ALASKA WORKERS' COMPENSATION BOARD

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

DARYL WILLIAMS, Employee, Claimant, v. MCDONALD'S CORP. & ACE INSURANCE CO., and ARCTIC TERRA, LLC, & UMIALIK INSURANCE CO., Employers and Insurers, Defendants.	)	FINAL DECISIONAND ORDER ON RECONSIDERATION AND MODIFICATION AWCB Case Nos. 198708515, 201403502 AWCB Decision No. 16-0019 Filed with AWCB Anchorage, Alaska on March 11, 2016

Daryl Williams' (Employee) October 8, 2014 workers' compensation claims were heard on June 16, 2015, in Anchorage, Alaska, resulting in *Williams v. McDonald's Corp. and Arctic Terra*, AWCB Decision No. 15-0116 (September 17, 2015) (*Williams I*). Arctic Terra's (Arctic) timely September 29, 2015 petition for reconsideration, also treated as a petition for modification of *Williams I*, was heard on the written record on October 6, 2015, resulting in. *Williams v. McDonald's Corp. and Arctic Terra*, AWCB Decision No. 15-0130 (October 8, 2015) (*Williams II*). *Williams II* directed the parties to fully brief Arctic's petition and address additional issues raised by *Williams II*. Employee and Arctic timely filed their supplemental briefs on October 20, 2015 and October 23, 2015, respectively. McDonald's Corp. (McDonald's) did not file a supplemental brief. Attorney Keenan Powell represents Employee. Attorney Colby Smith represents McDonald's and its insurer. Attorney Robin Gabbert represents Arctic and its insurer. The record remained open for the parties to file supplemental briefs and closed on March 10, 2016, when the panel met to deliberate after the filing deadline had passed and the panel had

reviewed the parties' post-hearing documents. This decision resolves Arctic's September 29, 2015 petition on its merits.

ISSUES

Arctic contends *Williams I* made a factual error when it concluded temporary total disability (TTD) was late paid in a lump sum in September 2014. Arctic seeks an order correcting this factual mistake.

McDonald's did not file a brief on Arctic's petition. This decision assumes McDonald's takes no position on Arctic's petition.

Employee contends Arctic is correct. Employee agrees *Williams I* erred in finding TTD was late paid in a lump sum in September 2014.

1) Should *Williams I* be modified to correct a factual error concerning TTD payments?

Arctic contends it timely filed a February 7, 2014 Compensation Report. Therefore, Arctic contends it should not be assessed a late filing penalty.

McDonald's did not file a brief on Arctic's petition. This decision assumes McDonald's takes no position on Arctic's petition.

Employee contends there is no evidence Arctic timely filed a compensation report as required by law. He contends Arctic should be assessed a $1,000 civil penalty.

2) Should Arctic be assessed a late compensation report filing penalty?

Arctic contends it cannot legally be penalized for not paying and controverting a benefit that is not yet "due." Therefore, Arctic contends *Williams I* should not have penalized it for not paying Marilyn Yodlowski, M.D.'s, one percent permanent partial impairment (PPI) rating, since *Williams I* found Employee is not yet medically stable and subject to a PPI rating.

McDonald's did not file a brief on Arctic's petition. This decision assumes McDonald's takes no position on Arctic's petition.

Employee contends *Williams I* appropriately assessed a penalty on Dr. Yodlowski's one percent PPI rating. He contends at the time Arctic controverted-in-fact Dr. Yodlowski's rating, it had no basis for doing so, and a penalty was appropriately assessed.

3) Should *Williams I* be reconsidered to vacate the penalty assessed on Dr. Yodlowski's one percent PPI rating?

Arctic contends it could legally recover allegedly overpaid TTD benefits either by re-characterizing those benefits from TTD to PPI, or by recovering them under AS 23.30.155(j). Consequently, Arctic contends employee actually received his one percent PPI rating though it was called something else, or alternatively, Arctic simply recovered a TTD overpayment.

McDonald's did not file a brief on Arctic's petition. This decision assumes McDonald's takes no position on Arctic's petition.

Employee contends the Act contains no provision allowing an insurer to "recharacterize" past-paid benefits, and no regulation justifying this practice. He contends Arctic never argued an overpayment, or recharacterized previously paid TTD as PPI until the hearing. Employee contends Arctic waived this argument by failing to allege it prior to hearing. Therefore, he contends there is no legal or factual basis to reconsider the PPI penalty issue.

4) Has Arctic demonstrated a factual or legal basis to avoid a penalty on PPI?

FINDINGS OF FACT

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

1) On February 7, 2014, Arctic's adjuster completed a Compensation Report stating TTD payments had begun on February 20, 2014, and Arctic had paid Employee TTD from January 25, 2014, and continuing. (Compensation Report, February 7, 2014, Petition, Exhibit C).

2) The February 7, 2014 Compensation Report was not in Employee's agency file on June 16, 2015 hearing when the hearing occurred. (Observations).

3) On July 29, 2014, Employee saw Marilyn Yodlowski, M.D., orthopedic surgeon, for an employer's medical evaluation (EME). Dr. Yodlowski diagnosed among other things: (4) lumbar "sprain/strain" sustained in January 2014, now resolved and no longer a current condition. (Yodlowski EME report, July 29, 2014, finalized August 29, 2014).

4) In Dr. Yodlowski's opinion, Employee was medically stable with respect to "any sprain/strain." Accordingly, using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th edition, (*Guides*) Dr. Yodlowski determined Employee had a one percent whole-person PPI rating for his "sprain/strain" attributable to the Arctic injury. (*Id*.).

5) On September 3, 2014, Arctic filed a notice denying Employee's rights to all benefits. Arctic relied upon Dr. Yodlowski who stated Employee's January 2014 work injury caused only a lumbar "sprain/strain," which is "now resolved." Notably, the denial states Employee had a seven percent PPI rating due to spinal stenosis, seven percent due to spondylolisthesis and one percent "due to the work injury." (Controversion Notice, September 2, 2014).

6) As of September 3, 2014, Arctic had its own physician's medical opinion stating Employee had a one percent PPI rating attributable "to the work injury," and no medical evidence stating Employee had a zero percent PPI rating attributable to the Arctic injury. (Observations).

7) Arctic never paid Employee any PPI. (Compensation Report, September 19, 2014).

8) On October 8, 2014, Employee filed a claim against Arctic requesting TTD from January 24, 2014, and continuing; PPI; medical and related transportation costs; an unspecified penalty; interest; a finding of an unfair or frivolous controversion; and attorney's fees and costs. (Workers' Compensation Claim, October 7, 2014).

9) At hearing on June 16, 2015, the following colloquy occurred:

> MS. POWELL: He was -- I agree he was paid through October 20 -- August 26, 2014.
> CHAIR: Twenty-six or 24?
> MS. GABBERT: 26th.
> MS. POWELL: 26th.
> CHAIR: Okay. I thought you said 24.
> MS. GABBERT: He was paid through August 26, 2014. (Board Hearing Transcript, June 16, 2015, at 35).

10) The June 16, 2015 colloquy does not indicate when Employee had been paid for the cited dates. (Observations).

11) On September 17, 2015, *Williams I* made the following factual finding:

> • (60) On September 2, 2014, Arctic paid Employee for the first time TTD from January 25, 2014 through August 26, 2014. (Compensation Report, September 19, 2014). (*Williams I* at 22).

12) Factual finding (60) in *Williams I* was based on Employee's October 7, 2014 claim for TTD beginning "January 24, 2014," and on the only compensation report found in Employee's agency file, dated September 19, 2014. Read literally, the September 19, 2014 compensation report, block 15, states Arctic made a $13,892.88 TTD payment on September 2, 2014, covering the period from January 25, 2014 through August 26, 2014. (Observations).

13) Given the February 7, 2014 Compensation Report and the parties' agreement, factual finding (60) in *Williams I* was made in error. (Experience, judgment, observations and inferences drawn from the above).

14) In its order, *Williams I* said:

> • (7) Arctic is ordered to pay Employee $3,473.22 as a penalty on TTD previously paid under AS 23.30.155(e).
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> • (8) The director is asked to notify the division of insurance that Arctic's controversion of Dr. Yodlowski's one percent PPI rating, and its failure to either timely pay or controvert Employee's right to TTD, were frivolous and unfair. (*Williams I* at 69-70).

15) Because factual finding (60) in *Williams I* was made in error, *Williams I*'s order (7) awarding a late payment penalty on past-paid TTD was in error, as was the part of order (8) asking the director to notify the division of insurance that Arctic's failure to either timely pay or controvert Employee's right to past TTD was frivolous and unfair. (Judgment; observations).

16) *Williams I* concluded Employee has never been medically stable from his Arctic injury and Arctic owes him TTD benefits effective August 27, 2014 and continuing until he is either no longer disabled or is medically stable. (*Williams I* at 63).

17) *Williams I* also concluded Arctic has not overpaid Employee TTD. (*Id.*).

18) In his post-hearing brief, Employee agrees *Williams I* erred in concluding Arctic did not pay him TTD benefits until September 2, 2014, and he concedes TTD was timely paid.

Employee also concedes there are no penalties or interest owed on past-paid TTD, and no grounds to refer Arctic to the insurance division regarding the TTD issue. However, Employee contends there is no evidence Arctic timely filed its February 7, 2014 compensation report and Arctic should be assessed a $1,000 civil penalty. Employee further contends Arctic admitted it owed a one percent PPI rating based upon Dr. Yodlowski's report but never paid any PPI benefits. Since Arctic had no evidence to support controverting the PPI rating, Employee contends *Williams I* properly assessed a penalty. Employee agrees Arctic currently does not owe him any PPI, but contends this fact is irrelevant in determining whether Arctic had a duty to timely pay PPI when Dr. Yodlowski initially offered her rating. Since there was no contrary evidence or any legal reason to deny paying Dr. Yodlowski's PPI rating, Employee contends Arctic's failure to pay the rating constituted bad faith and warrants a referral to the insurance division. Lastly, Employee contends there is no legal basis for Arctic to escape a penalty on the one percent PPI rating by now retrospectively stating it "recharacterized" the PPI to TTD. He contends Arctic waived its right to claim it has already paid PPI by not reporting it as paid on any compensation report or in any pleadings prior to hearing. Further, Employee contends Arctic's current efforts to recharacterize past-paid benefits as PPI to avoid a penalty constitutes an impermissible "shell game." (Employee's Response to Interlocutory Decision and Order 15-0130 (10/8/15) Upon Arctic Terra's Position for Reconsideration, October 20, 2015).

19) Arctic's post-hearing brief contends *Williams I* erroneously found Arctic never paid TTD until it made a lump-sum payment on September 2, 2014. Arctic contends this error improperly resulted in an order requiring Arctic to pay a penalty on past-paid TTD. Arctic contends based upon its adjuster's affidavit, that it timely filed a compensation report within 28 days of the date TTD payments began. As for the PPI penalty, Arctic contends *Williams I* concluded no PPI was owed, as Employee is not yet medically stable. Accordingly, Arctic contends it cannot be penalized for a benefit that is not "ripe for payment." Further, and alternately, Arctic contends it already paid Employee the one percent PPI rating because it overpaid him TTD benefits. As an additional alternate argument, Arctic contends even if it has not already paid Employee PPI through "overpayment," it was entitled to recover overpaid TTD by recovering it from the one percent PPI rating, thus rendering the PPI rating a nullity. Lastly, Arctic contends no facts warrant referral to the insurance division for investigation. (Arctic Terra's Supplemental Briefing in Response to *Williams II*, October 23, 2015).

20) Attached to Arctic's post-hearing brief is a "Payment History" for Employee showing Arctic paid TTD benefits from January 25, 2014, through August 26, 2014. The payment history shows no benefits paid as PPI. (*Id*. at Exhibit A, page 2).

21) Attached to Arctic's brief is adjuster Tommy Sue Savina's affidavit. Savina states it was her normal practice to create compensation reports when payments began and file these with the board by mail. Savina avers she mailed the February 7, 2014 compensation report to the board on February 7, 2014. (*Id*. at Exhibit E, Affidavit of Tommy Sue Savina, October 22, 2015).

22) Sometimes documents filed with the division are accidentally misfiled. Sometimes documents mailed to the division get lost in the mail. (Experience; observations).

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 . . . employers. . . .

In *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987), the board had decided a second employer was liable for an injured worker's disability benefits. On appeal, the superior court reversed and remanded on grounds the board had failed to make certain required findings and its determination lack substantial evidentiary support. In reviewing the superior court's decision, the Alaska Supreme Court stated a reviewing court's duty was not to "reweigh the evidence presented to the Board, but to determine whether there is substantial evidence in light of the whole record that a reasonable mind might accept as adequate to support the Board's conclusion." *Rogers & Babler* also stated, "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." The board's opinion was supported by testimony and "inferentially" by the nature of the employee's work and by the fact he could work despite pain prior to his last employment but required surgery thereafter.. The court further held subjective determinations are "the most difficult to support." That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable. . . ." (*Id*. at 534).

> **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.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year . . . whether or not a compensation order has been issued . . . review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

For an alleged factual mistake, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005).

In *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009), a losing litigant in a child custody case appealed from a superior court judge's citation to a statute in her order denying Barlow's motion to dismiss for lack of jurisdiction. Barlow argued that Thompson alone had the "responsibility to provide legal arguments" opposing his motion to dismiss, that Thompson failed to do so, and that therefore any legal authority cited by the judge was insufficient to deny his motion. He also argued that by citing the statute, the judge impermissibly acted as "lay counsel" for Thompson. Finally, he argued the court's citation to the statute showed bias against him. (*Id*. at 1004-05). In rejecting this argument, the Alaska Supreme Court stated:

> These arguments are without merit. . . . 'A court is entitled to cite to the Alaska Statutes in its decision. The court recognizes that [Thompson] did not address [Barlow's] jurisdictional objections by opposition (written). Nonetheless a court must base its decisions on the law.' We agree. And it was entirely appropriate for the court to cite a statute that controlled the disputed issue, even though the parties did not. The parties had a full opportunity to brief the jurisdictional dispute. [The judge] did not act impermissibly, and correctly and properly rejected Barlow's motion to dismiss. (*Id*. at 1005).

In *Burch v. Alaska Fresh Seafoods, Inc*., AWCB Decision No. 08-0243 (Alaska 2008), the parties argued about a Social Security offset. In a previous decision, the board had granted a prospective offset against Burch's continuing benefits, but had held the employer's request for a retroactive offset in abeyance, and requested additional briefing and evidence as to why the employer waited 10 years to assert a Social Security offset given its knowledge Burch had been receiving these benefits for years. *Burch* found the employer's position a "shock to the conscience" and contrary to the Act's overall purpose to provide quick, efficient, fair and predictable compensation to injured workers at a reasonable cost to employers. *Burch* stated:

> We find a system which permits an employer to delay in asserting an offset claim, and then allows it to reach back any number of years, thereby creating an artificial 'overpayment,' which the employer then seeks to collect from the employee in a convoluted 'shell game of entitlements, offsets and actual payments,' (citation omitted) is neither quick, efficient, fair or predictable for either party. (*Id*. at 8).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
> . . . .
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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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> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

Employers must either pay or controvert benefits without an award but may controvert any time after payments are made. AS 23.30.155(a). A controversion notice must, however, be filed and

it must be filed in good faith to protect an employer from a penalty for nonpayment of benefits. *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. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *Id.* at 358. The employer must possess sufficient evidence in support of the controversion that, if the employee does not introduce evidence in opposition to the controversion, the board would find the employee not entitled to benefits. *Id.* The controversion and the evidence on which it is based must be examined in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion. *State of Alaska v. Ford*, AWCAC Decision No. 133 at 21 (April 9, 2010). When an employer has insufficient evidence an employee's disability is not work-related, the controversion was in bad faith, invalid and a penalty is imposed. *Harp* at 359.

In *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014), a paraplegic worker had a prescription for a special bed as a medical expense to treat bedsores. The employer controverted the bed. At hearing, the board found the employer's controversion of the bed was not made in good faith because the adjuster had no evidence on which to base its controversion. The board assessed a penalty on the value of the bed as of the controversion date. On appeal to the commission, the employer argued the board had erred by assessing a penalty on the value of a bed that was never purchased. Since the bed was never purchased, the employer argued payment for it was never "due" and "owing" and thus no penalty could be assessed. The commission agreed and Harris appealed to the Alaska Supreme Court, which reversed and said:

> The Alaska Workers' Compensation Act sets up a system in which payments are made without need of Board intervention unless a dispute arises. (Footnote omitted). If the employer disputes payment, it is required to file a timely controversion notice. (Footnote omitted). The purpose of the act is 'to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers . . . subject to [it].' (Footnote and emphasis in original omitted). . . . Under this compensation system, payments 'due' under the act are more appropriately characterized as '[p]ayable immediately or on demand,' not '[o]wed as a debt.' (*Id*. at 518).
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> **AS 44.62.540. Reconsideration**. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be

> considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied. . . .

AS 44.62.540 limits authority to reconsider and correct a decision under this section to 30 days. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743, n. 36 (Alaska 2005).

> **8 AAC 45.150. Rehearings and modification of board orders.** (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130. . . .

ANALYSIS

1) Should *Williams I* be modified to correct a factual error concerning TTD payments?

Arctic contends *Williams I* made a factual error in finding TTD was never paid until Arctic made a lump-sum payment on September 2, 2014. AS 23.30.130; 8 AAC 45.150. Alleged factual errors are not subject to "reconsideration," but are subject to "modification." AS 23.30.130; AS 44.52.540; *Lindekugel*. Employee agrees with Arctic's contention.

In his October 7, 2014 claim, Employee requested TTD from January 24, 2014, and continuing, and an unspecified penalty. In his June 12, 2015 hearing brief Employee argued, "Pursuant to AS 23.30.155(e), penalties are due on unpaid TTD and medical bills." He also contended, "Accordingly, Daryl Williams is entitled to TTD from the [sic] 1/24/14 until he recovers from the recommended surgery. Arctic Terra paid TTD through 8/26/14." However, neither Employee's brief, hearing argument nor any compensation report in his file when the hearing occurred on June 16, 2015, stated the date when Arctic began paying TTD. The only compensation report in the agency record on June 16, 2015, was the September 19, 2014 compensation report stating on its face that Arctic had had paid Employee lump-sum TTD benefits on September 2, 2014. Given the above, *Williams I* drew a reasonable conclusion finding, while TTD had been paid, it was not paid until September 2, 2014, and there was no good reason for non-payment. Thus, *Williams I* assessed a penalty and interest and referred the matter to the director for referral to the insurance division.

However, Arctic has now re-filed its February 7, 2014 compensation report, and Arctic and Employee have stipulated that Arctic timely paid past TTD in accord with the February 7, 2014 compensation report. This new evidence shows factual finding (60) is a mistake in *Williams I*'s "determination of a fact." AS 23.30.130(a); 8 AAC 45.150. Therefore, Arctic's request for modification will be granted and factual finding and conclusion (60) will be deleted. Since this factual finding and conclusion will be deleted, order (7) awarding a penalty on the past-paid TTD, and the part of order (8) related to past-paid TTD, which asked the director to refer the past-paid TTD matter to the insurance division for investigation, will all be rescinded.

2) Should Arctic be assessed a late compensation report filing penalty?

When reviewing Arctic's petition for reconsideration and the record, the panel in *Williams II* noticed a referenced February 7, 2014 compensation report was not in Employee's agency file. *Williams II* asked the parties to brief whether Arctic had timely filed this compensation report and if not, if Arctic should be subject to a civil penalty. *Barlow*. In response, Employee contends Arctic should be assessed a civil penalty for failure to timely file a compensation report. Arctic contends it should not be penalized, and relies upon its adjuster's affidavit stating the February 7, 2014 compensation report was mailed to the division on February 7, 2014.

Arctic's point is well taken. There is no reason to disbelieve Savina's affidavit in which she states it was her custom and practice to mail compensation reports to the division the same day she created them. Savina further stated she created and mailed the compensation report in question to the division on February 7, 2014. AS 23.30.122; *Smith*. Further, experience shows, notwithstanding division staff's best efforts to properly file documents, occasionally documents are accidentally misfiled. Sometimes documents also get lost in the mail. *Rogers & Babler*. Accordingly, because Arctic mailed the February 7, 2014 compensation report to the division on February 7, 2014, but the compensation report never made it to Employee's file, no civil penalty will be assessed against Arctic for failure to timely file a compensation report.

3) Should *Williams I* be reconsidered to vacate the penalty assessed on Dr. Yodlowski's one percent PPI rating?

a) A "penalty" was properly raised for adjudication.

Arctic contends Employee never requested a penalty on PPI and *Williams I* first raised the issue. But Employee's October 7, 2014 claim raised an unspecified penalty. Arctic was on notice Employee was claiming a penalty, and consequently a penalty applicable to any benefits to which Employee could be entitled was properly raised for the *Williams I* hearing. *Barlow*. Further, Arctic has now had an opportunity to fully brief and argue this issue.

b) *Williams I*'s medical stability and PPI findings are irrelevant to the penalty issue.

Arctic next contends it cannot be assessed a penalty under AS 23.30.155(e) on Dr. Yodlowski's one percent PPI rating when *Williams I* determined Employee is not yet medically stable. Arctic reasons that absent medical stability, no PPI is due under *Williams I* and thus no penalty may be assessed. Employee disagrees and contends the penalty was properly assessed. *Harris*.

If Arctic's duty to either pay or controvert its own doctor's PPI rating arose in retrospect, Arctic's position might have some merit. But *Williams I*'s September 17, 2015 ultimate determination Employee was not medically stable yet and not ready to be rated is irrelevant to Arctic's duty once it received Dr. Yodlowski's report a year earlier. By September 3, 2014, Arctic had received Dr. Yodlowski's August 29, 2014 report and had controverted Employee's right to PPI notwithstanding Dr. Yodlowski's undisputed opinion stating Employee had a one percent PPI rating attributable to his "sprain/strain" injury incurred on January 24, 2014, while working for Arctic. Arctic inexplicably controverted "all benefits," necessarily including PPI, based upon Dr. Yodlowski's report. A controversion must be timely filed, and filed in good faith, to avoid a penalty. *Harp*. Had this case gone to hearing solely on Employee's PPI claim, and had the only evidence presented been Dr. Yodlowski's report viewed in isolation, Employee would have, at that time, been entitled to $1,770 in PPI benefits. *Ford*. PPI would have been payable without an award. AS 23.30.155(a). Arctic's PPI controversion lacked sufficient evidence to support it, and was invalid. *Ford*. *Williams I* was correct in assessing a penalty on Dr. Yodlowski's PPI rating. AS 23.30.155(e).

Further, the PPI issue is not unlike the medically necessary bed addressed in *Harris*. The injured worker in *Harris* never bought the bed his doctor had prescribed to treat his bedsores, and his

employer's controversion of the bed was found lacking in medical support. *Harris* affirmed the penalty awarded on the value of the bed, even though the bed was never actually purchased, and the employer was never ordered to purchase it. While the benefit at issue is different, the concept is the same. Arctic had to either pay or validly controvert the PPI rating. It did neither. Accordingly, *Williams I* was correct in referring the PPI matter to the director. AS 23.30.155(o). Arctic's petition for reconsideration of the penalty on Dr. Yodlowski PPI rating will be denied.

4) Has Arctic demonstrated a factual or legal basis to avoid a penalty on PPI?

Alternately, Arctic contends other factual or legal bases exist for reconsidering *Williams I*'s penalty award on PPI. First, Arctic contends Employee has already received payment from Arctic for Dr. Yodlowski's PPI rating. The record shows otherwise. The compensation reports Arctic filed do not state Arctic paid Employee any PPI. Further, the "Payment History" attached to Arctic's post-hearing brief at Exhibit A, page 2, also shows Arctic paid Employee TTD, but no PPI. This evidence is given greater weight than Arctic's arguments. AS 23.30.122; *Smith*.

Arctic also argues, since it allegedly had a substantial TTD overpayment, it had a legal right to recover its TTD overpayment by withholding the PPI rating. In essence, Arctic argues the PPI rating became a nullity. But *Williams I* held Employee had not been overpaid any TTD benefits. Therefore, there is no TTD overpayment and nothing from which Arctic could withhold the PPI it now claims it has already paid, or recovered through withholding. Arctic's contention is confusing at best. Arctic's arguments sound like a "shell game of entitlements, offsets and actual payments," calculated to simply avoid a penalty. *Burch*. Arctic's position is contrary to a quick, fair, efficient and predictable method of delivering benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1). Arctic has failed to demonstrate a factual or legal basis upon which to modify or reconsider the penalty awarded in *Williams I*. Arctic's request for reconsideration on the PPI penalty will be denied.

CONCLUSIONS OF LAW

1) *Williams I* will be modified to correct a factual error concerning TTD payments.
2) Arctic will not be assessed a late compensation report filing penalty.

3) *Williams I* will not be reconsidered to vacate the penalty assessed on Dr. Yodlowski's one percent PPI rating.

4) Arctic has not demonstrated a factual or legal basis to avoid a penalty on PPI.

ORDER

1) Arctic's September 29, 2014 petition seeking modification of *Williams I* on the past-paid TTD issue is granted in accordance with this decision.

2) *Williams I* factual finding (60) on page 22 was entered in error and is deleted.

3) *Williams I* order (7) on page 69 was entered in error and is deleted.

4) *Williams I* order (8) on page 70, as it pertains to past paid TTD only, was entered in error and is deleted. In all other respects, order (8) remains in full force and effect.

5) Arctic's request for reconsideration of *Williams I* order (6) on page 69 is denied.

6) Arctic is ordered to pay Employee $442.50 as a penalty on Dr. Yodlowski's PPI rating under AS 23.30.155(e).

7) The director is asked to notify the division of insurance that Arctic's controversion of Dr. Yodlowski's one percent PPI rating was frivolous and unfair.

8) In all other respects, *Williams I* remains in full force and effect.

Dated in Anchorage, Alaska on March 11, 2016.

ALASKA WORKERS' COMPENSATION BOARD

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William Soule, Designated Chair

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Amy Steele, Member

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Patricia Vollendorf, 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 on Reconsideration & Modification in the matter of Daryl Williams, employee / claimant v. McDonald's Corp., employer & ACE Insurance Company, insurer; & Arctic Terra LLC, employer; Umialik Insurance Company, insurer / defendants; Case Nos. 198708515; 201403502; 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 March 11, 2016.

Charlotte Corriveau

Charlotte Corriveau, Office Assistant