Alaska Workers' Compensation Appeals Commission

Loretta Tonoian,
Appellant,

vs.

Pinkerton Security and ACE USA,
Appellees.

Final Decision
Decision No. 029 January 30, 2007

WCAC Appeal No. 05-007
AWCB Decision No. 05-0302
AWCB Nos. 200225523 & 200226202

Appeal from Alaska Workers' Compensation Board Decision No. 05-0302, issued November 10, 2005, by the northern panel at Fairbanks, Fred G. Brown, Chairman, John Giuchici, Member for Labor, and Chris N. Johansen, Member for Management.

Appearances: Loretta Tonoian, pro se appellant; Tasha Porcello, Law Office of Tasha Porcello, for appellees, Pinkerton Security and ACE USA.

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

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

By: Kristin Knudsen, Chair.

Loretta Tonoian reported she injured her right knee, lower back, and neck on April 23, 2002 when she slipped on some ice while working for Pinkerton Security at the National Oceanic and Atmospheric Administration site in Fairbanks. She filed a claim for benefits against Pinkerton on March 17, 2003.[1] Tonoian did not file a request for hearing until more than two years had passed after Pinkerton formally controverted her claim. The board dismissed her claim as denied under AS 23.30.110(c). Our review of the record reveals substantial evidence to support the board's dismissal of Tonoian's claim against Pinkerton. We affirm the board's decision.

[11] R. 000015-16. Tonoian did not give written notice of injury until late January 2003, R. 000001.

Factual background.

Tonoian was initially disabled in the course of her employment for the U.S. Postal Service. She suffered moderate to severe arthritis, and was given a right knee replacement in 1999 as a result of injuries received during her postal employment. In October 2001, she obtained employment as a security guard for Pinkerton, eventually transferring to the NOAA site in Fairbanks. She testified she slipped on some ice while performing her rounds April 23, 2002, struck her head on the corner of the building, and her back on the stair, her knee buckling under her. On April 30, 2002, Pinkerton lost the contract to provide security services at the NOAA site, but Tonoian continued to be employed as a security guard for the successor contractor. Tonoian requested medical leave from her employment in October 2002 in order to obtain surgery she believed would be covered by her federal workers' compensation benefits. She has not worked since.

Board proceedings.

Tonoian filed a notice of injury dated January 27, 2003, received by the Division of Workers' Compensation on February 11, 2003.[2] On March 17, 2003, Tonoian filed a claim against Pinkerton for compensation for "cervical, head, knee, and aggravated lower back injury."[3] Pinkerton controverted all benefits, challenging the causal relationship of the injury to the employment, on May 2, 2003.[4] On May 16, 2003, Pinkerton also filed an answer to the employee's claim.[5]

Paul Eaglin entered an appearance as Tonoian's attorney on May 7, 2003.[6] He attended a pre-hearing conference on June 12, 2003 with Tonoian[7] and he attended

---

2 R. 000001.

3 R.000015-16.

4 R. 000004. The controversion form is dated April 30, 2003.

5 R. 000022-24.

6 R. 000021.

7 R. 000995.

Tonoian's deposition on July 8, 2003.[8] He withdrew on October 1, 2003, stating that Tonoian "is aware of responsibility for her own case."[9] Robert Rehbock filed an entry of appearance on behalf of Tonoian on January 30, 2004.[10] He negotiated a complete settlement of Tonoian's claim against Pinkerton that was signed by Tonoian and the other parties and submitted to the board for approval on November 29, 2004.[11] Before the board approved the settlement, Tonoian announced she did not want to settle her claim.[12] She testified she had called her attorney and sent him a fax "with 17 different changes and he didn't do it."[13] On January 24, 2005, Robert Rehbock withdrew as Tonoian's counsel.[14] Shortly afterward, on February 1, 2005, Pinkerton's attorney sent the board a letter stating that she understood "Ms Tonoian withdrew the Compromise and Release after it was signed by all parties and filed with the board" without notifying Pinkerton.[15]

Tonoian also had a claim against Guardian Security, the successor contractor to Pinkerton. On January 28, 2005, the pre-hearing officer sent Tonoian a notice of a March 1, 2005 pre-hearing conference in the claim against Guardian.[16] A file note indicates that, at a March 1, 2005 pre-hearing conference, the parties agreed that the Pinkerton claim should be joined with the Guardian claim and that another pre-hearing

---

8 Tonoian 2003 Depo. 3.

9 R. 000027. Mr. Eaglin officially represented Tonoian 148 days.

10 R. 000028.

11 R. 000076-92.

12 Tr. 19.

13 Tr. 19.

14 R. 000106-07. Mr. Rehbock officially represented Tonoian 362 days.

15 R. 001006.

16 R. 001005.

conference would be scheduled in April.[17] On March 1, 2005, the pre-hearing officer sent Tonoian, Guardian and Pinkerton a notice of pre-hearing conference scheduled for April 6, 2005.[18] There is no record this conference was held. However, a pre-hearing conference was held April 28, 2005, by the hearing officer, Fred G. Brown.[19] There is no note in the record whether Tonoian requested a hearing in the April 28, 2005 conference or that she was provided a form to request a hearing.

The next pre-hearing conference was held July 14, 2005.[20] The officer who conducted the conference, Sandra Stuller, noted that Pinkerton's attorney asserted a defense based on the AS 23.30.110(c) time-bar because Tonoian failed to file a request for hearing within two years of the April 30, 2003 controversion.[21] Tonoian's response at the pre-hearing conference is not noted, but on August 9, 2005, she filed an affidavit of readiness for hearing.[22]

On July 28, 2003, Tonoian's deposition was taken by Guardian. Tonoian testified that she did not recall seeing controversion notices and that "most of the time when [she] got stuff from the lawyers, I just put it in the mail to him [her attorney]."[23] She said, "I didn't even open them. I'd just put them in an envelope and send them to him."[24] Regarding the settlement agreement with Pinkerton, Tonoian testified:

---

17 R. 001013.

18 R. 001010.

19 R. 001016-17.

20 R. 001021-22.

21 R.

22 R. 000121. An affidavit of readiness for hearing, form 07-6107, is the method set out in board regulation for requesting a hearing on a claim. *See*, 8 AAC 45.070(b)(1). The affidavit named both the March 17, 2003 claim against Pinkerton and the July 17, 2004 claim against Guardian.

23 Tonoian 2005 Depo. 105.

24 *Id.*

> I called the workmen's comp board and told them I was pulling it back and I didn't want to sign this because I had another physical and I didn't like what the doctor had said there. And – and that I – I wanted to go forward.
>
> Q. Do you recall who you talked to?
>
> A. I think I talked to Sandy.
>
> Q. You told Sandy Stullar you wanted to go forward?
>
> A. Uh-huh.
>
> Q. Did she send you any paperwork?
>
> A. She said she was doing a pre-hearing because Guardian was – hadn't had a pre-hearing is how I understood it.[25]

Tonoian also testified that the only conversation she had with Ms. Stuller was the one she had in late December 2004 or early January 2005 when she "pulled" the settlement agreement with Pinkerton – until the pre-hearing conference when, she said, "I found out that I was supposed to do that hearing thing, that I had a limit."[26]

The board held a hearing on whether AS 23.30.110(c) required dismissal of Tonoian's claim against Pinkerton on October 13, 2005. Tonoian was the only witness. At the hearing Tonoian testified as follows:

> I didn't know about all this stuff. I gave all the stuff to the attorney. The attorney got all that stuff and then I fired him because he didn't want to come up here. He didn't want to come to a board thing. He wanted me to take a settlement for $20,000. . . . I was extremely depressed and was depressed, and I was sick, too, and I'm still sick. And I don't understand all this stuff. I don't have any counsel. I knew that I had to do a two-year thing when you get hurt, that was made clear to me, but nobody at workmen's comp office or the lawyer or anything told me I had to do a two-year thing. No, I didn't read that thing. I had a whole stack of stuff. I didn't read it. The lawyer had most of it. He turned it back to me and it's still in a box. I have enough trouble trying to feed myself every month and keep from getting my house foreclosed and everything. And that's the only excuse I can give you. That may not be a viable

---

[25] Tonoian 2005 Depo. 88-89.

[26] Tonoian 2005 Depo. 94-95.

> excuse, but that's it. My doctor's worried about my mental health, I'm worried about my mental health, but it's just a normal thing to get out of paying anything, that's all. It's just the normal course of events.[27]

Later, following the arguments of Pinkerton and Guardian, Tonoian reiterated her testimony that no one told her to file a request for a hearing.[28]

The board's decisions.

The board's first decision was issued November 10, 2005. The board's findings of fact were brief. The board found Tonoian filed a claim against Pinkerton on March

---

[27] Tr. 6-7.

[28] Tonoian testified at Tr. 17-20:

> I did withdraw that C&R on the advice of two or three of my attorneys, not just one, because it wasn't enough money for anything, is how they put it. And the truth is, I don't know a damn thing about none of this . . . I don't feel like they should do this to me, because I didn't know. No, I didn't read it, you're right, I didn't read every single paper I get. Nobody I know does that except lawyers and paralegals. And I've been really sick. . . . So as to this date thing, nobody told me. I came in here about once every month, nobody said a word to me about it, I wanted a hearing, nobody said a word. I didn't really understand about that. And, I mean, I guess you're going to do whatever you're going to do, and I'm not going to kiss anybody's butt and beg, but I'm (indiscernible). . . . If I had known I had to do that within two years, had to do it, I thought the lawyer would do it. I called him and told him I wasn't going to do the C&R. I sent him a fax with 17 different changes and he didn't do it. He never talked to me. . . . he never acted interested to even see me or discuss anything with me. And when I get on the phone he would tell me how much (indiscernible) for so long, and, yeah, you didn't know. . . . I'm supposed to tell you that I did come in here two or three times. Nobody said a word about it. They had me fill that C&R, told me to go ahead (indiscernible). I called the lawyer, he got mad because he wasn't going to get all his money, or whatever. And I didn't feel like I was being represented at all, so I don't know what to say. You're going to do what you're going to do, anyway.

17, 2003.[29] Pinkerton controverted this claim on April 30, 2003; accordingly, Tonoian had until April 30, 2005 to file a request for hearing under AS 23.30.110(c).[30] The board found Tonoian failed to request a hearing by this date.[31] The board found "no basis in the record to conclude the running of the statute of limitations was tolled."[32] Therefore, the board concluded, the claim against Pinkerton was barred.[33]

Tonoian wrote a letter to the board contending that her delay in filing should be excused due to her depression and the stress she suffered.[34] She attached a copy of a letter from her personal physician.[35] The board treated Tonoian's letter as a motion for reconsideration, which it decided on December 8, 2005.[36]

The board found the letter from Dr. McAnnich "expressing a 'possibility' of lost memory does not provide a sufficient explanation as to the delay in filing her claim, such as allow us to justify excusal of the employee's failure to timely file."[37] The board concluded that because "no sufficient reason was given for the delay; we again find the claim must be barred under AS 23.30.110(c)."[38] Tonoian then filed this appeal.[39]

---

[29] *Loretta L. Tonoian v. Pinkerton Security and Guardian Security Systems, Inc., (Tonoian I),* AWCB Dec. No. 05-302, 4 (November 10, 2005).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] R. 000224.

[35] R. 000226. Jana McAnninch, M.D., attested that Tonoian suffered "multiple medical problems, including depression."

[36] *Loretta L. Tonoian v. Pinkerton Security and Guardian Security Systems, (Tonoian II),* AWCB Dec. No. 05-0336, 1 (December 20, 2005).

[37] *Tonoian II,* AWCB Dec. No. 05-0336 at 6.

[38] *Id.*

The commission's standard of review.

When reviewing appeals from board decisions, the commission may not disturb credibility determinations by the workers' compensation board.[40] If there is substantial evidence in light of the whole record to support the board's findings, the commission must uphold the board's findings. Because the commission makes its decision based on the record before the board, briefs, and oral argument,[41] no new evidence may be presented to the commission.[42]

Tonoian concedes that she was late in filing her request for a board hearing. Instead of denying the request was late, she argued before the board, and now on appeal, that her late filing should have been excused. Whether Tonoian asserted legal grounds for excusing a late-filed request is a matter of law to which we are required to apply our independent judgment.[43]

Tonoian had the burden to demonstrate that her late filing should be excused.

AS 23.30.120(a) provides that a claim is presumed to come within the workers' compensation act and that it is presumed that sufficient notice of the claim was given. In the absence of substantial evidence to the contrary, the presumption that a claim "comes within the provisions of this chapter" aids an injured worker in making a prima

---

[39] Tonoian's appeal to the commission was accompanied by a motion to accept late filing because she first attempted to file it at the workers' compensation division office. However, her appeal was filed with the commission December 21, 2005, within 30 days after the board's decision on reconsideration, issued December 20, 2005, and therefore was not late.

[40] AS 23.30.128(b). The board made no explicit credibility determinations in this case.

[41] AS 23.30.128(a).

[42] The appellant, who represented herself, offered additional factual statements in her oral argument to the commission to explain her conduct. We do not consider these facts because they were not present in the board record.

[43] AS 23.30.128(b).

facie case for coverage.[44] However, there is no statutory presumption that a person seeking to be excused from the operation of the provisions of this chapter is entitled to a presumption of excuse. Thus, a claimant asserting that the employer waived, or is estopped from, enforcement of the statute of limitations bears the burden of producing evidence of the facts necessary to establish waiver or estoppel and persuading the board that the facts asserted by the claimant are more likely true than not.[45] An insurer seeking to be excused from a penalty under AS 23.30.155(e) "owing to conditions over which it had no control" bears the burden of producing evidence of facts, and persuading the board that the facts are more likely true than not, that establish the basis for the excuse of lack of control. Similarly, if the board finds the claimant failed to request a hearing within two years of a post-claim controversion, the claimant bears the burden of producing evidence and persuading the board that the facts establish a legal excuse for the delay.

Tonoian failed to establish legal excuse from operation of the time-bar in AS 23.30.110(c).

AS 23.30.110(c) requires an employee, once a claim has been filed and controverted by the employer, "to prosecute the claim in a timely manner."[46] The language of AS 23.30.110(c) is clear.[47] The only act required of the employee to "prosecute the claim" is to file a request for hearing within two years of the date of a controversion of a claim, and the board "may require no more of the employee."[48] Expiration of the two-year period in AS 23.30.110(c) "results in dismissal of the

---

[44] *Burgess Constr. Co. v. Smallwood,* 623 P.2d 312, 316 (Alaska 1981).

[45] *For example*, *Schmidt v. Beeson Plumbing & Heating, Inc.*, 869 P.2d 1170, 1175 (Alaska 1994).

[46] *Jonothan v. Doyon Driling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995).

[47] *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 913 (Alaska 1999).

[48] *Id.* at 913; *Huston v. Coho Electric*, 923 P.2d 818, 820 (Alaska 1996)

particular claim."[49] Tonoian conceded that her request for hearing was not filed on time. Unless excused, her claim is dismissed by operation of law.

There are no statutory provisions in AS 23.30.110 that permit the board to excuse a pro se claimant's failure to file a request for hearing on time based on such general equitable grounds such as "good cause" or "in the interests of justice."[50] In this way, AS 23.30.110(c) differs from a general no-progress rule found in Alaska Rule of Civil Pro. 41(e).[51] The board is prohibited by its own regulations from waiving a

---

[49] *Tipton,* 922 P.2d 913 n. 4.

[50] *Bohlmann v. Alaska Constr. & Engineering, Inc.*, AWCAC Dec. No. 023 (December 8, 2006). In *Bohlmann* we discussed the board's lack of statutory authority to excuse a self-represented claimant because he was self-represented, in the absence of employer conduct that would have supported application of equitable estoppel. We acknowledged that the board may invoke equitable powers necessarily incident to its statutory powers to, for example, bar an employer from asserting a defense based on statute of limitations. *Bohlmann,* AWCAC Dec. No. 023 at 11. In *Bohlmann* we did not discuss application of the legal excuses we discuss in this case because he did not assert them.

[51] Alaska Rule of Civil Pro. 41(e), Dismissal for Want of Prosecution, provides:

> (1) The court on its own motion or on motion of a party to the action may dismiss a case for want of prosecution if
>
> > (A) the case has been pending for more than one year without any proceedings having been taken, or
> >
> > (B) the case has been pending for more than one year, and no trial or mandatory pretrial scheduling conference has been scheduled or held.
>
> (2) The clerk shall review all pending cases semi-annually and in all cases that are subject to dismissal under (e)(1), the court shall hold a call of the calendar or the clerk shall send notice to the parties to show cause in writing why the action should not be dismissed.
>
> (3) If good cause to the contrary is not shown at a call of the calendar or within sixty days after distribution of the notice, the court shall dismiss the action. The clerk may dismiss actions under this paragraph if a party has not opposed dismissal.

procedural requirement established by regulation "merely to excuse a party from failing to comply with the requirements of the law."[52] Nonetheless, there are recognized legal reasons why a pro se litigant's delay may be excused. We consider those of Tonoian's arguments that approach such legal excuses: 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. We discuss each in turn.[53]

Excuse due to mental incompetence.

Tonoian asserted to the board that her delay was caused by depression, stress, and possibly by forgetfulness induced by medication, and therefore should be excused. Her physician's letter supports her claim to suffer from depression.[54] However, Tonoian did not claim that her mental problems were so severe as to require appointment of a guardian or conservator,[55] that she was incompetent, or that she lacked the capacity to

---

> (4) A dismissal for want of prosecution is without prejudice unless the court states in the order that the case is dismissed with prejudice.
>
> (5) If a case dismissed under this paragraph is filed again, the court may make such order for the payment of costs of the case previously dismissed as it may deem proper, and may stay the proceedings in the case until the party has complied with the order.

[52] 8 AAC 45.195.

[53] Although Tonoian also asserted the excuse of waiver by the employer in her notice of appeal, she did not raise this issue to the board, pointed to no evidence of explicit conduct or words amounting to waiver, and failed to argue the point to the commission. We consider this argument to be abandoned.

[54] R. 000226.

[55] The director of the Division of Workers' Compensation is empowered to require appointment of a guardian or other representative (such as a conservator) by a competent court for any person who is "mentally incompetent" to "perform the duties required of the person under this chapter." AS 23.30.140. This provision recognizes that mental incompetence legally excuses non-performance of a duty under the workers' compensation statutes. *Cf.,* AS 09.10.140(a). For an example of the measure of incompetence justifying appointment of a representative, see AS 13.26.165(2)(a).

conduct her own affairs. The record shows she exercised her judgment by retaining an attorney, negotiating a settlement, seeking alternate legal advice, withdrawing the settlement just negotiated, and dismissing two attorneys. Whether in hindsight her choices were, or were not, prudent is not germane; she had reasons for making her decisions that do not demonstrate that she lacked the mental capacity to conduct her own affairs. The board's finding in *Tonoian II* that Tonoian failed to present sufficient evidence in her physician's letter to excuse delay is supported by substantial evidence in light of the whole record. We conclude that Tonoian did not establish grounds to excuse her delay due to mental incompetence.

Excuse based on lack of notice of time-bar to pro se litigant.

We have said that a pro se claimant may be able to establish grounds for relief if the evidence establishes the pro se litigant was not notified of the two-year time-bar, as when the controversion form does not include the board-approved language informing the recipient of the time-bar.[56] The obligation to give notice was satisfied by mailing the board-approved controversion forms (several delivered by Pinkerton and then by Guardian), which Tonoian admits she ignored. Tonoian did not deny receiving controversion notices or claim they were incomplete; instead she claimed she did not read them, or she did not open the envelopes, and thus did not know she needed to file a request for hearing. Tonoian's argument confuses lack of actual knowledge with lack of notice. Tonoian's admission that she sent unopened letters to the lawyer, did not open the envelopes, or did not read the notices does not tend to prove that notice (that her claim could be dismissed if she did not request a hearing within two years) on a board-prescribed form was not mailed to her. We conclude there is not sufficient

[56] This basis for this excuse is the requirement in AS 23.30.110(c) that the controversion be "on a board-prescribed controversion notice" containing language we held sufficient to put a reader on notice of the obligation to file a request for hearing within two years. *Bohlmann v. Alaska Constr. & Engineering, Inc.*, AWCAC Dec. No. 023, 10-11 (December 8, 2006).

evidence in the record to require the board to determine whether to excuse Tonoian's late filing on the grounds of lack of notice to a pro se litigant.[57]

Equitable estoppel against the board.

Finally, we turn to Tonoian's chief argument, that she wanted a hearing but no one at the division office in Fairbanks told her she needed to file a request for hearing. In effect, Tonoian claims that the board, a governmental agency, is equitably estopped from denying her claim because, through silence, it led her to believe she did not need to file a request for hearing. When a litigant invokes estoppel against a governmental agency, the litigant must establish that (1) the governmental body asserted a position by conduct or words; (2) the litigant acted in reasonable reliance on the board's assertion; (3) the litigant suffered resulting prejudice; and, (4) estopping the board from dismissing the litigant's claim would serve the interest of justice so as to limit public injury.[58] The Supreme Court cautions that equitable estoppel is rarely applied against the state's exercise of sovereign police powers, reasoning that where it acts for the good of its citizens as a whole, rather than a narrow proprietary interest, estoppel would be unjust to the public.[59]

We carefully apply the test to the facts presented, to determine whether Tonoian presented evidence that could have satisfied the elements of estoppel against the board. Such evidence would compel the commission to remand this case to the board for additional findings. We do not determine whether the facts related by Tonoian are true or not; we assume they are true solely for the purposes of reviewing whether she presented enough evidence to require the board to determine whether or not the board

---

[57] Because Tonoian failed to present evidence to support a lack-of-notice excuse, we need not address Pinkerton's argument that Tonoian, who was represented by two attorneys in her workers' compensation claim and sought advice from others, was not truly a pro se litigant.

[58] *State, Dep't of Commerce & Economic Development v. Schnell,* 8 P.3d 351, 356 (Alaska 2000); *citing Wassink v. Hawkins,* 763 P.2d 971, 975 (Alaska 1988).

[59] 8 P.3d 355-56, *citing Municipality of Anchorage v. Schneider,* 685 P.2d 94, 97 (Alaska 1984).

was estopped. We conclude that Tonoian did not produce sufficient evidence to satisfy the elements of estoppel.

Tonoian argued that she did not file a request for hearing because division staff did not tell her to file the paperwork to file a request for hearing. She recalled only one occasion when she purportedly asked for a hearing, during a telephone call in which she told Sandra Stuller she did not want to go through with the settlement she had signed. Tonoian said she told Stuller she "wanted to go forward." She also testified she told Stuller she "wanted to get this thing settled." Stuller scheduled a pre-hearing conference in Tonoian's parallel Guardian claim to join the two claims. [60]

Stuller's silence regarding filing a request for hearing in the face of Tonoian's statement is insufficient to establish that the board, through the adjudications support staff, asserted the position that Tonoian did not need to file a request for hearing. Scheduling a pre-hearing conference makes no promise that Tonoian would be relieved of the duty to file a request for hearing. Tonoian did not testify to any other occasion that she approached the division staff for help requesting a hearing after her telephone conversation with Stuller, but before the time-bar passed. The obligation to inform and instruct self represented litigants on how to pursue their claims[61] did not require division staff to seek out Tonoian and urge her to file paperwork on time or volunteer information that it may have reasonably assumed she has been told.[62] Tonoian did not present evidence of demanding further information in her visits to the division office and receiving misleading answers. Silence in these circumstances is not conduct amounting to an assertion of position.

---

[60] If Tonoian said she wanted to get her claims settled, a workers' compensation officer's response could be to hold a pre-hearing conference, at which the pre-hearing officer may consolidate cases and assist the parties toward settlement. *See*, 8 AAC 45.065(a)(8)-(9).

[61] *Richard v. Fireman's Fund Ins. Co.,* 384 P.2d 445, 449 (Alaska 1963); *Dwight v. Humana Hospital Alaska,* 876 P.2d 1114, 1120 (Alaska 1994).

[62] *Bohlmann,* AWCAC Dec. No. 023 at 9. Tonoian had been represented by counsel up to the point she withdrew from the settlement agreement.

Even if Stuller had made an erroneous statement of what the statute requires, as Tonoian claims on appeal, it would not be an "assertion of position" for estoppel purposes. As the Supreme Court said in *In re Stephenson*,[63] "it is well established that a state is not estopped to assert a result dictated by its rules, even if a state officer has made a contrary representation from the terms of the rules . . . and caused reliance on such representations."[64] Against this rule we must balance the obligation imposed by *Richard* to inform and instruct self-represented litigants. An error regarding the statutory requirements may not be considered an assertion of position, but, in view of the board's obligation to instruct self-represented litigants, a material misleading or incorrect instruction as to form or regulation-based procedure may be an "assertion of position" with regard to non-statutory requirements.[65]

Thus, an erroneous statement by adjudication staff as to the specific form that a request for hearing must take, or the specific day that the two years expires, may be grounds for application of estoppel against the board, but the board may not be estopped to deny that a request for hearing must be filed within two years. Tonoian's assertion is that Stuller's silence on a time-bar led her to believe there was none. This is a representation "contrary to the rules" that cannot be an assertion of position that would support application of equitable estoppel.

Because Tonoian failed to present evidence that would support a finding that the first element of equitable estoppel against the board, we need not consider the other three elements. Tonoian's argument that the board should excuse her failure to file a request for hearing because no one told her she had to do so is insufficient grounds to apply equitable estoppel against the board.

---

[63] 511 P.2d 136 (Alaska 1973), quoted in *State, Dep't of Commerce & Economic Development v. Schnell*, 8 P.3d at 358 (statement by division director reassuring real estate broker that the division did not want to deprive him of his livelihood did not bar division from proceeding against licensee).

[64] *In re Stephenson*, 511 P.2d at 143.

[65] *See*, 8 AAC 45.195. Application of the doctrine of estoppel when supported by the facts avoids "manifest injustice."

Conclusion.

The board did not make credibility findings regarding Tonoian's testimony. The board did not fully discuss the theories Tonoian raised in connection with her request to be relieved from operation of the time-bar in AS 23.30.110(c). The board's findings are sparse and conclusory. Nonetheless, our close review of the record reveals (1) Tonoian failed to articulate a recognized legal excuse; (2) the evidence she produced (largely her own testimony) before the board could not satisfy the elements of legal excuses she argued to the board and on appeal; and (3) the record contains substantial evidence to support the board's ultimate finding that there was no basis in the record to toll the running of the time-bar against Tonoian. We therefore AFFIRM the board's decision dismissing Tonoian's claim against Pinkerton.

Date: *30 January 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Phil Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. This final decision affirms (upholds) the board's decision dismissing the workers' compensation claim. It becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted. Look at the Certification on the last page to find the date this decision was filed in the commission. After November 7, 2005, proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision in the commission and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street,
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision on appeal in the matter of *Loretta Tonoian v. Pinkerton Security and ACE USA;* AWCAC Appeal No. 05-007; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on this *30th* day of January, 2007.

Signed
C. J. Paramore, Appeals Commission Clerk

DISTRIBUTION: I certify that on *1/30/07* a copy of the above Final Decision in Appeal No. 05-007 was mailed to Loretta Tonoian (certified), and T. Porcello, at their addresses of record, and a copy was faxed to AWCB Appeals Clerk, AWCB Fairbanks, and Director WCD.

Signed
L. A. Beard, Deputy Appeals Commission Clerk