Case: *Alaska Airlines and Eberle Vivian vs. Melanie Nickerson*, Alaska Workers' Comp. App. Comm'n Dec. No. 021 (October 19, 2006)

Facts: Board concluded that although employee had not timely requested a hearing, the employer waived its right to require the employee to file the hearing affidavit by agreeing to proceed with the second independent medical evaluation. Board awarded continuing medical benefits for employee's 1999 back injury. Employer appealed arguing employee failed to timely file for hearing on her claims per AS 23.30.110(c) and challenging the sufficiency of the evidence to support the board's finding that employee was entitled to continuing medical benefits. Employee argued that she did not know about the requirement to file a request for hearing.

Applicable law: AS 23.30.110(c) 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."

On whether employer could choose to waive enforcement of time-bar, AS 23.30.001(2) provides that "workers' compensation cases shall be decided on their merits except where otherwise provided by statute[.]" (Thus, operation of the time-bar to prevent a hearing on the merits of a claim is not the favored means of resolving claims.) 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[.]"

AS 23.30.128(d) provides that the commission may remand matters it determines were "improperly, incompletely, or otherwise insufficiently developed."

AS 23.30.095(a) on medical benefits, and *Phillip Weidner & Assocs. v. Hibdon,* 989 P.2d 727 (Alaska 1999).

Issues: Was the employee's claim barred by AS 23.30.110(c) because she had not requested a hearing within two years of the employer's controversion of her claim? Did she have notice of the .110(c) bar? Did the employer waive the time limits of section .110(c)? Does substantial evidence in the record support the board's finding that Nickerson had a present need for medical care as a result of her work-related injury?

Holding/analysis: Commission concluded 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. Unlike other workers' compensation statutes, .110(c) provided no excuses for late filing and no requirement that an employer assert the defense at a specific time. Moreover, Supreme Court had "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' . . . absent evidence of contrary legislative intent." Dec. No. 021 at 10 (citing *Tipton v. ARCO Alaska, Inc.,* 922 P.2d 910, 913 (Alaska 1999)).

Commission found the board's factual findings were inadequate to determine whether Nickerson had notice of the existence of the time-bar or whether Alaska Airlines had

made an implied waiver of its right to dismissal. On notice, the board made no determination of facts and did not decide whether employee's position that she did not know about the time-bar was credible. (Commission did note, however, that two of the four controversions in the record contain language warning about the .110(c) time-bar; in later decisions, commission has held the warnings on board-prescribed controversion forms constitute sufficient notice, so see those decisions before relying on this case to support a claimant's lack of notice.) On the waiver issue, employer needed to make specific affirmative statements, such as stipulating to an extension of the .110(c) time bar. Any stipulation must have "reflect[ed] the intentional relinquishment of a known right." Dec. No. 021 at 15. The board made no factual findings regarding any such stipulations. The commission also found insufficient findings to conclude that the employer made an implied waiver of the .110(c) time bar. "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." *Id.* at 16 (citing *Anchorage Chrysler Ctr., Inc., v. Daimler Chrysler Corp.*, 129 P.3d 905, 917 (Alaska 2006)).

Lastly, commission found that the board had failed to make sufficient factual findings to justify its award of medical expenses. The board decision did not specify 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.

Commission remanded with specific questions for the board on these issues and retained jurisdiction.

Note: Dec. No. 040 deals with the commission's decision after remand; the commission remanded the case again for incomplete findings.