Alaska Workers' Compensation Appeals Commission

Alaska Mechanical, Inc. and Zurich American Insurance Co., Petitioners, vs. Nathanael W. Harkness, Respondent.	Decision on Petition for Review Decision No. 176 February 12, 2013 AWCAC Appeal No. 12-004 AWCB Decision No. 12-0013 AWCB Case No. 200420003

Decision on petition for review of Alaska Workers' Compensation Board Interlocutory Decision and Order No. 12-0013, issued at Fairbanks on January 13, 2012, by northern panel members Zeb Woodman, Member for Labor, and Krista Lord, Member for Industry; Robert Vollmer, Chair, dissenting in part.

Appearances: Rebecca Holdiman Miller, Holmes Weddle & Barcott, P.C., for petitioners, Alaska Mechanical, Inc. and Zurich American Insurance Co.; Robert M. Beconovich, The Law Office of Robert M. Beconovich, for respondent, Nathanael W. Harkness.

Commission proceedings: Petition for Review filed January 30, 2012; Opposition to Petition for Review filed February 15, 2012; Order on Petition for Review (granting) issued March 8, 2012; briefing completed September 24, 2012; oral argument held January 8, 2013.

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

By: Laurence Keyes, Chair.

1. Introduction.

On December 21, 2009, petitioners, Alaska Mechanical, Inc., and its workers' compensation insurer, Zurich American Insurance Co.,[1] filed a petition to dismiss the workers' compensation claim filed by Alaska Mechanical's former employee, respondent,

[1] Where appropriate, "Alaska Mechanical" refers to both Alaska Mechanical, Inc. and Zurich American Insurance Company.

Nathanael W. Harkness (Harkness), based on two provisions of the Alaska Workers' Compensation Act (Act), AS 23.30.110(c)[2] and AS 23.30.105(a).[3] The Alaska Workers' Compensation Board (board) issued an interlocutory decision on the petition for dismissal, in which a majority of the board denied it.[4] Alaska Mechanical petitioned the Workers' Compensation Appeals Commission (commission) for review of the board's denial under AS 23.30.110(c) only. We reverse.

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[2] **AS 23.30.110. Procedure on claims.**

. . . .

(c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. After completion of the hearing the board shall close the hearing record. If a settlement agreement is reached by the parties less than 14 days before the hearing, the parties shall appear at the time of the scheduled hearing to state the terms of the settlement agreement. Within 30 days after the hearing record closes, the board shall file its decision. If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

[3] R. 0121-22.

[4] *Nathanael W. Harkness v. Alaska Mechanical, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 12-0013 (Jan. 13, 2012).

2. Factual background and proceedings.

On November 2, 2004, while working for Alaska Mechanical as a carpenter, Harkness was injured when a wind gust dislodged a 16-foot 2x4 that fell and struck him on the back of the neck.[5] Harkness began treating with Peter Marshall, M.D., on November 9, 2004, for neck pain. Initially, medication was prescribed and Harkness was placed on light duty for one week.[6] On November 18, 2004, Dr. Marshall ordered Harkness off work for a week.[7] His symptoms worsened; his time off work was extended until December 13, 2004.[8]

On December 8, 2004, Dr. Marshall referred Harkness to John W. Joosse, M.D., for an orthopedic consultation.[9] Harkness reported to Dr. Joosse that he was doing better since seeing Dr. Marshall, however he indicated his neck was still bothering him and it got worse when doing lifting. Dr. Joosse curtailed Harkness's work restrictions.[10] Alaska Mechanical paid him temporary total disability (TTD) benefits from November 19, 2004, to December 20, 2004.[11]

At his deposition in this matter, Harkness testified that between December 2004 and September 2006 he was in California.[12] While there in 2005, he tried to work as an estimator, production manager, and carpenter.[13] However, he could not perform the work of an estimator and production manager because he had a hard time with dates. He was fired from those jobs.[14] Harkness stated that he could not perform the work of

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5 R. 0001.

6 R. 0456-57.

7 R. 0467-68.

8 R. 0477-78.

9 R. 0482-83.

10 R. 0481.

11 R. 0004.

12 Harkness Dep. 13:5-11, Nov. 14, 2007.

13 Harkness Dep. 15:2–5, 17:5–18:9, 26:1-8, Nov. 14, 2007.

14 Hr'g Tr. 62:10-13, 64:20–65:4, Aug. 18, 2011.

a carpenter because of neck pain.[15] Upon returning to Alaska from California, Harkness attended a six-week truck driving training program in Anchorage but could not work as a truck driver because his neck would get sore and make him dizzy, and he could not control a motor vehicle.[16] In terms of medical treatment, Harkness testified that he eventually saw a neurologist, James Froelsch, M.D.,[17] who then referred him to Michel Gevaert, M.D.,[18] who in turn referred him to David D. Beal, M.D.[19] On March 16, 2007, Dr. Beal diagnosed Harkness with a possible left perilymphatic fistula, and recommended surgical repair.[20]

On June 4, 2007, Harkness filed a reemployment benefits eligibility request with the Division of Workers' Compensation (Division). It indicated that he had just learned of this benefit, that Dr. Marshall and workers' compensation staff had told him to give his injury more time to heal, and that he had tried to work as a carpenter or truck driver, but was no longer able to safely do so.[21] On June 8, 2007, he filed a workers' compensation claim for TTD, permanent partial impairment (PPI), medical costs, transportation costs, penalty, interest, and a Second Independent Medical Evaluation (SIME). In describing his injuries, Harkness stated he had "brain damage" diagnosed

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15 Hr'g Tr. 60:1-19, Aug. 18, 2011.

16 Harkness Dep. 12:10-25, 14:24–15:2, Nov. 14, 2007.

17 Harkness Dep. 42:6-25, Nov. 14, 2007.

18 Harkness Dep. 45:13-18, Nov. 14, 2007.

19 Harkness Dep. 48:10-25, Nov. 14, 2007.

20 R. 0493-94. Dr. Beal eventually performed that surgery on October 15, 2010. R. 1085-86.

21 R. 1243.

by Dr. Beal.[22] On July 19, 2007, he filed an Affidavit of Readiness for Hearing (ARH).[23] On July 20, 2007, Alaska Mechanical filed its first controversion of the claim.[24]

No "affidavit in opposition" was filed in response to the July 19, 2007, ARH,[25] nor was a hearing scheduled in relation to it.[26] In the 60 days between July 19, 2007, and September 17, 2007, there were seven hearing days on the master calendar available for a hearing on the trailing calendar in Fairbanks.[27] On September 17, 2007, the parties and attorney Michael J. Wenstrup (Wenstrup) attended a prehearing conference (PHC). At the PHC, counsel for Alaska Mechanical acknowledged that a medical dispute existed between the parties. Wenstrup stated that he would file an Entry of Appearance reflecting his representation of Harkness, that he would withdraw the ARH that Harkness had filed on July 19, 2007, and that he would file another ARH if necessary.[28] The PHC summary stated: "ARH (withdrawn by [Wenstrup])[.]" The following day, September 18, 2007, Wenstrup filed his appearance.[29]

Another PHC took place on October 17, 2007. Wenstrup was not at the PHC; instead, his paralegal, Richard Basarab, and Harkness, attended. The PHC summary for that conference indicated: "ARH (withdrawn by [Wenstrup])[.]" The summary also noted that "[t]he parties agreed that there appears to be a dispute that warrants an

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[22] R. 0014-15.

[23] R. 0016. AS 23.30.110(c) states in part: "Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing."

[24] R. 0006-07. Alaska Mechanical also controverted the claim on January 2, 2008, and on January 2, 2009, for failure to return medical releases. R. 0008-09.

[25] AS 23.30.110(c) provides in part: "An opposing party shall have 10 days after the hearing request is filed to file a response."

[26] AS 23.30.110(c) reads in part: "If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request."

[27] Division's master hearing calendar.

[28] R. 1175-76.

[29] R. 0022.

SIME and that [Wenstrup] will initiate the SIME form and serve it on [Alaska Mechanical's] attorney. When the SIME form is filed with the Board a follow-up PHC will be scheduled[.]"[30] The SIME form was never filed with the board.[31]

On November 27, 2009, Harkness filed a handwritten document which read, in relevant part:

> Mike Wenstrup and Richard A. Basarab no longer have my permission to file any paper-work or speak on my behalf for anything [except] following proper procedure for terminating our relationship. I have [verbally] requested my "complete" (Including x-ray CD's) file back from them both. The reason for this action is Mike & Rich's inability to move my case forward so I can get the medical attention I need, and is rightly owed to me by the workers comp insurance co. It's been over 5 yrs. now since my on the job (11/2/04) injury. I need an ear [surgery] & ongoing treatment for my spine to stabilize my equilibrium & so I can be once again [medically] stable.[32]

The board treated this filing as a withdrawal of attorney. Between Wenstrup's appearance on Harkness's behalf in September 2007 and his discharge by Harkness in late November 2009, there was little activity on the claim, as reflected in the board's file.[33]

On December 16, 2009, Harkness and counsel for Alaska Mechanical attended a PHC. Harkness stated he would be contacting another attorney regarding representation. He wanted to schedule an SIME, however, Alaska Mechanical opposed an SIME, because it had only recently received signed releases and did not possess the

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30 R. 1177-78.

31 *See Harkness*, Bd. Dec. No. 12-0013 at 39 (dissenting opinion).

32 R. 0393.

33 *See Harkness*, Bd. Dec. No. 12-0013 at 6. On the other hand, contrary to the board majority's finding that there was no Request for Conference in the board's file dated September 10, 2008, the record on appeal includes one, R. 0116, filed by Wenstrup's office on behalf of Harkness. Three prehearings were scheduled and rescheduled in October and November of 2008, however, they were not held. R. 1179-81. One prehearing notice, R. 1181, indicates that Wenstrup had still not initiated and served the SIME form on counsel for Alaska Mechanical, as he was instructed to do at the PHC on October 17, 2007. R. 1177.

medical records corresponding to those releases. It also asserted new defenses under AS 23.30.105(a) and .110(c). The PHC summary noted: "ARH filed 07/19/07 (withdrawn 09/17/09 by [Wenstrup])."[34]

That same day, December 16, 2009, Harkness filed a petition seeking an extension of time within which to hold a hearing owing to the lack of action on his claim by Wenstrup.[35] On December 17, 2009, Alaska Mechanical served its fourth post-claim controversion based on all prior controversions and AS 23.30.105(a) and .110(c).[36] On December 21, 2009, the board received the petition to dismiss that is the subject of the instant petition for review to the commission.[37] Harkness filed a handwritten opposition to the petition to dismiss on December 23, 2009.[38]

On January 4, 2010, Harkness and counsel for Alaska Mechanical attended another PHC. Harkness explained that the purpose of his December 16, 2009, petition was to seek an extension of time for filing an ARH.[39] On January 8, 2010, Harkness filed an ARH relating to that petition.[40] On January 15, 2010, Alaska Mechanical filed an ARH in connection with its petition to dismiss filed December 21, 2009.[41]

Another PHC was held on March 17, 2010, which Harkness could not attend, as he was out of town. Alaska Mechanical, through counsel, requested a hearing date on

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[34] R. 1188-89. The board majority noted that this summary and numerous subsequent summaries erroneously indicated that the ARH Harkness filed on July 19, 2007, was withdrawn by Wenstrup on September 17, *2009*. The ARH was withdrawn on September 17, *2007*. *See Harkness*, Bd. Dec. No. 12-0013 at 6.

[35] R. 0119-20.

[36] R. 0010. Alaska Mechanical had previously filed and served a second and a third controversion. *See Harkness*, Bd. Dec. No. 12-0013 at 5 and n.24, *supra*.

[37] R. 0121-22.

[38] R. 0123.

[39] R. 1190-91.

[40] R. 0126.

[41] R. 0127.

its petition to dismiss and the board's designee set a June 3, 2010, hearing date.[42] On May 18, 2010, Harkness filed what was treated by the board as a petition to the Director of the Division for appointment of a guardian and a petition for a continuance of the hearing date.[43] At a PHC on May 28, 2010, Alaska Mechanical indicated it would file an answer to the petition for appointment of a guardian. The parties agreed to continue the hearing on the petition to dismiss pending the Director's ruling on the guardianship petition.[44] On August 9, 2010, the Director denied the petition for the guardianship appointment, based on medical opinions that Harkness functioned at a diminished capacity. The Director concluded the findings of diminished functional capacity did not equate to findings that Harkness was mentally incapacitated.[45]

At another PHC on October 4, 2010, the board's designee advised the parties of the denial of the petition for appointment of a guardian and informed Harkness that he could petition the probate court directly if he still wanted to have a guardian appointed. A hearing on Alaska Mechanical's petition to dismiss was set for January 20, 2011. Harkness again expressed his intent to have an attorney represent him at hearing.[46] Another PHC was held on October 15, 2010, attended by counsel for Alaska Mechanical.[47] The board's designee expressed her opinion that Harkness might not be mentally competent and requested the Chief of Adjudications to recommend to the Director that a guardian be appointed for Harkness.[48]

At a PHC on December 15, 2010, the parties agreed to cancel the hearing set for January 20, 2011, and to await the Director's decision on the board designee's recommendation to appoint a guardian for Harkness. The PHC summary stated: "ARH

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42 R. 1202-03.

43 R. 0414-16.

44 R. 1207-08.

45 R. 0423-24.

46 R. 1211-12.

47 R. 1216-19. Harkness had surgery that day. *See* n.20, *supra*.

48 R. 1216-19.

filed 7/19/07 (withdrawn 09/17/07 by EE's former counsel)[.]"[49] On December 16, 2010, the Director denied the designee's request to seek appointment of a guardian for Harkness.[50]

On February 17, 2011, Wenstrup filed another appearance.[51] At the PHC that day, he said he was uncertain whether the state court had appointed a guardian for Harkness and indicated he would make inquiries. The parties agreed to postpone setting a date for a hearing on Alaska Mechanical's petition to dismiss until the guardianship issue was resolved.[52] At a PHC on March 14, 2011, Wenstrup reported that Harkness did not have a guardian. The parties set a June 9, 2011, hearing date on the petition to dismiss.[53]

On May 9, 2011, Alaska Mechanical filed a petition to disqualify Wenstrup as counsel for Harkness on the grounds he might be called as a fact witness.[54] On June 1, 2011, Wenstrup indicated he did not oppose the petition to disqualify him. He requested a continuance of the hearing on the petition to dismiss so that Harkness could retain other counsel. The hearing was continued until August 18, 2011.[55]

On August 16, 2011, Wenstrup withdrew and attorney Robert M. Beconovich (Beconovich) was substituted as counsel for Harkness.[56] At the hearing on August 18, 2011, Wenstrup testified he thought that the parties had agreed to an SIME.[57] He also testified that the attorney-client relationship between him and Harkness had broken

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[49] R. 1226-27. This summary and future summaries accurately state the date, September 17, *2007*, of the withdrawal of the ARH filed by Harkness on July 19, 2007. *See* n.34, *supra*.

[50] R. 1224-25.

[51] R. 0324.

[52] R. 1232-33.

[53] R. 1234-35.

[54] R. 0325-26.

[55] R. 1239-40.

[56] R. 0449.

[57] Hr'g Tr. 15:2–19:16, Aug. 18, 2011.

down because Harkness had behaved erratically, was frustrated, and was subject to mood swings. In 2009, according to Wenstrup, his behavior worsened. It was Wenstrup's opinion that Harkness was not competent.[58]

The board majority ultimately made the following "findings." Harkness was never given a hearing on his petition for appointment of a guardian or informed that the Director's denial of his petition was appealable. None of the PHC summaries notified Harkness or his attorney of the significance of failing to file, or re-file, an ARH, or when the deadline for filing one under AS 23.30.110(c) would run. Board personnel never advised Harkness when he was unrepresented, or his lawyer, of any consequences arising from the withdrawal of the ARH that he filed on July 19, 2007, nor advised him of any additional steps that needed to be taken thereafter to avoid dismissal of the claim under AS 23.30.110(c). Similarly, no statutes or regulations gave Harkness or his attorney notice of any consequences arising from the withdrawal or additional steps to take to avoid dismissal. Finally, based on the evidence, Harkness lacked the mental capacity to exercise the powers granted to him, or perform the duties required of him under the Act, in 2008 and 2009.[59]

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[60] Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion.[61] Whether the quantum of evidence is substantial enough to support a

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58 Hr'g Tr. 20:4–21:4, 27:7-12, Aug. 18, 2011.

59 *See Harkness*, Bd. Dec. No. 12-0013 at 11-12.

60 *See* AS 23.30.128(b).

61 *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

particular finding is a legal question.[62] We exercise our independent judgment when reviewing questions of law and procedure.[63]

4. Discussion.

In the commission's view, this proceeding presents primarily mixed questions of fact and law. As to each such issue, we will combine our discussions whether substantial evidence supports the board majority's findings and whether there was any legal error in its analysis.

a. Were certain requirements in AS 23.30.110(c) met?

To avoid dismissal of a claim, a hearing must be requested "within two years following the filing of [a] controversion notice[.]"[64] This portion of subsection .110(c) is at the center of the parties' dispute here. The evidence shows that Harkness filed his claim on June 8, 2007, and requested a hearing by filing an ARH on July 19, 2007. Shortly thereafter, on July 26, 2007, Alaska Mechanical filed its first controversion notice. Subsequently, on September 17, 2007, Wenstrup purportedly withdrew the hearing request.[65] This undisputed sequence of events gives rise to two legal issues. Harkness requested a hearing before the controversion was filed, not following it. 1) Did that ARH initially toll the running of the two-year time limit within which to request a hearing, as provided in subsection .110(c)? There is no mention in that subsection whether a hearing request, once made, can be withdrawn. 2) Was Wenstrup's withdrawal of the ARH that Harkness had filed legally effective?

With respect to the first issue, the Alaska Supreme Court (supreme court) has stated that substantial compliance with AS 23.30.110(c) is all that is required of a

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62 *See, e.g., Tinker v. Veco, Inc.*, 913 P.2d 488, 492 (Alaska 1996).

63 *See* AS 23.30.128(b).

64 AS 23.30.110(c).

65 The board majority characterized the withdrawal in this fashion. *See Harkness*, Bd. Dec. No. 12-0013 at 11. However, as discussed below, the characterization was prompted by the board majority's faulty *legal* conclusion that an ARH cannot be withdrawn, not on a factual finding to that effect.

claimant.[66] We conclude that, *in the specific circumstances of this case*,[67] Harkness substantially complied with subsection .110(c), for two reasons. First, even though Harkness filed his ARH before Alaska Mechanical controverted his claim, his request for a hearing and the filing of the controversion were roughly contemporaneous, having occurred only a week apart. We are reluctant to exalt form over substance, and declare that the request for a hearing *must* take place after a controversion is filed. Second, despite the filing of the ARH preceding the filing of the controversion, Harkness was actually fulfilling the subsection's purpose. He was expediting the claim process by promptly requesting a hearing after filing his claim.[68] Therefore, at least initially, Harkness had substantially complied with subsection .110(c).[69]

The second issue, whether the ARH was effectively withdrawn by Wenstrup, is more complex. Preliminarily, we must consider, factually, whether Wenstrup was acting

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[66] *See Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 196 (Alaska 2008).

[67] Cases such as *Providence Health System v. Hessel*, Alaska Workers' Comp. App. Comm'n Dec No. 131 (March 24, 2010)(*Hessel*), *Kim*, and *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910 (Alaska 1996) are distinguishable on their facts.

[68] *See Hessel*, App. Comm'n Dec. No. 131 at 12 (citing *Bailey v. Texas Instruments, Inc.*, 111 P.3d 321, 325 n.5 (Alaska 2005)).

[69] We note that if we were to have concluded that the ARH filed by Harkness on July 19, 2007, did not substantially comply with AS 23.30.110(c), there was no effective request for a hearing on his claim until Harkness filed an ARH on January 8, 2010. *See* n.40, *supra*. By then, more than two years, five months, had passed since Alaska Mechanical first controverted the claim.

on behalf of Harkness when he withdrew it. A board regulation, 8 AAC 45.178,[70] requires individuals who represent parties before the board to document that representation by filing appearances and withdrawals with the board. The purpose of the regulation is to prevent a party from later disavowing the acts of his, her, or its representative.[71] Here, despite the evidence that both Wenstrup and Harkness attended the PHC on September 17, 2007,[72] the board majority found that Wenstrup was not representing Harkness at that PHC and did not have authority to withdraw the ARH Harkness had previously filed. Its basis for doing so was that Wenstrup had not yet filed an appearance.[73] The appearance was filed the following day. We conclude that substantial evidence does not support the board majority's findings. Harkness was present at the PHC, expressed no objection to Wenstrup representing him, and acquiesced in the ARH being withdrawn. In our view, these facts constitute substantial evidence that, not only was Wenstrup representing Harkness as of September 17, 2007, he had the authority to withdraw the ARH at that time. We consider the board majority's contrary findings to have been overly reliant on a technicality, that Wenstrup's formal appearance was not filed until the next day.

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[70] 8 AAC 45.178 reads in relevant part:

> (a) A person who seeks to represent a party in a matter pending before the board shall file a written notice of appearance with the board, and shall serve a copy of the notice upon all parties. . . .
>
> (b) A representative of a party may withdraw an appearance by filing with the board a written notice of withdrawal and by serving the notice upon all parties. The withdrawal becomes effective upon receipt by the board.

[71] *See Harkness*, Bd. Dec. No. 12-0013 at 44 (dissenting opinion) (citing *Ruiz v. Trident Seafoods Corp.*, Alaska Workers' Comp. Bd. Dec. No. 11-0076 at 7 (May 16, 2011)).

[72] R. 1175.

[73] *See Harkness*, Bd. Dec. No. 12-0013 at 29.

Secondarily, the commission must decide whether the purported withdrawal by Wenstrup had any legal effect. According to the board majority it did not, because there is no legal authority for withdrawing an ARH.[74] We disagree.

The dissenting opinion pointed out, as of the PHC on September 17, 2007, that Wenstrup "was new to the case and wanted to pursue an SIME [and Harkness] was not ready to proceed to hearing[.]"[75] Practically speaking, as provided for in AS 23.30.110(h),[76] the withdrawal had the effect of a request for a continuance of a yet-to-be-calendared hearing. Moreover, the board designee's acknowledgement in the PHC summary that the ARH was withdrawn constituted board approval of the continuance. In the language of AS 23.30.110(h), the granting of the request for a continuance rendered the ARH filed by Harkness "inoperative, and the two-year time period specified in (c) of [AS 23.30.110] continue[d] to run again[.]"

In addition to AS 23.30.110(h), a board regulation also supports the principle that an ARH can be withdrawn at a prehearing. 8 AAC 45.065(a)(2), which covers prehearings, allows the board's designee to amend papers that have been filed, which would necessarily include the ARH. The withdrawal can be viewed as an amendment to the ARH.

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74 *See Harkness*, Bd. Dec. No. 12-0013 at 28-29.

75 *Harkness*, Bd. Dec. No. 12-0013 at 45 (dissenting opinion).

76 AS 23.30.110(h) reads:

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

Finally, there is case law authority that an ARH can be withdrawn. In *Jonathan v. Doyon Drilling, Inc.*,[77] the ARH filed by the employee was canceled at a PHC. The employee subsequently filed another ARH, which the supreme court recognized as the operative affidavit of readiness.[78] The cancellation of the ARH was tantamount to a withdrawal. Also, there are board decisions which hold that a withdrawn ARH does not continue to toll the AS 23.30.110(c) time limit.[79] It stands to reason that, if a withdrawn ARH does not toll the subsection, an ARH can be withdrawn.

In the commission's view, the foregoing is legal authority that the ARH could be, and was, effectively withdrawn. Absent some other reason for tolling the running of the two-year time limit for filing an ARH, it resumed running on September 17, 2007.

b. Was there a violation by the board of the requirement in AS 23.30.110(c) to hold a hearing within 60 days?

AS 23.30.110(c) states in part: "If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request." Here, Harkness filed his ARH on July 19, 2007. The hearing request was unopposed by Alaska Mechanical.[80] The 60-day deadline for scheduling a hearing was September 17, 2007, which, coincidentally, was the date of the first PHC. Because the board neglected to schedule a hearing within 60 days of the hearing request, the board majority declined to dismiss the claim.[81]

We conclude, notwithstanding the board majority's finding that the board failed to timely schedule a hearing, the finding is legally inconsequential. Even though the board had not scheduled a hearing date within 60 days, a PHC was held on the 60th day following the filing of the ARH. At that PHC, pursuant to AS 23.30.110(h), a

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[77] 890 P.2d 1121 (Alaska 1995).

[78] *See Jonathan*, 890 P.2d at 1122.

[79] *See, e.g., Victoria v. Browns Electrical Supply Co., Inc.*, Alaska Workers' Comp. Bd. Dec. No. 03-0289 (Dec. 5, 2003).

[80] Alaska Mechanical did file a controversion of the claim on July 26, 2007, which is at least some indication the claim was disputed.

[81] *See Harkness*, Bd. Dec. No. 12-0013 at 26-27.

hearing continuance was sought and granted,[82] and, pursuant to 8 AAC 45.065(a), the ARH was amended by withdrawing it. These procedural developments distinguish this matter from others cited by the board majority.[83] As the dissenting opinion pointed out:

> [T]o whatever extent the board was about to have erred, or appeared to have already erred [in terms setting a hearing within the 60-day deadline], was rendered moot by [Harkness's] withdrawal of his own ARH. [Harkness] was not prejudiced by any [b]oard error related to its purported failure to schedule a hearing within the statutory timeframe because [Harkness], himself, was not ready to proceed to a hearing. By withdrawing his ARH, [Harkness] afforded himself additional time to prepare his claim. Therefore, any purported [b]oard failure to schedule a hearing within the statutory timeframe is entirely distinct from the inquiry whether or not [Harkeness] filed an ARH with two years of [Alaska Mechanical's] controversion.[84]

Unlike the board majority, we are unable to conclude that the board's failure to schedule a hearing within 60 days constituted legally sufficient grounds for denying Alaska Mechanical's petition to dismiss. It should not have been denied on this basis.

c. Did the board fail to properly advise Harkness?

The board majority held that, based on a line of cases cited in its decision,[85] the board's failure to properly advise Harkness how to pursue his claim prevented dismissal of the claim.[86] In reaching this holding, the majority found that, while he was unrepresented, Harkness had filed a valid ARH, but the board did not advise him of his rights or duties under AS 23.30.110(c), or that "some new 'retriggering' event" might

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[82] *See* Part 4(a), *supra*.

[83] *See Harkness*, Bd. Dec. No. 12-0013 at 20 (citing *Summers v. Korobkin*, 814 P.2d 1369, 1372 (Alaska 1991) and *Kim*, 197 P.3d 193, 198 n.23).

[84] *Harkness*, Bd. Dec. No. 12-0013 at 45 (dissenting opinion).

[85] *See Harkness*, Bd. Dec. No. 12-0013 at 12-17 (citing *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445 (Alaska 1963); *Dwight v. Humana Hosp. Alaska*, 876 P.2d 1114 (Alaska 1994); *Bohlmann v. Alaska Constr. & Eng'g, Inc.*, 205 P.3d 316 (Alaska 2009); *Gilbert v. Nina Plaza Condo Ass'n*, 64 P.3d 126 (Alaska 2003); and *Breck v. Ulmer*, 745 P.2d 66 (Alaska 1987)).

[86] *See Harkness*, Bd. Dec. No. 12-0013 at 27-28.

require Harkness to take further action to prevent dismissal of his claim. The board majority went on to find that, while Harkness was represented by Wenstrup, the board did not advise *them* of any additional requirements to avoid dismissal under subsection .110(c).[87]

We accept, for the purposes of the instant discussion, the foregoing findings by the board majority. As a matter of law, however, the commission does not agree with the majority's conclusion that, under these facts, the board was required to advise Harkness, while unrepresented, or Harkness *and* Wenstrup, during the existence of the attorney-client relationship between them. Our reasons for doing so are as follows.

In one of the cases cited by the board majority, *Richard*, the supreme court held "that a workmen's compensation 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."[88] Here, focusing on the initial timeframe during which Harkness was unrepresented, he had filed an ARH. Having satisfied the requirement in subsection .110(c) that a hearing must be requested within two years of a controversion, so far as board personnel knew, Harkness had complied with that requirement. There was no need to advise him in that respect. Moreover, at that time, board personnel would have no reason to anticipate that, in the future, the ARH would be withdrawn, and advise Harkness accordingly. While Wenstrup was representing Harkness, board personnel would be justified in presuming that Wenstrup was capable of advising him,[89] eliminating any duty on their part to do so.[90] Thus, board personnel would have no duty to alert Harkness and Wenstrup that some new retriggering event,

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[87] *See Harkness*, Bd. Dec. No. 12-0013 at 27-28.

[88] *Richard*, 384 P.2d 449 (footnote omitted)(italics added).

[89] *See Tonoian v. Pinkerton Security*, Alaska Workers' Comp. App. Comm'n Dec. No. 029, 14 (Jan. 30, 2007).

[90] In fact, advising Harkness while he was represented by Wenstrup could be viewed as interfering with the attorney-client relationship. *See Parker v. Tomera*, 89 P.3d 761, 770 (Alaska 2004).

like withdrawing the ARH Harkness had filed, might require further action to prevent dismissal of the claim.[91] Lastly, how were board personnel to know that, given the initial flurry of activity on the claim and Wenstrup's appearance for Harkness, the claim would not be vigorously pursued? They could not.

In another case cited by the board majority on the board's duty to advise Harkness, *Bohlmann*, the claimant was *pro se*,[92] that is, he was not represented by an attorney. *Bohlmann* also involved the subsection .110(c) two-year time limit for requesting a hearing. The supreme court held: "Because there is no indication in the appellate record that the board or its designee informed Bohlmann of the correct deadline or at least how to determine what the correct deadline was, the board should deem his affidavit of readiness for hearing timely filed. This is the appropriate remedy[.]"[93] Unlike Bohlmann, here, Harkness was represented by counsel. In our view, this distinction makes the holding in *Bohlmann* inapplicable. Between September 17, 2007, when Wenstrup attended the PHC, and November 27, 2009, when Harkness dismissed him, a period in excess of two years, Harkness was represented. The board was under no obligation to advise either of them regarding the two-year time limit in AS 23.30.110(c).

Finally, Harkness argued to the commission that the board had a duty to advise him, even while he was represented by Wenstrup, because he dropped in at the board regularly.[94] We reject this argument for several reasons. First, as already stated, we question whether there was any duty on the board's part to advise Harkness while he was represented by counsel. Second, the hearing testimony that supposedly supports this argument is vague as to the timeframe Harkness was referring to when he visited

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[91] Paradoxically, under the board majority's reasoning, an ARH cannot be withdrawn, prompting the question: If an ARH cannot be withdrawn, what reason would the board have to alert Harkness to the ramifications of withdrawing his?

[92] *See Bohlmann*, 205 P.3d at 319.

[93] *Bohlmann*, 205 P.3d at 321.

[94] Hr'g Tr. 53:16–54:2, Aug. 18, 2011.

the board. It may relate to the mid-2007 timeframe, before he was represented by Wenstrup. However, as previously mentioned, Harkness had filed an ARH shortly after filing his claim, eliminating any need to advise him of the subsection .110(c) deadline. If the testimony relates to the timeframe after Harkness dismissed Wenstrup, by then the two-year time limit for requesting a hearing had run, rendering the failure to advise Harkness at that time harmless. Third, it does not take into account that board personnel may have known that Harkness was represented by counsel, if the visits occurred while he was. Under those circumstances, they might not take it upon themselves to advise him.

d. Was Harkness competent?

The board majority declined to dismiss Harkness's claim because it found that he lacked adequate mental capacity to perform the duties required of him under the Act, which necessarily would include meeting the subsection .110(c) deadline for requesting a hearing.[95] The commission is not qualified to pass judgment on whether or not Harkness was competent. Nevertheless, we believe that there was enough evidence in the record to raise concerns in this respect, at the very least. Thus, for present purposes, we accept the board majority's finding.

Here, the specific issue is compliance with the subsection .110(c) two-year deadline for requesting a hearing, not with the provisions of the Act generally. As previously discussed, we have rejected the board majority's holding that the ARH filed by Harkness on July 19, 2007, could not be withdrawn at the PHC on September 17, 2007.[96] Therefore, the focus of our analysis is on the circumstances that existed in the two years following withdrawal of the ARH. For those two years, there was no

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[95] *See Harkness*, Bd. Dec. No. 12-0013 at 30-31.

[96] *See* Part 4(a), *supra*.

operative ARH, the subsection .110(c) time limit to file a request for a hearing continued to run, and another hearing request could have been filed, but was not.[97]

Between the withdrawal of the ARH on September 17, 2007, and November 27, 2009, when Harkness dismissed Wenstrup as his attorney, a period of two years, two months, Harkness was represented by counsel. Even though he had legal representation, the board majority did not attach any significance to that fact. The commission does not share that view. Certainly, if Harkness was unrepresented in that timeframe, whether he was mentally competent to file a timely request for a hearing would be a consideration. However, that entire time, Harkness had an attorney looking after his interests, someone familiar with the Act, including the subsection .110(c) deadline. Because Wenstrup could have filed a timely hearing request on Harkness's behalf, it alleviates any concern that Harkness might have been mentally incapable of doing so himself.

In the exercise of the commission's independent judgment, as a matter of law we conclude that the board majority erred. It did so when, in accordance with its finding that Harkness lacked the mental capacity to timely request a hearing, the majority held that any failure to do so on his part was excused, even though Harkness was represented by counsel.

e. Had the SIME process begun?

We have saved for last consideration of Harkness's argument that the two-year time limit in AS 23.30.110(c) was tolled because the SIME process had commenced as of the PHC on October 17, 2007, when, according to the board majority, the parties

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[97] Later developments, in particular, whether, in 2010, Harkness should have had a guardian appointed for him, in our view are not relevant. *See Harkness*, Bd. Dec. No. 12-0013 at 32. *Cf. Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 342-43 (Alaska 2005) (dissenting opinion).

stipulated to an SIME. There is board authority on this issue.[98] It provides a legal framework for our review of the evidence, evaluation of the board majority's finding in terms of that evidence, and analysis of its legal conclusion. In *Snow*, the board concluded that the subsection .110(c) time limit was tolled by the parties' signing and filing the SIME form. In *McKitrick*, the time limit was tolled when the employer petitioned and the board ordered an SIME. The claimant in *Turpin* had extensively discussed an SIME at prehearings, signed medical releases, otherwise cooperated with discovery, and filed a petition for an SIME; the board declined to dismiss her claim. In *Aune*, the parties stipulated that a dispute existed and an SIME was needed, and the prehearing officer ordered an SIME prior to the two-year time limit having passed.

Reviewing the evidence, Wenstrup's hearing testimony was some evidence that there was an agreement that an SIME would be performed.[99] On the other hand, the summary from the PHC on October 17, 2007, stated in part that "[t]he parties agreed that there appears to be a dispute that warrants an SIME and that [Wenstrup] will initiate the SIME form and serve it on [Alaska Mechanical's] attorney. When the SIME form is filed with the [b]oard, a follow-up PHC will be scheduled[.]"[100] Wenstrup never "initiated" the SIME form and the form was never filed with the board.[101] On the basis of this evidence, the board majority found that the parties had stipulated to an SIME and declined to dismiss the claim under subsection .110(c).[102]

As a matter of fact and law, the board majority erred. First, the finding that the parties stipulated to an SIME was not supported by substantial evidence. As the

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98 *See, e.g., Snow v. Tyler Rental, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 11-0015 (Feb. 16, 2011); *McKitrick v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 10-0081 (May 4, 2010); *Turpin v. Alaska General Seafoods*, Alaska Workers' Comp. Bd. Dec. No. 09-0054 (Mar. 18, 2009); *Aune v. Eastwind, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 01-0259 (Dec. 19, 2001).

99 *See* n.57, *supra*.

100 R. 1177.

101 *See Harkness*, Bd. Dec. No. 12-0013 at 49 (dissenting opinion).

102 *See Harkness*, Bd. Dec. No. 12-0013 at 30.

dissenting opinion pointed out, "[a]n agreement there 'appears to be a dispute that warrants an SIME' is entirely distinct from, and far short of, an agreement to actually perform an SIME."[103] Moreover, Wenstrup's testimony that he thought the parties agreed to an SIME is at odds with other evidence. He failed to initiate the SIME form, as he was instructed to do, the form was never filed with the board, and the board never ordered an SIME. Had the form been filed or had the board ordered an SIME, it would probably have constituted substantial evidence that the parties had agreed to an SIME.

Second, for the same reasons, the quantum of evidence was not substantial enough to support the board's finding that the SIME process had commenced. The October 17, 2007, PHC summary did not indicate that the parties agreed to an SIME, it merely stated that there appeared to be a dispute that warranted an SIME. Also, despite his testimony that he thought there was an agreement for an SIME, over a more than two-year period, Wenstrup never took action to file the SIME form, as he was instructed to do, or otherwise inform the board that an SIME was needed. Finally, the board never ordered an SIME.

Third, and most importantly, even if we were to accept the board majority's finding that the parties stipulated to an SIME, in terms of case law cited above,[104] without more, that finding would not warrant its legal conclusion that the time limit in subsection .110(c) was tolled. This case is not comparable, on its facts, to *McKitrick*, where the employer, or *Turpin*, where the claimant, filed petitions for an SIME. *Aune* is distinguishable because, unlike here, the board ordered an SIME before the subsection .110(c) time limit ran. The only somewhat similar case, factually, is *Snow*. However, in that matter, the parties signed and filed the SIME form. That did not occur here.

We respectfully disagree with the board majority's conclusion. The commission is not persuaded that, in this case, the SIME process had progressed to the point

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103 *Harkness*, Bd. Dec. No. 12-0013 at 48 (dissenting opinion).

104 *See* n.98, *supra*.

where, consistent with existing board authority, it could be considered to have commenced, tolling the AS 23.30.110(c) time limit. Furthermore, we do not think that tolling should be extended to the facts of this case, where so little was done to move the SIME process forward.

5. Conclusion and order.

The board majority's decision is REVERSED. It is ORDERED that the claim Harkness filed on June 8, 2007, is DISMISSED.

Date: *12 February 2013* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

This is a decision on the petition for review. The appeals commission reverses the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to petition the Alaska Supreme Court for review are instituted (started).[105] For the date of distribution, see the box below.

[105] A party has 10 days after the distribution of a decision on a petition for review by the commission to petition for review to the Alaska Supreme Court. If this decision was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c), which states:

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

This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted (started).[106] For the date of distribution, see the box below.

PETITION FOR REVIEW

A party may file a petition for review of this decision with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401-403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this decision's distribution.[107]

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612
More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

I certify that this is a full and correct copy of the Decision on Petition for Review No. 176 issued in the matter of *Alaska Mechanical, Inc. and Zurich American Insurance Co. v. Nathanael W. Harkness,* AWCAC Appeal No. 12-004, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on February 12, 2013.

Date: *February 13, 2013*

Signed
K. Morrison, Deputy Commission Clerk

106 *See* n.105, *supra*.

107 *See id.*