ALASKA WORKERS' COMPENSATION BOARD

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

SOFIA MORALES DE LOPEZ, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201307999
UNISEA, INC., Employer,	)	AWCB Decision No. 16-0069
and	)	Filed with AWCB Anchorage, Alaska on September 12, 2016
ALASKA NATIONAL INSURANCE, Insurer, Defendants.	)	

Sofia Morales de Lopez' (Employee) September 24, 2015 petition for a finding of unfair or frivolous controversion, September 24, 2015 claim, and March 7, 2016 claim were heard on August 16, 2016 in Anchorage, Alaska. The hearing date was selected on June 30, 2016. Attorney Eric Croft appeared and represented Employee. Attorney Richard Wagg appeared and represented Unisea, Inc. (Employer). There were no witnesses. The record closed at the conclusion of the hearing, on August 16, 2016.

ISSUES

Employer contends Employee refused to attend a regularly scheduled employer's medical examination (EME). Employer contends Employee's refusal entitled it to suspend temporary total disability (TTD) benefits. Employee contends she did not refuse to attend the EME; rather, she missed the evaluation because of confusion about its location.

1) **Did Employee unreasonably refuse to attend a properly noticed EME?**

Employee contends because she did not refuse to attend the EME she is entitled to TTD from the date of the missed EME until the date an EME took place. Employer contends if Employee is entitled to additional TTD, it should be entitled to recoup the cost of the missed EME from the compensation.

2) **Is Employee entitled to additional TTD benefits?**

Employee contends Employer's controversion of TTD benefits after the missed EME was unfair or frivolous. Employer contends the controversion was well supported by facts and law.

3) **Did Employer unfairly or frivolously controvert Employee's TTD benefits?**

Employee contends she is entitled to a penalty and interest on the TTD that was not paid.

4) **Is Employee entitled to a penalty and interest?**

Employee contends Employer should be estopped from relying on her election of a job dislocation benefit given the delay between the election and payment of the benefit. Employer contends the job dislocation benefit was timely paid, and Employee cannot rescind her election.

5) **Should Employer be estopped from relying on Employee's election of a job dislocation benefit?**

Employee contends the parties stipulated to mediation, and should be ordered to attend if the issue of additional TTD is not resolved in this decision. Employer contends the Board does not have the authority to order parties to mediate.

6) **Should the parties be ordered to attend mediation?**

Employee contends she will obtain benefits as the result of the services provided by her attorney, and, as a result, is entitled to an award of attorney fees. Employer contends Employee should not be awarded further benefits, but if she is, her attorney is limited to statutory fees because Employee did not file an affidavit of attorney fees and costs.

7) **Is Employee entitled to an attorney's fee and cost award?**

FINDINGS OF FACT

All findings in *Morales de Lopez v. Unisea, Inc.*, AWCB Decision No. 16-0050 (August 8, 2016) (*Lopez I*) are incorporated herein. The following facts are reiterated from *Lopez I*, or are established by a preponderance of the evidence:

1) Employee was injured on June 23, 2013 "while sorting fish on the third floor and . . . fell off the roof & broke right ankle & fractured the left knee & broke 3 ribs." (Workers' Compensation Claim, June 3, 2015).

2) On January 10, 2014, Employee was found eligible for reemployment benefits based on her doctor's prediction she would have a permanent impairment when medically stable and would not be able to return to her job at the time of injury or any other job she had held in the past ten years. (Eligibility Determination, January 10, 2010).

3) On March 3, 2014, Employee elected to receive the job dislocation benefit rather than reemployment benefits. (Reemployment Benefits Election Form, March 3, 2014). Employee's election form was received by the Board on March 28, 2014 and served on Employer on April 3, 2014. (Record; Notice of Service, April 3, 2014).

4) On November 3, 2014, Employee was seen by psychiatrist Michael Friedman, D.O., for an employer's medical evaluation (EME). The evaluation took place at Dr. Friedman's office at 901 Boren Avenue, Suite 1910, Seattle, Washington. Employee, who uses a walker and a wheelchair and speaks only limited English, was accompanied by a friend, Rubisela Hinojos, who assisted her and acted as an interpreter. When Ms. Hinojos and Employee arrived at suite 1910, the office was open, but unoccupied. After waiting about five minutes, Dr. Friedman appeared, and Employee left with him for the evaluation. Employee knew that she was required to attend the evaluation, and that her benefits could be stopped if she did not do so. (R. Hinojos, Deposition Testimony, October 26, 2015; Employee, Deposition Testimony, October 26, 2015).

5) Dr. Friedman's report was issued under a caption or heading stating, "ExamWorks, Independent Medical Examination." The report states:

> The claimant was and continues to be in need of psychiatric treatment following the June 23, 2013 injury. . .
>
> Psychiatrically, I would anticipate the claimant's condition should resolve within six to eight months. . .
>
> [The claimant] has not reached medical stability. . .

Responding to whether Employee has incurred a ratable permanent partial impairment, Dr. Friedman states, "She is not in a position in which she is ratable. . ." Regarding whether additional palliative care is reasonable or necessary, Dr. Freidman states only, "The claimant has not reached psychiatric stability." (Friedman EME Report, November 3, 2014).

6) On November 4, 2014, Employee was seen by neurologist Mark Holmes, M.D., and orthopedic surgeon Eugene Toomey, M.D., for an EME. The report, signed by Drs. Holmes and Toomey, states:

> The patient has received five percent impairment of the lumbar spine. . . and the discussion is covered [sic] how we came to that rating. The work injury was the substantial cause of this permanent impairment under the Alaska guidelines. . .
>
> We do not believe this patient is in need of further treatment and that she is fixed and stable from her injuries. . .
>
> No further palliative care is needed. (Holmes & Toomey, EME Report, November 4, 2014).

7) On February 17, 2015, Employer controverted further medical treatment for Employee's neck, back, and right foot as well as further personal attendant care based on the November 4, 2014 EME report by Drs. Toomey and Holmes. (Controversion Notice, February 17, 2015).

8) On June 3, 2015, Employee filed a claim seeking unspecified temporary total disability (TTD), medical costs, transportation costs, and a "personal care attendant." (Workers' Compensation Claim, June 3, 2015).

9) On July 14, 2015, Employer's adjuster wrote to Employee informing her another EME had been scheduled with Dr. Friedman. The letter stated Employee was to check in at Dr. Friedman's office at 901 Boren Avenue, Suite 711, in Seattle. The letter was accompanied by a travel itinerary. The section of the itinerary titled "Independent Medical Examination Information," listed the location as the "Office of Dr. Michael Friedman," and gave the address as suite 711. Under the "Ground Transportation" section of the itinerary, Dr. Friedman's address was listed as suite 1910. The itinerary stated "PLEASE BRING THIS LETTER WITH YOU WHEN YOU TRAVEL TO SEATTLE." On August 5, 2015, Employee was sent a revised itinerary, but the relevant sections were unchanged. (Letter to Employee, July 14, 2015; Itineraries, July 14, 2015 and August 5, 2015).

10) On August 7, 2015, Employee and Ms. Hinojos flew to Seattle for the EME and were met by the transportation service. Before going to Dr. Friedman's office, they stopped at their hotel and dropped off their luggage. The transportation service then dropped them off at 901 Boren Avenue prior to the scheduled time for the evaluation. Because they had left the itinerary in their luggage, they checked the building directory, which listed Dr. Friedman's office as suite 1910. Employee and Ms. Hinojos went to suite 1910, which was again open and unoccupied. They entered and waited. After the scheduled time for the evaluation when no one had appeared, Ms. Hinojos contacted Employee's attorney's office and asked what to do. Employee's attorney's staff attempted to contact Employer's attorney, but was unable to do so. About one half hour after the scheduled time, Employee and Ms. Hinojos left Dr. Friedman's office. While waiting in the lobby of the building, they were approached by a man who identified himself as the interpreter who had been hired for the evaluation. He explained they had been waiting in suite 711, the ExamWorks office, but the evaluation had been cancelled when Employee did not show up. (R. Hinojos, Deposition Testimony, October 26, 2015; Employee, Deposition Testimony, October 26, 2015).

11) Employee was willing to complete the evaluation on August 7, 2015, but it already been canceled, and she would have been available on other days too. (Employee Deposition, October 26, 2015).

12) On August 14, 2015, Employer controverted all benefits. The notice states, "Employee refuses to submit to a properly notified examination requested by the employer." (Controversion Notice, August 14, 2015).

13) On September 24, 2015, Employee filed a claim for medical treatment, to "reinstate TTD from 8/12/2015 and continuing," unfair or frivolous controversion, penalty, interest, and attorney's fees and costs. (Workers' Compensation Claim, September 24, 2015).

14) Also on September 24, 2015, Employee filed a petition for a finding of unfair or frivolous controversion. The petition states:

> [Employee] is seeking a Board finding that the controversion of 8-12-2015 is frivolous and lacks a factual basis. The insurance company has controverted her benefits based on an allegation that she refused to attend an EME. [Employee] and her interpreter went to the address given to her, waited, and left only when she and her interpreter could not find the EME doctor, due to either reasonable mistake or the fault of the EME doctor. It has now been over 30 days and the insurance company has made no attempt to reschedule the evaluation. She has not

> refused to attend under AS 23.30.095(e) and [Employee] is willing to attend if the insurer reschedules. (Petition, September 24, 2015).

15) On November 13, 2015, Employee attended the rescheduled EME with Dr. Friedman. Dr. Friedman's report states:

> The claimant has had extensive psychiatric treatment. She describes her condition as having plateaued. More probable than not, she is at medical stability. . .
>
> The claimant would correspond to a 10 percent Mental and Behavioral Disorders (M&BD) impairment in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition. . .
>
> I do not believe additional psychiatric treatment will prove curative. . .
>
> The only treatment I am recommending is the consideration of the use of a second generation antipsychotic. I do not feel there are any additional evaluations necessary. (Friedman EME Report, November 13, 2015).

16) On February 8, 2016, Dr. Friedman issued an addendum to his November 13, 2015 report in response to questions regarding Employee's PPI rating. Dr. Friedman explained his 10 percent M&BD rating would combine with the 5 percent rating for Employee's lumbar spine for a whole person PPI of 15 percent. (Dr. Friedman, EME Addendum, February 8, 2016).

17) On March 7, 2016, Employee filed a claim for penalty on late-paid PPI, a Board finding that the job dislocation benefit Employee signed on March 3, 2014 was not valid, interest, and attorney's fees and costs. (Workers' Compensation Claim, March 7, 2016). The claim states:

> On November 4, 2014, the insurer had Ms. Morales seen by Drs. Toomey & Holmes for her physical injury. They rated her physical condition at 5%. On February 17, 2016, the insurer mailed Ms. Morales the $8,500 PPI. This is 470 days, or 1 year, 3 months, and 13 days between the report date and the check date.
>
> On November 13, 2015, the insurer had Ms. Morales seen by Dr. Friedman for her mental injury. He rated he mental condition at 10%. On February 17, 2016, the insurer mailed Ms. Morales the $17,700 PPI. This is 96 days or 13 weeks and 4 days between the report date and the check date.
>
> On February 8, 2016, at the request of the insurer, Dr. Freidman combines the 5% and 10% for a final 15% whole person impairment. (*Id*.).

Attached as an exhibit to the March 7, 2016 claim was a copy of a February 7, 2016 check issued by Alaska National Insurance Company, payable to Employee, in the amount of $34,550. The

check itemizes this amount as $8,850 for 5% "WPI," $17,700 for 10% "WPI," and $8,000 for a job dislocation benefit. (*Id.*).

18) A hearing was set for May 17, 2016 on the issues of whether Employee's failure to attend August 7, 2015 EME should affect Employee's TTD benefits, medical costs, transportation costs, penalty, interest, unfair controversion, and attorney fees and costs. A second hearing was set for June 22, 2016 to address the issues of penalty, interest, unfair controversion, and attorney fees and costs. (Prehearing Conference Summary, April 27, 2016).

19) On May 13, 2016, the parties stipulated to go to mediation and cancel the hearing set for the May 17, 2016. The parties also stipulated that "[a]t the conclusion of the mediation, the insurer agrees to pay to the employee past TTD benefits from 08/08/15 through 11/13/2015. The employee will receive $3,416.00. The payment will be made regardless of the outcome of the mediation." (Stipulation, May 13, 2016).

20) On June 1, 2016, Employee's attorney sent an email to Employer's attorney about scheduling the mediation. The email concluded with the following statement:

> I do not want to postpone or cancel the hearing on the penalty for the (ridiculously) late payment of PPI nor the upcoming prehearing to set a hearing on the reemployment/dislocation issue. We have a fundamental disagreement on these issues and need the board to resolve it for us. (Email, June 1, 2016).

21) On June 17, 2016, Employee filed an affidavit of attorney's fees and costs. (Affidavit, June 17, 2016).

22) On June 22, 2016, Employee's March 7, 2016 claim for penalty and interest on late-paid PPI, an unfair controversion of PPI benefits, and attorney's fees and costs was heard. At the hearing, the parties agreed to defer argument over the amount of attorney fees and costs until it had been determined Employee was entitled to such an award. (Record). The record was reopened at the Board's request and closed on July 8, 2016, after additional medical reports had been filed. (Record).

23) At the June 30, 2016 prehearing, a hearing was set for August 16, 2016 on whether Employee's failure to attend August 7, 2015 EME should affect Employee's TTD benefits, medical costs, transportation costs, penalty, interest, unfair controversion, and attorney fees and costs, plus stipulation to mediate and failure to timely pay the job dislocation benefit. (Prehearing Conference Summary, June 30, 2016).

24) On August 8, 2016, *Lopez I* issued, which held Employee's PPI had timely been paid. Consequently, Employee was not entitled to a penalty, interest, or attorney fees and costs related to the PPI benefits, and Employer had not unfairly controverted the PPI benefits. (*Lopez I*).

25) At the August 16, 2016 hearing, Employee argued Employer had unfairly controverted her TTD benefits as she had not refused to attend the August 7, 2015 EME; rather, her failure to attend was simply due to a mistake or misunderstanding as to the suite number where the evaluation was to take place. Employee contended she was entitled to TTD from August 8, 2015 through November 13, 2015, when the evaluation occurred, as well as a penalty, interest, and attorney fees and costs. She also argued she should be allowed to withdraw her March 3, 2014 election of a job dislocation benefit. Employee argued that by failing to pay the dislocation benefit until February 2016, Employer lost its right to enforce the election. Lastly, Employee explained she was only seeking Board-ordered mediation if she was not awarded the TTD she sought. (Record).

26) Employee did not file an affidavit of attorney fees and costs prior to the August 16, 2016 hearing. At hearing, Employer argued that if Employee was awarded attorney fees, the fees must be limited to statutory attorney fees under AS 23.30.145(a). (Record).

27) "Refuse" has been defined as "To deny, decline, reject. 'Fail' is distinguished from 'refuse' in that 'refuse' involves an act of will, while 'fail' may be an act of inevitable necessity." Black's Law Dictionary 1282 (6th Ed. 1990).

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. . .
>
> (3) this chapter may not be construed by the courts in favor of a party;
>
> (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 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . . .
>
> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" for
>
> (1) the employee's job at the time of injury; or
>
> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."
>
> . . . .
>
> (g) Within 30 days after the employee receives the administrator's notification of eligibility for benefits, an employee shall file a statement under oath with the board, on a form prescribed or approved by the board, to notify the administrator and the employer of the employee's election to either use the reemployment benefits or to accept a job dislocation benefit under (2) of this subsection. The notice of the election is effective upon service to the administrator and the employer. The following apply to an election under this subsection:
>
> . . . .
>
> (2) an employee who elects to accept a job dislocation benefit in place of reemployment benefits and who has been given a permanent partial impairment rating by a physician shall be paid
>
> (A) $5,000 if the employee's permanent partial impairment rating is greater than zero and less than 15 percent;

(B) $8,000 if the employee's permanent partial impairment rating is 15 percent or greater but less than 30 percent; or

(C) $13,500 if the employee's permanent partial impairment rating is 30 percent or greater;

AS 23.30.095. Medical treatments, services, and examinations.
. . . .

(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 . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited.

AS 23.30.135. Procedure before the board. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

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.

(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.

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. . .

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

(d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

(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. . .

(j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

> (p) An employer shall pay interest on compensation 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. . .

The Alaska Supreme Court has held the purpose of AS 23.30.155 is clear: "It is an incentive to employers to make prompt and timely compensation owing to employees. The importance to the worker, whose means of support is more often than not composed mainly of his wages, of receiving compensation without delay cannot be overemphasized. The injured worker, depending on his circumstances, typically cannot afford time away from the job without periodic and prompt compensation." *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1191 (Alaska 1984).

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 v. ARCO*, 831 P.2d 352 (Alaska 1992).

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.*

Under AS 23.30.155(p), interest accrues from the date a benefit should have been paid. *Land & Marine Rental Company v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984).

> **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.

> **8 AAC 45.090. Additional examination.**
> . . .
>
> (g) If an employee does not attend an examination scheduled in accordance with AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section,
>
> (1) the employer will pay the physician's fee, if any, for the missed examination; and
>
> (2) upon petition by a party and after a hearing, the board will determine whether good cause existed for the employee not attending the examination; in determining whether good cause existed, the board will consider when notice was given that the employee would not attend, the reason for not attending, the willfulness of the conduct, any extenuating circumstances, and any other relevant facts for missing the examination; if the board finds
>
> (A) good cause for not attending the examination did not exist, the employee's compensation will be reduced in accordance with AS 23.30.155(j) to reimburse the employer the physician's fee and other expenses for the unattended examination; or
>
> (B) good cause for not attending the examination did exist, the physician's fee and other expenses for the unattended examination is the employer's responsibility.

> **8 AAC 45.180. Costs and attorney's fees.**
> . . .
>
> (b) . . . An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying

> about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee. . . .
>
> (d) . . .
>
> > (1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section. . . .

The issue of Board-ordered mediation was first addressed in *Lindeke v. Anchorage Grace Christian School,* AWCB Decision No. 11-0400 (April 18, 2011). *Lindeke* noted there was no specific statutory or regulatory provision requiring parties to submit to mediation, but the Alaska Workers Compensation Act contained broad authority for resolving disputes. The Act requires "process and procedure" to be as "summary and simple as possible," and is to be interpreted to ensure the "quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost" to Employer. That goal and intent had not been met in *Lindeke* as the case had languished or "gone nowhere" for over six years. *Lindeke* noted that mediation is relatively quick, usually taking only one business day, very efficient because it normally resolves the entire case with very little Division resources, and fair because both parties must agree to a mediated settlement. Also, costs to the employer for a mediated settlement are likely to be significantly less than continued litigation. Consequently, *Lindeke* ordered the parties to mediate, but advised they were not required, or forced, to actually resolve this case through mediation.

Board-ordered mediation was again addressed in *Ellison v. Fairbanks Gold Mining Co.*, AWCB Decision No. 13-0026 (March 15, 2013). *Ellison* had been ongoing for over seven years without resolution, and, relying on *Lindeke,* mediation was ordered. *Ellison* noted employers were

equally entitled to a reasonable-cost resolution as employees were to medical and indemnity benefits.

Board-ordered mediation was also addressed in *Freelong v. Chugach Alaska Services, Inc.*, AWCB Decision No. 14-0140 (October 20, 2014). In *Freelong*, the case had been ongoing for over six years, and there had been four Board decisions, including a decision on the merits that was on appeal to the Appeals Commission. Noting that significantly more litigation would be required before a final decision was reached by the board or Commission, the parties were ordered to attempt mediation. *Id.*

ANALYSIS

1) Did Employee unreasonably refuse to attend a properly noticed EME?

Employer contended Employee's failure to take the itinerary with her to the EME, and the fact she did not go to suite 711, constitutes a refusal to attend the EME. By using "refuses" rather than "fails" in AS 23.20.095, the legislature intended to permit the suspension of benefits only where the failure is due, at least in part, to some willfulness on the part of the employee. AS 23.30.001; AS 23.30.135; *Rogers & Babler*.

Despite needing an assistant and being required to use a walker or wheelchair, Employee flew to Seattle and went to the correct building, just as she had done for the prior EME. However, Employee was unquestionably confused as to the location of the evaluation, and it is far from certain that having taken the itinerary with her would have helped. *Id.* While the itinerary states the location of the evaluation is suite 711, it also states that is the "Office of Dr. Michael Friedman." Suite 711 is ExamWorks' office; Dr. Friedman's office is suite 1910, which the itinerary correctly identified it two other locations. The itinerary is unclear and confusing. It was not unreasonable for Employee to go to Dr. Friedman's office as listed on the building directory as she did for the prior EME. Because Employee's failure to attend the August 7, 2015 evaluation was not willful, she did not refuse to attend the EME. *Id.*; 8 AAC 45.090(g).

2) Is Employee entitled to additional TTD benefits?

Employer's denial of TTD was based only on Employee's refusal to attend the EME; it does not contend she was otherwise ineligible prior to being found medically stable at the November 13, 2015 EME. Because this decision finds Employee did not refuse to attend the August 7, 2015 EME, she is entitled to TTD from August 7, 2015 through November 13, 2015. AS 23.30.001; AS 23.30.135; 8 AAC 45.090; *Rogers & Babler*.

Employer, however, asks that it be allowed to deduct the cost of the missed evaluation from the TTD due to Employee. Under 8 AAC 45.090(g), an employee's compensation may be reduced if the employee did not have good cause for missing an EME. In determining whether good cause exists, the board is to look at whether and when the employer was notified the employee would not attend, the willfulness of the employee's conduct, and other extenuating circumstances. AAC 45.090(g)(2). Here, Employee did not notify Employer she would not attend the evaluation, and, given the confusion as to where the EME was to occur, Employee's failure to attend was not willful. *Id*. Good cause existed for Employee's failure to attend the EME. *Id*. Under 8 AAC 45.090(g)(2)(B), costs for the examination are Employer's responsibility, and Employer will not be allowed to recoup those costs from Employee's TTD. *Id*.

3) Did Employer unfairly or frivolously controvert Employee's TTD benefits?

Employee contends Employer's August 14, 2015 controversion was unfair because she had not refused to attend an EME. 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.* Although this decision has determined Employee did not refuse to attend the EME, it did so based on evidence Employee introduced in opposition to the controversion. At the time the controversion was filed, the evidence showed Employee and Ms. Hinojos had been flown to Seattle and driven to the location of the EME, yet failed to appear. Based on that evidence alone, the Board may well have found Employee was not entitled to benefits. Employer's August 14, 2015 controversion was not unfair or frivolous. AS 23.30.001; AS 23.30.135; AS 23.30.155; *Harp*; *Rogers & Babler*.

4) Is Employee entitled to a penalty and interest?

Employee contends she is entitled to a penalty and interest on the unpaid TTD from August 7, 2015 through November 13, 2015. Under AS 23.30.155(e), an employee is entitled to a 25 percent penalty on benefits not paid when due, unless the employer has properly filed a controversion notice under AS 23.30.155(d). This decision has determined that Employer's August 14, 2015 controversion was properly filed. Consequently, Employee is not entitled to a penalty on the unpaid TTD. *Id*.

Under AS 23.30.155(p) interest is mandatory when compensation is not paid when due. Employee should have been paid TTD biweekly from August 7, 2014 through November 13, 2015. AS 23.30.155(b). She was not, and she is therefore entitled to interest on each installment that was not timely made. *Id*.

5) Should Employer be estopped from relying on Employee's election of a job dislocation benefit?

Employee contends the delay between the date she elected the job dislocation benefit on March 3, 2014 and her receipt of the February 7, 2016 check deprived her of the benefit of her election, and Employer should be estopped from relying on it. The delay in this case was unusually long, but for two reasons it remains binding and Employer will not be estopped from relying on it. First, AS 23.30.041(g) specifically states the election is effective upon service on the reemployment benefits administrator (RBA) and the employer. Employee's election form was filed with the RBA on March 28, 2014 and served on Employer on April 3, 2014. Therefore, it became effective on April 3, 2014. AS 23.30.001; AS 23.30.135; *Rogers & Babler*.

Second, a delay in payment will often occur because of the difference between the statutory requirements for eligibility for reemployment benefits and the calculation of the amount of the dislocation benefit. *Id*. To be eligible for reemployment benefits, an employee must have a physician predict that their permanent physical capacity will be less that what was required either by their job at the time of injury or in their ten-year work history. AS 23.30.041(e). All that is required is a prediction; the physician is not required to determine or estimate the degree of impairment, and it is not necessary for the employee to have reached medical stability. *Id*.

However, under AS 23.30.041(d)(2), the amount of the job dislocation benefits depends on an actual PPI rating. As *Lopez I* noted, a permanent impairment may be rated only after an employee has reached what the *Guides* terms "maximum medical improvement." Here, Employer did not have a final, whole person PPI rating until Dr. Friedman's February 8, 2016 EME addendum. Given Employer paid the dislocation benefits on February 7, 2016, there was no undue delay, and Employer will not be estopped from relying on the election.

6) Should the parties be ordered to attend mediation?

Employer contends the Board does not have the power under the Act to order parties to mediate. While there is no specific statutory or regulatory provision requiring parties to submit to mediation, the Board has held the broad authority for resolving disputes under the Act permits it to order the parties to attempt to mediate in appropriate cases. *Lindeke, Ellison, Freelong*. In cases where the mediation was ordered, the litigation had been ongoing for several years, and little progress was being made. In contrast, in this case it has been only about 15 months since Employee first filed a claim on June 3, 2015. And between *Lopez I* and this decision, many of the issues in the case have been resolved. The parties will not be ordered to attend mediation. AS 23.30.135; *Rogers & Babler*.

While the parties also might be ordered to participate in mediation based on their May 13, 2016 stipulation, at hearing Employee's attorney clarified Employee was only seeking mediation if TTD was not awarded. Because this decision awards Employee the TTD she sought, mediation will not be ordered. *Id*.

7) Is Employee entitled to an attorney's fee and cost award?

An attorney requesting a fee in excess of the statutory minimum must file an affidavit itemizing the fees at least three working days before the hearing. 8 AAC 45.180(b). If an attorney does not do so, only statutory minimum fees may be awarded. *Id*. Employee's attorney did not file a fee affidavit prior to the August 16, 2016 hearing. Although the parties agreed at the June 22, 2016 hearing to defer argument regarding attorney fees, there was no discussion or agreement regarding the filing of fee affidavits at future hearings. This decision awarded Employee TTD from August 7, 2015 through November 13, 2015 plus interest. Because Employee's attorney did

not file a fee affidavit, statutory minimum fees under AS 23.30.145(a) will be awarded based on the value of those benefits. AS 23.30.145; 8 AAC 45.180.

CONCLUSIONS OF LAW

1) Employee did not unreasonably refuse to attend a properly noticed EME.
2) Employee is entitled to additional TTD benefits from August 7, 2015 through November 13, 2015.
3) Employer did not unfairly or frivolously controvert Employee's TTD benefits.
4) Employee is not entitled to a penalty, but is entitled to and interest on the TTD awarded in this decision.
5) Employer will not be estopped from relying on Employee's election of a job dislocation benefit.
6) The parties will not be ordered to attend mediation.
7) Employee is entitled to an award of statutory minimum attorney's fees based on the value of the benefits awarded in this decision.

ORDER

1) Employee is entitled to additional TTD benefits from August 7, 2015 through November 13, 2015.
2) Employee is not entitled to a penalty, but is entitled to and interest on the TTD awarded in this decision.
3) Employer will not be estopped from relying on Employee's election of a job dislocation benefit.
4) The parties will not be ordered to attend mediation.
5) Employee is entitled to an award of statutory minimum attorney's fees based on the value of the benefits awarded in this decision.

Dated in Anchorage, Alaska on September 12, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Stacy Allen, Member

/s/
Dave Kester, 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 SOFIA MORALES DE LOPEZ, employee / claimant; v. UNISEA, INC., employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 201307999; 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 September 12, 2016.

/s/
Pamela Hardy, Office Assistant