

Alaska Workers' Compensation Appeals Commission

Charlayne W. O'Brien,
Appellant,

vs.

Central Peninsula General Hospital,
Wausau Underwriters Insurance Company,
and Alaska National Insurance Company,
Appellees.

Memorandum Decision
on Order to Show Good Cause

Decision No. 280 July 31, 2020

AWCAC Appeal No. 19-007
AWCB Decision No. 19-0033
AWCB Case Nos. 200308494, 200701733

Appearances: Charlayne W. O'Brien, self-represented appellant; Nora G. Barlow, Barlow Anderson, LLC, for appellees, Central Peninsula General Hospital and Wausau Underwriters Insurance Company; John Periman, Meshke Paddock & Budzinski, PC, for appellees, Central Peninsula General Hospital and Alaska National Insurance Company.

Commission proceedings: Appeal filed April 12, 2019; briefing notice issued August 21, 2019; order granting first extension of time to file appellant's brief issued October 23, 2019; order granting second extension of time to file appellant's brief issued December 19, 2019; order granting third extension of time to file appellant's brief issued March 10, 2020; notice of default and order to comply issued April 10, 2020; order to show good cause issued May 15, 2020; hearing on show of good cause held July 8, 2020; written show of good cause filed July 15, 2020.

Commissioners: Michael J. Notar, S. T. Hagedorn, and Andrew M. Hemenway, Chair *pro tempore*.

By: Andrew M. Hemenway, Chair *pro tempore*.

1. Introduction.

Charlayne O'Brien filed this appeal from a decision issued by the Alaska Workers' Compensation Board (Board) denying her petition for modification (and related actions)

of a prior Board decision.¹ The Alaska Workers' Compensation Appeals Commission (Commission) issued an order directing Ms. O'Brien to show good cause why her appeal should not be dismissed for failure to prosecute.² Ms. O'Brien submitted a written response to the order, and the Commission conducted a hearing at which she testified.

We find, based on the record before the Board and before the Commission, that Ms. O'Brien has failed to prosecute her appeal with due diligence. Because Ms. O'Brien is not represented by counsel, we afford her a final opportunity to file her opening brief. If she fails to file her opening brief on or before October 5, 2020, her appeal will be dismissed on October 6, 2020.

2. Board proceedings.

Ms. O'Brien incurred injuries in 2003 and 2007. Represented by counsel, she filed a claim relating to the latter injury on October 22, 2008.³ Surgeries, disputes over the provision of medical records, and other issues resulted in a substantial delay in bringing the 2008 claim to hearing. Initially, a hearing on the merits was set for November 3, 2010.⁴ The hearing date was cancelled in order for the parties to pursue mediation, after which Ms. O'Brien's counsel withdrew on March 2, 2011.⁵ On July 15,

¹ *O'Brien v. Central Peninsula Gen. Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 19-0033 (Mar. 7, 2019) (*O'Brien IX*). The Board had issued eight prior decisions in the matter. See *O'Brien v. Central Peninsula Gen. Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 13-0079 (July 15, 2013) (*O'Brien I*); *O'Brien v. Central Peninsula Gen. Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 13-0151 (Nov. 19, 2013) (*O'Brien II*); *O'Brien v. Central Peninsula Gen. Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 16-0082 (Oct. 5, 2016) (*O'Brien III*); *O'Brien v. Central Peninsula Gen. Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 16-0093 (Oct. 25, 2016) (*O'Brien IV*); *O'Brien v. Central Peninsula Gen. Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 17-0005 (Jan. 19, 2017) (*O'Brien V*); *O'Brien v. Central Peninsula Gen. Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 17-0069 (Jun. 15, 2017) (*O'Brien VI*); *O'Brien v. Central Peninsula Gen. Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 17-0131 (Nov. 21, 2017) (*O'Brien VII*); *O'Brien v. Central Peninsula Gen. Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 17-0140 (Dec. 13, 2017) (*O'Brien VIII*).

² 2 AAC 57.250(b).

³ *O'Brien I* at 3, No. 8. See R. 1660.

⁴ R. 16464.

⁵ *O'Brien I* at 5, No. 18. See R. 16470.

2013, in *O'Brien I*, the Board granted Ms. O'Brien eight months to file an affidavit of readiness for hearing (ARH).⁶ Subsequently, Ms. O'Brien filed a claim for the 2003 injury and, on November 19, 2013, the two claims were joined for purposes of a hearing.⁷

Additional medical examinations⁸ and settlement negotiations led to further delays. The parties engaged in mediation with a Board hearing officer in September 2014.⁹ Thereafter, Ms. O'Brien retained counsel.¹⁰ The parties extended the time to file an ARH to February 29, 2016, in order to continue settlement negotiations.¹¹ Ms. O'Brien's counsel withdrew in November 2015 after the parties were unable to reach a settlement agreement.¹²

In February and March 2016, asserting that she had exacerbated her pain when she had a functional capacities evaluation,¹³ Ms. O'Brien filed a petition to extend the deadline for filing an ARH¹⁴ and, when that petition was set for hearing on April 19, 2016, a petition to continue that hearing.¹⁵ The hearing date was rescheduled to May 25, 2016, and Ms. O'Brien filed a petition to cancel the hearing altogether.¹⁶ On June 7, 2016, the petitions to extend the date for filing an ARH, and to continue the hearing on that petition, were finally set for hearing on September 6, 2016.¹⁷ On

⁶ *O'Brien I* at 17, 19.

⁷ *O'Brien II*.

⁸ See R. 10190 – 10221, 10265 – 10285.

⁹ See R. 563, 579, 16600.

¹⁰ R. 564.

¹¹ R. 568 – 570.

¹² R. 565 – 567, 574, 579 – 580, 585.

¹³ R. 814. See *O'Brien VII* at 30 – 32, Nos. 153, 154, 162.

¹⁴ R. 577 – 582.

¹⁵ R. 589 – 593. See *O'Brien III* at 4 – 5, No. 5; 5, No. 6; 6, No. 10; *O'Brien IV* at 2, No. 1.

¹⁶ R. 609 – 618, 939 – 940.

¹⁷ R. 956 – 957.

August 9, 2016, Ms. O'Brien was in Georgia undergoing treatment in anticipation of surgery and she filed a petition to cancel the scheduled September 6, 2016, hearing and for an indefinite continuance of all future hearings.¹⁸ The Board's designee declined to cancel the scheduled hearing, and on August 25, 2016, Ms. O'Brien had revision surgery. The Board conducted a hearing on September 6, 2016, at which Ms. O'Brien testified that due to her surgery and medication, she was unprepared and that she did not know how long it would be before she could effectively participate in the proceedings.¹⁹ In *O'Brien III*, the Board denied the petition for a continuance, but extended the date to file an ARH until April 5, 2017.²⁰

On October 31, 2016, Ms. O'Brien filed a petition asking the Board to excuse her from reviewing paperwork or making filings for three months (in effect, a request that the Board stay proceedings for three months).²¹ Following a variety of discovery disputes, the Board scheduled a procedural hearing for December 28, 2016, and a hearing on the merits for February 22, 2017.²² The procedural hearing was conducted as scheduled, and in *O'Brien V*, the Board declined to excuse Ms. O'Brien from participation or reschedule the hearing on the merits.²³

Ultimately, the Board conducted a hearing on the merits on August 23 – 24 and October 25, 2017. In *O'Brien VII*, issued on November 21, 2017, the Board found that the 2003 injury was "not a substantial factor in her subsequent disability or need for medical care" and that the 2007 injury was "not the substantial cause of her subsequent disability or need for medical care after January 28, 2008."²⁴ On December 7, 2017, Ms. O'Brien filed a petition for an extension of time to request

¹⁸ R. 839-843.

¹⁹ *O'Brien III* at 7, No. 16; 7 – 8, No. 18.

²⁰ *Id.* at 18.

²¹ R. 1313.

²² *O'Brien V* at 5, Nos. 5 – 7; 6, Nos. 10 – 12; 7, No. 14.

²³ *Id.* at 23.

²⁴ *O'Brien VII* at 51.

reconsideration or modification of *O'Brien VII*. A week later, in *O'Brien VIII*, the Board denied the request. Ms. O'Brien did not file an appeal from *O'Brien VII* or *O'Brien VIII*.

On November 21, 2018, Ms. O'Brien filed a petition for a second independent medical examination (SIME) and for an extension of time to request modification (in order to obtain additional evidence to support modification), along with a petition for modification.²⁵

The Board conducted a hearing on Ms. O'Brien's November 2018 petitions on February 7, 2019. In *O'Brien IX*, the Board denied the petition for an SIME (on the ground that she had not filed a petition for an SIME prior to the hearing on the merits, and since after the hearing the Board denied her claim, there was no pending medical dispute),²⁶ denied an extension of time to request modification (on the ground that Ms. O'Brien "does not identify any specific evidence that she was unable to obtain by the deadline"),²⁷ and denied the petition for modification (on the ground that the additional evidence Ms. O'Brien had submitted did not show that the Board had made a mistake in the determination of a fact).²⁸

3. Commission proceedings.

Ms. O'Brien filed this appeal from *O'Brien IX* on April 12, 2019. She was provided compact discs containing a copy of the record on appeal on June 27, 2019. Her opening brief and excerpt of record were due at the Commission on September 20, 2019. On that date, Ms. O'Brien filed a motion for an extension of time of six months to one year, asserting that she was "able to tolerate being upright about 2-3 hours per day" and could sit for only "very limited" periods, "primarily for meals and transportation by taxi to treatment."

The Commission extended the time for filing a brief for 70 days. Ms. O'Brien filed a motion and supporting documentation on November 29, 2019, requesting

²⁵ R. 12126

²⁶ *O'Brien IX* at 10.

²⁷ *Id.* at 9-10.

²⁸ *Id.* at 10.

another 60-day extension of time. The Commission issued an order granting Ms. O'Brien an additional extension of time until January 28, 2020, to file her brief.

On January 28, 2020, Ms. O'Brien filed a third motion for an extension of time to file her brief, requesting another 60-day extension. The Commission granted Ms. O'Brien an additional 60 days to file the required documents and informed her that if she did not timely file those documents, the Commission would issue an order to show cause why the appeal should not be dismissed for failure to prosecute.

Ms. O'Brien did not file the necessary documents, and the Commission issued an order to show cause why the appeal should not be dismissed. The Commission conducted a hearing on July 8, 2020, at which Ms. O'Brien testified. She filed a written response to the order to show cause on July 15, 2020.

4. Factual findings.

From the time her claim was filed through the date of the first Board decision in July 2013, Ms. O'Brien had multiple invasive surgical procedures, including two disc replacements (January 2011, February 2012), implantation and battery replacement of a spinal cord stimulator (November and December 2012), and a lumbar fusion (January 2013).²⁹ In *O'Brien I*, in order to provide sufficient time for her to recuperate from her January 2013 lumbar fusion, the Board granted Ms. O'Brien eight months (*i.e.*, until April 15, 2014) to bring her case to hearing.³⁰ After the lumbar fusion in January 2013, Ms. O'Brien's next invasive surgical procedure was revision surgery on her sacroiliac joints, performed in Georgia by Dr. David Weiss on August 25, 2016.³¹ She remained in Georgia, recuperating and then undergoing "intensive rehabilitation" for eight months, and returned to Alaska around the end of April 2017.³² Ms. O'Brien had fully recuperated from her 2016 surgery and, for a period of at least several months beginning before her return to Alaska, was physically capable of preparing for the Board

²⁹ *O'Brien I* at 12, No. 44; *O'Brien II* at 3, No. 11.

³⁰ *O'Brien I* at 17, 19.

³¹ *O'Brien VII* at 32, No. 164.

³² Motion for Extension of Time at 2, Sept. 20, 2019 (O'Brien letter).

hearing on the merits of her case in August and October 2017.³³ In May 2017, she was provided an adaptive equipment evaluation, which described how she might maximize her ability to perform the tasks such as those associated with record review and document preparation.³⁴

O'Brien VII was filed with the Board on November 21, 2017. The statutory deadline for filing an appeal was thirty days after that date (December 21, 2017) unless a timely request for reconsideration was filed. On December 7, 2017, one day after the deadline for filing a request for reconsideration, Ms. O'Brien filed a petition asking for "more time to send in the reconsideration and modification requests" regarding *O'Brien VII*, as well as for another SIME.³⁵ The Board denied the request for additional time to request reconsideration in *O'Brien VIII*.³⁶ It denied the request for additional time to request modification, noting that the time for requesting modification would not expire until November 21, 2018, and Ms. O'Brien had not shown that she would be unable to meet that deadline.³⁷ The Board did not address her request for another SIME.

³³ See, e.g., R. 10341 (Chart Note, SCG Orthopaedics, PC, Mar. 20, 2017) ("The patient states she overall is 90% better than she was prior to the surgery. . . . She continues to be markedly more active[.]"); R. 10338 – 10340 (Discharge Summary, Gainesville Physical Therapy, Mar. 20, 2017); R. 10390 (Hamilton Mill Spine Center, May 18, 2017); R. 16225 – 16228 (Dr. Ramzi Nassar, Psychiatric New Patient Evaluation, Sept. 7, 2017) ("She reports that she has limited capacity to function. . . . She has a very difficult time sitting unless it is in a straight backed hard chair. . . . She is capable of doing her full activities of daily living per her own report."); R. 16244 – 16253 (Physical Therapy Notes, Sept. 25 – Oct. 23, 2017).

³⁴ R. 8886 – 8890 (Liz Dowler, Ph.D., Apr. 26 and May 30, 2017, Adaptive Equipment Evaluation).

³⁵ R. 11663 – 11664.

³⁶ *O'Brien VIII* at 5 – 6.

³⁷ *Id.* at 6.

Ms. O'Brien did not file an appeal from either *O'Brien VII* or *O'Brien VIII*. During much of 2018, until October 23, 2018, when she exacerbated her condition,³⁸ Ms. O'Brien was physically capable of performing the tasks required for record review and document preparation.³⁹ She took no action in her case until November 21, 2018, when she filed a petition for modification, additional time to submit evidence, and another SIME.⁴⁰ The Board conducted a hearing on the petition on February 7, 2019. In *O'Brien IX*, issued on March 7, 2019, the Board denied all three requests.

Ms. O'Brien filed this appeal on April 12, 2019. At that time, she was living at her home in Soldotna.⁴¹ She was able to perform stretching exercises for two hours per day and, although her movement was guarded and she walked with a shuffling gait, she could open doors, walk on stairs, and drive short distances for limited grocery shopping.⁴² On August 25, 2019, she flew to Georgia⁴³ for evaluation and treatment.⁴⁴ Briefly, she lived in a hotel, but beginning shortly after she arrived she lived in an AirBnB property, an owner-occupied house in which several rooms are rented out, including one to Ms. O'Brien.⁴⁵ While there, she did her own grocery shopping and

³⁸ Motion for Extension of Time (Sept. 20, 2019) (Progress Note, Dr. Marguerite McIntosh, July 12, 2019) ("She reminds me that the exacerbation in her pain occurred on 10/23/2019 [*sic*] when she was kneeling, bending over, and turning to the left, storing clothes for a garage sale. . . .").

³⁹ *See, e.g.*, R. 16193 – 16204 (Daily Encounter Notes and Progress Reports, Jan. 11 – Oct. 22, 2018); Motion for Extension of Time (Sept. 20, 2019) (O'Brien letter at 1) ("I became incapacitated on 10/23/18 . . . a significant change in condition since 10/23/18"); *id.* at 8 (Progress Note, Dr. Marguerite McIntosh, Oct. 29, 2018) ("She recently . . . did a plank for 1 minute, she has also been very active with chores around her house.").

⁴⁰ R. 12126 – 12127.

⁴¹ Ms. O'Brien's Notice of Appeal provides a Soldotna mailing address.

⁴² Motion for Extension of Time at 13 (Sept. 20, 2019) (Progress Note, Dr. Marguerite McIntosh, July 12, 2019).

⁴³ *Id.* at 17.

⁴⁴ *Id.* at 2 (Note, Dr. Marguerite McIntosh, Aug. 23, 2019).

⁴⁵ O'Brien testimony (July 8, 2020).

prepared her own meals in the shared kitchen.⁴⁶ She obtained assistance from the homeowner for doing her laundry, which requires substantial bending; she had no professional care provider, relatives, or personal acquaintances to assist her with the activities of daily living; she used a walker and wore a back brace.⁴⁷

Upon her arrival in Georgia, beginning August 28, 2019, through March 31, 2020, Ms. O'Brien regularly participated in physical therapy, typically two or three times per week for three hours per session.⁴⁸ Her physical therapy included floor stretching exercises, such as bringing her knees to her chest, stretching out her hips, and using a strap to pull up her hamstring; some standing exercises were also performed.⁴⁹ Ms. O'Brien also performed stretching exercises at home for up to an hour per day.⁵⁰ She attended 20 massage therapy and 32 medical appointments.⁵¹ Ms. O'Brien is unable to drive; she travelled to and from her various appointments by cab or private vehicle.⁵²

⁴⁶ O'Brien testimony (July 8, 2020).

⁴⁷ O'Brien testimony (July 8, 2020); *see* Motion for Stay of Proceedings at 1 (Mar. 31, 2020) ("I . . . wear a back brace continually"); Motion for Extension of Time at 13 (Sept. 20, 2020) (Progress Note, Dr. Marguerite McIntosh, July 12, 2019) ("She states she has to wear her pelvic stabilization brace.").

⁴⁸ Motion for Stay of Proceedings (Mar. 31, 2020) (Gainesville Physical Therapy Previous Appointment Lists); Good Cause Showing at 3 (July 15, 2020).

⁴⁹ O'Brien testimony (July 8, 2010).

⁵⁰ Good Cause Showing at 3 (July 15, 2020).

⁵¹ *Id.*

⁵² *Id.*

While in Georgia, Ms. O'Brien has generally been in bed for up to 18 hours per day, and up and about for at least six hours.⁵³ She has spent substantial time and effort dealing with insurance issues and scheduling her medical appointments. Ms. O'Brien uses a laptop computer to draft documents. The record on appeal is available for her review on her computer. Ms. O'Brien typically composes documents on her laptop while lying on her stomach, or while in a kneeling position on her bed with pillows for support.⁵⁴ She has not sought to obtain a lectern or standing workstation to use while composing documents, reviewing the record, or performing online research.⁵⁵

5. Discussion.

Ms. O'Brien asserts that her appeal should not be dismissed because her physical limitations and related cognitive impairments (due to medication, difficulty in sleeping, pain, and stress and anxiety) made it impossible for her to timely file the required documents. She adds that her medical and physical therapy appointments, coupled with necessary daily activities and other administrative tasks (*e.g.*, insurance and taxes)

⁵³ Ms. O'Brien described her time out of bed as substantially less than this. *See* Good Cause Showing at 2 (July 15, 2020) ("Some days when I had physical therapy I was up about 5 hours maximum, and some days in bed for 23 hours. . . ."); Motion for Stay of Proceedings at 1 (Mar. 31, 2020) ("Typically I am lying down 19-23 hours per day. . . ."); Motion for Extension of Time (Sept. 20, 2019), O'Brien letter ("I am . . . only able to tolerate being upright about 2-3 hours per day on average"); Motion for Extension of Time at 1 (Nov. 29, 2019) ("4-5 hours . . . to complete my tasks"); Motion for Extension of Time at 1 (Jan. 28, 2020) ("my tolerance being up out of bed is 5-6 hours per day"). However, she states that her medical appointments (presumably including her physical therapy appointments) "take an average of 3-4 hours of her day, and there are [stretching exercises] . . . for at least one hour per day." Motion for Stay at 1 (Mar. 31, 2020). These activities, totaling 4-5 hours per day, do not include activities of daily living, such as bathing, shopping, and meal preparation (in addition to the 45 minutes per day she states [*id.*] she spends eating). We find that the time required to perform the out of bed activities Ms. O'Brien regularly engaged in prior to March 31, 2020, was at least six hours daily. We recognize that on occasion Ms. O'Brien was bedridden for longer periods; our finding is that she generally was not so confined.

⁵⁴ O'Brien testimony (July 8, 2020).

⁵⁵ *Id.*

have consumed virtually her entire capacity for productive activity. That she has exercised due diligence to prosecute her appeal is shown, she asserts, by the fact that she timely filed her notice of appeal and requests for extensions of time, has reviewed 900 pages of transcript, and has created a loose outline of a brief and some arguments that might be included in it. That she is proceeding in good faith, she asserts, is demonstrated by the expenses she incurred to maintain her appeal.

In considering these assertions, we have reviewed the record pertaining to the course of proceedings before the Board. The record establishes that in 2016, after experiencing increased pain following a functional capacities evaluation, Ms. O'Brien on multiple occasions sought continuances or extensions of time from the Board, based on assertions of an inability to timely submit documents or prepare for hearing due to physical and cognitive impairments substantially similar to those she asserts prevented her from timely filing her brief in this matter.⁵⁶

As described by Ms. O'Brien and in the medical records she submitted, her physical and cognitive limitations during that time, and later during the period of time prior to the hearing before the Board in February, 2019, was substantially similar to her physical and cognitive limitations during the period of time this appeal was pending, through March 31, 2020. Ms. O'Brien's physical and cognitive limitations in 2019 did not prevent her from filing lengthy, detailed, and comprehensive prehearing and hearing briefs before the Board,⁵⁷ and similarly substantial memoranda supporting her motions for extensions of time before the Commission.

In our view, the record and the evidence submitted to the Commission establish that Ms. O'Brien had the physical and cognitive ability to file a brief and excerpt of record on or before March 31, 2020. The preponderance of the evidence is that from the time she received the record on appeal, through March 31, 2020, she was generally able to be out of bed and move about for at least six hours per day. That she was

⁵⁶ R. 575 – 582 (Feb. 24, 2016); R. 589-590 (Mar. 30, 2016); R. 609-618 (May 13, 2016).

⁵⁷ See R. 12181 – 12196 (prehearing memorandum, Feb. 5, 2019), R. 10393 – 10410 (hearing brief, Aug. 23, 2017).

unable sit for more than 15 minutes at a time does not mean that she was incapable of standing at an elevated workstation for a reasonable period of time daily, and she made no attempt to obtain a lectern or other assistive equipment. She states she typically worked on appeal matters while lying on her abdomen, which is ergonomically improper,⁵⁸ but did not establish that she could not have worked effectively while in another position.⁵⁹ That she was able to attend and participate in multiple physical therapy sessions each week, as well as medical appointments, supports the conclusion that her physical limitations did not prevent her from performing the relatively minimal physical tasks of reviewing and composing documents. The briefing she submitted to the Commission in support of her multiple motions for additional time show that she had sufficient cognitive capacity to identify and articulate issues of concern to her. That she had other matters to attend to does not mean that they must at all times have taken precedence over this appeal. That she has incurred expenses in prosecuting the appeal does not establish good faith, as the same expenses would have been incurred if her sole purpose was to delay the proceedings. The limited degree of record review she has completed, and the failure to submit any manner of brief at all, notwithstanding that she was able to prepare and submit multiple requests for extensions of time with accompanying supporting materials, further indicates that she failed to attend to this matter with due diligence.

In addition to her physical and cognitive condition, Ms. O'Brien asks that the Commission take into consideration her status as a pro se (self-represented) litigant lacking a legal background. The Board has twice found that Ms. O'Brien had an

⁵⁸ Motion for Extension of Time at 1 (Jan. 28, 2020); Motion for Stay at 1 (Mar. 31, 2020); Good Cause Showing at 2 (July 15, 2020).

⁵⁹ In particular, we observe that the adaptive equipment evaluation suggests that much of the problem pertained to the fact that Ms. O'Brien was reviewing documents on a tabletop while using her laptop, resulting in twisting her neck. *See* R. 8886. But the record in this case consists of computer files that are viewed on the computer. In any event, the evaluation indicated that assistive equipment would significantly improve her ability to work in a seated position. Further, Ms. O'Brien did not show that she could not work while lying on her back, either in a prone or slightly elevated position.

adequate familiarity with the record and understanding of the issues to adequately prepare for hearing notwithstanding similar assertions of incapacity,⁶⁰ and her participation in the proceedings on appeal is similarly indicative of an ability to articulate her position on appeal, notwithstanding her lack of legal training. However, we discern in her filings before the Commission a misconception of what is required of her. She suggests that “specific methods are required, ie [*sic*] the format, the citation guidelines, ex[c]erpt of records, record on appeal, and citations to legal authority” and points out that she has “no examples of previous written appeals to follow, or experience in writing an [a]ppeal.”⁶¹ Ms. O’Brien, who described herself as a perfectionist,⁶² is concerned that if she submits a “defective or incomplete brief, it would still be considered my brief and judged accordingly.”⁶³ But the Commission neither expects nor requires that pro se litigants fully conform to all of the technical requirements set forth in our regulations. We have stated:⁶⁴

[W]e hold pro se litigants to a less demanding standard in presenting their appeal briefs than those represented by counsel. We do not reject briefs from pro se litigants that fail to cite legal authority or lack formal parts. We recognize that pro se litigants may not know the name of a legal theory that underlies their arguments. We read the briefs of pro se litigants generously. So long as the commission is able to discern the pro se litigant’s arguments on appeal, and the opposing party is able to discern and respond to them, the commission considers the brief adequate. . . .

The commission may exercise its discretion to require oral argument on an appeal involving a pro se litigant, even if not requested by the parties,

⁶⁰ See *O’Brien III*, p. 8, No. 22, pp. 16-17; *O’Brien V*, p. 8, No. 17, pp. 21-22.

⁶¹ Motion for Stay at 3 (Mar. 31, 2020). See also, Good Cause Showing at 4 (July 15, 2020). We note that Ms. O’Brien was provided with the Commission’s standard packet for pro se litigants, which includes forms and instructions on what to include, and what not to include, in the various parts of a brief.

⁶² O’Brien Testimony (July 8, 2020).

⁶³ Good Cause Showing at 7.

⁶⁴ *Khan v. Adams & Assocs.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 057 at 6 (Sept. 27, 2007).

in order to further question the parties, draw out the nuances of their argument and guide the pro se litigant in presenting an argument. . . . However, we cannot excuse a pro se appellant from the core task of an appeal, which is to explain to the commission in writing why the appellant believes the board's decision was wrong and what the appellant thinks the commission should do in response to the appeal. To do so forces the commission to act as the appellant's advocate and detracts from the impartiality of the commission.

Filing a brief that meets our minimal requirement that it "explain to the commission in writing why the appellant believes the board's decision was wrong and what the appellant thinks the commission should do in response," even if the brief is in some respects, in Ms. O'Brien's words, "defective or incomplete," demonstrates good faith and due diligence.⁶⁵ Filing multiple timely, albeit frequently last minute, requests for additional time without, in our view, adequate excuse indicates not good faith, as Ms. O'Brien suggests, but rather an intent to delay matters to avoid a final resolution. Unexcused delay is prejudicial to the appellees in that they incur additional litigation expenses as well as the continuing costs of maintaining reserves in the matter.

Given that Ms. O'Brien did not appeal from the Board's decision to deny her claims, and that the Board heard and denied her request for modification on its merits, it does not appear that dismissal for failure to prosecute would be unjust. Nonetheless, dismissal should not be ordered when another remedy is possible. Therefore, given her apparent misconception of the task at hand and notwithstanding her unexcused failure to file a timely brief, we will provide Ms. O'Brien with a final opportunity to submit a brief before dismissing her appeal.⁶⁶ Given that she had surgery June 5, 2020, a reasonable period of time to recuperate is appropriate. We will allow a 90-day period before expecting a resumption of efforts to prepare a brief. Beyond that, we believe

⁶⁵ See *Gamboa v. Alaska Housing Fin. Corp.*, 2017 WL 2822786 Memorandum Opinion and Judgment, June 28, 2017 (Alaska Supreme Court); *Collins v. Arctic Builders*, 957 P.2d 980, 983 (Alaska 1998) ("[W]e recognize a distinction between a pro se litigant who fails entirely to file required materials and one who files defective materials.").

⁶⁶ See *Metcalf v. Felec Servs.*, 938 P.2d 1023 (Alaska 1997) (Superior Court erred in dismissing appeal when late brief was filed before dismissal).

that a 30-day period is ample to prepare an acceptable brief, given that Ms. O'Brien has prepared an outline and made notes regarding arguments to be made, and in light of the time she has previously had to work on the matter. Furthermore, our review of the record in connection with this matter has afforded us sufficient familiarity with its contents, and we will, therefore, waive the requirement for Ms. O'Brien to file an excerpt of record.

6. *Order.*

IS HEREBY ORDERED:

1. Ms. O'Brien shall file her opening brief on or before **Monday, October 5, 2020**. If Ms. O'Brien fails to file her opening brief on or before October 5, 2020, an order dismissing her appeal for failure to prosecute will be issued on **Tuesday, October 6, 2020**.
2. No further extensions to file her opening brief will be granted to Ms. O'Brien.

DATE: July 31, 2020 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Michael J. Notar, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Andrew M. Hemenway, Chair *pro tempore*

RECONSIDERATION

The Alaska Supreme Court ruled in *Warnke-Green vs. Pro West Contractors, LLC*, 440 P.3d 283 (Alaska 2019), that "AS 23.30.128(f) does not prohibit the Commission from reconsidering orders other than the final decisions described in AS 23.30.128(e) because the authority to reconsider is necessarily incident to the Commission's express authority to issue other orders as appropriate."

A party may ask the Commission to reconsider this order by filing a motion for reconsideration no later than 10 days after the date shown in the notice of distribution (the box below). If a request for reconsideration of this order is filed on time with the

Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties.

APPEAL PROCEDURES

This decision may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

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

More information is available on the Alaska Court System's website:

<http://www.courts.alaska.gov/>

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Memorandum Decision No. 280, issued in the matter of *Charlayne W. O'Brien v. Central Peninsula General Hospital, Wausau Underwriters Insurance Company, and Alaska National Insurance Company*, AWCAC Appeal No. 19-007, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 31, 2020.

Date: August 12, 2020



Signed

K. Morrison, Appeals Commission Clerk