Case: *Loretta Tonoian vs. Pinkerton Security and ACE USA*, Alaska Workers' Comp. App. Comm'n Dec. No. 029 (January 30, 2007)

Facts: Employee injured her right knee, lower back and neck in April 2002 when she slipped on some ice while working. She filed a claim on March 17, 2003. The employer controverted her claim on May 2, 2003, on a controversion form that was dated April 30, 2003. The employee's first attorney assisted her from May 7, 2003, until he withdrew on October 1, 2003. Her second attorney, who entered an appearance on January 1, 2004, helped her negotiate a settlement in 2004 but Tonoian withdrew from the compromise and release, stating that she did not want to settle the claim, after she and the other parties had signed it and submitted it to the board for approval. Her second attorney withdrew on January 24, 2005. Pinkerton Security asserted the statute of limitations defense at a prehearing conference on July 14, 2005, as Tonoian had not yet submitted an affidavit of readiness for hearing. Tonoian filed her request for hearing on August 9, 2005. The board dismissed her claim as time-barred because her request for hearing was filed more than two years after the employer's controversion under AS 23.30.110(c). Tonoian testified that she did not recall receiving controversion notices, that she did not read much of what was in her file and she would forward letters on to her attorneys without opening them. She testified that she was unaware that she had to request a hearing within a certain timeframe until the July 14, 2005, prehearing conference. She testified that when she spoke to an adjudications officer about withdrawing from the settlement that she told the officer that she wanted to "go forward," and that the officer then scheduled a prehearing conference without advising her that she needed to request a hearing within two years of the controversion. After the board decided her claim was time-barred, Tonoian petitioned for reconsideration because her late hearing request should be excused due to depression and stress. The board denied reconsideration, finding that the letter from her doctor "expressing a 'possibility' of lost memory does not provide a sufficient explanation as to the delay in filing her claim, such as allow us to justify excusal of the employee's failure to timely file." Dec. No. 029 at 7. Tonoian appealed.

Applicable law: AS 23.30.110(c) providing in part, "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."

Employee has the burden to prove a late filing should be excused. Dec. No. 029 at 8-9.

Although .110(c) does not explicitly provide for any excuses for a late filing, the commission recognized that the following, if proven, could constitute a legal excuse for a late filing – 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. Dec. No. 029 at 11.

When a litigant invokes estoppel against a governmental agency, the litigant must establish that (1) the governmental body asserted a position by conduct or words; (2) the litigant acted in reasonable reliance on the board's assertion; (3) the litigant

suffered resulting prejudice; and, (4) estopping the board from dismissing the litigant's claim would serve the interest of justice so as to limit public injury. *State, Dep't of Commerce & Economic Development, Div. of Ins. v. Schnell,* 8 P.3d 351, 356 (Alaska 2000). The Alaska Supreme Court cautions that equitable estoppel is rarely applied against the state's exercise of sovereign police powers, reasoning that where it acts for the good of its citizens as a whole, rather than a narrow proprietary interest, estoppel would be unjust to the public. *Id*. at 355-56.

Issue: Did the employee assert legal grounds for excusing a late-filed request for hearing?

Holding/analysis: The commission concluded Tonoian did not prove lack of mental capacity. Although she suffered from depression, stress and possibly forgetfulness induced by medication, "Tonoian did not claim that her mental problems were so severe as to require appointment of a guardian or conservator, that she was incompetent, or that she lacked the capacity to conduct her own affairs." Dec. No. 029 at 11-12. The commission noted that she retained and dismissed two attorneys, negotiated a settlement, sought alternate legal advice, and withdrew the settlement just negotiated. Moreover, she had reasons for making these decisions that did not demonstrate that she lacked the mental capacity to conduct her own affairs.

Tonoian also did not prove lack of notice of the time-bar. The obligation to give notice was satisfied by the mailing of the board-prescribed controversion notices. Tonoian did not argue that the forms did not contain the warning about the time limit or deny receiving the forms altogether; instead, she claimed she did not read them or open envelopes. Tonoian needed to prove lack of notice, rather than a lack of actual knowledge.

Lastly, Tonoian claimed that the board, a governmental agency, is equitably estopped from denying her claim because, through silence, it led her to believe she did not need to file a request for hearing. The commission considered whether Tonoian presented enough evidence that, if true, would require it to remand to the board to decide the equitable estoppel issue. It concluded that she had not presented evidence to satisfy the first element of equitable estoppel.

In view of the board's *Richard* duty (*Richard v. Fireman's Fund Ins. Co.,* 384 P.2d 445, 449 (Alaska 1963)) to inform and instruct pro se litigants, the commission concluded that "an erroneous statement by adjudication staff as to the specific form that a request for hearing must take, or the specific day that the two years expires, may be grounds for application of estoppel against the board, but the board may not be estopped to deny that a request for hearing must be filed within two years. Tonoian's assertion is that [adjudication officer's] silence on a time-bar led her to believe there was none. This is a representation 'contrary to the rules' that cannot be an assertion of position that would support application of equitable estoppel." Dec. No. 029 at 15.