ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

MICHAEL T. MIRE-RODRIGUEZ, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201212038
ALASKA BRANDS GROUP, LLC , Employer,	)	AWCB Decision No. 13-0171
and	)	Filed with AWCB Anchorage, Alaska on December 30, 2013
ALASKA WORKERS'COMPENSATION BENEFITS GUARANTY FUND Defendants.	)	

The Alaska Worker's Compensation Benefits Guaranty Fund's (Fund) December 27, 2012 petition to join the members of Alaska Brands Group, LLC (Employer) as parties and Michael T. Mire-Rodriguez's (Employee) October 31, 2012 claim were heard on December 12, 2013 in Anchorage, Alaska. This hearing date was selected on October 24, 2013. Employee appeared and represented himself Velma Thomas, Fund administrator, appeared for the Fund. Lynn M. Allingham and Gregory J. Galik, members of Employer, appeared and represented themselves and Employer. Joanne Pride testified as a witness. The record closed at the hearing's conclusion on December 12, 2013.

ISSUES

The Fund contends Ms. Allingham and Mr. Galik, members of the Employer, should be joined as individual parties to the case. Ms. Allingham and Mr. Galik contend they have accepted

personal liability for Employee's benefits, but there is no legal basis on which they should be joined as parties. Employee took no position on the petition to joind.

1. Should Ms. Allingham and Mr. Galik be joined as parties in their individual capacities?

The Fund contends a board order is necessary to confirm Employer's obligation to reimburse the Fund for benefits paid to Employee. Employer contends it has entered a stipulation acknowledging its liability, so no board order is necessary. Employee took no position on the entry of an order for reimbursement.

2. Is an order confirming Employer's obligation to reimburse the Fund appropriate?

Employee acknowledged most benefits had been paid, but he contends he is due interest and penalty on benefits which were not timely paid, and he is entitled to ongoing medical benefits. The Fund contends it is not liable for interest or penalties if they are awarded. Employer contends, that although it was uninsured when Employee was injured, it went well beyond what was required when the members of the LLC accepted liability, and it asked that no interest or penalty be awarded.

3. To what benefits is Employee entitled?

FINDINGS OF FACT

The following findings of fact and factual conclusions are established by a preponderance of the evidence:

1. On July 30, 2012, Employee was operating a bottle filling machine when his right hand was pulled into the machine and the second and third (index and middle) fingers were crushed. (Report of Injury, August 22, 2012; Employee).
2. Employer was uninsured at the time of injury, but began paying Employee benefits through Northern Adjusters, Inc. (Stipulation, November 25, 2013).
3. The day of the injury, Employee was seen by April Leuzinger, PAC. Ms. Leuzinger noted pain over the second and third metacarpophalangeal (MCP) joints with swelling and numbness in the second finger. An x-ray revealed no fractures, and she diagnosed right

second and third finger contusion. Employee was given a splint, pain medication, and restricted from using his right hand. (U.S. HealthWorks, chart note, July 30, 2012).

4. On August 2, 2012, Employee returned to PAC Leuzinger. She noted moderate swelling, contusion, and pain. Employee was placed in a sling in addition to the splint. (U.S. HealthWorks, chart note, August 2, 2012).
5. On August 20, 2012, Employee reported to PAC Eric Suoja that he still had significant discomfort with a burning sensation in the palm of his hand. He was unable to make a fist. Mr. Suoja referred Employee for therapy. (U.S. HealthWorks, chart note, August 20, 2012)
6. On August 28, 2012, PAC Suoja noted Employee's third finger was improving significantly, but the second finger had been "very slow." He noted the possibility of a partial tendon laceration. (U.S. HealthWorks, chart note, August 28, 2012).
7. Because of Employee's lack of improvement, on September 4, 2012, PAC Leuzinger referred Employee to an orthopedic specialist. (U.S. HealthWorks, chart note, September 4, 2012).
8. On September 13, 2012, Employee was seen by Robert Thomas, PAC, at Alaska Hand-Elbow & Shoulder Surgical Specialists, who sent Employee for a nerve conduction velocity/electromyography (NCV/EMG) study. (Alaska Hand-Elbow & Shoulder Surgical Specialists, chart note, September 13, 2012).
9. An MRI taken on September 17, 2012 showed a disruption of the ulnar collateral ligament with some effusion at the joint and soft tissue edema. (University Imaging Center, radiology report, September 17, 2012).
10. Sean Taylor, M.D. performed NCV/EMG testing on September 19, 2012. The testing revealed mild median nerve entrapment at the right wrist, but no evidence of injury to the digital nerve in the right index finger. (Dr. Taylor, report, September 19, 2012).
11. On September 25, 2012, PAC Thomas noted Employee had not progressed with therapy and scheduled him for a preoperative exam for possible repair of the collateral ligament. (Alaska Hand-Elbow & Shoulder Surgical Specialists, chart note, September 25, 2012)
12. Employee saw Michael McNamara, M.D., on October 2, 2012 for a preoperative exam. Dr. McNamara was not convinced the collateral ligament tear needed surgical repair, but diagnosed "an early causalgia type picture." He referred Employee to Alaska Spine Institute. (Alaska Hand-Elbow & Shoulder Surgical Specialists, chart note, October 2, 2012).

13. Also on October 2, 2012, the Fund administrator received a telephone call from Northern Adjusters informing her that Employer would be unable to continue to pay Employee benefits. (Affidavit of Velma Thomas, November 23, 2013).
14. On October 15, 2012, Employee was seen by Shawn Johnston, M.D., at Alaska Spine Institute. Dr. Johnston noted that repeated electrodiagnostic studies still showed changes in the right median nerve at the wrist. He deferred a decision on surgery to Dr. McNamara, but prescribed medication and work hardening. (Alaska Spine Institute, referral report, October 15, 2012).
15. On October 29, 2012, Northern Adjusters made its last payment of benefits. Employee was paid temporary total disability TTD through October 24, 2012 and medical providers were paid. (Northern Adjusters, Claimant Bills/Compensation, November 15, 2012).
16. On October 31, 2012, Employee filed a claim seeking additional TTD, temporary partial disability (TPD), medical and transportation costs, interest, penalty, and asserting Employer had unfairly or frivolously controverted benefits. Employee stated the reason for filing the claim was Employer was uninsured, and he sought to join the benefits guaranty fund. The claim was served on Employer and the Fund administrator. (Claim, October 31, 2012).
17. On November 26, 2012, Northern Adjusters informed Employee that Employer could no longer fund his claim directly. (Letter, Northern Adjusters to Employee, November 6, 2012).
18. The Fund began paying benefits on November 29, 2012, at which time it issued a check to Employee for TTD from October 25 to December 5, 2012. (Fund account ledger, November 18, 2013).
19. On December 27, 2012, the Fund filed a petition seeking to join Ms. Allingham and Mr. Galik as Employer's corporate officers. (Petition, December 27, 2012).
20. On January 16, 2013, Dennis Chong, M.D., performed an employer's medical evaluation (EME). Dr. Chong diagnosed a right hand crush injury and the early manifestation of complex regional pain syndrome (CRPS), although the full diagnostic criteria for CRPS had not been met. He opined the July 30, 2012 work injury was the cause of both conditions. (Dr. Chong, EME Report, January 16, 2013).
21. On February 19, 2013, Employee received a right stellate ganglion block. (Alaska Spine Institute, Sedation Record, February 19, 2013).

22. On February 19, 2013, Employer filed an answer to Employee's claim, denying that all medical treatment was related to the work injury, and asserting the work for Employer was not the substantial cause of Employee's injury or illness. (Answer, February 19, 2013).
23. On March 1, 2013, Dr. Johnston noted Employee had received no relief from the stellate ganglion block, and referred him for a psychiatric consult. (Alaska Spine Institute, chart note, March 1, 2013).
24. On March 7, 2013, Ramzi Nassar, M.D., a psychiatrist, evaluated Employee and found his current pain syndrome was exacerbating his preexisting mood disorder. (Dr. Nassar, New Patient Evaluation, March 7, 2013).
25. A functional capacity evaluation performed March 12, 2013 placed Employee in the light physical demand classification. (Functional Capacity Evaluation, March 12, 2013).
26. On March 22, 2013, Dr. Johnston found Employee had reached medical stability, but he anticipated Employee would require additional medication. (Dr. Johnston response to MMI letter, March 22, 2013).
27. On March 22, 2013, Employee accepted Employer's offer of a permanent light duty position. (Offer of modified duty, March 22, 2013). Employee found alternative employment, however, and did not return to work for Employer. (Employee).
28. On March 26, 2013, Dr. Johnston found Employee had an eight percent permanent partial impairment (PPI) rating. (Alaska Spine Institute, Permanent Partial Impairment Rating, March 26, 2013).
29. At the July 30, 2013 prehearing conference, Employee stated his TPD claim had been resolved but added a claim for PPI. He explained that his claim for unfair or frivolous controversion was that the gap between Northern Adjuster's last payment of benefits and the Fund's resumption of payments constituted a controversion in fact. His claim for interest relates to the same period. (Prehearing Conference Summary, July 30, 2013).
30. On November 25, 2013, the board approved a stipulation between Employer and the Fund, in which Employer and its members, Ms. Allingham and Mr. Galik, agreed to reimburse the Fund $61,766.01 for benefits paid to Employee. The stipulation states in bold print "this stipulation only covers benefits paid to date," and sets out the terms for payment. (Stipulation, November 25, 2013).

31. Employee acknowledged receiving payment for the eight percent permanent impairment and stated he was not seeking additional PPI. He also acknowledged that, except for medical bills that had recently been submitted to the Fund, all medical and transportation costs had been paid. (Employee). Ms. Pride confirmed some medical bills had been submitted to the fund the week of the hearing. (Pride).
32. Employer conceded Employee had been injured in the course of his employment with Employer. (Allingham).
33. The interest rate under AS 09.30.070(a) for 2012 was 3.75 percent. (http://courts.alaska.gov/int.htm, last visited December 18, 2013).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage.**
> (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability

> or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
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> **AS 23.30.075. Employer's liability to pay.**
> (a) An employer under this chapter, unless exempted, shall either insure and keep insured for the employer's liability under this chapter in an insurance company or association duly authorized to transact the business of workers' compensation insurance in this state, or shall furnish the division satisfactory proof of the employer's financial ability to pay directly the compensation provided for. If an employer elects to pay directly, the board may, in its discretion, require the deposit of an acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred.
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> (b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the division, upon conviction, the court shall impose a fine of $10,000 and may impose a sentence of imprisonment for not more than one year. If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

In re United Auto Sales, LLC¸ AWCB Decision No. 11-1031 (August 24, 2012), held the personal liability provision of AS 23.30.075(b) does not apply to members of limited liability companies because the section refers only to corporations, which are a different legal entity than LLCs.

> **AS 23.30.082. Workers' compensation benefits guaranty fund.**
> (a) The workers' compensation benefits guaranty fund is established in the general fund to carry out the purposes of this section. The fund is composed of civil penalty payments made by employers under AS 23.30.080, income earned on investment of the money in the fund, money deposited in the fund by the

> department, and appropriations to the fund, if any. However, money appropriated to the fund does not lapse. Amounts in the fund may be appropriated for claims against the fund, for expenses directly related to fund operations and claims, and for legal expenses.
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> . . . .
> (c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter.
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> (d) If the fund pays benefits to an employee under this section, the fund shall be subrogated to all of the rights of the employee to the amount paid, and the employee shall assign all right, title, and interest in that portion of the employee's workers' compensation claim and any recovery under AS 23.30.015 to the fund. Money collected by the division on the claim or recovery shall be deposited in the fund.

In *Workers' Compensation Benefits Guaranty Fund v. West*, AWCAC Decision No. 145 (January 20, 2011), the commission held that under AS 23.30.082, the Fund was liable for interest, but not liable for penalties. *West*, at 16, 19.

> **AS 23.30.095. Medical examinations.**
> (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . .
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> **AS 23.30.097. Fees for medical treatment and services.**
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> (d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later.
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> **AS 23.30.120 Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

> (1) the claim comes within the provisions of this chapter; . . . .
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> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Carter*, 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

Application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish "a causal link" between employment and his or her disability, need for medical treatment, etc. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011) at 2. Medical evidence may be needed to attach the presumption of compensability in a complex medical case. *Burgess Constr. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). However, an employee "need not present substantial evidence that his or her employment was a substantial cause of his disability." *Fox v. Alascom, Inc.*, 718 P.2d 977, 984 (Alaska 1986) "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

If the employee establishes the preliminary link, then "if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the [need for medical treatment], etc., the presumption is rebutted." *Runstrom* at 7. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fireman's Fund Am. Ins. Companies v. Gomes*, 544 P.2d 1013, 1015 (Alaska 1976). The determination of whether evidence rises to the level of substantial is a legal question. *Id*. Because the employer's evidence is considered by itself and not weighed at this step, credibility is not examined at this point. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

If the presumption is raised and not rebutted, the claimant need produce no further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Runstrom* at 8.

AS 23.30.155. Payment of compensation

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating

(1) that the right of the employee to compensation is controverted;

(2) the name of the employee;

(3) the name of the employer;

(4) the date of the alleged injury or death; and

(5) the type of compensation and all grounds upon which the right to compensation is controverted.

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.

. . . .

(d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due.

> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
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> . . . .
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> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

The Supreme Court has found a controversion in factwhere an employer fails to pay benefits but does not file the notice required by AS 23.30.155(a). See, e.g., *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978). The court has explained how to determine what actions constitute a controversion in fact:

> To determine whether there has been a controversion in fact in cases where an employer does not file a notice of controversion, the Board needs to look at the employer's answer to a claim for benefits and its actions after the claim is filed to determine whether the employer has controverted in fact the employee's claim for benefits. *Harnish Group., Inc. v. Moore*, 160 P.3d 146, 152 (Alaska 2007).

A controversion notice must be filed "in good faith" to protect an employer from a penalty or to avoid referral to the Division of Insurance. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." *See also* 3 A. Larson, *Larson's Workmen's Compensation Law* § 83.41(b)(2) (1990) ("Generally a failure to pay because of a good faith belief that no payment is due will not warrant a penalty."). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Harp*, 831 P.2d at 358. The evidence which the employer possessed "at the time of

controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id*. The board must examine the evidence in support of a controversion in isolation and without consideration of credibility, to determine if the evidence is sufficient to rebut a presumption of compensability of the compensation controverted. Because the sufficiency of evidence to overcome the presumption is considered without determining credibility or weighing it against other evidence, evidence to support a controversion is also viewed in isolation, without determining weight or credibility. *Municipality of Anchorage v. Monfore*, AWCAC Decision No. 081 (June 18, 2008).

The penalty for late-paid compensation under AS 23.30.155(e) applies to late-paid medical benefits. *Childs v. Copper Valley Elec. Ass'n.*, 860 P.2d 1184 (Alaska 1993).

> **8 AAC 45.142. Interest.**
> (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.
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> (b) The employer shall pay the interest
> (1) on late-paid time-loss compensation to the employee or, if deceased, to the employee's beneficiary or estate;
> . . . .
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> (3) on late-paid medical benefits to
> (A) the employee or, if deceased, to the employee's beneficiary or estate, if the employee has paid the provider or the medical benefits;
> (B) to an insurer, trust, organization, or government agency, if the insurer, trust, organization, or government agency has paid the provider of the medical benefits; or
> (C) to the provider if the medical benefits have not been paid.
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> **AS 09.30.070. Interest on judgments; prejudgment interest.**
> (a) Notwithstanding AS 45.45.010, the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered, except that a judgment or

> decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

ANALYSIS

1. Should Ms. Allingham and Mr. Galik be joined as parties in their individual capacities?

Under AS 23.30.075(b), when an employer is a corporation, all persons with the authority to insure the corporation and the person actively in charge of the corporation are personally liable for the payment of benefits to employees injured while the corporation was uninsured. However, Employer is an LLC, not a corporation, and AS 23.30.075(b) makes no mention of LLCs. A corporation created under the Alaska Corporations Code is an entirely different type of entity than an LLC organized under the Alaska Revised Limited Liability Company Act. Members of an LLC cannot be held personally liable for payment of benefits to an injured employee of the LLC under AS 23.30.075(b).

In the November 25, 2013 stipulation, Ms. Allingham and Mr. Galik voluntarily accepted personal liability to reimburse the Fund. That liability was clearly limited to reimbursing the Fund for benefits the Fund paid to that date, however. The stipulation does not provide a basis for further liability or a reason to join Ms. Allingham and Mr. Galik in their personal capacities.

2. Is an order confirming Employer's obligation to reimburse the Fund appropriate?

As a matter of law, the Fund is subrogated to the rights of an Employee against Employer for benefits paid. AS 23.30.082(d). The order approving the November 25, 2013 stipulation recognizes and confirms Employer's obligation to reimburse the Fund for benefits paid through that date. Should the Fund pay additional benefits, it is entitled to reimbursement for those benefits as well, and it is entitled to an order confirming that obligation.

3. To what benefits is Employee entitled?

As there is no dispute as to any material fact, the presumption analysis is unnecessary. Employer concedes work was the substantial cause of Employee's injury. Employer acknowledged that he

had been paid all TTD, PPI, transportation costs to which he was entitled as of the hearing. Employee acknowledged that with the exception of the recently submitted medical bills for which payment was not yet due, all his medical costs had been paid. Neither Employer nor the Fund disputed the recently submitted medical bills. Employer shall pay future medical and related transportation cost in accordance with the Act.

Employee explained at the July 30, 2013 prehearing conference and at hearing that his claim for penalty and interest arose from the gap in payment between the final payment from Northern Adjusters and the first payment by the Fund. Employee contended the payment gap constituted a controversion in fact, entitling him to a penalty.

The Supreme Court has held that a controversion in fact may exist when an employer fails to pay benefits but does not file a notice of controversion. In determining whether a failure to pay constitutes a controversion in fact, *Harnish* requires an examination of the employer's answer and other pleadings to determine if the employer had denied the employee's claim. Here, Employer first denied Employee was entitled to benefits in its February 19, 2013 Answer – well after the payment gap. During the gap, Employer failed to timely pay benefits because it was unable to do so; it did not deny its liability for benefits. Employer's failure to timely pay does not create a controversion in fact.

The Act, however, imposes a penalty on late-paid benefits independent of any controversion. Under AS 23.30.155(e), a penalty of 25 percent accrues on any benefits not paid within seven days of the date due. While the late-payment penalty applies to medical benefits, Employee did not identify any medical bills that were not paid within the 30 days allowed by AS 23.30.097(d), let alone after the seven additional days before the penalty accrues. No penalty is due on medical benefits.

Under AS 23.30.155(b), disability compensation must be paid every 14 days. Under AS 23.30.155(e), the penalty does not accrue until seven days after the due date. In the case of TTD benefits this is 21 days after the TTD becomes due. Northern Adjusters paid Employee TTD through October 24, 2012. Payment for October 25th was due November 8, 2012, and the

penalty began to accrue 7 days later, or November 15, 2012. As the Fund paid all outstanding TTD benefits on November 29, 2012, TTD benefits for November 8th and later did not accrue a penalty. As a result, a penalty is due on TTD from October 25, 2012 through November 7, 2012, a period of 14 days, a two-week period. Employee's weekly compensation rate was $239.00, or $478.00 for the two-week period. Employee is due a penalty of 25 percent of that amount, or $119.50.

The Fund correctly notes that under *West*, it is not liable for penalties. While the members of Employer are to be commended for accepting personal liability for Employee's benefits, the beneficiary of that largess is the Fund, not Employee. It is not justification for denying Employee a benefit to which he is otherwise entitled. Employer will be ordered to pay Employee a penalty of $119.50.

Under AS 23.30.155(p), interest must be paid on benefits not paid when due; the seven-day grace period applicable to penalties does not apply to interest. Interest is due on late-paid medical costs, but, as previously noted, Employee did not identify any medical benefits that were not timely paid. As also noted above, TTD must be paid every 14 days. Interest begins to accrue immediately if it is not timely paid. Under 8 AAC 45.142, the interest rate in 2012 was 3.75 percent.

Employee was timely paid TTD through October 24, 2012. Payment for the two week's TTD beginning October 25th was due by November 7. It was not paid until November 29, 2012, or 22 days (3.14 weeks) later. Again, Employee's weekly compensation rate was $239.00, or $478.00 for two weeks. As a result, Employee is entitled to interest of $1.08 on TTD from October 25 through November 7, 2012 ($478.00 x 3.75% x 3.14 weeks/52 weeks). Employee was likewise due payment on the next two-week's TTD, from November 8 through November 21, on November 21, 2012. He was not paid until November 29, 2012, eight days (1.14 weeks) later. He is entitled to interest on that TTD of $0.39 ($478.00 x 3.75% x 1.14 weeks/52 weeks). Employee is due a total of $1.47 interest.

Employer will be ordered to pay Employee the interest. Under *West*, the Fund may be liable for interest, so, should Employer fail to pay interest, the Fund will be obligated to do so.

CONCLUSIONS OF LAW

1. Ms. Allingham and Mr. Galik will not be joined as parties in their individual capacities.
2. An order confirming Employer's obligation to reimburse the Fund is appropriate.
3. Employee is entitled to future medical benefits and related transportation costs in accordance with the Act, as well as a penalty of $119.50 and interest of $1.47.

ORDER

1. The Fund's December 27, 2012 petition to join Ms. Allingham and Mr. Galik in their individual capacities is denied.
2. Employee's October 31, 2012 claim isgranted in part and denied in part.
3. Employer shall pay Employee's future medical and related transportation costs in accordance with the Act.
4. Employer shall pay Employee a penalty of $119.50.
4. Employer shall pay Employee interest of $1.47.
5. The Fund shall pay Employee future medical and transportation costs or interest as ordered herein, if Employer fails to timely do so.

Dated in Anchorage, Alaska on December 30, 2013

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Designated Chair

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Linda Hutchings, Member

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Stacy Allen, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 23 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of MICHAEL T. MIRE-RODRIGUEZ, employee / claimant; v. ALASKA BRANDS GROUP, LLC, employer, and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND / defendants; Case No. 201212038; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on December 30, 2013.

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Mariaanna Subeldia, Office Assistant

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