Alaska Workers' Compensation Appeals Commission

Providence Health System and
Sedgwick CMS,
Appellants,

vs.

John W. Hessel,
Appellee.
Trena Heikes, in her official capacity as Director of the Division of Workers' Compensation,
Amicus.

Final Decision
Decision No. 131 March 24, 2010

AWCAC Appeal No. 09-014
AWCB Decision No. 09-0065
AWCB Case No. 200316796

Appeal from Alaska Workers' Compensation Board Decision No. 09-0065 issued on April 6, 2009, at Anchorage, Alaska, by southcentral panel members Laura Hutto de Mander, Chair, David Robinson, Member for Industry, and Robert Weel, Member for Labor.

Appearances: Jeffrey Holloway, Holmes Weddle & Barcott, PC, for appellants Providence Health System and Sedgwick CMS. John W. Hessel, pro se, appellee. Daniel S. Sullivan, Attorney General, and Erin A. Pohland, Assistant Attorney General, for *amicus* Trena Heikes, Director of the Division of Workers' Compensation.

Commission proceedings: Motion for Extraordinary Review filed on April 15, 2009. Opposition to motion filed April 29, 2009. Hearing on motion held May 13, 2009. Motion for Extraordinary Review granted, June 8, 2009. Appeal filed June 19, 2009. Order Clarifying Statement of Appeal Procedures issued July 1, 2009. Motion to Intervene granted July 14, 2009. Appellee's request for extension of time to file brief granted, October 7, 2009. Appellee's second request for extension of time to file brief converted to a motion to accept late-filed brief; motion granted December 10, 2009. Oral argument on appeal presented January 15, 2010.

Commissioners: Jim Robison, Stephen T. Hagedorn, Kristin Knudsen.

By: Stephen T. Hagedorn, Appeals Commissioner.

The issue presented by this appeal is whether the board properly denied Providence Health Systems' petition to dismiss John Hessel's claim for failing to request a hearing within two years of Providence's controversion. The board decided that, although Hessel had received multiple board-prescribed controversion notices, the notices were ineffective to warn Hessel of his duty to request a hearing under AS 23.30.110(c), effectively invalidating the board-prescribed language warning of the § .110(c) time-bar in the controversion notices. The board also found that it and the division failed in their duty to provide assistance to Hessel as a pro se claimant. The board concluded Hessel was "legally excused" from complying with the § .110(c) requirement. In the alternative, the board decided that if Hessel was not excused due to lack of notice, he substantially complied with the requirement to request a hearing by filing a claim for benefits.

Providence argues the board abused its discretion and erred as a matter of law by excusing Hessel from compliance with § .110(c) when he was provided with sufficient notice of the deadline in four controversion notices. Providence asserts the board failed to follow controlling precedent in concluding that Hessel substantially complied with § .110(c). Lastly, Providence and the director of the Division of Workers' Compensation contend that the board panel exceeded its authority by imposing duties on the division staff and effectively invalidating the board-prescribed controversion notice form.

Hessel concedes that he received the controversion notices but contends that he misread them and did not seek further help because he mistakenly believed that he had satisfied the § .110(c) requirement to request a hearing within two years. He argues that he substantially complied with the requirement to request a hearing because he did not fail to pursue his claim during the two years. He asserts he lacked notice of the time-bar due to his misunderstanding and, in any event, the board designee should have verbally warned him about the § .110(c) time-bar in a prehearing conference and that the failure to verbally warn excuses him from compliance with § .110(c). Lastly, he

asserts that the board's decision imposed duties on the board and its designees, not the division.

The parties' arguments require the commission to consider whether Hessel's circumstances may constitute substantial compliance with AS 23.30.110(c) or legally excuse him from the time-bar. We conclude that filing a claim does not substantially comply with a requirement to request a hearing *after* that claim is filed and controverted. We hold that the board erred by legally excusing Hessel because the board-prescribed controversion notices Hessel acknowledged receiving provided adequate notice of the § .110(c) time-bar. Finally, we conclude the board hearing panel lacks the authority to order non-adjudicatory division staff to provide verbal warnings of the § .110(c) time-bar and that the controversion notice is an implementation of a regulation that a board panel cannot invalidate. We REVERSE the board's decision denying Providence's petition to dismiss and remand for further proceedings.

1. Factual background and board proceedings.

John Hessel reported injuring his "head, neck, shoulders, back" when a patient was "resisting and fighting" on September 27, 2003, while working at Providence as a registered nurse.[1] Providence paid compensation until receiving a medical report in November 2003 that released Hessel to return to work.[2]

Hessel filed a workers' compensation claim two years later, on November 6, 2005, seeking temporary total disability compensation (TTD), temporary partial disability compensation (TPD), medical costs, and permanent partial impairment compensation (PPI).[3] Providence issued a controversion notice on December 12, 2005, denying all temporary disability benefits after November 10, 2003, due to Hessel's release to work.[4] The employer also controverted the claims for medical costs and PPI

---

1 R. 0001.

2 R. 0603, 0101.

3 R. 0019-20.

4 R. 0930.

and in its answer to Hessel's claim, filed on the same day as the controversion, disputed his claim for TPD.[5] The controversion was on a board-prescribed form, which stated at the top: "EMPLOYEE: READ IMPORTANT INFORMATION ABOUT YOUR RIGHTS ON THE BACK."[6]

On the back, the form stated:

> TO EMPLOYEE (OR OTHER CLAIMANTS IN CASE OF DEATH), READ CAREFULLY
>
> This notice means the insurer/employer has denied payment of the benefits listed on the front of this form for the reasons given. If you disagree with the denial, you must file a timely written claim (see time limits below). The Alaska Workers' Compensation (AWC) Board provides the "Application for Adjustment of Claim" form for this purpose. You must also request a timely hearing before the AWC Board (see time limits below). The AWC Board provides the "Affidavit of Readiness for Hearing" form for this purpose.[7]

Under "Time Limits," the form stated:

> 1. When must you file a claim?
>
> a. Compensation Payments.
>
> You will lose your right to compensation payments unless you file a written claim within two years of the date you know the nature of your disability and its connection with your employment and after disablement. If the insurer/employer voluntarily paid compensation, you must file a written claim within two years of the last payment.
>
> . . . .
>
> 2. When must you request a hearing?
>
> Within two years after the date the insurer/employer filed this controversion notice, you must request a hearing before the AWC Board. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within two years. Before requesting a hearing, you should file a written

---

5 R. 0930, 0025, 0027.

6 R. 0930-31, 0010. The copy initially filed omitted the back of the form.

7 R. 0931, 0012, 0014, 0016 (emphasis omitted).

claim.[8]

At the bottom the form provided: "IF YOU ARE UNSURE WHETHER IT IS TOO LATE TO FILE A CLAIM OR REQUEST A HEARING, CONTACT THE NEAREST AWC BOARD OFFICE."[9] Below this written instruction, the board offices and phone numbers were listed.[10]

Providence amended its controversion of Hessel's claims on March 16, 2006, after receiving more information about Hessel's condition from his second treating physician, and the dates for which he was claiming TTD.[11] It once again filled out the board-prescribed form with the time limits and other information on the back.[12] After an employer medical evaluation was conducted, Providence supplemented its controversion, on November 7, 2006, filling out the board-prescribed form for the third time.[13] Finally, Providence controverted all Hessel's benefits again on the board-prescribed form after receiving an addendum medical report on December 7, 2006.[14] All four controversion notices indicated that they were served on Hessel by mail.[15]

On December 12, 2007, the two-year time limit for requesting a hearing under AS 23.30.110(c)[16] expired. Almost five months later, on May 7, 2008, Hessel requested a hearing by filing an affidavit of readiness for hearing.[17] Providence filed a petition to

---

8 R. 0931, 0012, 0014, 0016.

9 R. 0931, 0012, 0014, 0016.

10 R. 0931, 0012, 0014, 0016.

11 R. 0011.

12 R. 0011-12.

13 R. 0013-14.

14 R. 0015-16.

15 R. 0930, 0011, 0013, 0015.

16 AS 23.30.110(c) provides in relevant 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."

17 R. 0045.

dismiss Hessel's claims as time-barred on June 26, 2008.[18]

The board held a hearing on the petition to dismiss on March 17, 2009.[19] Hessel testified that he had read the warning on the back of the controversion form, but believed that he had complied with the time limits when he filed his claim on November 6, 2005.

> [S]ince I didn't know there was a second two-year statute of limitations on there, I just understood it to be that that was the first one that I did, . . . [W]hen I read it, I thought why are they sending me this stuff that I'm already past already, shouldn't we be going further ahead instead of going backwards. That's what was going through my head, so that's what I understood it to say. Now, maybe I didn't read it right - - obviously I didn't - - but that's what I understood it to say.[20]

Hessel argued during the hearing that "the board is kind of, oh, more or less obligated to make what the procedures are available to you so this type of thing doesn't happen where time goes by and you never realized that there was another time limit after the first (indiscernible) year time limit."[21] Hessel stated that, despite several prehearing conferences in his case, it wasn't until May 7, 2008, when he visited the office of workers' compensation technician Janet Bailey, who had previously assisted him, that he became aware of the requirement of requesting a hearing within two years after the controversion.[22]

Providence argued that Hessel had failed to request a hearing within two years of the first or second controversion notices and, therefore, his claim should be dismissed by operation of law under AS 23.30.110(c).[23] Providence contended that *Kim*

---

18 R. 0054.

19 Hrg. Tr. 2, 4:17-21.

20 Hrg. Tr. 18:4-6, 15-21.

21 Hrg. Tr. 10:17-21.

22 Hrg. Tr. 10:22 – 11:2.

23 Hrg. Tr. 7:15 – 8:6.

v. Alyeska Seafoods, Inc.[24] requires an employee to file some request for hearing to advance his claim during the two years after a controversion, even a request for more time to get ready for the hearing, and that Hessel did not do this.[25]

Providence also addressed the board's obligations to give notice to unrepresented claimants. It argued that *Richard v. Fireman's Fund Ins. Co.*[26] does not require the board to advise unrepresented claimants on every aspect of workers' compensation law, but only to provide help when questions are asked.[27] Moreover, Providence argued that the language on the board-prescribed controversion form was sufficient to inform claimants of the requirements of AS 23.30.110(c).[28] Providence argued that Hessel had admitted that he had read the back of the controversion form, and if he found it confusing, he should have contacted the Workers' Compensation Division, as directed on the back of the form.[29] Lastly, Providence observed that although the prehearing summaries did not indicate that Hessel was warned about the running of AS 23.30.110(c), such a discussion may have occurred and been left out of the summary.[30]

The board denied Providence's petition to dismiss on April 6, 2009.[31] The board found that Hessel had failed to file an Affidavit of Readiness for Hearing, or any other request for more time, within two years of the first controversion filed by Providence and, therefore, the benefits sought by Hessel were time-barred by operation of AS 23.30.110(c).[32] However, the board concluded there was a legal basis for excusing

---

[24] 197 P.3d 193 (Alaska 2008).

[25] Hrg. Tr. 8:15-9:15.

[26] 384 P.2d 445 (Alaska 1963).

[27] Hrg. Tr. 14:13-24.

[28] Hrg. Tr. 14:25 – 17:9.

[29] Hrg. Tr. 19:5-12.

[30] Hrg. Tr. 20:2-8.

[31] *John W. Hessel v. Providence Health Sys.*, Alaska Workers' Comp. Bd. Dec. No. 09-0065, 14 (Apr. 6, 2009) (L. Hutto de Mander, Chair).

[32] *Id.* at 11.

Hessel's failure to timely file a request for hearing, and, therefore, denied Providence's petition to dismiss.

The board found Hessel to be a credible witness.[33] The board found that while the board-prescribed controversion notice might be sufficient to warn other claimants, the controversion notices were ineffective to warn Hessel of his duty under AS 23.30.110(c):

> The record reveals the employee profoundly misunderstood the information contained on the reverse side of the controversion form. We find the employee relied on Worker's Compensation Division staff and expected staff would assist him with his claim. . . . We find the means used by the Division to communicate the AS 23.30.110(c) time bar, including the language on the reverse side of the controversion form, was ineffective as to this employee who demonstrated a limited ability to understand the warning based upon his belief he previously complied with the requirements outlined on the reverse of the controversion form. We find the employee consistently throughout the hearing expressed this belief. We find his belief reasonable because he filed his workers' compensation claim in response to the first warning on the back of the controversion form, and there is no indication on the reverse side of the controversion form that employee's may be required to take more than one of the listed actions. Further, we find the Division failed to dispel this notion, and failed to meet its mandate under *Richard* by not providing the employee any warning regarding AS 23.30.110(c) at the three prehearing conferences held after the initial controversion by including an appropriate statement regarding AS 23.30.110(c) in the prehearing conference summaries.[34]

The board concluded that Hessel had "substantially complied" with the requirement to request a hearing within two years after the December 2005 controversion by filing a claim one month earlier in November 2005.[35] Lastly, the board concluded that, although Hessel had timely filed his claim by chance, he never had notice of the

---

33 *Id.*

34 *Id.* at 12-13 (footnotes omitted).

35 *Id.* at 14.

requirement to file a claim within two years after Providence stopped payment.[36] The board stated:

> [T]he Division has an affirmative duty under *Richard* to inform employees when they file a Report of Occupational Injury or Illness of the information contained on the reverse side of the controversion form, including when an employee must file a written claim after payments are stopped, after death and medical benefits are denied, as well as when they must request a hearing after a controversion notice, . . .[37]

Providence appeals.

2. 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.[38] The board's findings on credibility when the witness testified before the board are binding on the commission.[39] Here, the board found that Hessel was credible.[40] However, the issue is whether the circumstances that Hessel credibly testified to are sufficient to either legally excuse him from compliance with the AS 23.30.110(c) time-bar or to conclude that he substantially complied with the statute. These questions are a matter of law on which the commission is required to exercise its independent judgment. [41]

In addition, whether the language on the back of the controversion notice is subject to a reasonable person standard of understanding, rather than a purely

---

[36] AS 23.30.105(a) requires that ". . . if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of the last payment of benefits under AS . . . 23.30.185 . . ." AS 23.30.185 provides for payment of temporary total disability benefits.

[37] *John W. Hessel,* Bd. Dec. No. 09-0065 at 14 (footnote omitted).

[38] AS 23.30.128(b).

[39] AS 23.30.128(b). *See also* AS 23.30.122 providing that "[t]he board has the sole power to determine the credibility of a witness."

[40] *John W. Hessel,* Bd. Dec. No. 09-0065 at 12-13.

[41] AS 23.30.128(b). *See also Tonoian v. Pinkerton Security*, Alaska Workers' Comp. App. Comm'n Dec. No. 029, 8 (Jan. 30, 2007) (stating that whether the claimant "asserted legal grounds for excusing a late-filed request is a matter of law to which we are required to apply our independent judgment.").

subjective test, is a matter of law.[42] If a reasonable person standard is applied, believing Hessel's testimony is not enough to conclude the notice was ineffective; the board must have found that the notice is so poorly written a reasonable person could not have interpreted it correctly. This is a conclusion of law that the commission reviews by applying its independent judgment.[43]

3. Discussion.

a. Hessel did not substantially comply with AS 23.30.110(c), which required him to request a hearing within two years of Providence's controversion.

The board concluded that Hessel had substantially complied with § .110(c) by filing his claim in November 2005. We conclude this was an error of law. The board failed to apply the requirements of AS 23.30.110(c) as applied in Supreme Court and commission decisions.

AS 23.30.110(c) states that "the party seeking a hearing shall file a request for a hearing together with an affidavit stating the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied." In *Kim v. Alyeska,*[44] the Supreme Court concluded that strict compliance with the affidavit requirement of § .110(c) was not required because

---

[42] *See, e.g., John's Heating Serv. v. Lamb*, 129 P.3d 919, 923-24 (Alaska 2006) (explaining that under the discovery rule, the statute of limitations begins to run when a person discovers or reasonably should have discovered that a cause of action has accrued); *Segupta v. Wickwire*, 124 P.3d 748, 753 (Alaska 2005) (noting that the limitations period begins to run when "the plaintiff has information sufficient to alert a reasonable person to the fact that he has a potential cause of action."); *Zok v. Estate of Collins*, 84 P.3d 1005, 1008 (Alaska 2004) (concluding that "no reasonable person" would have found that the notice that the plaintiff received was adequate); *Cameron v. State of Alaska*, 822 P.2d 1362, 1366 (Alaska 1992) (stating cause of action accrues when person discovers or reasonably should have discovered existence of all elements essential to cause of action).

[43] AS 23.30.128(b).

[44] 197 P.3d 193 (Alaska 2008).

requiring an affidavit in order to timely request a hearing could force claimants to choose between lying or having their claims denied. Instead, the Court permitted "substantial compliance . . . absent significant prejudice to the other party"[45] with the affidavit requirement:

> [W]e do not suggest that a claimant can simply ignore the statutory deadline and fail to file anything. . . . 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 hearing. Filing the hearing request and the request for additional time to prepare for the hearing constitutes substantial compliance . . . .[46]

Unlike *Kim,* this case is not centered on the requirement of filing an affidavit. In this case, the board found that Hessel failed to file anything requesting a hearing, or more time to prepare for one, within two years of Providence's controversion.

Even if *Kim* is interpreted broadly as permitting substantial compliance with the requirement to request a hearing, which Hessel asserts is the correct interpretation,[47] the board erred in concluding that Hessel had substantially complied with this requirement. Hessel was not a few days late in requesting a hearing. He was almost five months late.[48] Hessel argued that he substantially complied with prosecuting his

---

[45] *Id*. at 196 (quoting *S. Anchorage Concerned Coal., Inc. v. Mun. of Anchorage Bd. of Adjustment*, 172 P.3d 768, 772 (Alaska 2007) (citing *In re Wiederholt*, 24 P.3d 1219, 1233 (Alaska 2001))).

[46] 197 P.3d at 198 (footnotes omitted).

[47] The commission does not decide whether *Kim* permit substantial, rather than strict, compliance with the requirement to request a hearing within two years of a controversion, as distinguished from the requirement to file an affidavit attesting to one's readiness to go to hearing, because Hessel's arguments fail even under the broader interpretation.

[48] Hessel argued he timely filed a request for hearing because his request was filed on May 7, 2008, which was within two years after Providence's third controversion, filed on Nov. 7, 2006. R. 0045, 0013. The board thus erroneously stated

claim in a timely fashion because he attended several prehearing conferences, an employer medical evaluation, and a third doctor's evaluation.[49] But, as the commission has stated, "Substantial compliance does not mean late compliance, it means, . . . 'actual compliance in respect to the substance essential to every reasonable objective of the statute.' Where a statute provides a deadline, it is a reasonable objective of the statute that the deadline be met."[50] But, the object of the statute is not only to generally pursue the claim, it is to bring it to the board for a decision quickly so that the goals of speed and efficiency in board proceedings are met.[51] To do this, the statute requires a claimant request a hearing on his claim within two years of controversion. Hessel did not substantially comply with the deadline to request a hearing; he missed it altogether.

The board concluded Hessel substantially complied even though he missed the deadline because he reasonably believed that by filing a claim *before* Providence's

---

in its decision that Hessel's hearing request was not filed "within two years of any of the employer's controversions." Bd. Dec. No. 09-0065 at 11. Nevertheless, the running of AS 23.30.110(c) deadline was triggered by the employer's first controversion on his claims. The three other controversions merely supplemented the earlier one, instead of being a wholly new controversion of a new claim. *See Bailey v. Texas Instruments, Inc.*, 111 P.3d 321, 324-25 (Alaska 2005) (holding third claim was independent of the first two claims because it sought compensation for medical expenses incurred after the first claim was filed, and, therefore, AS 23.30.110(c) limitations period began running for the third claim after that claim was filed and controverted, not when the first claim was filed and controverted).

[49] Br. for Extraordinary Review at 6.

[50] *Lawson v. State of Alaska, Workers' Comp. Div.*, Alaska Workers' Comp. App. Comm'n Dec. No. 110, 24 (May 29, 2009) (citation omitted) (holding filing an appeal 15 days late did not substantially comply with the AS 23.30.127(a) deadline where appellants ignored their mail for weeks and, even after learning the decision was adverse to them, failed to timely file anything, even a technically deficient document, to request more time to prepare their appeal or to contact the commission before the filing deadline).

[51] *See Bailey v. Tex. Instruments, Inc.*, 111 P.3d 321, 325 n.5 (Alaska 2005) (noting that AS 23.30.110(c) was rationally connected to "the core purpose of the workers' compensation act: to establish a quick, efficient, and fair system for resolving disputes.").

controversion that he had complied with the requirement to request a hearing.[52] We conclude this belief is not reasonable and contradicts the plain meaning of AS 23.30.110(c). We note that the Supreme Court has held that "section 110(c) is clear."[53] Because the statute is clear, Hessel, who is seeking to avoid the section's plain meaning, has the greater burden to demonstrate the statute's meaning is not clear.[54]

The time-bar in § .110(c) is triggered only after the employee files a claim, defined as a written application for benefits with the board, and the employer controverts that claim.[55] In *Jonathan v. Doyon Drilling, Inc.*, an employer controverted benefits prior to the employee's filing a claim and also denied those benefits in its answer to the claim.[56] The employer argued that the employee's hearing request was untimely because it was not filed within two years of its initial controversion.[57] The Court held that only the second controversion, filed after the employee's written claim, started the running of the limitations period.[58] The Court's reading harmonized the § .110(c) time-bar for requesting a hearing with the separate statute of limitations for filing a claim in AS 23.30.105(a):

> If AS 23.30.110(c) requires the employee to request a hearing within two years of a controversion of the right to compensation, then the limitations period of section 105 is rendered essentially meaningless, because the employee would have to file a claim *and* be ready for a hearing within two years. Both limitations periods can be effective, however, if the limitations period of section 110(c) is only triggered after the employee files a claim. Then, AS 23.30.105(a) limits the time in which the employee must file a claim, while 110(c) requires the employee, once a

---

52 *John W. Hessel,* Bd. Dec. No. 09-0065 at 13-14.

53 *Tipton v. ARCO Alaska, Inc.,* 992 P.2d 910, 913 (Alaska 1996) (holding that AS 23.30.110(c) did not require claimant to request another hearing after his first one was cancelled because the parties were close to settling, but never did).

54 *Id.* at 912-13.

55 *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1123-24 (Alaska 1995).

56 *Id.* at 1121-22.

57 *Id.* at 1123-24.

58 *Id.* at 1124.

> claim has been filed and controverted by the employer, to prosecute the employee's claim in a timely manner.[59]

It defies logic to conclude that filing a claim *before* a controversion complies with a requirement to request a hearing *after* a claim is filed and then controverted. The Board's interpretation in this case writes the hearing request requirement out of the statute, rather than construing each part or section of a statute with every other part or section, "so as to produce a harmonious whole."[60] This interpretation is also erroneous because it is at odds with *Doyon*, which gave effect to the two distinct limitations periods in the Workers' Compensation Act.

Moreover, the plain language on the back of the controversion notice that Hessel received informed him about the separate requirements and distinctly different time limits to file a claim and request a hearing in two places. No evidence supports the board's assertion that Hessel's belief was reasonable because "no instruction on . . . the Controversion form indicat[es] that the employee may be required to comply with more than one of the items listed."[61] At the top, the notice stated, "If you disagree with the denial, you must file a timely written claim (see time limits below). . . . You must also request a timely hearing before the AWC Board (see time limits below)."[62] Under time limits, the notice specified the time period of filing a claim and separately described the time limit for requesting a hearing, concluding this section with: "Before requesting a hearing, you should file a written claim."[63] Nothing in the plain reading of the controversion notice suggests that filing a claim alone is sufficient to meet the requirement to timely file a request for hearing. Moreover, no evidence supports the board's assertion that Hessel filed a claim "in response to the first warning on the back

---

59 *Id*.

60 *Forest v. Safeway Stores*, 830 P.2d 778, 781 (Alaska 1992) (interpreting AS 23.30.015 which deals with workers' compensation "where third persons are liable").

61 *John W. Hessel*, Bd. Dec. No. 09-0065 at 13.

62 R. 0931, 0012, 0014, 0016 (emphasis omitted).

63 *Id.*

of the controversion form";[64] Hessel filed his claim *before* Providence's four controversions.[65]

Therefore, the commission concludes the board erred as a matter of law in concluding that Hessel substantially complied with AS 23.30.110(c).

b. The board erred in concluding that Hessel was legally excused from complying with § .110(c) because the board and division failed to assist him in pursuing his claim.

The board concluded that Hessel was legally excused from complying with AS 23.30.110(c) because the board and division failed to provide adequate instructions to him. The board found that the written notice "was insufficient here for this claimant"[66] because he "demonstrated limited ability to understand the warning."[67] In Hessel's case, the board concluded that a verbal warning should have been given during one of the prehearing conferences.[68] Therefore, the board concluded, "the division did not adequately inform the employee of the two-year deadline" as directed in *Richard v. Fireman's Fund.*[69]

---

64 *John W. Hessel*, Bd. Dec. No. 09-0065 at 13.

65 R. 0019-20; 0930, 0010, 0011, 0013, 0015.

66 *John W. Hessel*, Bd. Dec. No. 09-0065 at 12.

67 *Id.* at 13.

68 *Id*.

69 384 P.2d at 445. The board also concluded that Hessel had no notice of the AS 23.30.105(a) requirement to file a claim within two years of the last payment of benefits. Bd. Dec. No. 09-0065 at 14. This issue was not properly before the board because neither of the parties raised it and the board did not provide notice to the parties that it was going to address the issue. *Simon v. Alaska Wood Prods*., 633 P.2d 252, 256 (Alaska 1981) (holding Simon's attorney could not have reasonably believed that the work-relatedness issue was raised and that the board is limited to deciding "questions raised by the parties or by the agency upon notice duly given to the parties."). Moreover, because Hessel timely filed his claim, an issue Providence does not dispute, whether Hessel had notice of the claim-filing deadline is irrelevant. The board is limited to deciding only those questions necessary to resolve a claim. *See* AS 23.30.110(a) (providing the "board may hear and determine all questions *in respect to the claim.*") (emphasis added).

Recently, in *Apone v. Fred Meyer Inc.,*[70] the Supreme Court rejected the argument that the board failed in its *Richard* duty to a pro se litigant. While it affirmed that "the board's duty to assist pro se litigants is similar to the duty of a court,"[71] the Court stated that strategy decisions are "beyond what is required of the board."[72] The Court also suggested that where the board was not alerted to the claimant's difficulties with the discovery process, trial process, and deadlines, the board cannot be found to have failed to fulfill its duties to him.[73]

The commission concludes that there is not substantial evidence in the record to support the board's conclusion that the board failed its *Richard* duty to assist Hessel. *Richard* held that the board "owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law."[74] In *Bohlmann v. Alaska Construction & Engineering, Inc.*,[75] the Supreme Court considered the extent of the board's duty to inform a self-represented claimant about the AS 23.30.110(c) time-bar. Although the Court did not delineate the full extent of the *Richard* duty regarding the time-bar, the Court held that the board should have either corrected an employer's erroneous assertion that the AS 23.30.110(c) time-bar had run or explained to the claimant how to determine whether the deadline had passed.[76] Because the board concluded that Bohlmann would have timely filed had he known of the correct date, his reliance on the uncorrected

---

[70] _____ P.3d ____, Slip Op. No. 6463 (Alaska, March 19, 2010)

[71] Slip Op. No. 6463 at 15 (citing *Bohlmann v. Alaska Constr. & Eng'g, Inc.*, 205 P.3d 316, 320-21 (Alaska 2009)).

[72] *Id.*

[73] *Id.* at 16 n.25 (citing *Kaiser v. Sakata,* 40 P.3d 800, 804 (Alaska 2002) for holding that where pro se litigant does not inform court of his difficulties with discovery process, litigant is not entitled to greater guidance from court regarding mechanics of that process).

[74] 384 P.2d at 449.

[75] 205 P.3d 316 (Alaska 2009).

[76] *Id.* at 319-20.

error was sufficient to excuse his late filing of a hearing request.[77]

In *Tonoian v. Pinkerton Security*,[78] we held that claimants may be legally excused from a statutory deadline for reasons such as "lack of mental capacity or incompetence; lack of notice of the time-bar to a pro se litigant, and equitable estoppel against a governmental agency by pro se litigant."[79] Hessel bears the burden of establishing one of these legal excuses[80] and the board record lacks substantial evidence that he has done so. Although Hessel misunderstood the board-prescribed controversion notice, his misunderstanding does not amount to legal incompetence. Hessel's testimony makes it clear that he understood the notice when he read it at the hearing; his testimony was not that he was incapable of understanding it.[81] Moreover, nothing in the record reflects that he needed a guardian or conservator appointed because he lacked the capacity to conduct his own affairs.

Moreover, substantial evidence does not support a finding that Hessel lacked notice of the § .110(c) time-bar. In *Tonoian*, we held that mailing the board-approved controversion form with the warning about § .110(c) satisfied the obligation to give notice.[82] Four controversion notices were mailed to Hessel containing the board-prescribed warnings and Hessel acknowledged receiving them. He conceded that he failed to "read it right."[83] In *Tonoian*, the claimant received the controversion notices but did not open or read them. In that case, we concluded that although the claimant may have lacked actual knowledge of the § .110(c) deadline, she nevertheless received

---

77 *Id*. at 321.

78 App. Comm'n Dec. No. 029.

79 *Id*. at 11. *See also Omar v. Unisea, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 053, 8 (Aug. 27, 2007) (remanding for board to consider whether the circumstances as a whole constitute compliance with AS 23.30.110(c) sufficient to excuse the claimant's filing an incomplete affidavit of readiness for hearing).

80 *Tonoian,* App. Comm'n Dec. No. 029 at 9.

81 Hrg. Tr. 17-18.

82 App. Comm'n Dec. No. 029 at 12.

83 Hrg. Tr. 18:19-21.

notice of the deadline on the board-prescribed controversion forms.[84] Similarly, although Hessel testified he misread the controversion notice and thus may have lacked actual knowledge of the deadline, we conclude that he nevertheless cannot be excused from complying with the deadline because he received notice.

Finally Hessel's circumstances can be distinguished from *Bohlmann* and equitable estoppel.[85] Unlike *Bohlmann*, the board never gave Hessel misleading or incorrect information, or failed to correct the misleading statements of others. Unlike *Bohlmann*, the board made no finding that Hessel would have timely filed had he understood when the deadline was. Hessel conceded he alone was mistaken in his understanding of the deadline and that he understood the controversion notice when he read it at hearing.[86] No evidence suggests that Hessel sought a hearing and was denied instruction or denied access to a legal technician to assist him in preparing for hearing. The board faulted the division for not informing Hessel about the availability of assistance from a workers' compensation technician.[87] However, Hessel already knew about the technicians because one had helped him with his claim.[88] Moreover, *Richard* limited the board's duty to advising a claimant of "all the real facts which bear upon . . . his right to compensation, so far as it may know them."[89] Here, the board had no reason to know

---

[84] App. Comm'n Dec. No. 029 at 12.

[85] Equitable estoppel against a governmental agency requires a litigant to 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." *Tonoian*, App. Comm'n Dec. No. 029 at 13 (citation omitted).

[86] Hrg. Tr. 17-18.

[87] *John W. Hessel*, Bd. Dec. No. 09-0065 at 12-13.

[88] Hrg. Tr. 10:22 – 11:2. The board also specifically referred to the "Workers' Compensation and You" pamphlet, noting that it did not tell injured workers about the workers' compensation technicians. *John W. Hessel*, Bd. Dec. No. 09-0065 at 13 n.80. However, it did say that assistance was available and explained that an affidavit of readiness for hearing must be filed.

[89] 384 P.2d at 449.

of Hessel's misunderstanding, so it could not be expected to explain the § .110(c) time-bar again. Hessel admitted the controversion notice confused him,[90] but no evidence supports that he communicated his confusion to the board before the employer petitioned for dismissal.

In *Tonoian*, we also stated that the *Richard* duty "did not require division staff to seek out [the claimant] and urge her to file paperwork on time or to volunteer information that it may have reasonably assumed she has been told."[91] Hessel argues that he was not asking the board to seek him out, but to merely verbally mention the time-bar in the prehearing conferences that he attended.[92] However, the board's silence in prehearing conferences about the time-bar does not amount to an assertion that the § .110(c) deadline did not apply to him. Because Hessel received four controversion notices with the board-approved language informing him of the time-bar, and his education and work as a registered nurse permits the board to assume he could read well enough to understand the notices, the board designee reasonably could assume he was informed about the deadline. The commission concludes that the board erred by extending *Richard* to require a verbal warning of the AS 23.30.110(c) time-bar in Hessel's case.

Finally, we conclude that a single board panel lacks the authority to impose *Richard* duties on all division staff. Although Hessel argues that the board did not impose duties on the division but only on board designees,[93] the board decision referred at least five times to the *Richard* failures of the "division" or "division staff."[94] However, the board consists of nine separate hearing panels and is a separate entity from the Workers' Compensation Division.[95] The full board, through regulation, – not a single

---

90 Hrg. Tr. 17-18.

91 App. Comm'n Dec. No. 029 at 14.

92 Appellee's Br. at 3-4.

93 Appellee's Br. at 2.

94 *John W. Hessel*, Bd. Dec. No. 09-0065 at 12-13.

95 AS 23.30.002 (establishing division in the Department of Labor and

board panel – may authorize the division to assist with the board's responsibilities.[96] But the board cannot hire, supervise, or fire division staff. The commissioner, not the board, appoints the division's director.[97] The Workers' Compensation Act itself, rather than the board, grants the power to the commissioner to appoint the director.[98] Finally, the board may not delegate powers that properly belong to the commissioner, who serves as the executive officer and chair of the board,[99] or the powers that are directly granted to the commissioner or to the director under the Act. To the extent, then, that the board hearing panel in Hessel's case sought to impose affirmative duties on the division staff to fulfill the board's responsibilities, it exceeded the power of a single board hearing panel.

Moreover, the board hearing panel's imposition of duties to advise *pro se* claimants on the division staff extended *Richard* without evaluating whether such an extension was appropriate. In both *Richard* and *Bohlmann*, the Court held that the board (or its designee, the prehearing conference officer) had failed to inform a pro se claimant how to proceed with his claim. In *Richard*, the Court held the board failed to promptly inform the claimant on how to proceed after receiving his doctor's urgent recommendation for surgery by an out-of-state doctor.[100] Although the *Bohlmann* Court noted that it "refers to division staff and board staff interchangeably in this

---

Workforce Development); AS 23.30.005(a) (establishing nine board panels and specifying the membership of those panels). Each board panel must include three members, a representative for industry and a representative for labor, both of which are appointed by the governor and confirmed by the legislature; and the commissioner of the Department of Labor and Workforce Development or a hearing officer designated to represent the commissioner. AS 23.30.005(a). The commissioner or the commissioner's designee serves as chair of the panel. AS 23.30.005(b).

[96] AS 23.30.005(m) provides: "The board may by regulation delegate authority to the director to assist the board in administering and enforcing this chapter." Regulations are "adopted by the department" and must be "approved by a majority of the full board." AS 23.30.005(*l*).

[97] AS 23.30.002.

[98] AS 23.30.002.

[99] AS 23.30.005(b).

[100] 384 P.2d at 448-49.

opinion,"[101] it was the board designee, the prehearing conference officer, who failed to correct an employer's erroneous assertion that the AS 23.30.110(c) time-bar had run or to explain how to determine whether the deadline had passed during a pre-hearing conference,[102] an adjudicatory proceeding. The *Bohlmann* Court compared the board's *Richard* duties to those a trial court owes to pro se litigants because of the similar adjudicatory function of the board and trial courts.[103] It seems unlikely that the Court would extend such duties to the entire division because, unlike the board (and division staff designated to act for the board), the division is not generally an adjudicative body.

Therefore, we conclude a single board panel, as was the case here, cannot impose affirmative duties on the division. In addition, we conclude that the board did all that *Richard* and *Bohlmann* required to notify Hessel of the AS 23.30.110(c) deadline. Substantial evidence does not support that Hessel should be legally excused from compliance with the deadline.

c. The warning on the controversion form was sufficient notice to a reasonable person and a single board panel lacked authority to invalidate the controversion form.

The board determined that the use of the controversion notice was "ineffective as to this claimant."[104] The board did not find that Hessel lacked sufficient literacy or English language skill to understand the form, or that he lacked mental capacity to understand it. Hessel testified to his subjective confusion about what he was supposed to do. However, the board cannot invalidate the controversion notice as to a single claimant because one claimant's subjective understanding is not relevant to the validity of the notice; the board should ask whether the form provides sufficient notice to a reasonable person.[105] Because the board concluded Hessel's understanding of the

---

101 205 P.3d at 317 n.1.

102 *Id*. at 320.

103 *Id*. at 319-20.

104 *John W. Hessel*, Bd. Dec. No. 09-0065 at 12.

105 *See, e.g., John's Heating Serv.*, 129 P.3d at 923-24; *Segupta*, 124 P.3d at 753; *Zok*, 84 P.3d at 1008; *Cameron*, 822 P.2d at 1366.

warnings was "reasonable,"[106] the board determined that the language of the controversion notice was ineffective to a reasonable person, thus invalidating the form.

First, the commission concludes that a single board panel lacks the authority to reach this determination because the warnings on the controversion form implement a regulation. AS 44.62.640(a)(3) defines a regulation:

> every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; "regulation" does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public.

The Supreme Court has held that "indicia of a 'regulation' include: (1) whether the practice implements, interprets or makes specific the law enforced or administered by the state agency, and (2) whether the practice affects the public or is used by the agency in dealing with the public."[107] While a form itself is not a regulation, the requirement that all employers use a specific form, prescribed by the board or director, to comply with the statutes is a regulation.[108] The Administrative Procedures Act

---

[106] *John W. Hessel*, Bd. Dec. No. 09-0065 at 13.

[107] *E.g., Kachemak Bay Watch, Inc., v. Noah*, 935 P.2d 816, 825 (Alaska 1997).

[108] 8 AAC 45.182(a) (requiring use of "form 07-6105" to controvert a claim). *See* 23.30.110(c) (providing "[i]f the employer controverts a claim on a board-prescribed controversion notice . . . ."); AS 23.30.155(a) (stating "To controvert a claim,

requires a "regulation . . . to implement the law under which the form is issued; . . ."[109] The board did not find, and Hessel did not contend, that the form was not the one duly prescribed by the director under board regulation. Hessel did not contend that most people would misread the form. Moreover, the warnings given in the controversion forms make "specific the law enforced . . . by the state agency" and are "used by the agency in dealing with the public."[110]

The Department of Labor and Workforce Development must adopt, and the majority of the entire board approve, a regulation in order for the regulation to be valid;[111] therefore, only the department and full board may repeal a valid regulation. The commission concludes that a single board panel acting alone lacks the authority to invalidate the department's proper implementation of a board regulation.

Finally, regulations adopted under the Administrative Procedures Act are presumed "procedurally and substantively valid" and the burden of proving otherwise is placed on the challenging party.[112] Thus, the language in the controversion notice is presumed reasonable. The board lacked substantial evidence to overcome this presumption of reasonableness. The board claims the warnings provide "no indication . . . that employee's may be required to take more than one of the listed actions,"[113] but, as we discussed above, the notice in fact states in two different places that a claimant must both file a claim and request a hearing.[114]

Therefore, the commission concludes that the board lacked substantial evidence to decide the warnings on the controversion form provide insufficient notice of the § .110(c) deadline to a reasonable person. We also conclude that the board hearing

---

the employer must file a notice, on a form prescribed by the director, stating . . . .").

[109] *See* AS 44.62.640(a)(3).

[110] *See, e.g., Kachemak Bay Watch,* 935 P.2d at 825.

[111] AS 23.30.005(h), (i) & (*l*).

[112] *E.g., State, Alaska Bd. of Fisheries v. Grunert*, 139 P.3d 1226, 1232 (Alaska 2006).

[113] *John W. Hessel*, Bd. Dec. No. 09-0065 at 13.

[114] R. 0931, 0012, 0014, 0016.

panel lacked the authority to invalidate the notice specifically required by regulation in any event.

4. Conclusion.

The board erred in concluding that Hessel either substantially complied with the AS 23.30.110(c) deadline or was legally excused due to a lack of notice. The board erred by extending *Richard*[115] to apply to the non-adjudicatory division employees and by concluding that the board and division had not satisfied a duty of providing advice to Hessel on the § .110(c) deadline. Finally, the board lacked substantial evidence as well as the authority to invalidate the warnings in the controversion notice. Therefore, we REVERSE the board's decision and REMAND for action consistent with this decision.

Date: *March 24, 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair *Pro Tempore*

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission reversed the board's decision denying Providence Health Systems' petition to dismiss Mr. Hessel's November 6, 2005, workers' compensation claim. The commission sent the case back to the board to take action consistent with its decision. This means the board must dismiss Mr. Hessel's workers' compensation claim.

This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme

[115] 384 P.2d at 449.

Court within 30 days of the date this final decision is mailed or otherwise distributed 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. The appeals commission and the workers' compensation board are not parties.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If you wish to appeal (or petition for review or hearing) 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

This is a decision issued under AS 23.30.128(e), so 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 within 30 days after this decision was distributed or mailed. If a request for reconsideration of this final decision is filed on time 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 is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors this is a full and correct copy of the Final Decision No. 131 issued in the matter of *Providence Health System v. John Hessel,* AWCAC Appeal No. 09-014, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 24, 2010.

Date: *March 24, 2010*

Signed
B. Ward, Appeals Commission Clerk