claim" is used in other parts of section 110).

[49] "Together with" is a phrase that appears frequently in the Alaska Statutes. It occurs most frequently to direct payment or deposit of a sum *together with* interest, costs, damages, money, fees, or the like. For example, AS 08.72.150 directs that a person applies to take the social worker examination by "by filing an application with the department *together with* the examination fee by the deadline" and AS 03.35.055 provides that an animal owner may redeem an impounded animal "at any time before the sale by paying the reasonable charges for keeping and feeding the animal, *together with* damages and costs, to the person impounding the animal." The phrase occurs to describe what documents must be with applications for permits, certificates, or registrations. For example, in AS 04.11.240(b), describing the requirements for a special event permit, a "sworn affidavit showing the length of time the organization has been in existence must accompany the application, *together with* a certified copy of the resolution of the board of directors authorizing the application;" AS 10.20.495(b) requires that the "certificate of authority, together with the duplicate original of the application affixed to it by the commissioner, shall be returned;" AS 13.16.090(d) provides that informal probate of a will which has been previously probated elsewhere

sentence of subsection 110(c) could mean one document, (a request that contains or includes an affidavit), or documents filed together, (a request and an affidavit). The last sentence of AS 23.30.110(c) does not refer to a document; it uses "request" as a verb meaning "to ask," instead of a noun: "the employee does not request a hearing within two years." The lack of reference to the affidavit in the last sentence of section 110(c), coupled with use of the verb "request," hints that filing a hearing request without an affidavit will toll the time-bar. This is what Kim's attorney claims he did.

The board's regulation at 8 AAC 45.070 resolves any ambiguity in the operation of the statute created by the last sentence of AS 23.30.110(c). The board's regulation interprets "a request for hearing" or "hearing request" as inseparable from the affidavit. 8 AAC 45.070(b)(1) provides in part:

> A hearing is requested by using the following procedures:
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> . . .
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> (C) For an appearance in-person at the hearing, except for a venue determination, a party must file an affidavit of readiness in accordance with (2) of this subsection requesting an in-person hearing.

The board's regulation embodies an interpretation that gives effect to all of the subsection 110(c) text. The first sentence of subsection 110(c) lists the contents of the affidavit required to be filed together with the request: "an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing." The statement that the party requesting the hearing is "prepared for

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"may be granted at any time upon written application by any interested person, *together with* deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated;" and, an application for registration of subdivision must include a "legal description of the subdivided land offered for registration, *together with* a map" under AS 34.55.010(a)(2). Sometimes the words are used to describe information that must be included with certain notices, as when the board of accountancy mails "copies of the proposed rule or amendment *together with* a notice of its effective date" under AS 08.04.080; or in reports, as under AS 24.45.061, an employer of a lobbyist must report "the total amount of payments made to influence legislative or administrative action during the period, and the name and address of each person to whom these payments have been made during the period by the maker of the report, *together with* the date and amount."

the hearing" refers to the hearing that the party is requesting by filing a request "together with" the affidavit. If the last sentence of AS 23.30.110(c) were read to permit a request for hearing to be filed by a wholly unprepared party, it would conflict with the direction in the same statute to schedule a hearing on an unopposed hearing request within 60 days.[50] The unprepared party would be forced to a hearing in less than 60 days, defeating an important purpose of the statute, which is to ensure that claimants are ready to have their claims heard when they request a hearing.

In AS 23.30.110(c) the legislature imposed a duty on claimants and petitioners to gather sufficient evidence in support of the claim or petition so that they are prepared to ask for a hearing before the end of two years after controversion.[51] The board's regulation does not increase the burden on proceeding to hearing beyond that imposed by the statute. On the other hand, if a claimant or petitioner could request a hearing, thus tolling the time-bar, but avoid *scheduling* a hearing by not filing an affidavit, the statute would not accomplish its purpose – to require claimants and petitioners to prosecute their claims or petitions promptly. Filing a satisfactory affidavit of readiness to avoid dismissal in two years obliges the claimant or petitioner to diligently pursue the claim or petition.

The regulation clarifies that a party requests a hearing by filing an affidavit requesting a hearing. The affidavit is an integral part of the hearing request, whether the affidavit is contained on the same document or accompanies another document making the request. The request for hearing is incomplete without an affidavit complying with AS 23.30.110(c). There is substantial evidence in the record that Kim did not file an affidavit of readiness, on the board's form or otherwise.[52] There is

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[50] AS 23.30.110(c) provides that "

[51] *Jonathan*, 890 P.2d at 1124. ("110(c) requires the employee, once a claim has been filed and controverted by the employer, to prosecute the employee's claim in a timely manner.").

[52] Kim's counsel argued on reconsideration that the board's decision requires him to file a particular form, and that the board should focus on the substance, not the

substantial evidence in the record Kim was not prepared for a hearing when he filed his "constructive" request for a hearing.[53] Kim's motion and declaration, even with the January 2006 letter that followed, were insufficient to constitute a complete hearing request because they were not filed together with an affidavit meeting the requirements of AS 23.30.110(c). The board's finding that Kim failed to file an Affidavit of Readiness for Hearing or otherwise request a hearing is supported by substantial evidence.

3. Kim did not present evidence justifying equitable relief from dismissal for his failure to file a timely and complete hearing request.

Kim argues that his motion for continuance should have been granted by the board because it would be unjust to dismiss Kim's claims and the employer will not be prejudiced by the delay. We agree that Kim's motion cannot be logically termed a "motion to continue" because nothing had been scheduled which the board could continue. Kim's motion was a motion to stay dismissal of his claim and to toll the statute.

The board correctly states that AS 23.30.110(c) is mandatory; it is not a statute that gives the board discretion to relieve a claimant or petitioner from its operation in the interests of justice or for good cause.[54] Nonetheless, as we have recognized that

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form of the writing he filed. The board noted it had considered the substance of the motion. AWCB Dec. No. 06-0227 at 6 n.9.

[53] In the board hearing, Kim's counsel urged that the motion to continue be viewed as a "a constructive ARH, as you guys put it." The contents of the motion, supporting declaration, and subsequent letter do not comply in substance with AS 23.30.110(c) because they do not state that Kim is ready for the hearing he is requesting. Mr. Walsh's January 23, 2006, letter on behalf of his client states "Mr. Kim is most definitely NOT ready for hearing" and, in the last paragraph, "this is notice of Mr. Kim's request for hearing, with the caveat that he is not prepared for hearing in any respect." R. 0487-88. Even as the January 2006 letter purports to give notice of a request for hearing, it makes it clear that Kim is not prepared for hearing.

[54] *Bohlmann v. Alaska Constr. & Engineering, Inc.*, AWCAC Dec. No. 023 (December 8, 2006); *Tonoian v. Pinkerton Security,* AWCAC Dec. No. 029 (January 30, 2007); *Morgan v. Alaska Regional Hospital,* AWCAC Dec. No. 035 (February 28, 2007).

there are recognized legal excuses the board, exercising its equitable powers, may apply to relieve a self-represented claimant or petitioner from claim dismissal.[55] However, in this case, Kim did not argue, or present evidence to support, application of such recognized legal excuses. Kim's counsel did claim that it was impossible for him to comply with AS 23.30.110(c) because he could not truthfully swear that Kim was prepared for hearing. However, he could not do so because, as the board found, he and Kim had not "timely prosecuted" the claim.[56] Without adopting the rule, the Alaska Supreme Court noted in *Kaiser v. Umialik Ins.*,[57] that other courts have allowed equitable tolling of statutes of limitation when, despite diligent efforts, plaintiffs have been kept from the courts by legal barriers outside their control[58] or by truly extraordinary events, like wars.[59] Like the plaintiff in *Kaiser,* the circumstances described by Kim's counsel[60] would not earn application of this form of equitable tolling, if recognized in the Alaska.

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[55] *Id.* The commission has not previously considered application of equitable relief in a case involving a claimant represented by legal counsel when the two years expired.

[56] The board's footnote to *Aune v. Eastwind Inc.,* AWCB Dec. No. 01-0259 (December 19, 2001), informs us that the board meant that Kim had not made diligent and timely efforts to prepare for hearing. We find the record contains substantial evidence to support this finding, notably the absence of medical summaries, requests for conference, requests for board subpoenas, notices of deposition, or other documents filed by Kim indicating diligent preparation for hearing.

[57] 108 P.3d 876 (Alaska 2005).

[58] *Id.* at 882, *citing Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 595-96 (9th Cir.1991) (equitably tolling limitations period because unconstitutional statute barred plaintiffs from filing claims).

[59] *Kaiser,* 108 P.3d at 882, citing *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 542, 18 L.Ed. 939 (1867) (tolling statute of limitations because Civil War made filing suit impossible); *Osbourne v. United States*, 164 F.2d 767, 768-69 (2d Cir.1947) (tolling statute of limitations because plaintiff held in Japan during Second World War was unable to file claim).

[60] Kim argues difficulty understanding English and two moves in the Seattle area impaired his ability to prepare for hearing; these are not "truly extraordinary"

Conclusion.

There is substantial evidence in light of the whole record to support the board's findings that Kim failed to file a request for hearing within the two-year time-bar of AS 23.30.110(c). The board properly applied AS 23.30.110(c) and 8 AAC 45.070(b)(1). Kim failed to present evidence justifying application of a recognized legal excuse that would allow the board to exercise equitable powers to relieve Kim from the operation of the time-bar. We AFFIRM the board's dismissal of Kim's November 21, 2003 claim.

Date: *22 May 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final administrative agency decision. The appeals commission affirmed (upheld) the workers' compensation board decision denying and dismissing Nghi Kim's workers' compensation claim against his employer. This decision becomes effective when it is filed in the office of the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are instituted. To find the date of filing, look at the Certification by the commission clerk on the last page.

Effective November 7, 2005, proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the filing of this decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129.

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compared to Kaiser's incarceration, illness and divorce, which were held insufficient as a matter of law.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision was mailed to the parties, whichever is earlier. See AS 23.30.128(f).

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

You may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision. The commission will accept fax filing of a motion for reconsideration.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of the Final Decision in the matter of *Nghi Kim v. Alyeska Seafoods Inc. and Alaska National Ins. Co.*; Appeal No. 06-026; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *22nd* day of *May*, 200*7*.

Signed
R. M. Bauman, Appeals Commission Clerk

I certify that on *5/22/07* a copy of the above Final Decision in AWCAC Appeal No. 06-026 was mailed to J. Walsh and K. Heikkila and a copy was faxed to Walsh, Heikkila, AWCB Appeals Clerk and Director WCD.

Signed
R. M. Bauman, Appeals Commission Clerk