

Case: *Mohamed D. Omar vs. Unisea, Inc. and Alaska National Insurance Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 053 (August 27, 2007)

Facts: The board dismissed Omar's claim because he failed to file an affidavit of readiness for hearing within two years after the employer's controversion. Omar filed claims on April 10, 2001, and on May 6, 2002. Unisea controverted the April 10, 2001, claim on May 16, 2001, and on October 4, 2001. Unisea controverted the May 6, 2002, claim on June 11, 2002.

The board found that the earliest date of an affidavit of readiness for hearing filed by Omar was July 26, 2005. Because Omar filed the July 26, 2005, affidavit of readiness for hearing well after the July 6, 2004, and February 6, 2005, deadlines, the board dismissed Omar's claims under AS 23.30.110(c). (The board's deadlines factored in a period of tolling during the second independent medical examination (SIME) process.)

The board did not discuss the legal effect, if any, of an August 2003 affidavit of readiness for hearing filed by Omar. This affidavit was filed on a board form. The document correctly referenced the case number and the date of injury. In box 12 of the form, the affiant is asked to indicate that he is prepared for a hearing on issues presented in either an "application" or a "petition." Omar did not check either option in box 12. In the blank line provided in box 12 asking the affiant to identify the petition for which a hearing is requested, Omar wrote "08-08-03." There is neither an application (a claim) nor a petition of either party filed on or about August 8, 2003.

Omar appealed the board's decision, challenging the board's failure to consider the August 2003 affidavit of readiness for hearing.

Applicable law: AS 23.30.110(c) states 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."

Issues: Does substantial evidence support the board's decision that the employee failed to file a timely affidavit of readiness for hearing? Should the board consider the August 2003 affidavit?

Holding/analysis: The commission decided that the board erred because it failed to determine whether the employee's August 2003 affidavit of readiness for hearing was valid, an issue that the employee raised before the board. The commission remanded to the board to determine if the employee complied with AS 23.30.110(c) when he filed his August 2003 affidavit of readiness for hearing.

The commission noted that "A claimant has the right to have the board 'fairly consider' evidence and arguments presented." AS 23.30.001(4). Additionally, "[w]hen the board fails to make a necessary finding, the commission cannot bridge the gap by making its own determination from the record." Dec. No. 053 at 6-7 (citing *Bolieu v. Our Lady of Compassion Care Ctr.*, 983 P.2d 1270, 1275 (Alaska 1999)).

The commission explicitly did not decide whether the Workers' Compensation Act permits tolling periods in determining .110(c) deadlines.