ALASKA WORKERS' COMPENSATION BOARD

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

FLORDELIZA MARQUEZ, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201420153
SUNSET HAVEN, LLC Employer,	)	AWCB Decision No. 15-0086
and	)	Filed with AWCB Anchorage, Alaska on July 22, 2015
WORKERS COMPENSATION BENEFITS GUARANTY FUND, Defendants.	)	

Flordeliza Marquez's January 26, 2015 amended claim was heard June 10, 2015 in Anchorage, Alaska by a two-member panel. This hearing date was selected on April 7, 2015. Attorney Keenan Powell appeared and represented Flordeliza Marquez (Employee), who appeared and testified. Attorney Christopher Hoke appeared and represented Sunset Haven, LLC (Employer). Velma Thomas appeared and represented the Workers Compensation Benefits Guaranty Fund (Fund). Witnesses included Angelo Mike Ocampo, one of Employer's owners, and Joanne Pride, the Fund's adjuster. The record remained open to allow Employee's attorney to file a supplemental affidavit of fees and costs, and closed on June 24, 2015.

ISSUES

Employee contends she was injured in the course and scope of her employment when she slipped and fell while taking supplies to an outside storage shed. Employer contends Employee went to the storage shed to store or retrieve her personal property, and the injury was not in the course

and scope of her employment. The Fund took no position on whether the injury occurred in the course and scope of the employment.

1. Was Employee injured in the course and scope of her employment?

Employer contends its workers' compensation insurer improperly cancelled its policy and if Employee is entitled to any benefits, the insurer should be liable. Employee contends she is entitled to benefits whether or not Employer was insured. The Fund took no position as to whether the insurer was liable.

2. Is Employer's insurer liable for benefits?

Employer contends Employee is not entitled to benefits because she did not timely report the injury. Employee contends she gave Employer timely notice of the injury. The Fund did not take a position as to whether notice was timely given.

3. Did Employee timely report the injury to Employer?

Employee contends she is entitled to temporary total disability (TTD) from October 23, 2014 until she becomes medically stable. Employer contends Employee is not entitled to TTD because the injury did not occur in the course and scope of employment. The Fund took no position on Employee's entitlement to TTD.

4. Is Employee entitled to TTD benefits and, if so, for what time period?

Employee contends she required medical treatment as a result of the injury and is entitled to an award of medical and related transportation costs. Employer contends Employee is not entitled to medical benefits or transportation costs because the injury did not occur in the course and scope of employment. The Fund took no position on Employee's entitlement to medical benefits and transportation costs.

5. Is Employee entitled to medical benefits and related transportation costs?

Employee contends Employer unfairly or frivolously controverted her claim. Employer contends it did not controvert Employee's claim; the only controversion was filed by its insurer. The Fund took no position on whether there was an unfair or frivolous controversion.

6. Did Employer unfairly or frivolously controvert Employee's claim?

Employee contends she is entitled to penalties and interest on benefits not paid when due. Employer did not specifically address Employee's claim for interest and penalties, but as Employer opposes the other benefits Employee claims, it is assumed Employer opposes any award of penalty or interest as well. The Fund did not take a position on Employee's claim for penalties and interest.

7. Is Employee entitled to penalties or interest?

Employee contends her attorney provided valuable services in securing her benefits, and she is entitled to an award of attorney fees and costs. Employer did not specifically address Employee's claim for attorney fees and costs, but as Employer opposes the benefits which would support such an award, it is assumed Employer opposes the award of attorney fees and costs. The Fund did not address Employee's claim for fees and costs.

8. Is Employee entitled to attorney fees and costs?

The Fund contends it is not liable to pay benefits until Employee's claim is found to be compensable and Employer fails to pay. Neither Employee nor Employer addressed the Fund's contention.

9. Is the Fund liable to pay Employee's benefits?

FINDINGS OF FACT

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

1. Employer operates Sunset Haven Assisted Living Home (Sunset Haven) in Anchorage, Alaska. Mr. Ocampo and his wife are Employee's co-owners. (Ocampo). Mr. Ocampo is also an owner of another nearby assisted living home. (Ocampo).
2. Employee worked for Employer as a live-in caretaker. She cleaned and prepared meals for the residents and provided hygienic care and other assistance as required as well as other scheduled chores. When her scheduled work was done, Employee remained on-call to assist

residents when needed, although she was otherwise able to pursue personal interests during this "down" time. (Employee; Employer).

3. Employee's primary language is Tagalog, but she speaks limited English. (Observation).
4. Employee resided and ate her meals at the home; Employer provided this room and board at no cost to Employee. She was paid $2,000.00 per month for working five days a week, but often worked weekends for which she was paid $80.00 per day. Her monthly wages were paid by check, but the additional amounts for weekend work were paid in cash. (Employee; Employer).
5. Medicare regulations require a caretaker to be in the home any time there is a resident present. (Ocampo). As a result, when Employee needed to leave for any reason, even during her down time, a "reliever" was required to replace her. (Ocampo).
6. Employer used an insurance agent for its insurance needs. In December 2013, Mr. Ocampo contacted the agent to inquire about adding his son as an owner of Employer. The agent indicated a new workers' compensation policy would be required. In December 2013, Employer received a letter from the insurance company with a new policy number as well as renewal notices for the old policy. In September or October 2014, after a final premium audit, Employer received a refund of $2,264.00 from its insurer. (Ocampo).
7. Employer's workers' compensation policy was canceled on September 6, 2014 for nonpayment of a $202.00 renewal fee. Mr. Ocampo testified Employer did not receive notice its policy was expiring, and was not contacted by its agent. (Ocampo)
8. On October 23, 2014 in the early afternoon, Employee slipped and fell on the back deck of the residence. She fell backwards, landing on her buttocks, hitting her head, and losing consciousness for a period of time. (Employee).
9. Prior to Employee's fall, Mr. Ocampo had taken one of the residents to a medical appointment. (Ocampo).
10. Employee explained a pharmacy had delivered adult diapers for one of the residents and she was taking two boxes of the diapers to a storage building in the back yard. The only resident home at the time was sleeping. (Employee).
11. When Employee regained consciousness, she returned to the home, lay on the kitchen floor for a time, and then went upstairs and lay on her bed. She stated Mr. Ocampo was at the

other assisted living home, and she did not see him until about 7:00 p.m., when she told him she had fallen, but didn't know how badly she was hurt. (Employee).

12. Although the exact date is uncertain, Employee stopped working after the fall, but she continued to reside in the home until November 20, 2014. (Employee).
13. On November 4, 2014, Employee went to Anchorage Neighborhood Health Center (ANHC) where she was seen by Christopher Cornelius, M.D. She was accompanied by a neighbor who served as interpreter. She complained of back, buttock, and right posterior leg pain since a fall at work about ten days before. She was diagnosed with a possible facture of the sacrum, which was confirmed by an x-ray. (ANHC, Chart Note and Radiology Report, November 4, 2014).
14. On November 11, 2014, Employee went to the emergency department at Providence Alaska Medical Center (PAMC) in Anchorage. Her son served as interpreter. She again reported losing consciousness in the fall followed by back pain, dizziness, headache, and vomiting. Although she tried to continue working after the fall, she was unable to continue because of the ongoing pain and nausea. She stated that an x-ray at ANHC showed a fractured coccyx and an injury to her right leg. An MRI revealed a compression fracture of the T10 vertebra. She was prescribed pain medication and instructed to return to ANHC for a recheck. She was restricted from work for two weeks. (PAMC, Emergency Notes and Work Restriction, November 11, 2014).
15. Employee filed a report of injury with the board on November 12, 2015. (Report of Occupational Injury of Illness, November 12, 2014).
16. On November 18, 2014, Employee returned to ANHC complaining of back pain, nausea, dizziness, and vaginal pain. Dr. Cornelius reaffirmed the T10 compression and sacral/coccyx fractures and noted the vaginal pain appeared to be referred pain from the coccyx fracture. He continued Employee's pain medication. (ANHC, Chart Note, November 18, 2014).
17. Falls are a common cause of low back injuries. (Observation; Experience).
18. On November 21, 2014, Employee returned to PAMC emergency room complaining she had been experiencing blood in her urine and vomiting blood. The treating doctor was unable to determine a cause, but prescribed medication to treat the symptoms and directed Employee to follow up with ANHC. (PAMC, Emergency Notes, November 21, 2014).

19. On November 26, 2014, Employee filed a workers' compensation claim seeking temporary total disability (TTD) or temporary partial disability (TPD) beginning October 24, 2014 and continuing and medical and transportation costs. (Claim, November 26, 2014). The claim was served on Employer, Employer's insurer, and the Fund. (Record).
20. Employee returned to ANHC on December 2, 2014. Dr. Cornelius continued Employee's pain medications. (ANHC, Chart Note, December 2, 2014).
21. On January 7, 2015, Employer filed a letter from Mr. Ocampo in answer to Employee's November 26, 2014 claim. Mr. Ocampo stated that on October 23, 2014, he had returned to the home about 2:30 or 3:00 p.m., and sought out Employee, who appeared okay and did not tell him of the injury until November 4, 2014. Mr. Ocampo stated Employee had stored personal belongings in the outside storage building, and there was no reason the diapers needed to be stored there. Employer contended Employee's injury occurred while performing a personal errand, not in the course of her employment. (Answer, January 7, 2015).
22. Also on January 7, 2015, Employee, who was now represented by her attorney, filed an amended claim. In addition to the benefits requested in her November 26, 2014 claim, Employee sought a penalty, interest, attorney fees and costs, and alleged Employer had unfairly or frivolously controverted benefits. (Claim, January 6, 2015).
23. On January 20, 2015, Employee returned to ANHC for follow up. She reported numbness in her hands and fingers, wrist pain, and occasional vomiting and dizziness. She was diagnosed with fatigue and given a vitamin B12 injection. (ANHC, Chart Note, January 20, 2015).
24. On January 22, 2015, the adjuster filed a controversion notice on behalf of the insurer denying coverage on the grounds there was no policy in effect on the date of the injury. (Controversion Notice, January 22, 2015).
25. On February 6, 2015, Employee's attorney wrote to Dr. Cornelius asking him to review an enclosed job description for a "home attendant" and to respond to questions. Dr. Cornelius replied on March 6, 2015. Dr. Cornelius stated Employee had been disabled because of the T10 fracture since October 23, 2014, and he expected her disability to last between three and twelve months. (Dr. Cornelius, Response to Letter, March 6, 2015).
26. On March 10, 2015, Employee returned to ANHC complaining of ongoing tailbone pain and dizziness, and she asked if she could return to work. Dr. Cornelius diagnosed impacted

earwax, which was removed, and stated it would be preferable that Employee not return to work. Employee was also given a mammogram. (ANHC, Chart Note, March 10, 2015).

27. On March 17, 2015, Employee again returned to ANHC for earwax removal. (ANHC, Chart Note, March 17, 2015).
28. At the April 7, 2015 prehearing conference, the board designee set a hearing for June 10, 2015 on Employee's January 26, 2015 claim. The issues identified for hearing were TTD or TPD from October 23, 2014 and ongoing, medical costs, transportation costs, compensation rate adjustment, penalty, interest, unfair or frivolous controversion, and attorney's fees and costs. (Prehearing Conference Summary, April 7, 2015).
29. On May 13, 2015, Employee was seen by Douglas Bald, M.D., for an employer's medical evaluation (EME) requested by the Fund. Dr. Bald examined Employee and reviewed her medical records through March 10, 2015. He diagnosed a nondisplaced sacral fracture and a compression fracture of the T10 vertebral body, both of which were caused by the October 23, 2014 injury. He also diagnosed nausea, vomiting, and abdominal pain, which were unrelated to the work injury. He found Employee to be medically stable as of the day of the exam, and able to return to her job at the time of injury. (Dr. Bald, EME Report, May 13, 2015).
30. In his deposition, Mr. Ocampo testified he was unaware Employee had been injured or needed medical care until November 4, 2014, when the reliever told him Employee had gone to ANHC, but the reliever did not know the reason for Employee's visit. He spoke to Employee the next day, November 5, 2014, and Employee told him she had gone to get treatment for her back, but she did not tell him it was due to a work injury. (Ocampo Deposition, pp. 44-46, February 19, 2015).
31. At the June 10, 2015 hearing, Mr. Ocampo testified he returned to the home the afternoon of October 23, 2014, Employee did not appear injured and did not mention the fall. He spoke to Employee on November 5, 2014 after her visit to ANHC, to find out if she was capable of working. Employee explained she had gone to ANHC because she had a "bad back," but she did not say anything about a work injury. He first learned Employee contended the injury was work related on November 11, 2014, when he received a call from his insurance agent. (Ocampo).

32. Employee filed summaries of the cost of her medical treatment at PAMC and ANHC. Employee had made payments against the ANHC bill; the total medical costs at ANHC, before any payments by Employee, were $1,002.00. Included in the costs are charges for the mammogram and earwax removal. (ANHC, Account Financial History; Observation).
33. Employee's bill for the November 11, 2014 visit to PAMC was $13,748.52. The total charges for her November 21, 2014 visit were $6,366.27. (PAMC, Explanations of Benefits, November 11, and 21, 2015).
34. At the June 10, 2015 hearing, Employer introduced a photograph of a cardboard box in the outside storage building on which was written "COAT FLOR w/diapers." (Employer, Hearing Exhibit). The "COAT FLOR" and "w/diapers" appear to be in different handwriting, and while Employee admitted the "COAT FLOR" was her handwriting, she denied the "w/diapers" was her handwriting. (Observation; Employee).
35. At the June 10, 2015 hearing, Employer and Employee stipulated that Employee's gross weekly earnings were $1,300.00, including $441.00 for the value of the room and board provided. They also agreed that based on gross weekly earnings of $1,300.00, Employee's compensation rate was $644.18 per week, but Employer would be entitled to a credit of $1,764.00 for the four weeks Employee resided in the home after the injury ($441.00 x 4 = $1,764.00). (Hearing Stipulation).
36. On June 3, 2015, Employee filed an affidavit of attorney fees and costs detailing $11,484.00 in attorney fees and $1,005.34 in costs. (Affidavit of Attorney Fees and Costs, June 2, 2015). On June 15, 2015, Employee filed a supplemental affidavit of fees and costs that detailed $2,052.00 in fees and $280.00 in costs incurred after the June 2, 2015 affidavit. (Supplemental Affidavit of Fees and Costs, June 12, 2015). Employee's total attorney fees were $13,536.00 and her total costs were $1,285.34. (Observation).
37. For 2014 and 2015 the interest rate under AS 09.30.070(a) is 3.75 percent. (http://www.courtrecords.alaska.gov/webdocs/forms/adm-505.pdf).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter.
It is the intent of the legislature that

> (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.

Under the Alaska Workers' Compensation Act, coverage is established by a work connection, meaning the injury must have "arisen out of" and "in the course of" employment. If an accidental injury is connected with any of the incidents of one's employment, then the injury both would "arise out of" and be "in the course of" employment. The "arising out of" and the

"in the course of" tests should not be kept in separate compartments but should be merged into a single concept of "work connection." *Northern Corp. v. Saari*, 409 P.2d 845, 846 (Alaska 1966).

> **AS 23.30. 045. Employer's liability for compensation.**
> (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.042, 23.30.050, 23.30.095, 23.30.145, and 23.30.180-23.30.215.
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> **AS 23.30.070. Report of injury to division.**
> (a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall send to the division a report . . .
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> (f) An employer who fails or refuses to send a report required of the employer by this section or who fails or refuses to send the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.
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> **AS 23.30.082. Workers' compensation benefits guaranty fund.**
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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.

The Fund is not liable for payment of compensation or benefits until three conditions are satisfied: 1) the employer fails to pay compensation or benefits, 2) a claim for payment by the Fund is filed, and 3) the employer has no defenses that the Fund can assert. *Workers' Comp. Benefits Guaranty Fund v. West*, AWCAC Decision No. 145 (Jan. 20, 2011) at 19. Although the Fund may be liable for interest and attorney fees, it is not liable for penalties assessed against the employer. *Id*. at 15-16.

> **AS 23.30.095. Medical treatments, services, and 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. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require.
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> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. . . . .
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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 23.30.100. Notice of injury or death.**
> (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.
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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
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> (1) the claim comes within the provisions of this chapter; . . . .

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 is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Id.*

Application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and

the employment. See, e.g., *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). 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). In less complex cases, lay evidence may be sufficiently probative to establish the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). The employee need only adduce "some," "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson*, J.V., 742 P.2d 239, 244 (Alaska 1987). "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 v. Alaska Native Medical Center*, AWCAC Decision No. 150, 7 (Mar. 25, 2011). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). 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 Employee need produce no further evidence and the Employee 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 23.30.122. Credibility of witnesses**.
> The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

> **AS 23.30.145. Attorney fees.**
> (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
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> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150-51 (Alaska 2007), the Supreme Court explained fee awards under AS 23.30.145(a) and (b):

> Subsection (a) authorizes the Board to award attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim. . . . In contrast, subsection (b) requires an employer to pay reasonable attorney's fees when the employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim.

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging,* 787 P.2d 103, 108 (Alaska 1990).

> **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. . . ..

> (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.
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> (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. . . .
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> (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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> (p) An employer shall pay interest on compensation that is 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 under AS 23.30.155(e) or to avoid referral to the Division of Insurance under AS 23.30.155(o). *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* at 358.

The Alaska Supreme Court has taken a broad reading of the term "controverted," and has held a "controversion in fact" can occur when an employer does not file a formal notice of controversy. *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978). A controversion-in-fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation, *Shirley v. Underwater Construction, Inc*., 884 P.2d 156; 159 (Alaska 1994), or when an employer consistently denies and litigates its obligation to pay an increase in benefits. *Wien Air Alaska v. Arant*, 592 P.2d 352 (Alaska 1979). To determine whether there has been a controversion-in-fact, an employer's answer to a claim for benefits and its actions after the claim is filed must be examined. *Harnish Group, Inc. v. Moore*, 160 P.3d 146; 152 (Alaska 2007). Resistance before the filing of a claim cannot serve as a basis for a controversion-in-fact. *Id*. For there to be a controversion in fact, an employer must take some action in opposition to a claim after it is filed. *Id*.

> **AS 23.30.185. Compensation for temporary total disability.**
> In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

> **AS 23.30.395. Definitions.**
> In this chapter,
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> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .
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> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;

8 AAC 45.070. Hearings

. . . .

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

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.

8 AAC 45.177. Claims against the workers' compensation benefits guaranty fund

. . . .

(c) A workers' compensation claim shall be filed against the fund within the same time and in the same manner as a claim filed against the employer in accordance with AS 23.30.105 , AS 23.30.110 , and 8 AAC 45.050. The division shall serve the claim upon the fund's administrator and advise the parties that copies of all future documents filed with the division are also to be served upon the fund's administrator.

(d) The fund is subject to the same claim procedures under the Act as all other parties.

(e) The fund may not be obligated to pay the injured worker's claim unless the

(1) employee and employer stipulate to the facts of the case, including that the employee's claim is compensable, which has the effect of an order under 8 AAC 45.050(f), or the board issues a determination and award of compensation; and

(2) the employer defaults upon the payment of compensation for a period of 30 days after the compensation is due.

(f) In case of default by the employer in the payment of compensation due under an award and payment of the awarded compensation by the fund, the board shall issue a supplementary order of default. The fund shall be subrogated to all the

rights of the employee and may pursue collection of the defaulted payments under AS 23.30.170.

ANALYSIS

1. Was Employee injured in the course and scope of her employment?

It is undisputed that Employee was Employer's employee, and that the injury occurred on the business premises, but Employer contends the injury occurred while Employee was engaged in a personal errand, rather than in the course and scope of the employment. The presumption analysis under AS 23.30.120 applies to the question of whether an injury occurred in the course of employment. To attach the presumption, an employee must first establish a preliminary link between his or her injury and the employment. The preliminary link requires only "some," or "minimal," relevant evidence. In complex medical cases, medical evidence may be needed to establish the link, but in simpler cases lay evidence is sufficient. In determining whether the presumption is met, credibility of the evidence is not considered.

It is undisputed that Employee was injured at the workplace. That fact plus Employee's testimony that she slipped and fell while storing supplies for one of the residents of the home is sufficient to raise the presumption. Employee successfully raised the presumption she was injured in the course of her employment on October 23, 2014.

To rebut the presumption, either Employer or the Fund must present substantial evidence that a cause other than employment played a greater role in causing the disability or need for medical treatment. "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. Mr. Ocampo testified that if Employee was injured taking diapers to the storage building she was not engaged in work activities because she failed to follow instructions and violated Medicare regulations by leaving the home when a resident was present. However, workers' compensation is a no-fault system. It applies regardless of whether an employee, or employer, may have been negligent. The fact Employee may have violated a regulation or her instructions is not substantial evidence the injury did not occur in the course and scope of her employment.

Employer also contends that preexisting injuries may have played a part in Employee's injury. However, as Employer offered no evidence of any preexisting injury, it is speculation, not substantial evidence. Employer did not rebut the presumption as it failed to present substantial evidence a cause other than employment played a greater role in Employee's disability or need for medical treatment.

The Fund took no position as to whether Employee's injury occurred in the course and scope of her employment. It presented no evidence to suggest the injury was not work related, and, consequently, it did not rebut the presumption.

Both Employer and the Fund failed to rebut the presumption that Employee was injured at work, and Employee prevails on the raised but un-rebutted presumption. *Williams*. Employee was injured in the course and scope of her employment on October 23, 2014, and is entitled to benefits under the Act.

2. Is Employer's insurer liable for benefits?

Employer contends its insurer is liable for any benefits due to Employee. That was not included among the issues for this hearing in the April 7, 2015 prehearing conference summary, and under 8 AAC 45.070(g), it cannot be considered at this time. Under AS 23.30.145(a), Employer is liable for benefits regardless of whether an insurance policy was in place. Employer remains free to pursue a determination as to whether the insurer wrongfully cancelled Employer's policy.

3. Did Employee timely report the injury to Employer?

Employer contends it was unaware Employee was injured on October 23, 2014, and when she sought medical care on November 4, 2014, Employer was unaware she was seeking treatment for a work related injury. Mr. Ocampo stated Employer first learned Employee was claiming a work injury on November 11, 2015, when Mr. Ocampo spoke to the insurance agent. Consequently, Employer was aware of Employee's injury, and that she was claiming the injury was work related well within the 30 day time period of AS 23.30.100. Employee timely reported the injury to Employer.

4. Is Employee entitled to TTD benefits?

Employee contends she is entitled to TTD from October 23, 2014, until released to work by her own doctor. The presumption of compensability applies to this issue. Under AS 23.30.185, a temporarily disabled employee is entitled to TTD benefits until one of two conditions are met. First, the employee is no longer disabled, meaning the employee is again able to earn the wages they were earning at the time of the injury. Second, the employee becomes medically stable. To establish her eligibility for TTD, Employee must show both that she was disabled due to the work injury and was not yet medically stable. The date of medical stability may be a complex medical issue that requires medical evidence.

To raise the presumption she is entitled to TTD, Employee needed only "some," or "minimal," relevant evidence. Credibility is not considered nor is the evidence weighed against competing evidence. Dr. Cornelius's March 6, 2015 opinion that Employee was disabled since the injury and Dr. Bald's May 13, 2015 opinion that work was the substantial cause of Employee's disability are more than sufficient to raise the presumption.

To rebut the presumption, Employer or the Fund needed to present substantial evidence demonstrating that employment was not the substantial cause of Employee's disability. Employer argued only that the injury did not occur in the course and scope of Employee's employment, and that issue was resolve above. Neither Employer nor the Fund presented any evidence that Employee was not temporarily disabled due to the work injury prior to Dr. Bald's May 13, 2015 opinion. For the period from October 23, 2014 to May 13, 2015, Employee prevails on the raised but unrebutted presumption. However, Employer and the Fund successfully rebutted the presumption Employee was entitled to TTD after May 13, 2015 with Dr. Bald's opinion that she was medically stable as of that date.

Because Employer and the Fund rebutted the presumption for dates after May 13, 2015, Employee was required to prove by a preponderance of the evidence that she remained temporarily disabled after that date. She did not do so. Dr. Cornelius's opinion as to medical stability is given less weight than Dr. Bald's. Dr. Bald's opinion that Employee became medically stable on May 13, 2015 was clear and specific. Dr. Cornelius' March 16, 2015

response is ambiguous. He stated that he anticipated Employee's disability would last from three to twelve months, but it is unclear whether he meant three to twelve months from the date of injury or three to twelve months from the date of his response. Additionally, nothing in Dr. Cornelius's chart notes after December 2, 2014 indicates Employee received any actual treatment for the work injury, although she did discuss her progress with Dr. Cornelius. There was no indication Employee was to return for further treatment or that her prescription for pain medication was being renewed. The preponderance of the evidence is that Employee was medically stable as of May 13, 2015. Consequently, Employee is entitled to TTD from October 23, 2014 to May 13, 2015, a period of 28 weeks and six days. At the stipulated compensation rate of $644.18 per week, Employee is entitled to $18,589.19 (28 6/7 x $644.18) less the agreed deduction of $1,764.00 for room and board, for a net due of $16,835.19.

5. Is Employee entitled to medical benefits and related transportation costs?

Again, these are issues to which the presumption of compensability applies. The medical bills filed by Employee show she has been evaluated or treated for several conditions: the fractured vertebra and the fractured sacrum/coccyx, abdominal pain, nausea, and vomiting, impacted earwax, and a mammogram.

To raise the presumption she is entitled to medical benefits related to her coccyx/sacrum and T10 fractures, Employee needed only "some," or "minimal," relevant evidence. Credibility is not considered nor is the evidence weighed against competing evidence. Employee raised the presumption through Dr. Bald's May 13, 2015 opinion that the work injury was the substantial cause of the need for treatment for her mid and lower back conditions.

To rebut the presumption, Employer or the Fund needed to present substantial evidence demonstrating that employment was not the substantial cause of Employee's need for medical treatment. Employer argued only that the injury did not occur in the course and scope of Employee's employment, and that issue was resolved above. Neither Employer nor the Fund presented any evidence that the need for treatment of Employee's mid and lower back was not due to the work injury, and, as to medical treatment for her mid and low back, Employee prevails on the raised but unrebutted presumption.

As to Employee's abdominal pain, nausea, and vomiting, impacted earwax, and mammogram, Employee did not raise the presumption. There is no evidence those conditions, or treatments, were related to the work injury. Employee is not entitled to medical care for those conditions.

As to transportation costs related to medical care, Employee failed to raise the presumption. She did not file a transportation log or other written documentation of her medically related travel, and she offered no testimony about her transportation costs. Employee provided no evidence she is entitled to medically related transportation costs.

6. Did Employer unfairly or frivolously controvert Employee's claim?

The only written controversion filed in the case was the January 22, 2015 controversion filed by the insurer. In a typical workers' compensation case, the interests of the employer and the insurer are identical, and the actions of one may be imputed to the other. That is not the situation in this case. Because the insurer denied coverage, its actions cannot be imputed to Employer. Whether the insurer's controversion was unfair or frivolous cannot be determined until it has been determined the insurer is liable for benefits. As stated above, that was not an issue for this hearing.

Employee also contends Employer controverted in fact. Employer's January 7, 2015 letter in answer to Employees' claim denied benefits, alleging Employee was engaged in personal activities when she was injured. The letter constitutes a controversion in fact. For a controversion to be 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. Determining whether an employee who resides at the workplace and is on call but also has personal time is injured in the course and scope of the employment can be difficult. Here, Employer alleged Employee stored personal belongings in the storage shed and was injured while going to the shed on a personal errand. Had Employee not introduced evidence to the contrary, Employee would not have been entitled to benefits. The controversion in fact was not frivolous.

7. Is Employee entitled to penalties or interest?

Employee contends she is entitled to penalties on two grounds. First, Employee contends she is entitled to a 20 percent penalty under AS 23.30.070 because Employer did not timely report the injury. Second, Employee contends she is entitled to a penalty of 25 percent under AS 23.30.155(e), because benefits were not paid within seven days of the date they were due.

Under AS 23.30.070(a), an employer must file a report of injury within ten days of the date it had knowledge of the injury and that the employee was alleging the injury arose out of or in the course of the employment. The purpose of subsection .070(a) is to ensure timely reporting of injuries. Under AS 23.30.070(f), the board *may require* the employer to pay a penalty if the report is not timely filed.

The parties disagree as to whether Employee told Mr. Ocampo of the injury on October 23, 2015. In both his deposition and hearing testimony, Mr. Ocampo stated he learned of the injury and that Employee was alleging it was work related on November 11, 2014. Employee filed the report of injury the next day, November 12, 2014. Here, the report of injury was filed 20 days after the October 23, 2014 injury. Given the report of injury was filed relatively promptly and given the lack of clear evidence as to when Employer knew both that Employee had been injured and that the injury was work related, a penalty under AS 23.30.070 will not be required.

Employee also contends she is entitled to a penalty under AS 23.30.155(e) because benefits were not paid within 7 days of the date they were due. Under AS 23.30.155 (b), TTD must be paid within 14 days of injury and every 14 days thereafter. Under AS 23.30.097(d), an employer must pay medical benefits within 30 days of receiving the provider's bill or a treatment plan under AS 23.30.095(d). This decision found Employee entitled to TTD from October 23, 2014 to May 13, 2015. Neither Employer nor the Fund have paid any TTD, and it was due far more that 7 days ago. Employee is entitled to a penalty of 25 percent on all TTD.

This decision also awards Employee medical costs for treatment of her mid and lower back. It is not clear from the evidence if, or when, Employer received the medical bills for that treatment.

Employer is liable for a 25 percent penalty on all medical bills related to the treatment of Employee's low and mid back that were not paid within 30 days of receipt.

As a matter of law, Employee is entitled to interest on all benefits not paid when due. Employee is entitled to interest at 3.75 percent interest on all TTD and medical costs awarded in this decision.

8. Is Employee entitled to attorney fees and costs?

Under AS 23.30.145(b), an employer is required to pay reasonable attorney's fees when the employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes her claim. *Harnish*. Here, Employer resisted paying compensation, including medical benefits, and Employee's attorney was successful in prosecuting Employee's claim. Employee is entitled to reasonable attorney fees and costs. Neither Employer nor the Fund objected to either Employer's attorney's hourly rate or the time expended. Employee will be awarded attorney fees of $13,536.00 and costs of $1,285.34.

9. Is the Fund liable to pay Employee's benefits?

The mere fact that Employer is liable for benefits does not mean the Fund is also immediately liable. In *West*, the appeals commission set out three preconditions to the Fund's liability: 1) the employer is uninsured and fails to pay compensation or benefits, 2) a claim is filed for payment by the Fund, and 3) the employer has no defenses that the Fund can assert. Also, under 8 AAC 45.177(e)(2) the Fund does not become liable until the employer defaults upon the payment of compensation for a period of 30 days after the compensation is due.

Here, Employer was uninsured at the time of the injury and it has not paid compensation or benefits, satisfying the first *West* factor. Employee filed her claim, which was served on the Fund, satisfying the second *West* factor. As to the third *West* factor, the Fund asserted a defense Employer could have, and, in fact, did raise: that Employee was not injured in the course and scope of her employment. This decision resolves that issue, and all the *West* factors have been satisfied.

Under 8 AAC 45.177(e)(2) the Fund only becomes liable if the employer defaults for a period of 30 days after the compensation is due. Upon the issuance of this decision and order, Employer's liability for benefits to Employee is established. If Employer does not pay those benefits as provided in the Act, the Fund will be liable benefits, other than penalties, 30 days after Employer failed to pay.

The Fund is not now liable for benefits to Employee, but it will become liable should Employer fail to pay as required by the Act.

CONCLUSIONS OF LAW

1. Employee was injured in the course and scope of her employment.

2. Whether Employer's insurer is liable for benefits was not an issue for this hearing.

3. Employee timely reported the injury to Employer.

4. Employee is entitled to TTD benefits from October 23, 2014 to May 13, 2015.

5. Employee is entitled to medical benefits related to her low and mid back. She is not entitled to transportation costs.

6. Employer did not unfairly or frivolously controvert Employee's claim.

7. Employee is entitled to penalties and interest on the benefits awarded in this decision.

8. Employee is entitled to attorney fees and costs.

9. The Fund is not presently liable to pay Employee's benefits, but will become so if Employer does not timely pay the benefits awarded in this decision.

ORDER

1. Employee was injured on October 23, 2014 in the course and scope of her employment with Employer.

2. The question of whether Employer's insurer is liable for benefits was not ripe and could not be considered in this decision.

3. Employee timely reported her injury to Employer on or before November 11, 2014.

4. Employer shall pay Employee TTD from October 23, 2014 to May 13, 2015 at the rate of $644.18 per week, less a credit of $1,764.00 for room and board, for a total of $16,835.19.

5. Employer shall pay the medical costs related to Employee's low and mid back injury. To the extent Employee paid such medical costs out-of-pocket, payment shall be made to her. To the extent such medical costs remain unpaid, Employer shall pay the medical provider.

6. Employee's claim for an unfair or frivolous controversion is denied.

7. In addition to the $16,835.19 in TTD benefits ordered above, Employer shall pay Employee a penalty of 25 percent or $4,208.00.

8. Employer shall pay a penalty of 25 percent on all medical costs related to Employee's low and mid back. To the extent Employee paid medical costs out-of-pocket, the penalty shall be paid to her. The penalty on any unpaid medical bills shall be made to the medical provider .

9. Employer shall pay interest at 3.75 percent on all unpaid TTD or medical benefits from the date due until the date paid. The interest shall be paid to the person or entity to whom the benefit is paid.

10. Employer shall pay Employee's attorney $13,536.00 in fees and $1,285.34 in costs for a total of $14,821.00

11. Should Employer fail to pay the above amounts within 30 days of the date ordered in this decision, the Fund shall pay the TTD, medical costs, interest, and attorney fees and costs as ordered herein.

Dated in Anchorage, Alaska on July 22, 2015.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Designated Chair

_____

Pamela Cline, 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.

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 FLORDELIZA MARQUEZ, employee / claimant; v. SUNSET HAVEN, LLC, employer; WORKERS COMPENSATION BENEFITS GUARANTY FUND, defendants; Case No. 201420153; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on July 22, 2015.

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Elizabeth Plietez, Office Assistant