Alaska Workers' Compensation Appeals Commission

Brenda Pruitt, Appellant, vs. Providence Extended Care and Sedgwick CMS, Inc., Appellees.	Decision Upon Reconsideration Decision No. 158 January 27, 2012 AWCAC Appeal No. 10-032 AWCB Decision No. 10-0156 AWCB Case No. 200403225

Decision upon reconsideration on appeal from Alaska Workers' Compensation Board Decision No. 10-0156, issued at Anchorage on September 15, 2010, by southcentral panel members Laura Hutto de Mander, Chair, Patricia Vollendorf, Member for Labor, Don Gray, Member for Industry.

Appearances: Brenda Pruitt, self-represented appellant. Colby J. Smith, Griffin & Smith, for appellees, Providence Extended Care and Sedgwick CMS, Inc.

Commission proceedings: Appeal filed November 22, 2010; briefing completed May 19, 2011; oral argument held September 14, 2011; Final Decision issued November 23, 2011; State's Motion for Reconsideration filed December 7, 2011; Amended Final Decision issued December 15, 2011; Request for Reconsideration filed January 12, 2012.

Commissioners: David Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, Brenda Pruitt (Pruitt), appealed a decision of the Alaska Workers' Compensation Board (board)[1] in which the board concluded that a provision in

[1] *Brenda Pruitt v. Providence Extended Care, et al.,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 (Sept. 15, 2010).

AS 23.30.110(c)[2] bars Pruitt's claim against appellees, Providence Extended Care and Sedgwick CMS, Inc. (collectively Providence). The board dismissed Pruitt's claim on the grounds that she needed to request a hearing by filing an Affidavit of Readiness for Hearing (ARH) within two years of Providence's controversion of her claim. We, the Alaska Workers' Compensation Appeals Commission (commission), in an Amended Final Decision,[3] remanded the matter to the board so that it might clarify its decision to indicate whether or not Pruitt's noncompliance with AS 23.30.110(c) was attributable to an inability on her part to understand the statute's requirements.[4]

Providence timely filed a Request for Reconsideration (Request) with the commission in which it argued that the commission overlooked a material fact as found by the board.[5] Providence maintained that the board had made adequate findings that related to the issue whether Pruitt understood the requirements of AS 23.30.110(c). It urged the commission to reconsider our remand to the board. On reconsideration, the commission agrees with Providence. The board made adequate findings in this respect and decided the issue, eliminating any need for a remand. Therefore, the commission rescinds its remand to the board of the issue whether Pruitt's noncompliance with AS 23.30.110(c) resulted from a lack of understanding with respect to the actions the statute required her to take. This decision upon reconsideration is intended to supersede the commission's amended final decision in *Pruitt I*.

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[2] AS 23.30.110(c) reads 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."

[3] *See Pruitt v. Providence Extended Care, et al.,* Alaska Workers' Comp. App. Comm'n Dec. No. 157 (December 15, 2011)(*Pruitt I*).

[4] *See Pruitt I* at 10.

[5] *See* Request at 1.

2. Factual background and proceedings.

Based on a Report of Injury, Pruitt injured her back in 1995 while working for the Fairbanks Correctional Center.[6] According to her 2010 deposition testimony, Pruitt reported an injury for severe trauma and stress when working at Alaska Executive Search in 2000.[7] On April 4, 2003, Pruitt completed and signed an Occupational Health History questionnaire for Providence. On the form, in response to the question whether she had ever had an on-the-job injury, Pruitt answered "no."[8] At her 2005 deposition, Pruitt testified that she misunderstood this question.[9]

On March 29, 2004, Pruitt reported that she injured her back on March 10, 2004, while pushing a medication cart.[10] Providence initially paid benefits.[11] Following an employer's medical evaluation (EME), Providence first controverted benefits on September 3, 2004.[12] Through her attorney, Michael Patterson (Patterson), Pruitt filed a workers' compensation claim (WCC) on February 8, 2005, seeking temporary total disability (TTD), permanent total disability, permanent partial impairment (PPI), medical costs, attorney fees and costs, and a second independent medical evaluation.[13] On February 10, 2005, Providence filed a controversion on the board's form 07-6105, in which it disputed TTD, PPI, rehabilitation benefits, and medical costs after January 11, 2005, on the basis of the EME.[14] The board's form contains the following warnings on the reverse side:

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6 *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 2.

7 *See id.*

8 *See id.*

9 *See id.*

10 *See id.*

11 *See id.* at 2-3.

12 *See id.* at 3.

13 *See id.*

14 *See* Appellees' Exc. 12-13.

> **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. Get forms from the nearest AWC Board Office listed below.**
>
> **TIME LIMITS**
>
> . . . .
>
> 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 the two years. Before requesting a hearing, you should file a written claim.[15]

Patterson withdrew as Pruitt's attorney on May 5, 2005, serving a copy of the withdrawal on Pruitt at her correct address at the time.[16] On July 1, 2005, Providence controverted all benefits, asserting that Pruitt had falsified answers on the health history questionnaire.[17] On February 8, 2006, Pruitt attended a prehearing conference (PHC). The prehearing conference summary (PHCS) stated:

> Ms. Pruitt is reminded that, if a controversion notice is served and filed, after the date of her workers' compensation claim, she must serve and file an affidavit, in accordance with 8 AAC 45.070, requesting a hearing within the time limits set by AS 23.30.110(c) to avoid possible dismissal of her claim. AS 23.30.110(c) provides: "If the employer controverts a claim on a board-prescribed controversion notice and the employee does not

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[15] *See* Appellees' Exc. at 13.

[16] *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 3.

[17] *See* Appellees' Exc. 16-20.

> request a hearing within two years following the filing of the controversion notice, the claim is denied."[18]

The PHCS was served on Pruitt on February 9, 2006.[19]

Pruitt received long-term disability benefits through Providence until August 2009, when those benefits were terminated.[20] She filed an ARH on August 26, 2009.[21] Providence controverted all benefits on September 2, 2009, based in part on AS 23.30.110(c).[22]

The board held a hearing on August 19, 2010.[23] At that proceeding, Pruitt raised the issue of her mental competence in connection with requesting the appointment of a guardian.[24] The chair referred her to the statute for appointment of a guardian, AS 23.30.140,[25] and explained that the issues of Pruitt's competence or need for a guardian could not be addressed at that hearing.[26] The board found Pruitt's assertions

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[18] *Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 3 (emphasis in original).

[19] *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 3.

[20] *See id.* at 4.

[21] *See id.*

[22] *See id.* Providence also controverted benefits pursuant to AS 23.30.022. That statute bars the receipt of benefits by an employee who knowingly makes a false statement in response to a medical inquiry, in this case, Pruitt's responses to the health history questionnaire. *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 4-5.

[23] *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 1.

[24] *See* Aug. 19, 2010, Hr'g Tr. at 40-46.

[25] This statute authorizes the director of workers' compensation to seek appointment, by a court, of a guardian or other representative for any person who is mentally incompetent.

[26] Chair: [W]hat they're referring to is the board requesting that you get a guardian, and the board does that if they feel that you're not mentally competent to deal with your own case. I don't think anyone has suggested that at any point in this process, at least it's not in the record in any way. Aug. 19, 2010, Hr'g Tr. at 41.

(footnote continued)

1) that she thought attorney Patterson had requested a hearing before he withdrew; 2) that until October 20, 2009, she was unaware that he withdrew; and 3) that she did not understand the workers' compensation process, were inconsistent and/or not credible.[27] It further found that Pruitt's "assertion that she did not know she had to request a hearing within two years lack[ed] credibility."[28] Ultimately, the board dismissed Pruitt's claim.[29]

3. Standard of review.

The board's credibility findings are binding on the commission.[30] We review the board's application of AS 23.30.110(c) as a question of law subject to our independent judgment.[31] The board's factual findings are to be upheld if supported by substantial evidence in light of the whole record.[32] "Substantial evidence is such relevant evidence

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> Chair: Ms. Pruitt, just so you understand, this hearing is limited to what was in the prehearing conference . . . for today's hearing, and it's limited to the two petitions the employer has filed.
>
> I understand the technicians have talked to you about requesting that the board request the director to appoint a guardian on your behalf, but you would have to file a petition asking the board to do that and to have a prehearing on that matter so that we could schedule a hearing. Aug. 19, 2010, Hr'g Tr. at 45.

[27] *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 4. As for Pruitt's assertion that she did not understand the workers' compensation process, the board noted that she had participated in several legal proceedings, including two other workers' compensation matters. *See id*.

[28] *Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 8. As Providence points out in its Request, Pruitt understood that, had attorney Patterson continued to represent her, he would have had to file an ARH within two years. This contradicts Pruitt's assertion that she did not understand the statute's requirements. *See* Request at 5.

[29] *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 8.

[30] *See* AS 23.30.128(b).

[31] *See id.*

[32] *See id.*

as a reasonable mind might accept as adequate to support a conclusion."[33] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law"[34] and therefore independently reviewed by the commission.[35]

4. Discussion.

The sole issue presented in this appeal is whether the board erred in dismissing Pruitt's claim pursuant to the provisions of AS 23.30.110(c).[36] In deciding this issue, Alaska Supreme Court[37] and commission[38] precedent compels us to review whether Pruitt substantially complied with .110(c) or could be excused from doing so for good cause.

a. Substantial compliance with the deadline in AS 23.30.110(c) is what is required of a claimant.

The Alaska Supreme Court analyzed the operation of AS 23.30.110(c) in *Kim v. Alyeska Seafoods.* Kim had filed a motion for a continuance on December 15, 2005, two days before the second anniversary of his employer's controversion, requesting additional time to prepare for hearing.[39] Instead of opposing Kim's motion, on January 3, 2006, Alyeska filed a petition for denial of Kim's claim pursuant to

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[33] *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors,* 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted)).

[34] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

[35] *See* AS 23.30.128(b).

[36] Because Pruitt's claim was dismissed pursuant to AS 23.30.110(c), the board declined to rule whether Pruitt's claim should be dismissed under AS 23.30.022. *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 8.

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

[38] *See, e.g., Providence Health Sys. v. Hessel,* Alaska Workers' Comp. App. Comm'n Dec. No. 131 (March 24, 2010).

[39] *See Kim,* 197 P.3d at 194.

AS 23.30.110(c).[40] In reversing the board's denial of Kim's claim[41] and the commission's affirmation of that denial,[42] the supreme court prefaced its analysis, stating: "Because the relevant statutory language for requesting a hearing is directory rather than mandatory, *substantial compliance is sufficient to toll the [.110(c)] time-bar, and the Board has discretion to extend the deadline for good cause*."[43] The court expanded on its analysis as follows:

> In holding that subsection .110(c) is directory, we do not suggest that a claimant can simply ignore the statutory deadline and fail to file anything. A determination that a statute is directory instead permits substantial compliance with statutory requirements, rather than strict compliance. 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 the hearing. Filing the hearing request and the request for additional time to prepare for the hearing constitutes substantial compliance and tolls the time-bar until the Board decides whether to give the claimant more time to pursue the claim.[44]

Ultimately, the supreme court held that Kim's motion for a continuance demonstrated substantial compliance with AS 23.30.110(c).[45]

Also of relevance here is another appeal to the Alaska Supreme Court involving the application of AS 23.30.110(c).[46] Although the board's decision and the parties' briefing do not reference the case, in *Kim* the supreme court cited *Bailey v. Texas*

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[40] *See Kim,* 197 P.3d at 195.

[41] *See Kim v. Alyeska Seafoods, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 06-0202 (July 21, 2006).

[42] *See Kim v. Alyeska Seafoods, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 042 (May 22, 2007).

[43] *Kim,* 197 P.3d at 194 (italics added).

[44] *Id.* at 198 (footnotes omitted).

[45] *See id.* at 198 n.24.

[46] *See Bailey v. Texas Instruments, Inc.,* 111 P.3d 321 (Alaska 2005).

Instruments a number of times.[47] Bailey was not represented by an attorney before the board.[48] He failed to file a request for a hearing until July 2002 on a claim that was controverted in October 1997.[49] The thrust of the holding in *Bailey* is that a claimant must file something within two years of a controversion in order to not run afoul of the two-year time limit in AS 23.30.110(c).[50]

From the holdings in *Kim* and *Bailey* we conclude that substantial compliance with AS 23.30.110(c) is what is required of a claimant. However, the board has the discretion to excuse noncompliance with the statutory deadline for good cause.

b. Did Pruitt substantially comply with AS 23.30.110(c)?

First, in our view, the facts in this matter more closely resemble those in *Bailey* than those in *Kim*. Here, once attorney Patterson withdrew, Pruitt, like Bailey, was not represented before the board. Despite being personally informed at the PHC on February 8, 2006, of the two-year time limit under AS 23.30.110(c) to request a hearing, Pruitt did not file a request for a hearing supported by an affidavit, nor a request for additional time. Nothing was filed until August 26, 2009, when she filed an ARH. By then, four-and-a-half years had passed since Providence controverted Pruitt's WCC on the board's form containing the warnings quoted above and three-and-a-half years had passed since the PHC.

Second, we defer, as we must, to the board's credibility findings concerning Pruitt. Even though the board did not deny the claim pursuant to AS 23.30.022, based on Pruitt's false responses to the health history questionnaire, it was reasonable for the board to take those false responses into account when making its credibility findings.[51] Moreover, years passed without Pruitt directing any inquiries to the board or attorney Patterson as to the status of her workers' compensation claim. Having considered the

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47 *See Kim*, 197 P.3d at 196 n.4, 197 n.17, and 198 n.22.

48 *See Bailey,* 111 P.3d at 323.

49 *See id.* at 324.

50 *See Kim,* 197 P.3d at 198 n.22 (citing *Bailey,* 111 P.3d at 324).

51 *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 2.

relative importance of the claim to Pruitt, the board found that for her to neglect her claim for so long defied belief.[52] Consequently, the board determined Pruitt's assertions that 1) she thought Patterson had requested a hearing before he withdrew; and 2) she was unaware he withdrew until October 20, 2009, were not credible.[53] Ultimately, the board concluded that the termination of Pruitt's long-term disability benefits in August 2009 was a more plausible explanation for her renewed interest in her claim than her assertion that she did not know she had to request a hearing within two years.[54]

Given the foregoing facts and the board's credibility findings, we conclude that substantial evidence exists to support the board's ruling that Pruitt did not substantially comply with the requirement in AS 23.30.110(c) that she request a hearing within two years of Providence's controversion of her claim. It is undisputed that Pruitt did not file anything with the board in connection with a hearing within two years of the controversion.

c. Could lack of an ability to understand the statute's requirements constitute good cause and excuse Pruitt's failure to substantially comply with AS 23.30.110(c)?

In the process of reaching its holding in *Kim*, the supreme court discussed other board and commission decisions excusing compliance with AS 23.30.110(c).[55] The court commented: "From these decisions, it appears that *the Commission and the Board already exercise some discretion and do not always strictly apply the statutory requirements*. This approach is consistent with the notion that a statute of limitations

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[52] *See Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 7.

[53] *See id.* at 4.

[54] *See id.* at 8.

[55] *See Kim,* 197 P.3d at 198 (citing *Morgan v. Alaska Reg'l Hosp.,* Alaska Workers' Comp. App. Comm'n Dec. No. 035 (February 28, 2007); *Tonoian v. Pinkerton Security,* Alaska Workers' Comp. App. Comm'n Dec. No. 029 (January 30, 2007); and *Omar v. Unisea, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 053 (August 27, 2007)).

defense is disfavored."[56] Thus, the supreme court seemed to acknowledge that compliance with the statute, which operates similarly to a statute of limitations, may be excused for good cause.

The commission's decision in *Tonoian v. Pinkerton Security* recognized mental incompetence as a basis for excusing compliance with AS 23.30.110(c).[57] Furthermore, in *Kim*, the supreme court cited *Tonoian* as an example of a case in which some discretion might be exercised in the application of the AS 23.30.110(c) bar to a claim.[58] Based on this case law, if a claimant's mental incompetence is determined by a court, it could constitute good cause and excuse a claimant's failing to comply with AS 23.30.110(c). Similarly, Pruitt argued at the August 2010 board hearing[59] that she did not understand what was required of her to comply with the statute. If she could demonstrate that lack of understanding to the board's satisfaction, it could constitute good cause and excuse her noncompliance.

In *Pruitt I* we declared that it was not clear that the board decided the specific issue whether Pruitt understood the statute's requirements and remanded the matter to the board.[60] However, on reconsideration, the commission concludes that the board made adequate findings in this respect. Providence noted in its Request that, among other things, the board found that Pruitt's assertions that she did not understand the workers' compensation process and did not know she had to request a hearing in two

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56 *Kim,* 197 P.3d at 198 (italics added).

57 *See Tonoian,* Workers' Comp. App. Comm'n Dec. No. 029 at 11-12.

58 *See* n.55, *supra*.

59 *See* Aug. 19, 2010, Hr'g Tr. at 40-46.

60 *See Pruitt I*, Alaska Workers' Comp. App. Comm'n Dec. No. 157 at 10.

years lacked credibility.[61] Moreover, as previously mentioned,[62] there were other factors that the board considered in finding that Pruitt disingenuously claimed she did not understand the statute's requirement that she request a hearing within two years of the controversion. They include the relative importance to Pruitt of her claim and the fact that her renewed interest in it coincided with the termination of her disability benefits.

We conclude that the foregoing evidence is substantial evidence in support of the board's finding that Pruitt understood what was required of her under AS 23.30.110(c). Because Pruitt understood what the statute required of her, it moots any issue whether a lack of understanding of the statute on Pruitt's part could constitute good cause and excuse her failure to request a hearing within two years of Providence's controversion.

5. Conclusion.

On the basis of Providence's Request, we have reconsidered our decision. The commission AFFIRMS the board's decision to dismiss Pruitt's claim.

Date: *27 January 2012* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David Richards, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

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[61] *See* Request at 2, 3 (quoting *Pruitt,* Alaska Workers' Comp. Bd. Dec. No. 10-0156 at 4, 8). Providence also pointed out that Pruitt thought her attorney would be filing the necessary paperwork to request a hearing. *See* Request at 5. It follows that this understanding on her part manifests some understanding of the statute's requirements.

[62] *See* Part 4(b), *supra* at 9-10.

APPEAL PROCEDURES

The commission's decision upon reconsideration affirms the board. The commission's decision becomes effective when distributed unless proceedings to appeal to the Alaska Supreme Court are instituted (started).[63] 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 Court no later than 30 days after the date this decision upon reconsideration is distributed[64] 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. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. 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

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of the Decision Upon Reconsideration, Decision No. 158 issued in the matter of *Pruitt v. Providence Extended Care,* AWCAC Appeal No. 10-032, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 27, 2012.

Date: *January 31, 2012*

Signed

B. Ward, Appeals Commission Clerk

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[63] A party has 30 days after the service or distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was served by mail only to a party, then three days are added to the 30 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.

[64] *See* n.63, *supra*.