Alaska Workers' Compensation Appeals Commission

Alaska Airlines and Eberle Vivian,
Appellants,

vs.

Melanie Nickerson,
Appellee.

Memorandum Decision and Order
Decision No. 021 October 19, 2006

AWCAC Appeal No. 06-009
AWCB Decision No. 06-0057
AWCB Case No. 199911086

Memorandum Decision and Order on Appeal from Alaska Workers' Compensation Board Decision No. 06-0057, Northern Panel at Fairbanks issued March 3, 2006, by Fred G. Brown, Chairman, and Chris Johansen, Member for Management.

Appearances: Richard Wagg, Russell, Tesche, Wagg, Cooper & Gabbert, for appellants Alaska Airlines and Eberle Vivian; Melanie Nickerson, pro se, appellee.

Commissioners: Marc Stemp, Jim Robison, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

Alaska Airlines appealed the award of additional compensation and medical benefits to Melanie Nickerson on the grounds that her claim for permanent partial disability compensation and vocational reemployment benefits were barred by AS 23.30.105(a) and that she failed to file an affidavit of readiness for hearing within two years of the date of controversion of her claim as provided by AS 23.30.110(c). Alaska Airlines also challenged the sufficiency of the evidence to support an award of continuing medical benefits. At oral argument before the commission on October 6, 2006, Alaska Airlines withdrew its appeal based on AS 23.30.105(a) because Nickerson's attorney had recorded an amendment of her first claim in a pre-hearing conference summary. After careful review of the record, we find there are inadequate findings of fact to decide this appeal. We REMAND this case to the board for further

findings and we RETAIN JURISDICTION to decide the appeal once the board has made its findings of fact.

Factual background and proceedings before the board.

When she was 23 years old, Nickerson was hired by Alaska Airlines in December 1996 to work as a customer service agent in Fairbanks, Alaska.[1] She injured her back when she picked up a customer's bag and twisted to put it on the conveyor belt on June 17, 1999.[2] She returned to work part time for an undetermined time. She later moved to Sandy, Oregon, where she lives with her four children.[3] Nickerson has not returned to work with Alaska Airlines.

Alaska Airlines paid medical benefits and temporary disability compensation until November 28, 2000.[4] Before compensation was terminated, on May 22, 2000, Nickerson filed a Workers' Compensation Claim she dated May 17, 2000.[5] She asked for temporary total disability compensation from June 17, 1999 to October 1999, temporary partial disability compensation thereafter through the present, medical costs, penalties, and interest.[6] Alaska Airlines controverted the claim for temporary total disability compensation after October 26, 1999; temporary partial disability compensation after March 31, 2000; and the claim for penalties, based on a report by Dr. Brockman.[7]

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[1] R. 000001.

[2] R. 000146.

[3] At the time of her injury in 1999, Nickerson reported she had four children, ages 1, 2, 5 and 7 years old. R. 000001.

[4] R. 0000010, 000012, 000016.

[5] R. 000046-47.

[6] R. 000047.

[7] R. 000004, 000130-135.

A pre-hearing conference was held June 27, 2000. Nickerson stated then that she believed all medical bills had been paid, but she was still on light duty.[8] A second pre-hearing conference was held August 8, 2000.[9] Nickerson was late appearing for the conference but she reported she had sent her time sheets to Alaska Airline's attorney.[10] Alaska Airlines noted it may schedule another Employer Medical Examination (EIME).[11]

Alaska Airlines did schedule another employer medical examination, which was done by Dr. Chaplin on September 20, 2000.[12] After examining Nickerson, he stated:

> I believe she has recovered from the sprain of the lumbosacral spine and there is no orthopedic explanation for her continued unrelenting pain at this time. It is felt that she specifically does not have any neurological deficits. She does not have evidence of injury and as such there is no specific reason for continued complaints of pain. . . . [S]he is considered to be medically stable.
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> * * *
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> There is no indication of permanent impairment using the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fourth Edition unrevised.
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> * * *
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> The only further treatment would be a self-directed exercise program in order to improve her physical conditioning.[13]

Based on this report, Alaska Airlines issued a controversion on December 12, 2000 of temporary partial disability compensation, temporary total disability compensation, permanent partial impairment compensation, and medical treatment.[14]

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8 R. 000279.

9 R. 000281.

10 R. 000281.

11 R. 000281.

12 R. 000193-200.

13 R. 000199.

14 R. 000008.

However, it was July 20, 2001 before a third pre-hearing conference was scheduled, and then Nickerson failed to appear.[15] Alaska Airlines' attorney appeared, reported that there were "issues for an SIME," and agreed to initiate the SIME process.[16] In the next pre-hearing conference, September 5, 2001, the parties (Nickerson was present) stipulated to the SIME.[17]

The SIME was done by Dr. Greenwald. The parties agreed that certain questions were not fully answered by his report, and in a pre-hearing on December 11, 2001, they agreed to put the additional questions to him.[18] On March 13, 2002 a pre-hearing conference was attended by Phyllis LaVita,[19] a representative of Kalamarides & Lambert, a law firm that entered an appearance on Nickerson's behalf.[20] Nickerson's claim was amended to include both permanent partial impairment compensation and vocational reemployment benefits.[21] It was also noted that "settlement negotiations may be in place."[22] Without explanation, Kalamarides and Lambert withdrew from representing Nickerson on April 15, 2002.[23] On August 19, 2002, Alaska Airlines controverted medical benefits.[24]

Nothing further happened in Nickerson's claim until March 7, 2003, when she filed an Affidavit of Readiness, indicating her readiness to proceed to hearing on her

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15 R. 000283.

16 R. 000283.

17 R. 000286.

18 R. 000291.

19 R. 000295.

20 R. 000055.

21 R. 000295.

22 R. 000295.

23 R. 000057.

24 R. 000043.

May 17, 2000 claim.[25] Alaska Airlines' attorney filed an "affidavit of limited opposition to affidavit of readiness" on March 18, 2003 requesting a pre-hearing conference be scheduled so that a convenient hearing date could be set.[26] Although a pre-hearing conference was scheduled for April 15, 2003,[27] it was not held.[28]

Nickerson filed a second Workers' Compensation Claim on January 25, 2005.[29] On the 2005 Claim form, she asked for permanent partial impairment compensation, medical costs, and an unfair controversion penalty.[30] Alaska Airlines answered asserting a defense based on AS 23.30.105(a) and AS 23.30.110(c)[31] and filed a controversion of all benefits on February 23, 2005.[32]

A pre-hearing conference was scheduled on March 9, 2005. At the pre-hearing conference, Alaska Airlines asserted defenses "as in all prior answers and controversions in the board file."[33] The parties agreed to discuss settlement and if settlement was unlikely a hearing date would be set at the next pre-hearing

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[25] R. 000059.

[26] R. 000062.

[27] R. 000299.

[28] The board noted that "the employee failed to appear and it was cancelled." *Melanie Nickerson v. Alaska Airlines,* AWCB Decision No. 05-0214 at 4 (August 19, 2005).

[29] R. 000063-64. Nickerson's Workers' Compensation Claim is dated June 18, 2004, but was stamped by the board on January 25, 2005.

[30] R. 000064.

[31] R. 000065-66.

[32] R. 000044.

[33] R. 000302.

conference.[34] Settlement was not reached, and at a pre-hearing on May 2, 2005, the "parties agreed to an oral hearing on July 21, 2005."[35]

At the hearing July 21, 2005, the board limited the issue to "Whether the employee's claim for workers' compensation benefits should be denied based on the employer's affirmative defenses of AS 23.30.105(a) and AS 23.30.110(c)?"[36] In an Interlocutory Decision, the board decided that Nickerson had filed a claim within the two year period described in AS 23.30.105(a)[37] and that, although the employee failed to file an affidavit of readiness on time, "the employer waived its right to require the employee to file an Affidavit of Readiness at the . . . 2001 prehearing conferences, in which the parties agreed to proceed through the SIME process."[38] The board found "the employee's failure to request a hearing thereafter does not amount to a forfeiture under Section 110(c)."[39]

After the interlocutory order was issued, another pre-hearing conference was held.[40] At this conference, both claim forms were listed, amendments noted, and a hearing on the merits was set for January 12, 2006.[41] At the hearing, Nickerson was the only witness to testify.

The board decided the employee had presented sufficient evidence to attach the presumption of compensability to her claim, the employer rebutted it with substantial

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[34] R. 000302.

[35] R. 000306.

[36] *Melanie Nickerson,* AWCB Decision No. 05-0214 at 1, R.000068.

[37] *Melanie Nickerson,* AWCB Decision No. 05-0214 at 6, R. 000073.

[38] *Id.*

[39] *Id.*

[40] R. 000314.

[41] R. 000314. The parties were notified the hearing would occur January 19, 2006, R. 000316, but for a reason not explained in the record, the hearing actually occurred on January 26, 2006. R. 000318, Tr. 1.

evidence, and that "based on the medical opinions of Dr. Joosse and Greenwald, that the employee continues to experience residual symptoms from her work injury, and that she cannot continue to lift heavy objects, and she needs retraining, we find the employee has proven her case by a preponderance of the evidence."[42] However, the board found Nickerson had not presented "clear and convincing" evidence that she was not medically stable, and so denied her claim for further temporary disability compensation.[43] The board found she was entitled to a three percent permanent partial impairment compensation,[44] referred a finding on the claim for reemployment benefits to the administrator;[45] and, based on the determination that the employee's claim for continuing benefits is compensable, the board found the employer "shall reimburse the employee's continuing work-related medical costs."[46]

Arguments on appeal.

On appeal, Alaska Airlines argued that Nickerson's March 7, 2003 Affidavit of Readiness for Hearing was filed too late and that her claim was denied by the provision of AS 23.30.110(c) that states: "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." The board, Alaska Airlines argued, had no legal basis to find the employer "waived its right to require" enforcement of the statute, and that there were no findings made to support such a waiver. Alaska Airlines also argued that the board lacked evidence to

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[42] *Melanie Nickerson v. Alaska Airlines,* AWCB Decision No. 06-0057 at 6-7 (March 6, 2006); R.000323-24.

[43] *Id.* at 7; R. 000324.

[44] *Id.* at 8; R. 000325.

[45] *Id.* at 9; R. 000326.

[46] *Id.* at 10; R. 000327.

find that the employee had a continuing, present need for medical care as the record contained no contemporaneous medical evidence.[47]

Nickerson's argument was that she did not know about the requirement that she file a request for hearing. She was busy and somewhat depressed by her injury. She had not given the employer copies of her medical bills or expenses because her claim was controverted. Nickerson devoted most of her argument to her statement that her back injury had not resolved and that her employer had not provided her with adequate compensation for the change in her life. She insisted she could not return to her former employment. Nickerson appeared to argue that because she is still "on the books" as on medical leave, her employer was not prejudiced by her failure to give notice because it knew what was happening to her.

Our standard of review.

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[48] The board has the sole power to assess the credibility of testimony presented to it,[49] and the board's findings as to the credibility of a witness appearing before it are binding on the commission.[50] The question whether the quantum of evidence is substantial enough to

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[47] On appeal, Alaska Airlines also challenged the board's interlocutory decision and order that Nickerson's claim for permanent partial disability impairment was barred by failure to file a claim for the benefit within two years of the date that she knew or should have known of a permanent impairment. On questioning by the chair during oral argument regarding the effect of the amendment of Nickerson's claim recorded on the pre-hearing conference summary dated March 19, 2002, R. 000295-96, Alaska Airlines withdrew this argument from the appeal, conceding that Nickerson had provided notice, although not in written form, of her claim for permanent partial impairment and reemployment benefits.

[48] AS 23.30.128(b).

[49] AS 23.30.122.

[50] AS 23.30.122 provides that the board's findings are "subject to the same standard of review as a jury's findings in a civil action." AS 23.30.128(b) provides that the board's findings are "binding" upon the commission.

support a conclusion in the contemplation of a reasonable mind is a question of law.[51] The commission exercises its independent judgment on questions of law and procedure.[52]

> *AS 23.30.110(c) contains no requirement that the employer enforce the time-bar at pre-hearing conferences before the time-bar runs or waive application of the time-bar.*

AS 23.30.110(c) requires a "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." 8 AAC 45.070(b) provides that "a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed." 8 AAC 45.070(b)(1)(C) states: "For an appearance in person at the hearing, except for a venue determination, a party must file an affidavit of readiness in accordance with (2) of this subsection requesting an in-person hearing." However, if the board or designee "determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing" the board must give notice of the hearing in accord with AS 23.30.110 and 8 AAC 45.060(e).[53]

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[51] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[52] AS 23.30.128(b).

[53] 8 AAC 45.070(b)(3). AS 23.30.135 is cited as one of the authorities for 8 AAC 45.070(b)(3). It provides in part:

> **Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties.

The language of 8 AAC 45.070(b)(3) gives the board the authority to move beyond making investigation and inquiry to giving notice of a hearing even where the parties have not expressed readiness to proceed.

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."[54] The Alaska Supreme Court has emphasized that the language of AS 23.30.110(c) is clear.[55] 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,[56] and the board "may require no more of the employee."[57]

The question presented here by the board's decision is whether the board may excuse the employee's failure by imposing an obligation on the employer to enforce the statute before the time-bar expires. The Supreme Court previously rejected an attempt to read into the time bar in AS 23.30.110(c) "a provisio that simply is not there" and enjoined the board, and now this commission, to "apply the statute as written" unless absent evidence of contrary legislative intent.[58] There is no evidence the legislature meant otherwise than what it said: "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." The Supreme Court stated that the expiration of the two-year period in AS 23.30.110(c) "results in dismissal of the particular claim."[59]

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[54] *Jonothan v. Doyon Driling, Inc.,* 890 P.2d 1121, 1124 (Alaska 1995). Although initially compared to other statutes by which a claim may be dismissed for failure to prosecute or set it down for hearing in a specified or reasonable time, *Huston v. Coho Electric,* 923 P.2d 818, 820 (Alaska 1996) (Eastaugh, J.), the Supreme Court cautioned two months later that AS 23.30.100(c) should not be read as a comprehensive "no progress rule." *Wagner v. Stuckagain Heights,* 926 P.2d 456, 459 n.7 (Alaska 1996) (Fabe, J.).

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

[56] *Tipton,* 922 P.2d at 913.

[57] *Huston,* 923 P.2d at 820.

[58] *Tipton,* 922 P.2d at 913.

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

Although it "resembles a statute of limitations,"[60] section 110(c) differs from other statutes of limitation in the Alaska Workers' Compensation Act. AS 23.30.100(a) requires "notice of an injury . . . shall be given within 30 days after the date of such injury" but AS 23.30.100(d) provides that failure to give notice "does not bar a claim under this chapter (1) if the employer . . . had knowledge of the injury . . . and the board determines that the employer . . . has not been prejudiced . . . (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given; (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect of the injury." AS 23.30.100(a) imposes an obligation to perform an act within a certain time; AS 23.30.100(d) excuses failure to comply with the obligation in certain circumstances. No such excuse provisions are included in AS 23.30.110.[61] Instead, the requirement is reinforced, for AS 23.30.110(h) provides that if the employee requests a continuance after requesting a hearing, and the board grants the request, the two-year time period begins to run again "from the time 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 period in (c) of this section, the claim is denied."

The general statute of limitations in AS 23.30.105(a) provides that "the right to compensation . . . is barred unless a claim for it is filed within two years . . ." AS 23.30.105(b) excuses failure to file a claim within the period set forth in section 105(a) "unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard." No such provision requiring employer objection is included in AS 23.30.110(c).

The design of the Alaska Workers' Compensation Act provides generous opportunity for an injured worker to enforce the "right to compensation" referred to in

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[60] *Id.* (Noting AS 23.30.110(c) differs from a statute of limitations in affecting only the particular claim dismissed.)

[61] In addition, AS 23.30.122(a)(2) establishes a presumption that sufficient notice of the claim has been given, but there is no presumption that the employee has requested a hearing.

AS 23.30.105(a) by filing a claim and bringing the dispute to the board's attention so that the board may "make its investigation or inquiry and conduct its hearing."[62] The time for filing a claim is delayed until the employee "has knowledge of the nature of the injury *and* its relation to the employment *and* after disablement."[63] If compensation has been paid without an award by the board, the time for filing a claim is extended to "two years after the date of the last payment of benefits."[64] Provision is made for latent defects, "time limitations notwithstanding."[65] The statute of limitation is tolled during minority and incompetency[66] or during a law suit dismissed because the employee is the employee of a defendant who is an employer covered by workers' compensation insurance.[67] The statute of limitations defense is generally disfavored and we are instructed that neither the law nor the facts should be strained to aid its application.[68]

The Supreme Court has also stated that although "expiration of the two-year period in section 110(c) results in dismissal of the particular claim, it does not prevent the employee from applying for different benefits, or raising other claims, based upon a given injury."[69] The Court recognized that the Act has no unitary claim requirement that requires an employee to file and bring to hearing a single, unified claim arising from the injury, or the board to predict all future disabilities and needs for specific

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62 AS 23.30.135(a).

63 AS 23.30.100(a).

64 *Id.*

65 *Id.*

66 AS 23.30.100(c).

67 AS 23.30.100(d).

68 *Tipton,* 922 P.2d at 912, *citing Lee Houston & Assoc. v. Racine,* 806 P.2d 848, 854 (Alaska 1991) and *Safeco Ins. Co. v. Honeywell,* 639 P.2d 996, 1001 (Alaska 1981) (further citation omitted).

69 *Id.*

benefits in a single final award. An employee may file different claims for different benefits arising from the same injury as claims ripen, subject to the prohibition against "claim splitting"[70] and statute of limitations.

However, the Act's generous provision of opportunity to file claims is balanced by the requirement that an employee, once notified that the claim is controverted, must request a hearing within two years on that particular claim or the claim "is denied." There is no statutory requirement in AS 23.30.110(c) that the employer assert AS 23.30.110(c) as a defense to a claim *before* the two-year period has passed, and, in view of the Supreme Court's statements in *Tipton*, we do not read one into the statute. We conclude the board erred as a matter of law in holding that Alaska Airlines, by not raising the time-bar in pre-hearing conferences before the time-bar passed, waived enforcement of AS 23.30.110(c) against Nickerson.

The board is required to inform the employee of the time bar.

The Alaska Supreme Court said that the board "owes to every applicant for compensation the duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, . . . and of instructing him on how to pursue

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[70] *Robertson v. American Mechanical, Inc.,* 54 P.2d 777, 780 (Alaska 2002) (applying the rule against claim splitting to workers' compensation claims: "claims . . . based on the same injury and same 'core set of facts,' . . . should have been brought together."). The Supreme Court defined the rule against claims splitting as a "principle that all claims arising out of a single transaction must be brought in a single suit, and those that are not become extinguished by the judgment in the suit in which some of the claims were brought." 54 P.2d at 780, *citing, Osborne v. Buckman,* 993 P.2d 409, 412 (Alaska 1999). According to the Supreme Court, the rule is not applied as "rigidly in administrative proceedings," which we view as a practical response to the need to promote quick, efficient, and fair resolution of those disputes that are ripe, while recognizing the injured worker may be entitled to different benefits in the future. The workers' compensation adjudication system is not readily designed to predict the complete future circumstances of injured workers; if board hearings were to absorb all the witnesses necessary to establish the employee's right to coverage, entire future medical course, future need for reemployment benefits, and degree of permanent impairment in a single hearing, the system would soon become overburdened and intolerably slow. We endeavor to interpret *Tipton* and *Robertson* harmoniously.

that right under law."[71] The existence of a time-bar resulting in denial of a claim is a "real fact" bearing on Nickerson's claim. The duty to inform Nickerson may have been fulfilled, but Nickerson's position was that she "did not know" about the time-bar, and the board made no findings that reflect it decided that Nickerson's claim of a lack of knowledge or information was credible.

We cannot say that Nickerson was or was not informed of the operation of the time-bar from the record before us. She was briefly represented by counsel, but the pre-hearing conference summaries contain no record indicating the pre-hearing officer recorded that her counsel – or the pre-hearing officer -- told Nickerson about the time-bar. We note that two of the controversions in the record contain language on the reverse advising the employee that her claim may be denied if she does not request a hearing in two years, but two do not. We also note that when she filed a 2005 claim she included different benefits than those listed on her 2000 claim. Thus, even if her 2000 claim was denied by AS 23.30.110(c), to the extent she requested different benefits in 2005, a claim for those different benefits may not be time-barred.[72]

When applying a time-bar that results in denial of a claim, we are concerned that the claimant was notified of the existence of the time-bar, and, in this case, how it applied to the original 2000 claim and any amendments to the claim.[73] We find the

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[71] *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).

[72] Nickerson was not present at the pre-hearing conference in which her 2000 claim was amended to include additional benefits she listed on her 2005 claim form. Whether she knew about the amendment is a question that the board did not answer.

[73] The employer took the position that the time-bar in AS 23.30.110(c) would result in denial of the 2005 claim, R. 000066, because the employer controverted permanent partial impairment benefits in December 2000; but we disagree based on *Tipton*, except insofar as the 2005 claim requested the same benefits as the 2000 claim. The December 2000 controversion was filed *before* the employee filed a claim for permanent partial impairment benefits in 2005, or amended her 2000 claim in March 2002. Permanent partial impairment benefits were not controverted again until after the 2005 Claim form was filed.

board made no determination of facts in this area and we conclude the facts are not sufficiently developed to permit review of the board's decision.

The facts are insufficiently developed to complete review of the board's decision.

The question remaining is whether the employer may agree to a hearing on the merits of a claim that is denied under AS 23.30.110(c) by operation of the time-bar. We believe the employer may agree that the time-bar may be suspended by agreement for two reasons. First, the legislature intended that workers' compensation cases be decided on their merits except where otherwise provided by statute.[74] Operation of the time-bar to prevent a hearing on the merits of a claim is not the favored means of resolving claims. Second, while the act provides that the board is not bound by formal rules of procedure[75] it is bound by its own regulations. 8 AAC 45.065(a) requires the board, or its designee, to "exercise discretion in making determinations on . . . (3) accepting stipulations, . . . or other documents that may avoid presenting unnecessary evidence at the hearing."

A stipulation that extends the period of time for running of the time-bar is an agreement by an employer to submit to a hearing and abide by the board's decision on a claim that would otherwise expire by operation of law and is valid if accepted by the board or its designee in the exercise of discretion. However, because such a stipulation constitutes the waiver of a legal right, it must reflect the intentional relinquishment of a known right.[76] We cannot determine from the facts presented in this case if such a stipulation was made by the employer and accepted by the board's designee before the time-bar resulted in denial of Nickerson's 2000 claim. Similarly, as discussed above, we find we cannot determine from the facts presented in this case that Nickerson abandoned her 2000 claim with knowledge of the time-bar.

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[74] AS 23.30.001(2).

[75] AS 23.30.135(a)

[76] *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978). *D.J. v. P.C.*, 36 P.3d 663, 670 n. 31 (Alaska 2001).

We find that there are insufficient findings presented to conclude that Alaska Airlines made an implied waiver of the right to dismissal of Nickerson's 2000 claim by operation of AS 23.30.110(c). The standard for implied waiver is high and factual findings are required.[77] Neglect to insist on a right only results in an estoppel, or implied waiver, when the neglect is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question.[78]

Finally, we find the board failed to make findings of fact sufficient to award medical expenses. Because medical expenses are not presumed, a claimant has the burden of proving them by a preponderance of the evidence.[79] Nickerson testified:

> I deserve and I – I should have my medical bills that I'm still seeing doctors for that the State of Oregon now because I'm on state insurance is paying for my back doctors that I'm seeing and that I have been seeing, and I – I have – I haven't been able to have any money coming in from Alaska Airlines.[80]
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> * * *
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> I take Percocet, you know, once in awhile for pain. I shouldn't have to do that, so – and – and anti-inflammatories, and that's not (indiscernible) 30-year-old person, and I feel Alaska Airlines (indiscernible) is responsible for that.[81]

Nickerson also described reports she submitted:

> There was a fax, but then I also sent to – to worker's compensation and also to Rick Wagg [Alaska Airlines' attorney] a

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[77] *Anchorage Chrysler Center, Inc., v. Daimler Chrysler Corp.*, 129 P.3d 905, 917 (Alaska 2006).

[78] *Anchorage Chrysler,* 129 P.3d at 917, n.35; *quoting Wausau Ins. Cos. v. Van Biene,* 847 P.2d 584, 589 (Alaska 1993); *State, Dep't of Revenue v. Valdez*, 941 P.2d 144, 152 n.9 (Alaska 1997).

[79] *Tolbert v. Alascom, Inc.,* 973 P.2d 603, 607 (Alaska 1999).

[80] Tr. 4.

[81] Tr. 5.

> CT scan that I had that – where I have two bulging disks, L4-L5 and L5-S1.[82]
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> I also, then I sent that fax after that that I went and saw (indiscernible), who just thinks that I really just need to have my – my disks removed. . . . there are further things that need to be taken care of and – which is medical, and I – if you want me to get all my medical paperwork to Rick, I mean, I'll do whatever I have to.[83]

There was no express finding of credibility. Nickerson's testimony establishes that she sought treatment in Oregon for her back, but she was still living in Fairbanks as late as June 2004, when she completed a claim form.[84] Her testimony is that she still has back pain at least once in a while and she believes Alaska Airlines is responsible for it. Nickerson produced no bills or statements to support her claim for medical benefits, did not identify any further particulars or dates of her treatment, or identify the state agency that paid for the treatment.[85] No evidence was cited by the board to indicate that any particular treatment after March 13, 2002[86] was the result of the injury.

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[82] Tr. 13. The CT Scan report referred to dated in October 2005 and was date stamped January 17, 2006, nine days before the hearing date. R. 000229.

[83] Tr. 14. The report is probably the unsigned report by James Y Kim, M.D., dated November 30, 2005 and date stamped by the board January 26, 2006, the date of the hearing. R. 000231.

[84] R. 000063-64. The form was not filed until January 2005, but it is dated in June 2004 and shows a Fairbanks address.

[85] Nickerson testified that a physician told her that she needs to have disks removed, but this kind of hearsay is not reliable evidence of expert medical opinion and, more importantly, was not presented in a form that allows the opposing party to know the full content of the opinion and to be able to cross-examine the author before the board.

[86] At the pre-hearing conference on June 27, 2000, Nickerson conceded all medical expenses had been paid. R. 000279. At the pre-hearing conference March 13, 2002, medical expenses or benefits are not listed as an issue in dispute. R. 000295.

Nickerson was injured on June 17, 1999; therefore, the two-year period referred to by the board[87] expired on June 16, 2001. Alaska Airlines controverted medical benefits on December 12, 2000; but at that time Nickerson had not seen a physician since June 19, 2000. The treatment recommended on June 19, 2000, by Dr. Krengel was approved by the adjuster, but Nickerson apparently did not go forward with Dr. Krengel's recommendations.[88] There is no record that she returned to a physician until March 27, 2001.[89] Thus, there is some evidence the treatment recommended by Nickerson's physician in June 2000 was approved in June 2000. Nickerson presented no evidence she actually sought the treatment recommended by Dr. Krengel, either when it was approved, or between December 12, 2000 (when medical treatment was controverted) and June 17, 2001. Therefore, we cannot find the evidence the board relied on to determine that Nickerson sought specific medical treatment before June 17, 2001, that the treatment was unpaid and that expenses for the treatment shall be reimbursed because the employer failed to demonstrate it was not reasonable or necessary or within the realm of acceptable medical practice.[90]

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[87] *Melanie Nickerson*, AWCB Decision No. 06-0057, 10.

[88] R. 000189. Dr. Krengel recommended she see Dr. Baker or Dr. Chang for consideration of other studies and treatment; there are no reports from Dr. Baker or Dr. Chang in the record.

[89] R. 000216-219. At that time, Dr. Joosse recommended she continue her exercise program. R. 000218. A "self-directed exercise program" was excluded from the December 12, 2000 controversion. R. 000008.

[90] We have previously discussed at length in *S&W Radiator Shop v. Louise Flynn,* AWCAC Decision No. 016 (August 4, 2006), our understanding of *Phillip Weidner & Assocs. v. Hibdon,* 989 P.2d 727 (Alaska 1999). In *Hibdon*, the Alaska Supreme Court set standards for the board to determinine whether or not to order medical treatment recommended within two years from an employee's date of injury. The elements of the employee's claim include that the treatment is "reasonably effective and necessary for the process of recovery," and the "treatment falls within the range of medically accepted options." 989 P.2d at 732. Where a consensus is reached between the injured worker and her physicians regarding surgery, the employer bears a "heavy burden" to show that treatment is neither reasonable nor necessary. *Id.* However, the Court did not change the employer's burden of persuasion to "much greater than the

We turn now to the board's conclusion that Alaska Airlines is liable for "the employee's continuing work-related medical costs." Two medical records presented by Nickerson are dated after 2001: two reports faxed to the board shortly before the hearing.[91] The board did not cite these reports in its decision, probably because the board's regulations require that, for any document received less than 20 days before hearing, the board will rely on the document only if the parties expressly waive the right to cross-examination.[92] Because the board had no evidence of the medical expenses incurred or treatment reported, we conclude that the board did not have sufficient evidence on which to base a conclusion that the employer must reimburse the employee's medical expenses from June 17, 2001, and continuing into the future. We distinguish the board's conclusion that the employee's condition is compensable from its order directing the employer to reimburse medical expenses for treatment that has not been reported to the board.[93]

Conclusion and order.

AS 23.30.128(d) provides that the commission may remand matters it determines were "improperly, incompletely, or otherwise insufficiently developed." We find that this case presents too few facts, and too little discussion of how the board reached its conclusions, to permit the commission to review the board's decision. We therefore remand the case to the board with instructions to take evidence and make findings on the following specific questions:

1. Was the employee informed by the board, or the staff of the Division of Workers' Compensation, or Alaska Airlines about the need to file an Affidavit of Readiness for Hearing or to request a hearing in two years after controversion of her

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preponderance," as we explained in *Flynn,* AWCAC Decision No. 016 at 12-13 n. 70. The board's use of a "much greater than the preponderance" burden of persuasion in this case, *Melanie Nickerson,* AWCB Decision No. 06-0057 at 10, is plain error.

91 R. 000229, 000231.

92 8 AAC 45.120(i).

93 AS 23.30.095(c).

Claim in any form besides the back of the board-prescribed form filed August 14, 2000? How was that information delivered to her? What information, and in what form, did Alaska Airlines (including information given directly by the employer as opposed to the adjuster) give Nickerson? What information, and in what form, did the board and division staff give to Nickerson? Did Nickerson acknowledge in any manner receiving the information? Was Nickerson informed of the amendment of her 2000 claim?

2. What specific affirmative statements did Alaska Airlines make that constituted a waiver of a legal right based on AS 23.30.110(c)? What conduct did Alaska Airlines engage in at a pre-hearing conference in 2001 or later, that constituted a waiver of a legal right based on AS 23.30.110(c)? Did Alaska Airlines stipulate to an extension of the time-bar and was that stipulation accepted by the board?

3. Did Nickerson seek medical care after 2002, what medical care did she obtain, and how was the medical care related to and required for the process of recovery from the employment injury?

We determine that the record was incompletely developed. We REMAND this matter to the board for further proceedings to take evidence on the issues listed above, and to supplement its conclusions as necessary. The commission clerk is directed to return the record to the board within 14 days of this order. We RETAIN JURISDICTION of the appeal and we will take up the appeal after the record is supplemented. The board is directed to return the supplemented record to the commission within 60 days of the date of this order.

Date: *October 19, 2006* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Marc Stemp, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final decision on this appeal. The commission's order requires the board to make additional findings of fact and then the commission will finish making a decision on the merits of the appeal. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or to obtain Supreme Court review are instituted. Please read about reconsideration below.

Effective November 7, 2005 proceedings to appeal a final decision of the commission must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision 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. Because this is not a final decision on the merits of the appeal, the Supreme Court may not accept an appeal.

An alternative to an appeal is to file a petition for review under the Alaska Rules of Appellate Procedure. No decision has been made on the merits of this appeal, but if you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or an appeal. If you decide to appeal or 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

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 commission's Memorandum Decision and Order in the matter of *Alaska Airlines and Eberle Vivian v. Melanie Nickerson*; Appeal No. 06-009; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 19th day of October, 2006.

Signed
C. J. Paramore, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision in AWCAC Appeal No. 06-009 was mailed on *10/19/06* to M. Nickerson (certified) and Wagg at their addresses of record, and faxed to Wagg, Director WCD, AWCB Appeals Clerk and AWCB-Fbx.

Signed *10/19/06*
L. Beard, Deputy Clerk Date