ALASKA WORKERS' COMPENSATION BOARD

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

JUANA CONTRERAS-MENDOZA, Employee, Claimant, v. QDOBA MEXICAN GRILL, Employer, and ARGONAUT INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 200804514 AWCB Decision No. 13-0112 Filed with AWCB Anchorage, Alaska on September 13, 2013

Juana Contreras-Mendoza's (Employee) April 10, 2013 petition to "finalize" Employer's "economic obligations" was heard on August 14, 2013, in Anchorage, Alaska, a date selected on June 18, 2013. Non-attorney representative Vincent Briggs appeared, testified and represented Employee, who also appeared and testified. Attorney Michelle Meshke appeared and represented Qdoba Mexican Grill and its workers' compensation insurer (Employer). Adjuster Tina Arnold appeared and testified on Employer's behalf. The record closed at the hearing's conclusion on August 14, 2013.

SUMMARY OF DECISIONS

Contreras-Mendoza v. Qdoba Mexican Grill, AWCB Decision No. 12-0150 (August31, 2012) (*Contreras-Mendoza I)* held the board's designee did not abuse his discretion by determining he previously abused his discretion when he allowed Employee to withdraw her affidavit of readiness for hearing before properly advising her of possible consequences her withdrawal may have, and

then reinstating her affidavit of readiness without first providing Employer an opportunity to be heard. *Contreras-Mendoza I* also denied Employer's request to cancel the September 4, 2012 hearing (*id*. at 26).

Contreras-Mendoza v. Qdoba Mexican Grill, AWCB Decision No. 12-0174 (October 2, 2012) (*Contreras-Mendoza II)* denied Employer's petition to dismiss Employee's claim under AS 23.30.110(c); ordered Employer to pay any unpaid medical bills related to Employee's hand surgeries or reimburse Employee or Mr. Briggs for payments made, plus mandatory interest; denied without prejudice Employee's request for an order requiring Employer to pay for a follow-up visit with Dr. Meals; ordered Employer to pay Employee temporary total disability (TTD) benefits and mandatory interest but not past the date the parties subsequently determined Employee returned to full-or part-time work, or April 6, 2011, whichever was latest; reserved jurisdiction to resolve any TTD disputes; ordered Employer to pay Employee permanent partial impairment (PPI) and mandatory interest; denied Employee's request for review of the rehabilitation benefits administrator's decision as there was nothing to review; and directed Employee to consult with the rehabilitation benefits administrator in light of the decision for further action (*id.* at 50-51). On October 12, 2012, an errata to *Contreras-Mendoza II* issued correcting a minor dictation error.

Contreras-Mendoza v. Qdoba Mexican Grill, AWCB Decision No. 12-0187 (October 31, 2012) (*Contreras-Mendoza III)* modified a factual finding in *Contreras-Mendoza II* at Employee's request (*id*. at 9). On November 8, 2012, an errata to *Contreras-Mendoza III* issued correcting a formatting error.

ISSUES

Employee contends she is entitled to additional TTD benefits from Employer pursuant to *Contreras-Mendoza II*. She contends Employer failed to pay TTD as ordered from June 8, 2010 through April 6, 2011.

Employer contends it paid Employee TTD from May 20, 2008 through June 7, 2010. It contends it understood *Contreras-Mendoza II* to require payment only through June 7, 2010.

1) Is Employee entitled to additional TTD from June 8, 2010 through April 6, 2011?

Employee contends she is owed additional medical benefits pursuant to *Contreras-Mendoza II*. She characterizes these as benefits owed to several medical providers and money owed to her and her non-attorney representative Vincent Briggs, who paid many of Employee's medical bills from his own pocket.

Employer contends it recently received adequate documentation to justify paying medical benefits to medical providers, Employee and Mr. Briggs, and will do so. It contends it previously paid Employee for some work-related out-of-pocket medical expenses not knowing Mr. Briggs had paid some of these. Consequently, Employer contends Employee owes Mr. Briggs some of the funds it paid Employee following *Contreras-Mendoza II.*

2) Is Employer obligated to pay any additional medical expenses?

Employee contends she is entitled to interest on all benefits awarded in *Contreras-Mendoza II*. She contends Employer did not pay proper interest and seeks an order determining the proper rate and amount.

Employer contends it already paid Employee some interest. It contends Employee's interest rate is incorrect and seeks an order determining the proper rate and amount.

3) Is Employee entitled to interest?

Employee contends Employer's controversion notices were "bogus" and based upon an unreliable, unqualified medical opinion from Patrick Radecki, M.D., and an inadequate report from Loren Jensen, M.D. She seeks a penalty award under AS 23.30.155(e).

Employer contends its controversion notices were properly based upon its employer medical evaluations (EME) performed by Dr. Radecki and Dr. Jensen. Consequently, it contends its controversion notices were made a good faith and a penalty is not justified.

4) Is Employee entitled to a penalty under AS 23.30.155(e)?

FINDINGS OF FACT

The following facts and factual conclusions are either incorporated from *Contreras-Mendoza I* or *II*, or are newly established by a preponderance of the evidence:

1) On February 22, 2008, Employee was working for Employer as a line server. In the course of obtaining pots from a shelf above the sink, Employee's coworker accidentally dropped several line pots onto Employee while she stood leaning over the sink to get soap from a dispenser onto a sponge with which to wash the walls. Employee was startled and jammed her right hand into the soap dispenser, which was affixed to the wall. Employee injured her right thumb, index and middle fingers, wrist, and her mid-back (*Contreras-Mendoza II* at 6).

2) On May 13, 2008, Miriam Nolte, M.D., provided a return to work report and limited Employee's lifting to 20 pounds and no repetitive use of the right hand. Employee could use the cash register or wipe tables for up to four hours per day, effective May 27, 2008 (Return to Work Report, May 13 2008).

3) On May 14, 2008, Employee saw Leslie Dean, M.D. Dr. Dean reported Employee jumped whenever she touched her "anywhere." Dr. Dean referred her back to physical therapy for a spica splint, strengthening, and conditioning. The patient's "case manager" Tracy Davis was present throughout the evaluation. Dr. Dean continued the previously imposed limitations and suggested Employee may have a "trigger thumb" (Physician's Report, May 14, 2008; inferences).

4) On or about May 15, 2008, Employer advised Employee she could no longer work for Employer unless she was released to full duty (*Contreras-Mendoza II* at 10).

5) On June 11, 2008, Employee saw Dr. Dean who could not see any masses in the right thumb area, but found a weak muscle and a swollen joint which was "objectively asymmetrical" on the radial aspect. Employee complained of considerable pain and Dr. Dean's diagnosis was "right thumb MP joint sprain." Dr. Dean explained most people with this condition do not require surgery but, if Employee feels the joint is unstable, surgery may be necessary. Options included, first, repair or reconstruction of the right MP ligament, and second, possible fusion of the MP joint. Dr. Dean offered the first surgical procedure, and ordered a magnetic resonance imaging (MRI) scan of the right thumb to rule out a collateral ligament injury. Dr. Dean continued the light duty work release and required Employee to wear a splint (Physician's Report, June 11, 2008).

6) On June 12, 2008, an MRI interpreted by John McCormick, M.D., disclosed disruption of the ulnar collateral ligament (UCL) at the thumb's MCP joint and refers to "the ruptured tendon" (MRI report, June 12, 2008).

7) On June 13, 2008, Dr. Radecki saw Employee for an EME. Dr. Radecki diagnosed a possible right thumb sprain; mid back contusion; cyst in the left first MCP region; and multiple complaints in multiple areas believed to indicate "subjective pain syndrome." Dr. Radecki doubted the thumb had any ligament injury. Dr. Radecki doubted the mechanism of Employee's injury could cause a hand or thumb condition. Dr. Radecki opined the February 2008 injury was not the substantial cause of Employee's ongoing symptoms. He felt a "hysterical reaction" or a "hysterical conversion reaction" was the substantial cause. According to Dr. Radecki, Employee had no objective basis for her multiple subjective complaints; was released to return to work on a full-time basis; and did not need thumb surgery or any further diagnostic studies. He opined narcotics, injections, radiofrequency ablations, acupuncture, chiropractic or osteopathic manipulation, cervical traction, physical therapy, and an independent exercise gym program were not reasonable or necessary medical care or treatment. Dr. Radecki further opined the cyst on Employee's left thumb was idiopathic and not related to Employee's work. She had no permanent partial impairment and no residual physical injury (EME report, June 13, 2008).

8) Dr. Radecki's EME report gives specific, definite medical opinions concerning material issues and applies the correct legal causation standard even though the letter Employer sent to him did not express the proper causation standard in its questions (*id.*; experience, judgment, observations).

9) On or about June 20, 2008, Employer denied Employee's right benefits based upon Dr. Radecki's EME report (Controversion Notice, June 20, 2008).

10) On February 11, 2009, Employee saw Dr. Meals in Los Angeles for her right-hand injury. He concluded Employee had a "trigger digit" and a chronic sprain in the right thumb. He suggested and performed an injection into the tendon sheath with Kenalog and Lidocaine (report, February 11, 2009).

11) On December 3, 2009, Employee filed a claim for TTD from May 20, 2008, through the then-present, PPI, continuing medical costs, an eligibility evaluation for reemployment benefits, and a second independent medical evaluation (SIME) (claim, December 3, 2009).

12) On December 28, 2009, Employer filed a notice controverting all benefits requested in Employee's claim based on Dr. Radecki's EME report (Controversion Notice, December 24, 2009).

13) On January 22, 2010, Employee saw Dr. Meals, complaining of continued right thumb locking and triggering and an inability to flex her thumb. Dr. Meals recommended right trigger digit release on the right thumb (chart note, January 22, 2010).

14) On January 22, 2010, Dr. Meals performed "release of trigger digit, right thumb." Upon making his incision, Dr. Meals observed the underlying tendon appeared to be "entirely healthy" (Operative Report, January 20, 2010).

15) On April 23, 2010, Employee reported to Dr. Meals she was pleased with the "awesome" results from her right thumb trigger release surgery. Employee wanted to schedule surgery for chronic pain at the metacarpophalangeal joint (chart note, February 23, 2010).

16) On May 12, 2010, Dr. Meals examined Employee's hand and found the extensor pollicis longus tendon absent on the right. He assessed a tendon rupture of the extensor pollicis longus tendon and recommended surgery (chart note, May 12, 2010).

17) On May 14, 2010, Dr. Meals performed a tendon transfer surgery on Employee's right thumb. Dr. Meals observed the muscle tendon unit was intact and there was good excursion on the muscle. He induced anesthesia, asked Employee to forcibly extend all of her fingers, and determined she could extend the index, middle, ring and small fingers, and could extend the thumb but with only approximately 30% of the force compared to the adjacent digits. Accordingly, he decided to proceed with the tendon transfer, which in this decision is referred to as the "second surgery" (Operative Report, May 14, 2010).

18) On August 23, 2010, Employee told Dr. Meals she was generally pleased with her tendon transfer surgery and had complete pain relief. He advised Employee may "continue with full activity," could expect gradual improvement in strength over the next six months, and needed no further treatment (chart note, August 23, 2010).

19) On January 19, 2011, Dr. Jensen, orthopedic surgeon specializing in hands, performed an EME addressing Employee's right thumb. Dr. Jensen diagnosed a right thumb sprain treated with two surgeries. He opined there was "a degree of injury" to the supporting structures around Employee's MCP joint as identified in an earlier MRI. He could not comment on prior diagnoses of hysterical conversion reaction but believed Employee had "numerous nonmedical issues at play" influencing her care and condition. Dr. Jensen stated it was reasonable to regard a sprain as having occurred to the right thumb on February 22, 2008. He noted this should be regarded as a sprain of the MCP joint and not a ligament rupture. Dr. Jensen noted Dr. Meals did not find a rupture

interoperatively and any tendon damage would have had to result from some "undocumented injury" subsequent to the June 12, 2008 MRI. He opined the February 22, 2008 injury represents "the substantial cause" for the thumb sprain. The first surgery Dr. Meals performed, the trigger thumb release, can "reasonably be related to the workplace injury" and presumed swelling from the injury. Dr. Jensen further stated "the substantial cause" for the second surgery was "unclear." He noted the second surgery was standard treatment for a tendon rupture, but believed such condition was not caused by the February 22, 2008 injury and did "not appear to have been present." Dr. Jensen postulated Dr. Meals' diagnosis of "weak and incomplete extension of the right thumb" does not represent the "sequelae of the workplace injury." He further opined the stenosing tenosynovitis of the flexor pollicis longus "could be attributed to the swelling associated with the spraining injury but not a putative injury to [the] extensor tendon." Dr. Jensen would not restrict Employee from workplace activity based on her work-related injury. In his opinion, Employee's condition was medically stable and had been since June 7, 2010, when Dr. Meals said her treatment was complete. "A 1" pulley release should be regarded as being reasonable and medically necessary. However, Dr. Jensen said the reason for Dr. Meals' second surgery the "EIP tendon transfer," was "unclear." He recommended no further treatment or diagnostic testing and specifically recommended against further tendon transfers in an attempt to restore hyperextension of the IP joint in Employee's thumb (EME report, January 19, 2011).

20) Dr. Jensen's EME report gives specific, definite medical opinions concerning material issues and applies the correct legal causation standard (*id.*; experience, judgment, observations).

21) On June 13, 2012, Employer controverted Employee's claim based upon Dr. Jensen's EME report (Controversion Notice, June 11, 2012).

22) At the September 4, 2012 hearing, Employee relied upon Dr. Jensen's EME report to support her TTD claim. Employee asserted Dr. Jensen said she was disabled from May 20, 2008, through the date of medical stability, June 7, 2010 (Briggs).

23) On July 16, 2011, Employee saw John Lipon, D.O., orthopedic surgeon, for an SIME. Employee complained of right radial forearm pain from the elbow into the hand. Dr. Lipon concluded Employee suffered a sprained right thumb with an incomplete ulnar collateral ligament (UCL) rupture of the right thumb at the metacarpophalangeal joint; had a right trigger thumb surgical release on January 20, 2010; had decreased thumb range of motion; and suffered ongoing symptoms including pain, weakness and decreased function. Dr. Lipon opined the June

16, 2008 MRI showed ligament disruption, which supports a complete rupture of the thumb ligament at the MP joint level. Because there was no pre-existing history of her right thumb injury, Dr. Lipon stated "she did sustain an injury to her UCL secondary to the industrial accident of February 22, 2008." This is consistent with the mechanism of injury documented in the records and what Employee described to him during the SIME. In short, the February 22, 2008 industrial injury was the substantial cause for her symptoms around the right thumb metacarpophalangeal joint. Dr. Lipon determined Employee's right thumb was probably extended and abducted as she fell onto the soap plunger with the right palm and hand. He stated this does not support an injury to her right thumb EPL tendon. It is medically reasonable swelling about the metacarpophalangeal joint and an inflammatory response from the collateral ligament rupture was a cause of her right trigger thumb. Dr. Lipon opined the February 28, 2008 industrial injury was the substantial cause for the right trigger thumb condition and need for treatment. Dr. Lipon was unable to say Employee's symptoms were the substantial cause for the need for the EIP tendon transfer surgery. No further treatment was reasonable or necessary relating to the February 22, 2008 injury. By April 23, 2010, the work related injury was no longer the substantial cause of any disability or need for treatment. Similarly, medical treatment rendered through April 23, 2010, was related to the industrial claim of February 22, 2008. Dr. Lipon opined no further medical care or treatment was necessary. By April 6, 2010, Employee's right thumb trigger digit condition was medically stable. However, based on Dr. Meals 'August 23, 2010 report, Employee's EIP and EPL tendon transfer surgery would have been medically stable 45 days after six months following this visit, or by April 6, 2011. (SIME report, July 16, 2011).

24) At hearing, Employee relied upon Dr. Lipon's SIME report to support her TTD claim (Briggs).

25) On July 24, 2012, Employee filed and served a hearing brief to which was attached aJune 28, 2011 settlement offer, which included a listing of the medical expenses Employee paid and wanted reimbursed from Employer. However, the actual medical invoices were not attached to the brief or the letter (letter, June 28, 2011).

26) At hearing on September 4, 2012, Employee through her non-attorney representative stated the outstanding work-related medical bills for which she sought payment were attached to the June 28, 2011 settlement offer sent to Employer's attorney. Employee argued the only addition were

bills for the second hand surgery, which were not attached. However, she subsequently stated all the past, work-related medical bills were attached. One bill for $1,749.95 pertained to a non-work-related motor vehicle accident, and should not be included in the bills for which reimbursement was sought at hearing (Briggs; letter, June 28, 2011 attachments).

27) It was difficult from Employee's hearing presentation at the September 4, 2012 hearing to determine whether the above-referenced bills were actually unpaid at the time of hearing, or had been paid by Employee or by Mr. Briggs (observations).

28) Employee at the September 4, 2012 hearing credibly testified the two hand surgeries combined "corrected" what was wrong as a result of the work-related injury (Employee).

29) Mr. Briggs paid many of Employee's work-related medical expenses, including the first surgery and surgical facility charges, but at the September 4, 2012 hearing had difficulty specifying exactly how much he paid from his pocket. Employee and Mr. Briggs gave confusing testimony and argument concerning payment for the first and second surgeries. Ultimately it was determined Mr. Briggs paid for the first surgery from his pocket, and Employee paid for the second surgery from her pocket but had no documentation to prove the second surgery's costs (Employee; Briggs).

30) Division records show Employer initially paid Employee TTD from February 29, 2008 through March 31, 2008. Employee at the September 4, 2012 hearing agreed with these dates (Employee).

31) Neither adjuster Joann Pride nor Ms. Davis consulted with any other physicians, other than Dr. Radecki, before Employee's case was controverted in 2008 based upon Dr. Radecki's EME report (Pride; Davis; *Contreras-Mendoza II* at 28, as corrected by a subsequent errata).

32) Weighing all the evidence, and relying primarily on the MRI report showing a ligament tear, Dr. Dean's opinions, Dr. Lipon's SIME report and Employee's convincing lay testimony, *Contreras-Mendoza II* held Employee proved her claim by a preponderance of the evidence. *Contreras-Mendoza II* found the weight of medical testimony supported the first surgery Dr. Meals performed was work-related and met "the substantial cause" test. It further found the second surgery was "a closer call" but the weight of medical evidence and Employee's testimony similarly preponderated in her favor (*Contreras-Mendoza II* at 47).

33) *Contreras-Mendoza II* also found the weight of the medical evidence justified an order requiring Employer to pay the bills presented at hearing (*id*. at 48).

34) In respect to TTD, *Contreras-Mendoza II* held:

> Employee's first and second surgical procedures on her hand are found compensable. Accordingly, to the extent Employee was disabled and not medically stable, she is entitled to an award of TTD. Employer paid Employee TTD from February 29, 2008, through March 31, 2008. She seeks TTD from May 20, 2008, through June 7, 2010, the date Dr. Jensen stated she was medically stable. However, SIME Dr. Lipon convincingly stated Employee was not medically stable and suffered disability from one or the other surgeries until April 6, 2011. On or about May 15, 2008, Employer discharged Employee stating she could no longer work there unless and until he had a full duty work release. Consequently, unless she was an employee elsewhere, Employee was disabled as defined by law. AS 23.30.395(16). Based upon this evidence, Employee is entitled to an award of TTD beginning May 20, 2008. However, the record is unclear when and where Employee returned to work after her first and second hand surgeries. Rather than reopen the record and further delay this claim, this decision will award TTD subject to further review. AS 23.30.001(1). Employee's request for TTD from May 20, 2008 and continuing will be granted at this time, to the date Employee returned to work either part- or full-time. Employer will be directed to pay TTD benefits and mandatory interest from May 20, 2008, until the date Employee returned to work. The maximum possible "end date" for Employee's TTD claim at this time is April 6, 2011. The parties will be directed to determine the re-employment date, or dates as the case may be, and jurisdiction will be retained to resolve any disputes (*id.* at 45).

35) The above-referenced order was entered to avoid delay and hardship and provide Employee with retroactive TTD benefits subject to further Board action if necessary (judgment, experience and inferences drawn from all the above).

36) *Contreras-Mendoza II* found all of Employee's work-related medical conditions were medically stable on April 6, 2011, based upon Dr. Lipon's opinion (*id.*).

37) *Contreras-Mendoza II* ordered:

> ORDERS
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> 2) Employer shall pay any unpaid medical bills related to Employee's first and second hand surgeries or reimburse Employee or Mr. Briggs for payments made, plus mandatory interest.
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> 4) Employer is ordered to pay Employee TTD benefits and mandatory interest in accordance with this decision but not past the date the parties determine she returned to full-or part-time work, or April 6, 2011, whichever is latest. Jurisdiction is reserved to resolve any disputes (*id.* at 51).

38) On October 15, 2012, Employer through its adjusters issued three checks payable to Employee as follows: $24,930.39 for TTD, plus interest; $7,111.03 for medical bill

reimbursement, plus interest; and $3,702.57 for two percent PPI, plus interest (checks, October 15, 2012).

39) These checks provided no information about the dates for which TTD was paid, or which medical reimbursements were included (Employee; Arnold).

40) On April 15, 2013, Employee filed a petition seeking an order requiring Employer to "finalize" its "economic obligations" as set forth in *Contreras-Mendoza II*. Employee attached to her petition numerous documents demonstrating why she believe Employer owed additional medical bills to providers, additional reimbursements to Employee and to Mr. Briggs, additional interest, and additional TTD (Petition, April 10, 2013).

41) On June 18, 2013, the parties attended a prehearing conference. They stipulated to an August 14, 2013 hearing on Employee's April 10, 2013 petition. The issues noted for hearing included: "medical costs;" "attorney's fees/costs," and "additional employee compensation" (Prehearing Conference Summary, June 18, 2013).

42) On July 12, 2013, after receiving additional medical documentation from Employee, Employer's adjuster paid Employee $138.00 for date of service March 3, 2008, and $99.72 for date of service January 5, 2009. However, because the adjuster inadvertently wrote "Compromise and Release" in the check's subject line, rather than "Decision and Order," Employee on her non-attorney representative's advice refused to cash the check fearing Employer might allege an "accord and satisfaction" (Arnold; Briggs).

43) In its hearing brief, Employer cited the TTD order from *Contreras-Mendoza II* and explained it paid Employee TTD from May 20, 2008 through June 7, 2010, the date "the employer determine TTD was owed" (Employer's Hearing Brief, August 7, 2013).

44) Employer misunderstood *Contreras-Mendoza II*. The TTD order in *Contreras-Mendoza II* was non-specific as to the TTD end date only because it could not be determined from the hearing record when and if Employee ever returned to work. Had she returned to work, Employee's employment would have ended her TTD claim. However, the ultimate end date for TTD was April 6, 2011, based upon Dr. Lipon's medical stability opinion following Employee's second hand surgery. *Contreras-Mendoza II* also intended to require Employer to pay all work-related medical bills, including those related to allergic reactions to medical care for the work injury. As the parties September 4, 2012 hearing focused mainly on the surgical treatment for Employee's hand, *Contreras-Mendoza II* emphasized the surgeries were compensable treatments

arising out of and in the course of Employee's employment with Employer and were causally related to her February 22, 2008 work injury described above. Employer conceded there was no discussion among the parties after *Contreras-Mendoza II* about Employee's work status (experience, judgment, observations; *Contreras-Mendoza II*; Employer's hearing statement).

45) At the August 14, 2013 hearing, Employee again argued Employer should have consulted her attending physicians and reviewed then-recent MRI results prior to controverting based upon Dr. Radecki's opinion (Employee's hearing arguments).

46) At the August 14, 2013 hearing, Employee clarified she was not seeking attorney's fees and costs for Mr. Briggs' services. After lengthy discussion, it was determined Employee's remaining issues for hearing included: 1) unpaid medical bills or reimbursements, including payment to medical providers with outstanding balances due, reimbursement to Mr. Briggs, and reimbursement to Employee for out-of-pocket medical expenses; 2) TTD from June 8, 2010 through April 6, 2011; 3) interest on all benefits; and 4) a penalty under AS 23.30.155(e) based on Employer's "bogus" controversions in reliance upon Drs. Radecki's and Jensen's opinions (Employee's hearing arguments).

47) At the August 14, 2013 hearing, Employer initially objected to Employee's penalty claim, but after some discussion withdrew its objection and agreed to have the penalty claim heard and decided notwithstanding its absence from the controlling prehearing conference summary (Employer's hearing arguments; record).

48) At the August 14, 2013 hearing, it was still very difficult to understand Employee's accounting of allegedly unpaid medical bills, bills Employee paid, and bills Mr. Briggs paid. As some bills in question were referred to Cornerstone Collection Agency, it is inferred neither Employee nor Mr. Briggs paid these bills (experience, judgment, observations and inferences).

49) At the August 14, 2013 hearing, Employer credibly demonstrated through Ms. Arnold's testimony it had reimbursed the following medical expenses to Employee in checks dated November 21, 2012, and July 12, 2013 (record; Arnold):

Provider	**Date of Service**	**Amount**
Dr. Meals	2/11/09	$165.00
Dr. Meals	2/23/09	$50.00
Allergy Asthma & Immunology	6/17/09	$915.00

Allergy Asthma & Immunology: Co-pay	7/7/09	$30.00
Wal-Mart meds	7/10/09	$4.00
Wal-Mart meds	9/3/09	$53.88
Dr. Meals	1/22/10	$50.00
Dr. Meals	1/22/10	$800.00
Westwood Surgery Center	1/22/10	$1,900.00
Dr. Meals	5/12/10	$50.00
Dr. Meals	5/10/10	$2,400.00
Dr. Meals	8/23/10	$50.00
Total Reimbursements		$6,467.88
Interest @ 3.75%		$643.15
Sub-total Payments Made to Employee for Medical Reimbursement		**$7,111.03**
Family Health Center (paid on 7/12/13)	3/3/08	$138.00
Cornerstone/Hillside Family Medicine(paid on 7/12/13)	1/5/09	$99.72
Grand-total Payments Made to Employee for Medical Reimbursement		**$7,348.75**

50) Employee agrees she received and presumably cashed the November 21, 2012 check for $7,111.03, though she was unaware for which bills she was being reimbursed, and agreed she received the subsequent check dated July 12, 2013, for $237.72, but did not cash it ($138.00 + $99.72 = $237.72) (Employee; Briggs).

51) Employee has not given any of these funds to Mr. Briggs (Employee).

52) At the August 14, 2013 hearing, Employer agreed it would pay the following medical benefits directly to providers or to their collection services, and would probably try to negotiate some charges with the collection agencies, but in any event would resolve these charges (Employer's hearing statements):

Provider	Date of Service	Amount
Alaska Emergency Medicine c/o Cornerstone	6/17/09	$802.40
Citrus Valley Medical Center c/o Aschenbrenner Law Offices	2/13/09-2/15/09	$6,400.00
Glendora Radiological Associates	2/13/09	$241.00
Allergy Asthma & Immunology	6/17/09-7/27/09	$1,865.00
Providence Health Systems	6/17/09	$587.18
Providence Health Systems	7/27/09	$587.19
Total Additional Payments Employer Agreed to Make to Providers or to Their Collectors		**$10,482.77**

53) At the August 14, 2013 hearing, Employer agreed it would reimburse the following medical expenses directly to Mr. Briggs if he provided a W-9 tax form or his Social Security number (Employer's hearing statements):

Provider	Date of Service	Amount
OPA	12/9/08	$206.73
Westwood LA Center/CAST	1/22/10	$1,900.00
Total Payments Employer Agreed to Make to Mr. Briggs		**$2,106.73**

54) At the August 14, 2013 hearing, Employer agreed it would reimburse the following medical expense directly to Employee (Employer's hearing statements):

Provider	Date of Service	Amount
CAST	5/14/10	$2,500.00

55) At the August 14, 2013 hearing, Mr. Briggs argued he paid a total of $4,086.73 in medical benefits on Employee's behalf. He argued Employer still owed him the entire amount, notwithstanding the fact Employer credibly demonstrated at hearing it had already paid $1,980.00 of this amount to Employee in the November 21, 2012 check (Briggs; Arnold).

56) At the August 14, 2013 hearing, Mr. Briggs agreed to provide a W-9 tax form or his Social Security number to Employer's adjuster so the agreed payment to him could be made (Briggs).

57) According to the Alaska Court System's website, and applicable statutes, the relevant statutory interest rates in this case are as follows:

Year	Interest Rate
2008	7.75%
2009	3.5%
2010	3.5%
2011	3.75%
2012	3.75%
2013	3.75%

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board.**
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> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

The board may base its decision not only on direct testimony 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 23.30.135. 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 or formal 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 general purpose of workers' compensation statutes is to provide workers with a simple, speedy remedy to be compensated for injuries arising out of their employment. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978). Furthermore, this system is based upon "the ultimate social philosophy behind compensation liability," which is to resolve work-related injuries "in the most efficient, most dignified, and most certain form." *Gordon v. Burgess Construction Co.*, 425 P.2d 602, 604 (Alaska 1967).

> **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.
>
> . . .
>
> (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 the unpaid installment was to be paid.
> . . .
>
> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.
> . . .
>
> (p) An employer shall pay interest on compensation . . . not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *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." 3A. 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. Evidence the employer possessed "at the time of controversion" is the relevant evidence to review. *Id*.

> **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.
>
> (b) The employer shall pay the interest
>
> (1) on late paid time-loss compensation to the employee work, is deceased, to the employee beneficiary or estate;
> . . .

> (3) on late-paid medical benefits to
>
> > (A) the employee . . . if 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 of not paid.

Interest awards recognize the time value of money, and they give "a necessary incentive to employers to release . . . money due." *Moretz v. O'Neill Investigations,* 783 P.2d 764, 765-66 (Alaska 1989). The court consistently directs interest awards to injured workers for the time value of money. *Childs v. Copper Valley Electric Assn.,* 860 P.2d 1184 at 1191 (Alaska 1993) (*quoting Moretz* 783 P.2d 764, 765-766 (Alaska 1989)); *Land & Marine Rental Co. v. Rawls,* 686 P.2d 1187, 1192 (Alaska 1987).

ANALYSIS

1) Is Employee entitled to additional TTD from June 8, 2010 through April 6, 2011?

There is no factual dispute on this issue so the presumption of compensability need not be applied. It was previously applied on the TTD claim in *Contreras-Mendoza II.* Employer misunderstood *Contreras-Mendoza II. Contreras-Mendoza II* found the medical stability date for Employee's work-related injuries to be April 6, 2011, based upon Dr. Lipon's SIME opinion. All the hand surgeries Employee underwent after her work injury were found compensable. A specific end date for TTD was not provided in *Contreras-Mendoza II* only because the hearing testimony was so vague it could not be determined from the record if and when Employee returned to work after her surgeries. Had Employee returned to work following her surgery, Employee's TTD claim would have been extinguished though she might have been entitled to temporary partial disability, depending upon her earnings. As Employee made no temporary partial disability claim, *Contreras-Mendoza II* left it to the parties to determine if and when Employee returned to work thus extinguishing her TTD entitlement.

However, *Contreras-Mendoza II* left no room for confusion or disagreement about the medical stability date. In other words, if the parties agreed post-hearing that Employee never returned to

work thus ending her "disability," she was entitled to TTD through April 6, 2011, the date *Contreras-Mendoza II* found she was medically stable from all work-related injuries and treatments. Employer conceded there was no discussion among the parties after *Contreras-Mendoza II* about Employee's work status, and it does not appear to be an issue.

Therefore, Employee is entitled to additional TTD pursuant to *Contreras-Mendoza II* from June 8, 2010 through April 6, 2011. Employer will be directed to pay these benefits.

2) Is Employer obligated to pay any additional medical expenses?

Employee and Employer vigorously disagreed concerning Employer's obligation to pay additional medical expenses to providers or reimburse Mr. Briggs or Employee for out-of-pocket medical expenditures. Notwithstanding their disagreement, Employer, to its credit, once it obtained the necessary documentation agreed to pay to providers or their collectors, or reimburse to Mr. Briggs and Employee as the case may be, remaining medical bills Employee identified as still being in dispute. Thus, the actual bills and their amounts appear no longer in dispute and there is no need to apply the presumption of compensability analysis to this issue.

Based on medical bills or medical bill reimbursements Employee identified in his pre-hearing documents and at hearing, and based on Employer's agreement to pay, Employer will be directed to pay the following: $10,482.77 directly to medical providers or their collectors as appropriate as set forth in factual finding 53; $2,106.73 directly to Mr. Briggs pursuant to factual finding 54; and $2,500.00 directly to Employee as set forth in factual finding 55.

Employer may negotiate with collectors or other agents concerning these bills so long as the bills are paid in full and resolved completely within the time limitations imposed by law for payment following a decision and order. Payment to Mr. Briggs directly is proper pursuant to AS 23.30.155(a), as he is the person "entitled to" his particular reimbursement. Nothing in the Act prohibits an individual, who was not the injured worker or other entity in the business of providing benefits or services to injured workers from being a "person" entitled to compensation. Mr. Briggs is in a similar position to a third-party health insurer. Had the legislature intended to be more specific about whom a "person" entitled to compensation is or can be, it would have done so. The Act, however, uses the more general term "person," which inarguably includes Mr.

Briggs. Furthermore, Mr. Briggs' payment of Employee's medical bills may have ultimately resulted in Employer saving money by assisting Employee to recover more quickly from her work-related injuries, thus minimizing disability and possibly impairment.

As for amounts Mr. Briggs still believes he is owed, with exception of the above amount additionally awarded in this decision, those amounts have already been paid to Employee. Neither Mr. Briggs nor Employee is entitled to double recovery on reimbursable medical expenses. Employer cannot be faulted for paying all the out-of-pocket medical reimbursements resulting from *Contreras-Mendoza II* to Employee, as Mr. Briggs was vague and unable during the September 4, 2012 hearing to document precise amounts he paid from his own pocket to Employee's medical providers. Is unknown and immaterial what, if any, agreement Mr. Briggs had with Employee concerning her medical bills. Mr. Briggs voluntarily paid some of Employee's medical bills. It is unclear from the record whether or not Mr. Briggs and Employee actually had some kind of an agreement concerning this voluntary payment. Regardless, Mr. Briggs' remedy for the balance of medical benefits paid lies with Employee who has retained some of Mr. Briggs' funds. Mr. Briggs and Employee are in the best position to know how much Mr. Briggs paid on Employee's behalf and how much of this was reimbursed to Employee. This decision will leave it to those parties to work out their disagreements, if any.

3) Is Employee entitled to interest?

Interest is mandatory on workers' compensation benefits. AS 23.30.155(p). Interest on late-paid time loss compensation is paid to the injured employee. 8 AAC 45.142(b)(1). Interest on late-paid medical benefits is paid to the employee if the employee has paid the provider or has paid for the medical benefits. 8 AAC 45.142(b)(3)(A). Interest on late-paid medical benefits is paid to the provider if the medical benefits have not been paid by anyone. 8 AAC 45.142(b)(3)(C). But what about interest on benefits paid by a person like Mr. Briggs? Interest paid on late-paid medical benefits paid by an "insurer, trust, organization, or government agency," is paid to the party paying the medical benefits. 8 AAC 45.142(b)(3)(B).

Employer will be directed to pay statutory interest directly to Employee on the additional TTD benefits awarded in this decision. It will be directed to pay directly to Employee statutory

interest on the additional medical reimbursements awarded her in this decision. Employer will be directed to pay statutory interest directly to the medical providers or their collectors as ordered in this decision. Employer will also be directed to pay directly to Mr. Briggs statutory interest on the additional reimbursements it is directed to pay him in this decision.

As stated above, Mr. Briggs is in a situation similar to a third-party health "insurer." The parties could argue interminably about whether or not Mr. Briggs qualifies as an "insurer," as there is no evidence he has a business license, is an insurance agent or insurance company. Similarly there is no evidence he holds a trust for Employee, qualifies as an "organization," or is a government agency. Nevertheless, interest is compensation under the Act and is payable promptly and directly to the person entitled to it. AS 23.30.155(a). As the parties agree Mr. Briggs paid the medical bills awarded in this decision, he is entitled to the interest on those reimbursements. This result interprets the Act in a way to ensure "quick, efficient, fair, and predictable delivery" of benefits to injured workers at a reasonable cost to employers, in a summary and simple process. AS 23.30.001(1); AS 23.30.005(h). As Employer clearly owes interest on all benefits awarded, it should matter little to Employer whether Mr. Briggs technically qualifies as an "insurer, trust, organization, or government agency." This result makes everyone whole and best ascertains the rights of all parties. AS 23.30.135.

The parties also had some confusion about how interest is calculated. Interest awarded in this decision is "pre-judgment" interest. The whole purpose of interest is to compensate a person entitled to money for the loss of use of that money over time. *Moretz*. Therefore, interest is calculated on each TTD payment from the time each TTD payment was due. In this instance, Employee is entitled to additional TTD from June 8, 2010 through April 6, 2011. Employee lost the use of this money from June 8, 2010 through April 6, 2011, and to the present. Therefore, Employer or its adjuster will have to calculate the interest on each installment of TTD from the date it was due to the present, pursuant to AS 23.30.155(a). This is not difficult. It is part of an adjuster's job. This decision will not calculate the interest for the parties.

As the TTD award spans two calendar years, the interest rate may be different and Employer will be directed to use the appropriate interest rate for each year. If Employer determines it overpaid

Employee interest on her prior TTD payments because it used the wrong interest rate, Employer has the right to offset any additional interest owed Employee under AS 23.30155(j). As for the benefits paid to medical providers, collectors, Mr. Briggs or Employee, Employer will be directed to calculate interest on those payments or reimbursements from the date of service to the date paid, according to the statutory interest rate for the year in which the services are rendered as set forth in factual findings above.

4) Is Employee entitled to a penalty under AS 23.30.155(e)?

Employee does not like Dr. Radecki or his opinions. She believes he lacks the qualifications to provide an opinion she suffered from some kind of "conversion disorder." Accordingly, Employee seeks a penalty under AS 23.30.155(e), arguing Employer should never have controverted based upon this EME report. Employee also has difficulties with Dr. Jensen's EME report. She contends his report was inadequate to support a controversion notice.

Employee's argument is misplaced. Her arguments regarding Dr. Radecki's report goes to its weight, not its admissibility as evidence at a hearing or Employer's ability to rely upon it to controvert her right to benefits. Dr. Radecki's report made definitive statements saying, in his opinion; Employee's work was not the substantial cause of whatever ailed her hand or the need to treat it. He also stated the injury did not aggravate a pre-existing condition, she did not need further treatment, had no impairment, and could return to work without restrictions. Similarly, Dr. Jensen's report stated Employee suffered a work-related sprain, and affirmatively stated the tendon rupture was not caused by Employee's February 20, 2008 injury; he did not believe the rupture was even present. Accordingly, had a hearing been held and only Employer appeared with Drs. Radecki's and Jensen's reports, and no other evidence was offered, Employee would have been found not entitled to additional benefits. Therefore, Employer's evidence at the time it controverted met the *Harp* criteria, was not made in bad faith, and the evidence cannot support Employee's claim for penalty. Therefore, Employee's penalty claim will be denied.

CONCLUSIONS OF LAW

1) Employee is entitled to additional TTD from June 8, 2010 through April 6, 2011.
2) Employer is obligated to pay additional medical expenses.

3) Employee is entitled to interest.

4) Employee is not entitled to a penalty under AS 23.30.155(e).

ORDER

1) Employer is ordered to pay Employee TTD from June 8, 2010 through April 6, 2011.

2) Employer is ordered to pay additional medical expenses, specifically $10,482.77 directly to medical providers or their collectors as appropriate as set forth in factual finding 53; $2,106.73 directly to Mr. Briggs pursuant to factual finding 54; and $2,500.00 directly to Employee as set forth in factual finding 55, in accordance with this decision.

3) Employer is ordered to pay statutory interest to medical providers, collectors, Mr. Briggs and Employee at the statutory rate as applicable, in accordance with this decision.

4) Employee's penalty claim under AS 23.30.155(e) is denied.

Dated in Anchorage, Alaska on September 13, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Amy Steele, Member

_____
Mark Talbert, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 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.

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 filling 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 JUANA CONTRERAS-MENDOZA v. QDOBA MEXICAN GRILL dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on September 13. 2013.

_____

Pam Hardy, Office Assistant