ALASKA WORKERS' COMPENSATION BOARD

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

EZZELDIN ELATTAR, Employee, and	)	
	)	
ALAN MILLER, Guardian & Conservator for Employee,	)	FINAL DECISION AND ORDER
	)	
	)	AWCB Case No. 201817732J, 201818004J,
v.	)	201816325M
	)	
ABRAHAM GALLO D/B/A DIAMOND CONSTRUCTION, and ALASKA NATIONAL INSURANCE COMPANY,	)	AWCB Decision Nos. 20-0028
	)	
	)	Filed with AWCB Anchorage, Alaska on May 1, 2020
Defendants.	)	
	)	

Alan Miller's (Guardian) December 4, 2018 claim on Ezzeldin Elattar's (Employee) behalf against Abraham Gallo d/b/a Diamond Construction and its insurer Alaska National Insurance Co. (collectively, Diamond but in specific instances, Diamond or Alaska National) was heard on December 4, 2019, in Anchorage, Alaska, a date selected on October 7, 2019. An August 8, 2019 request gave rise to this hearing. Attorney Robert Bredesen appeared and represented non-attorney Guardian who also appeared and is Employee's legal guardian. Attorney Nora Barlow appeared and represented Diamond and Alaska National; effective February 14, 2020, attorney William Wuestenfeld also represents Alaska National. Assistant Attorney General Rebecca Hatton appeared by telephone and represented the Alaska Workers' Compensation Benefits Guaranty Fund (the Fund). Non-attorney Alex Zaitsev represents LXS Carpentry, LLC, (Employer), which *Elattar v. LXS Carpentry, LLC*, AWCB Decision No. 19-0123 (November 27, 2019) (*Elattar I*), found was Employee's employer on the injury date. No one appeared at this hearing for Employer; by oral order, the hearing proceeded in its absence.

As a preliminary matter at hearing, the Fund requested its dismissal from the case; there was no objection and an oral order dismissed it. Lori McFarland, Nancie Lamson and Dawn Whitehurst testified for Diamond. This decision examines the oral orders and decides Guardian's claim against Diamond on its merits. The record closed on December 4, 2019; the panel on its own motion reopened the record for additional evidence and briefing. To address a conflict-of-interest, Alaska National obtained separate counsel Wuestenfeld and requested additional time to respond to the panel's re-opening request. On January 27, 2020, the evidence and briefing deadline was extended to February 21, 2020. The record closed on April 8, 2020, when the panel deliberated.

ISSUES

There was no appearance from Employer at hearing. Given the proper service of a hearing notice on Employer, and without objection from any party, the hearing proceeded in its absence.

1) Was the decision to proceed with the hearing absent Employer correct?

At hearing, the Fund requested an order dismissing it as a party. The parties present stipulated to the request and an oral order dismissed the Fund as a party.

2) Was the oral order dismissing the Fund as a party correct?

Guardian contends Diamond and Alaska National must pay interest, penalties, attorney fees and costs awarded in *Elattar I* and *Elattar v. LXS Carpentry, LLC*, AWCB Decision No. 20-0014 (March 17, 2020) (*Elattar III*), under AS 23.30.045(a) and under the Act broadly interpreted. Alternately, he contends they must pay pursuant to their contractual insurance policy obligations.

Diamond contends it is not liable for interest or penalties awarded in *Elattar I* because these are not benefits enumerated in §045(a), where its liability derives as the "contractor-over" the uninsured Employer. Alaska National agrees with Diamond but further contends it is not liable for statutory attorney fees or costs because while Diamond could have handled things better, Alaska National did nothing wrong and did not generate litigation.

3) Are Diamond and Alaska National liable for penalties, interest, attorney fees and costs awarded in *Elattar I* and *III*?

FINDINGS OF FACT

All factual findings, conclusions, analyses and orders from *Elattar I* and *III* are incorporated here by reference and some are reiterated as necessary. A preponderance of the evidence establishes additional facts and factual conclusions as follows:

1) On January 19, 2018, the Divisions of Insurance and Workers' Compensation issued a joint bulletin. The bulletin references approved workers' compensation insurance policy contract forms adopted from the National Council on Compensation Insurance, Inc. (NCCI) and NCCI Basic Manual, 2001 Edition (NCCI Rule) approved by the insurance division:

> Under Rule 2(H), contractors "must furnish satisfactory evidence that the subcontractor has workers' compensation insurance in force covering the work performed for the contractor." Satisfactory evidence may be provided to the insurer by the contractor under the rule by the contractor providing (1) a certificate of insurance for the subcontractor's workers' compensation policy, (2) a certificate of exemption, or (3) a copy of the subcontractor's workers' compensation policy. Rule 2(H) also provides: "For each subcontractor not providing such evidence of workers' compensation insurance, additional premium must be charged on the contractor's policy for the uninsured subcontractor's employees. . . ." (Division of Insurance Bulletin B 18-01; Workers' Compensation Division Bulletin Number 18-01, January 19, 2018; emphasis in original).

2) On July 23, 2018, Employee fell from a roof while installing insulation and suffered catastrophic injuries. Medicaid paid his medical bills for several months. (*Elattar I*).

3) On November 6, 2018, Guardian claimed temporary and permanent total disability benefits (TTD and PTD), medical benefits and related transportation costs, attorney fees and costs, an unspecified penalty for late-paid compensation and interest for Employee against Employer and the Fund. (Claim for Workers' Compensation Benefits, November 6, 2018).

4) On December 4, 2018, Guardian claimed the same benefits against Diamond and Alaska National. It contended Diamond hired Employer, which was not insured, and Employer controverted the claim. (Claim for Workers' Compensation Benefits, December 4, 2018).

5) On December 17, 2018, Alaska National first paid TTD benefits to Employee covering from July 23, 2018, through December 23, 2018, at a $110 weekly rate, totaling $2,420. It continued paying TTD benefits through March 17, 2019; effective March 18, 2019, Alaska National began paying Employee PTD benefits at the same rate. (ICERS "Payments" tab in AWCB Case No. 201818004J). Though Alaska National contends it paid medical expenses on Employee's behalf,

the three files associated with this case do not show any medical benefit payments. (ICERS "Payments" tab in AWCB Case Nos. 201818004J; 201817732J; 201816325M).

6) On December 20, 2018, Diamond answered Guardian's December 4, 2018 claim and admitted: Alaska National insured it at relevant times. Diamond was the "contractor" and Employer was a "subcontractor" on the project as defined in §045(a). It acknowledged Guardian filed a claim against Employer on November 6, 2018, and Employer denied Elattar was an "employee." Diamond knew Employer had no workers' compensation insurance. It admitted that on November 26, 2018, the Fund's adjuster contacted Alaska National to advise and assert: Employee had been injured; he claimed to be Employer's "employee;" Employer did not have workers' compensation insurance; and Alaska National would be responsible for Employee's injuries under §045(a). Alaska National contended the phone call from the Fund's adjuster was its first notice of Employee's injury and its potential liability under §045(a). Diamond's answer further stated:

> 10. Mr. Elattar has provided no evidence to Alaska National that he was an employee of LXS at the time of his 07/23/18 injury.
>
> 11. LXS has denied that Mr. Elattar was its employee but has provided no evidence to Alaska National regarding the presence or absence of an employment relationship with Mr. Elattar on 07/23/18.
>
> 12. LXS's defense that Mr. Elattar is not an employee is a complete defense to Mr. Elattar's claim for workers' compensation benefits.
>
> 13. Alaska National is mandated by the Act and by the statutory and regulatory provisions governing the assigned risk pool to investigate Mr. Elatarr's claim, including his status as an employee for LXS.
>
> 14. Alaska National has initiated payment of ongoing workers' compensation benefits to Mr. Elattar pending resolution of the dispute between Mr. Elattar and LXS regarding Mr. Elatarr's employment status.

In its "Denials and Affirmative Defenses" section, the answer denied Alaska National owed a penalty for late-paid compensation asserting it began paying disability benefits within 21 days of receiving notice that Guardian sought benefits under §045(a). Alaska National denied attorney fees for the same reason but did not deny litigation costs; it asserted the only dispute was between Employee and Employer regarding employment status. Alaska National objected further to

attorney fees contending Bredesen was improperly acting, and billing legal services, as adjuster or care-coordinator and was impeding benefit delivery to Employee. Defenses included:

> 6. Alaska National reserves the right to assert such additional affirmative defenses as may be applicable in light of the revelations of further discovery.

Though the answer said Alaska National had initiated payment "of ongoing workers' compensation benefits," it did not specify the benefit type and did not expressly admit or deny Employee was entitled to any benefits requested in Guardian's December 4, 2018 claim. (General Contractor (AS 23.30.045(a)), Abraham Gallo dba Diamond Construction's Answer to Mr. Elatarr's Workers' Compensation Claim Dated 12/4/18, December 20, 2018).

7) On July 30, 2019, Guardian, who had previously filed a hearing request on only his claim against Employer, also requested a hearing on his claim against Diamond. Diamond objected, noting Employee's hearing request only listed his November 6, 2018 claim against Employer; the designee declined to set a hearing on both claims and advised Employee to file a separate hearing request on his claim against Diamond. The designee set a hearing for October 24, 2019, on only the claim against Employer. (Prehearing Conference Summary, July 30, 2019).

8) On October 7, 2019, Guardian again asked the board designee to add his claim against Diamond to the issues heard at the October 24, 2019 hearing. Diamond again objected, stating the issue had already been resolved at the previous prehearing conference and on grounds Guardian had never stated why a hearing against Diamond was necessary. Guardian disagreed and said he needed a hearing and a board order determining compensability and awarding benefits against Diamond. Unpersuaded, the designee set a December 4, 2019 hearing on Guardian's claim against Diamond only. (Prehearing Conference Summary, October 7, 2019).

9) On October 24, 2019, a hearing occurred limited to Guardian's November 6, 2018 claim against Employer only, though Diamond participated fully. The *Elattar I* hearing record discloses: In the four weeks prior to Employee's work injury, no one including Diamond's project manager Michael Bullock asked Employer if it had insurance. During that period, Zaitsev thought he had insurance, but he did not. On July 23, 2018, Gallo and Bullock were present when Employee fell from the roof. On July 24, 2018, Zaitsev initially told Bullock he had workers' compensation insurance; on that same day when Bullock requested Employer's insurance certificate, Zaitsev learned he had no insurance. On November 26, 2018, the Fund's adjuster Carl Trexler called Alaska National

and was first to advise it that Employee had been injured working for an uninsured employer and Alaska National had potential liability under §045(a). Diamond argued, "Gallo may have been aware of the injury, but there is no evidence that he was aware of the lack of workers' compensation coverage -- none, zero. That's the issue -- not whether or not he was aware of the injury." Alaska National's supervising adjuster Harvey testified that in serious head injury cases "the faster you act, the better outcome the injured worker has." Diamond contended, "If you would have asked us to stipulate that, that he was PTD, we would have said yes." Alaska National also contended that upon learning of Employee's injury, it immediately initiated payments and began paying PTD benefits, not TTD, from the onset. (*Elattar I*; record, October 24, 2019).

10) Gallo never advised its insurer Alaska National that it knew Employee had fallen or that it knew the day following the fall that Employer did not have workers' compensation insurance. (Record, October 24, 2019; inferences drawn from the above).

11) In preliminary remarks at the *Elattar I* hearing against Employer, Diamond argued "Mr. Bredesen makes much of the idea that Alaska National has not accepted that claim." It further asserted, "We have been left in an impossible position where we are neither denying nor accepting that he [LXS Carpentry] is an employer." Diamond contended it chose not to obtain discovery from Guardian to avoid becoming involved in "litigation." It said had it done so, Guardian would have demanded attorney fees. Diamond argued, "Mr. Bredesen has demanded that we accept the claim without providing access to his client so that we can evaluate the situation." It contended this case is only about Bredesen's attorney fees. Diamond further argued "the only thing" their answer did was deny penalties and attorney fees and include a "rote" defense reserving "the right to raise additional defenses as discovery continues." It contended this did not include the right to terminate Employee's benefits but to address other issues such as the proper compensation rate. Diamond contended it never said it intended to deny benefits at any time, but instead Alaska National signed contracts to provide services to Employee. Diamond further contended it was participating only because Employer took a position it had not adopted; *i.e.*, Employer disputed the employer-employee relationship. Diamond contended while there may be a board order required against Employer, there is no order required against Diamond or Alaska National under §045(a) to ensure Employee's benefits continue. Alaska National contended it never asked Guardian "why do you think Mr. Elattar was an employee of LXS?" In its view, had Bredesen allowed it to talk directly with Guardian "we might not be here today." Diamond presumed the

board would find Employer was Employee's "employer." It concluded, "There is no reservation of rights, notwithstanding what Mr. Bredesen says." (Record, October 24, 2019).

12) At the *Elattar I* hearing against only Employer, Diamond contended it would "not have any argument on the employee" status issue. Nonetheless, throughout the hearing Diamond actively advocated for Employer. For example, Diamond argued Guardian had to provide documentation for his litigation costs to justify a cost award against Employer. It demanded a right to cross-examine an expert on her cost bill and objected to her testifying without first providing a report. When Guardian called Brendon Haworth as a witness, Diamond repeatedly objected to his testimony and documentary evidence; it also cross-examined Haworth to support Employer's position. Diamond cross-examined Ashraf Mousa to determine if he knew Employer's other employee, "Mahir," knew if he was in Anchorage and knew why he did not appear at hearing. Diamond also objected to Loretta Leonardelli's testimony. (Record, October 24, 2019).

13) When Employer at the *Elattar I* hearing initially refused to stipulate to Employee's PTD status, Diamond asked for a recess so Barlow could speak to Employer privately. While the record does not reflect what was said during the recess, Employer promptly stipulated Employee was permanently and totally disabled. When the designated chair asked the parties if they would also stipulate that Employee's medical care had been reasonable, necessary and work-related, Diamond stated, "Yes, well if, depending upon this finding. . . ." It eventually stipulated to Employee's work-injury related PTD status and medical care. Diamond also cross-examined Zaitsev to strengthen Employer's position and weaken Guardian's, including questioning him about Mahir's whereabouts, Employer's hiring practices, who was "in charge" on the injury date, what "in charge" meant to Employer and how that might affect Employee's "agency" argument. Diamond asked Zaitsev if he had difficulty understanding English, in an effort to explain inconsistencies between his deposition and hearing testimony. Diamond succeeded in having Zaitsev testify that "at the end of the day," no one should have been working on the injury date, in an effort to influence the employer-employee issue. (Record, October 24, 2019; inferences drawn from the above).

14) When Guardian testified at the *Elattar I* hearing, Diamond objected repeatedly to his testimony. It cross-examined Guardian on Employee's pre-injury Social Security disability benefits from a prior accident and queried if his Social Security benefits would be cut off if he were employed at a new job. Diamond also questioned Guardian about why Employee thought he could do heavy construction work when he was on disability from a prior injury. After Guardian

testified about Employee's willingness to return to work part-time, Diamond questioned Zaitsev again to elicit testimony that he would never have hired a part-time employee and the work Employer did on the subject job was physically demanding. Diamond's questions went to the employer-employee relationship. (Record, October 24, 2019; inferences drawn from the above).

15) In its closing argument at the *Elattar I* hearing, Diamond said it "commented on the evidence," because Employer did not have the expertise to "understand" it. It argued there was no non-hearsay evidence before the board to find an enforceable contract between Employee and Employer; it argued Guardian had a "big problem" with his case because Mahir, the only other person with first-hand knowledge, was not called as a witness. Diamond used testimony it gleaned from cross-examining Mousa to contend Mahir was in Anchorage but was not called. It argued there was no evidence of an express hiring contract. Diamond highlighted Zaitsev's testimony concerning Employer's normal hiring practices and his contention he did not tell Employee to return to work the following Monday but only told him to come back "next week." It argued the conversation between Employee and Employer a week prior to the injury "could hardly be characterized as the start of an employment relationship." It also noted the lack of first-hand evidence about the starting wage. Barlow stated on Diamond's behalf, "I don't think there's any evidence of an express contract. I don't think there's any evidence of an implied contract." Diamond argued against the "tryout theory," citing Zaitsev's absence from the worksite on the injury date. Referring to Employee's injury, Barlow stated, "I don't think it falls into the tryout period." Diamond also argued Employer's workers had no authority to hire Employee; it argued a person's honest but incorrect belief they had been hired does not form an employment contract. It also contended Bredesen's case presentation at hearing on the employer-employee relationship put Employee's benefits at risk. It contended "it was a silly thing [for Guardian] to say," that Alaska National could simply cut off benefits because there were "rules against that." Diamond advocated actively for Employer, particularly on the employer-employee relationship issue, which had it been decided in Employer's favor, would have eliminated Diamond's and Alaska National's liability under §045(a). (Record, October 24, 2019; inferences drawn from the above).

16) At the *Elattar I* hearing, Diamond or its witness used the terms "accept," "accepting" and "accepted" in reference to Employee's claim as follows: "Mr. Bredesen has demanded that we accept the claim without providing access to his client so that we can evaluate the situation." (Barlow, October 24, 2019 Hearing Transcript at 17:7); "We've -- we have, have been in the

position before, where the contracting company did not have coverage, and it goes up, and, and we accept it." (Harvey, *id*. at 227:17); "And Mr. Bredesen makes much of the idea that Alaska National has not accepted that claim." (Barlow, *id*. at 16:20); "Alaska National has stepped up and paid all benefits. They've accepted that liability, per 045." (Barlow, *id*. at 30:19).

17) On November 8, 2019, the division served Employer notice for the December 4, 2019 hearing against Diamond, at Employer's record address. (Hearing Notice, November 8, 2019).

18) On November 27, 2019, *Elattar I* determined Employer had hired Employee and created an employee-employer relationship. As Guardian, the Fund, Diamond and Alaska National had stipulated at the *Elattar I* hearing that Employee was permanently totally disabled from his injuries, and his past and ongoing medical treatment was work-related, reasonable and necessary, the only remaining issues decided in *Elattar I* were Guardian's claims for penalties, interest, attorney fees and costs against Employer. *Elattar I* granted Guardian's November 6, 2018 claim against Employer and ordered it to pay PTD benefits to Guardian on Employee's behalf beginning July 23, 2018, and continuing until he was medically stable and no longer disabled. It ordered Employer to pay all past and ongoing work-related medical bills directly to the medical providers, and statutory interest to Guardian on all past permanent total disability benefits and to his medical providers on all past work-related medical care in accordance with the law. *Elattar I* ordered Employer to pay Guardian and his providers a 20 percent §070(f) penalty and a 25 percent §155(e) penalty on all benefits awarded that were not paid within 14 days of their due date. It ordered Employer to pay Bredesen statutory minimum attorney fees on the value of all benefits awarded, and costs totaling $6,318.31. (*Elattar I*).

19) At the December 4, 2019 hearing against Diamond and Alaska National, no one appeared for Employer. There was no objection to the hearing proceeding in its absence, and it proceeded. The Fund requested its own dismissal given *Elattar I*'s result. No party objected and an oral order dismissed the Fund as a party. (Record, December 4, 2019).

20) Diamond presented no evidence or witnesses related to the employer-employee issue addressed against Employer in *Elattar I.* (Record, December 4, 2019).

21) Diamond presented three witnesses at the December 4, 2019 hearing: McFarland was Alaska National's adjuster. She learned about Employee's potential claim from "another carrier" and knew Bredesen represented him. In her view, "investigation" means to reach out to parties, verify information and perhaps advise an injured worker. "Compensability" is normally "one of the first

things we look at." Whether this case was compensable was "one of the discussions we had." McFarland said Alaska National decided "early on we would do the right thing," and handle this case as compensable. She immediately contacted Paradigm, a company that handles catastrophic injuries, and tried to contact Guardian and Employee's family directly, but contends Bredesen denied access. As part of her investigation, McFarland contacted Diamond; she may have asked why it did not file an injury report or advise her about the injury, but if she did, she does not recall its response. McFarland would not have decided compensability or lack thereof in a catastrophic injury case alone but does not recall if she contributed to Alaska National's answer, which reserved its defenses. She could not affirmatively state the answer accepted or denied liability for Guardian's claim. McFarland expressed unfamiliarity with the terms "accepted or denied." To her, cases are either "compensable," or "not compensable." (McFarland).

22) Lamson is Vice President of Claims for Alaska National. She knew about Guardian's claim in November 2018, as soon as it came into the office, and participated in decision making. It is a "known exposure" when Alaska National insures a contractor that the contractor may hire sub-contractors who are not insured. It is undisputed Diamond hired Employer as a subcontractor and Alaska National insured Diamond. In Lamson's view, this case is about Bredesen getting paid because he helped Guardian for the first four months when Employee was not receiving benefits. Alaska National always reserves its right to raise future defenses; if evidence had sent Alaska National "in a different direction," they would have "dealt with it." Alaska National would never, "without any other information," "unilaterally" decide to stop paying Employee benefits. They signed contracts with Paradigm and Craig Hospital to provide medical services for Employee. In her experience, general contractors do not ordinarily file injury reports for workers employed by subcontractors who are injured on the general contractor's job. Lamson testified it was Bredesen's responsibility to find insurance coverage for Employee. She has no idea why there was a nearly four month delay between the injury date and Alaska National being told that there may be coverage required for Employee's accident. Lamson said an "accepted" claim is "foreign" to her. She participated in preparing Alaska National's answer to Guardian's claim and opined it contains the same "canned" information included in every answer. Lamson does not believe Employee was anybody's "employee," but because he was on the job site and got injured, the accident placed exposure on Alaska National. In her view, Alaska National's answer to Guardian's claim

contained no reservation of rights to later decide Employee was not an "employee" or to controvert the case in its entirety. (Lamson).

23) Dawn Whitehurst is a nurse case manager with Paradigm, handling workers' compensation cases. She met with Guardian and Employee's family upon his arrival for treatment at Craig Hospital and met with Guardian one other time in January 2019. Whitehurst has reached out to Bredesen but he has not responded; he does, however, receive all her reports. Jill Friedman was intimately involved in making decisions for Employee's health care. Whitehurst conceded she knew permission had been granted for her to contact Guardian directly and she had his telephone number and email address. It has been many months since she last communicated with him and her prior emails did not solicit a specific response. She also communicated with Bredesen and her communications with him similarly did not request a response. Whitehurst was providing information to several people and cross-copying Bredesen. She never requested anything from Bredesen that was not provided. Craig Hospital has in-house nurse case managers; Whitehurst worked closely with one, Karen Leonard, and typically works with all nurse case managers and others on the "treatment team." She has not seen Employee for two months but has weekly contact with his providers. (Whitehurst).

24) In his December 4, 2019 closing arguments, Guardian contends the issues are strictly legal. He contends *Elattar I* already decided compensability. His arguments rely on Diamond's answer, which reserved its right to deny benefits. He contends the only thing left to decide is Diamond's and Alaska National's liability for penalties, interest, attorney fees and costs. Guardian relies on *Thorsheim* stating general contractors have experience and economic power to ensure subcontractors are insured for workplace injuries and to require proof. He contends Diamond had the contractual right to require Employer to report workplace injuries promptly, but in this case did nothing. Guardian contends Diamond presented no evidence explaining its inaction. He contends *West* supports his position because it required the Fund to pay interest, which the Act does not expressly state is "compensation." Guardian contends properly construing §045 requires going beyond the expressly enumerated statutes to effectuate the Act's overall purposes. He contends Diamond as the contractor-over is liable for penalties, interest, attorney fees and costs. In his view, if contractor-overs are allowed to ignore penalty provisions, there would be no incentive for prompt payments and they could escape liability simply by hiring irresponsible subcontractors. Attorney fee statutes are self-executing and do not require a separate board order,

unlike the Fund's payment requirements, in his opinion. He further contends a reservation of rights in an answer amounts to a controversion for attorney fee purposes. In his view, Diamond must unqualifiedly accept the claim to avoid attorney fee liability. Guardian contends Diamond's and Alaska National's answer amounts to a factual denial. He contends Alaska National only paid benefits based on the presumption of compensability, which cut in Employee's favor. He contends several parts of Alaska National's answer reserved its right to deny liability. Further, Guardian contends Diamond at the *Elattar I* hearing advocated for Employer and requested findings that there was no employment contract between Employee and Employer thus exposing it to attorney fees and costs. (Record, December 4, 2019).

25) In its December 4, 2019 closing arguments, Diamond contends its answer does not say benefits can be unilaterally terminated; it considers Guardian's argument on this point "bizarre." It made a distinction between a compensable claim and an "accepted" one. Diamond contends the phrase "accepted claim" does not exist in workers' compensation law. It contends *Elattar I* decided no issues against Diamond and disputes Guardian's contention that *Elattar I* automatically made Diamond and Alaska National liable for attorney fees. Diamond contends §045 does not require the contractor-over to pay penalties. In its view, attorney fees are generated by actions from an employer or employer's insurer; since Diamond and Alaska National had no control over what Employer did or did not do in this case, Alaska National did nothing to "controvert-in-fact" when it filed its answer and did nothing to generate litigation or attorney fees. Alaska National contends its answer clearly stated it would continue to pay Employee benefits unless and until it found out he was not Employer's employee, and only a board decision could make this determination. It contends there is a difference between an employer's actions and the insurer's benefit payment. Diamond contends §045 should be read narrowly to require a contractor-over to only pay benefits enumerated in the statute and should not be expanded to include penalties. It contends a general contractor becomes a statutory "employer" for limited purposes, and *West* supports this position. *West*, Diamond contends, determined penalties were not "compensation" in a case against the Fund under a different statute. Further, it contends there is no legal requirement for a general contractor to file an injury report for a subcontractor's employee. Since penalties are intended to encourage particular conduct, Alaska National contends it makes no sense to penalize it for conduct over which it had no control. It further contends while, "Nobody's claiming Gallo did everything right here," Alaska National did nothing wrong, did not encourage

litigation and should not be required to pay attorney fees. Alaska National contends "it did everything right" and there is no valid basis to impose interest or penalties against it. "At the most, reasonable fees would be entirely appropriate and would have been voluntarily paid by Alaska National if presented by Mr. Bredesen." Initially, Diamond agreed Alaska National was liable for interest under *West* because it helps make an injured worker whole. However, on further reflection, Diamond changed its position and said it and Alaska National were not required to pay interest under §045(a). (Record, December 4, 2019).

26) On December 6, 2019, Guardian requested an order reconsidering the §070(f) penalty payee in *Elattar I*. (Petition, December 6, 2019).

27) On December 9, 2019, Diamond denied Employee's and Guardian's rights to penalties, interest and attorney fees citing §045, which it says "does not provide for penalties and interest against general contractors." It also contended the parties litigated the issue of whether Diamond was responsible for attorney fees, penalties and interest awarded in *Elattar I*, under §045(a) and said as an issue of first impression these benefits were not owed by Diamond and Alaska National until a board decision so states. (Controversion Notice, December 9, 2019).

28) On December 19, 2019, *Elattar v. LXS Carpentry, LLC*, AWCB Decision No. 19-0134 (December 19, 2019) (*Elattar II*) granted reconsideration of *Elattar I* solely to allow the parties time to respond to Guardian's December 6, 2019 petition. (*Elattar II* at 3).

29) On January 8, 2020, the panel on its own motion reopened the December 4, 2019 hearing record. The panel provided the parties with Bulletin 18-01 and asked them to discuss the effect, if any, the contractor's duty set forth under Rule 2(H) has on the issues in this case. The panel also asked the parties to provide evidence of whether the relevant workers' compensation insurance policy between Diamond and Alaska National required Diamond to reimburse Alaska National in the event the latter had to pay penalties, or if the policy otherwise made Diamond liable for penalties. It also gave the parties an opportunity to brief these issues. (Letter, January 8, 2020).

30) On February 14, 2020, Diamond filed the relevant insurance policy between Diamond and Alaska National. The policy states, "We will pay promptly when due the benefits required of you under workers compensation law." It will also pay "litigation costs taxed against you" and "interest on the judgment as required by law. . . ." Where required by law, "as between an injured worker and us, we have notice of the injury when you have notice." The policy further states:

> We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an agency authorized by law. Enforcement may be against us or against you and us.

The policy is both a workers' compensation and general liability policy. "PART ONE" covering workers' compensation insurance, does not exclude any benefits awardable under the Act, but does require Diamond to bear responsibility for benefits "in excess of the benefits regularly provided by the workers compensation law" and requires Diamond to reimburse Alaska National promptly if the latter must pay such benefits. "PART FOUR" explains Diamond's duties if an injury occurs: "Tell us at once if injury occurs that may be covered by this policy." The policy also explained Diamond's responsibilities regarding subcontractors:

> Workers compensation laws in most states, including Alaska, provide that an owner or general contractor is responsible for compensation benefits to employees of uninsured contractors and subcontractors. . . . When you are responsible for compensation benefits under the circumstances, we are required to charge an additional premium for the exposure.
>
> To avoid these costs, obtain certificates of workers compensation insurance for all contractors, subcontractors . . . and keep them with your payroll records for review by our auditor. (Employer's Notice of Filing, February 14, 2020; Workers' Compensation & Employer's Liability Insurance Policy 171 WW 97669).

31) As an eye-witness and experienced businessman, Gallo knew Employee had been injured on the injury date and knew the day following that Employee's alleged employer had no workers' compensation coverage. Under these circumstances, and as stated in his insurance policy, Gallo knew, or should have known, that Employee's injury "may be covered" by Diamond's policy with Alaska National. (Experience, judgment, and inferences drawn from the above).

32) On February 21, 2020, Guardian addressed the January 8, 2020 letter reopening the record. He contends while the bar and the parties routinely refer to an additional award or amount under §§070(f) and 155(e) as "penalties," the statutes do not actually call them penalties. He cites Professor Larson's treatise on workers' compensation law, which states insurers are ordinarily liable for their insured's late-payment penalties. Guardian contends as between Employee, Diamond and Alaska National, Diamond and Alaska National should carry the risk that Employer would fail to report the injury or make timely payments, not Employee. Further, he contends Rule 2(H) requires Alaska National to charge premiums for the work performed by uninsured

subcontractors. He contends Diamond had a duty to verify its subcontractors had coverage for workplace injuries, but failed to do so in this case. Guardian notes the contract between Diamond and Alaska National requires the insurer to promptly pay benefits required under the workers' compensation law, without exception. The contract also requires Diamond to reimburse Alaska National if the latter makes payments in excess of those regularly provided under the Act, such as penalties. In short, Guardian relies on the insurance contract language to support his position that Diamond and Alaska National are liable for penalties awarded in *Elattar I* and *III*. (Guardian's Supplemental Brief, February 21, 2020).

33) On February 21, 2020, Alaska National through separate counsel also addressed the panel's January 8, 2020 letter. It contends, "It is undisputed that neither Gallo nor Alaska National controverted Elattar's claim." Addressing the issues in the instant decision, it contends:

> Pursuant to AS 23.30.045 Gallo is liable to Elattar for payment of compensation payable under ". . . AS 23.30.095 (medical), 23.30.145 (attorney fees) and 23.30.180-215 (disability, impairment). Alaska National is liable to Elattar under its policy affording coverage for payment of ". . . benefits required of you [Gallo] by the workers compensation law." Policy Page 1 of 7, Part One, B.

Alaska National contends it is not liable for any penalty assessed in *Elattar I* or *III* because its insurance policy only requires it to pay "benefits" owed to claimants by its insured. It contends §045(a) requires it to pay "some, but not all," amounts Employer owes Employee. Alaska National asserts the issue is "whether penalties are benefits or compensation." It concedes its policy affords "coverage for some benefits and compensation." However, Alaska National contends penalties are punitive and not "compensation" but are "a different kind of award." It cites the Restatement (Second) of Torts' punitive damages definition as support for its position. Based on this treatise, Alaska National contends its policy only affords coverage for compensatory benefits and not penalties. It also relies on the commission's *West* decision, which it contends determined penalties are neither compensation nor benefits in respect to the Fund's liability under §082(c). Alaska National contends the situation in *West* is "directly analogous" to the instant case. It contends it should not be liable for penalties because it acted "timely and in good faith" by paying Employee benefits as soon as it learned it had potential liability. It contends Guardian's position is misplaced because the insurance policy between Diamond and Alaska National excludes any duty to inspect for employee safety. It further criticizes Guardian's reference to "vicarious liability," which it

contends is a "tort concept," which "has no application here." Alaska National contends *Elattar I* and *III* "penalties" and "fees" for failure to timely pay cannot be assessed against it directly and should not be assessed against it through Diamond with "Alaska National left with the chance to recover the penalties." It contends penalties are not "regularly provided" and not payable under its policy with Diamond. Alaska National contends it had no knowledge that a claim existed for which payment could be due and suggests it did not know about Employee's claim until "it was notified by Gallo," after which it immediately commenced adjusting and paying the claim. It further contends:

> Here, as required by Basic Manual Rule 2-H, Alaska National charged Gallo premium based on the remuneration paid to Gallo's uninsured subcontractor, LXS.

Alaska National concedes attorney fees are payable under §045(a) but contends it is not liable for them because neither Gallo nor Alaska National controverted and "payments were timely paid as soon as there was a known claim to adjust." As for its duty to recover payments it makes from Gallo, Alaska National agrees it "must" recover additional payments from Gallo for any payments it makes pursuant to Division of Insurance Bulletin B 18-01. "However, Alaska National is entitled to reimbursement from Gallo and LXS for payments, if any, Alaska National must make." For this proposition, Alaska National cites from its policy:

> The policy provides "You [Gallo] are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because of a serious and willful misconduct." It also provides "If we make any payments in excess of the benefits regularly provided by the workers compensation law on your behalf, you will reimburse us promptly. . . ."
>
> Here, any penalties are payments in excess of the benefits regularly provided, and are by definition incurred because of employer willful misconduct. . . .

Alaska National concludes since penalties are not included in §045(a) and are not "benefits regularly provided" under its policy, "only Gallo" must pay penalties. (Alaska National Insurance Company's Brief Addressing Board January 8, 2020 Letter/Order, February 21, 2020).

34) There is no credible evidence Gallo, its agents or representatives ever advised Alaska National about the injury. (Agency file; records, October 24, 2019 and December 4, 2019).

35) On February 24, 2020, the designated chair asked the parties for any reason why Guardian's December 6, 2019 reconsideration petition should not be decided. Diamond objected and

contended it had not received *Elattar II* and requested additional time to answer Guardian's December 6, 2019 petition. (Soule letter, February 24, 2020; Barlow email, February 24, 2020).

36) On March 6, 2020, Diamond and Alaska National, the only parties to address Guardian's December 6, 2019 petition, provided a six-page brief arguing against Guardian's position on the §070(f) penalty payee issue from *Elattar I*. (General Contractor and Its Insurer's Response to Petition for Reconsideration, March 6, 2020).

37) On March 17, 2020, *Elattar III* granted Guardian's December 6, 2019 petition over Diamond's and Alaska National's objection and made Guardian payee for the §070(f) penalty. (*Elattar III* at 7).

38) No party appealed *Elattar I* or *III*. (Agency file).

39) Employers and insurers in workers' compensation cases routinely pay costs awarded pursuant to board decisions. All benefits are paid with money. Employers usually ensure compensation by purchasing insurance or by being self-insured. (Experience, judgment).

40) Guardian's lawyer has provided legal services in this case since at least early November 2018. Some legal issues in this case are novel and relatively complex. The benefits to Guardian and Employee from Guardian's lawyer's efforts are significant; he obtained a decision *Elattar I* finding an employee-employer relationship and obtained stipulation from all parties that Employee was PTD status, and his past and ongoing medical care from his injury was reasonable and necessary. (Experience, judgment and inferences from the above).

PRINCIPLES OF LAW

> **AS 01.10.040. Words and phrases; meaning of "including."** (a) Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those that have acquired a particular and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning.
>
> (b) When the words "includes" or "including" are used in a law, they shall be construed as though followed by the phrase "but not limited to."
>
> **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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

The board may base its decision on not only 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).

The Alaska Supreme Court in *Underwater Construction, Inc. v. Shirley,* 884 P.2d 150 (Alaska 1994) said, the court "generally construes statutes *in pari materia* where two statutes were enacted at the same time, or deal with the same subject matter," and in such a way "to produce a harmonious whole." The only law with which a section of the Act must be harmonious is the Act itself. (*Id*. at 155). In *Shehata v. Salvation Army,* 225 P.3d 1106 (Alaska 2010), the court said, "The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others." (*Id*. at 1114). When construing a statute, the court looks at three factors: (1) the statute's language, (2) its legislative history and (3) the legislative purpose behind the statute. (*Id*.).

In *Croft v. Pan Alaska Trucking, Inc*., 820 P.2d 1064, 1066 (Alaska 1991), the court explained the principle of statutory construction *expressio unius est exclusio alterius,* which establishes an inference that "where certain things are designated in a statute, all omissions should be understood as exclusions." However, in *Chevron USA, Inc. v. LeResche,* 663 P.2d 923, 930-31 (Alaska 1983), a party used this doctrine to argue that because a statute authorized a commissioner to require data submission on "leased" state lands, it forbade requiring similar submissions on "unleased" state lands. The commissioner argued for an expanded reading that included unleased lands. *LeResche* cited from Professor Sutherland's statutory construction treatise and said "the maxim should be cautiously applied." The court citing the treatise agreed with the commissioner and said:

> . . . where an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, [or] is a necessary incidental to a power or right, . . . the maxim will be disregarded and an expanded meaning given.

Nelson v. Municipality of Anchorage, 267 P.3d 636, 642 (Alaska 2011), provided further guidance on how the court construes a statute:

> When construing a statute, this court "presume[s] that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous" (citation omitted). "[A]ll sections of an act are to be construed together so that all have meeting and no section conflicts with another" (citations omitted). If one statutory "section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict, the specific section will control over the general" (citation omitted). "[I]f two statutes conflict, then the later in time controls over the earlier" (citation omitted).

Harris v. M-K Rivers, 325 P.3d 510, 515 (Alaska 2014), said statutes are to be interpreted according to "reason, practicality and common sense," considering their purposes. Generally, the same words used twice in the same statute have the same meaning. *ARCTEC Services v. Cummings*, 295 P.3d 916 (Alaska 2013). The general purpose of workers' compensation statutes is to provide workers with a simple, speedy remedy to be compensated for injuries arising out of their employment. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978). "[T]he ultimate social philosophy behind compensation liability" is to resolve work-related injuries "in the most efficient, most dignified, and most certain form." *Gordon v. Burgess Construction Co.*, 425 P.2d 602, 604 (Alaska 1967).

> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
> . . . .
>
> (h) the department shall adopt rules for all panels. . . . Process and procedure under this chapter shall be as summary and simple as possible.

> **AS 23.30.012. Agreements in regard to claims.** (a) At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter, but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose. Except as provided in (b) of this section, an agreement filed with the division discharges the liability of the employer for the compensation . . . and is enforceable as a compensation order. . . .

In *Lindekugel v. Fluor Alaska*, 934 P.2d 1307 (Alaska 1997), the Alaska Supreme Court held that an oral agreement for dismissing a party with prejudice was "an agreement in regard to a claim" within the meaning of §012(a) and was void.

> **AS 23.30.015. Compensation where third persons are liable**. . . .
> . . . .
>
> (e) An amount recovered by the employer under an assignment, whether by action or compromise, shall be distributed as follows:
>
> (1) the employer shall retain an amount equal to
> . . . .
>
> (B) the cost of all benefits actually furnished by the employer under this chapter;
> (C) all amounts paid as compensation and second-injury fund. . . .
> (D) the present value of all amounts payable later as compensation, . . . and the present value of the cost of all benefits to be furnished later under AS 23.30.095. . . ; the amounts so computed and estimated shall be retained by the employer as a trust fund to pay compensation and the cost of benefits as they become due and to pay any finally remaining excess sum to the person entitled to compensation or to the representative; and
>
> (2) the employer shall pay any excess to the person entitled to compensation or to the representative of that person.
> . . . .
>
> (g) If the employee or the employee's representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (e)(1)(A)-(C) of this section insofar as the recovery is sufficient after deducting all litigation costs and expenses.
>
> **AS 23.30.025. Approval and coverage of insurance policies**. . . .
> . . . .
>
> (b) All policies of insurance companies insuring the payment of compensation under this chapter are conclusively presumed to cover all the employees and the entire compensation liability of the insured employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such policy or agreement. A provision in a policy attempting to limit or modify the liability of the company issuing it is wholly void except as provided in this section. . . .

AS 23.30.030. Required policy provisions. A policy of a company insuring the payment of compensation under this chapter is considered to contain the provisions set out in this section.

(1) The insurer assumes in full all the obligations to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and compensation or death benefits imposed upon the insured under the provisions of this chapter.

(2) The policy is made subject to the provisions of this chapter and its provisions relative to the liability of the insured employer to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . compensation or death benefits to and for said employees or beneficiaries, the acceptance of the liability by the insured employer, the adjustment, trial, and adjudication of claims for the physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . compensation or death benefits, and the liability of the insurer to pay the same are considered a part of this policy contract.

(3) As between the insurer and the employee or the employee's beneficiaries, notice to or knowledge of the occurrence of the injury on the part of the insured employer is notice or knowledge on the part of the insurer; jurisdiction of the insured employer for the purpose of this chapter is jurisdiction of the insurer; and the insurer, in all things, is bound by and subject to the orders, awards, judgments, and decrees made against the insured employer under this chapter.

(4) The insurer will promptly pay to the person entitled to them the benefits conferred by this chapter, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . and all installments of compensation or death benefits awarded or agreed upon under this chapter. The obligation of the insurer is not affected by a default of the insured employer after the injury, or by default in giving a notice required by this policy. The policy is a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies . . . compensation or death benefits, and is enforceable in the name of that person. . . .

. . . .

(6) All claims for compensation, . . . physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . may be

> made directly against either the employer or the insurer, or both, and the order or award of the board may be made against either . . . or both. . . .
>
> **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 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 -- 23.30.215. If the employer is a subcontractor and fails to secure the payment of compensation to its employees, the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor. If the employer is a contractor and fails to secure the payment of compensation to its employees or the employees of a subcontractor, the project owner is liable for and shall secure the payment of the compensation to employees of the contractor and employees of a subcontractor, as applicable.

In 2004, the legislature amended §045(a) to add "project owners" to the list of entities ultimately required to pay compensation benefits in the event a worker was injured while not insured by either his or her employer or a contractor-over. Minutes from the legislative hearings state:

> SENATOR RALPH SEEKINS, Alaska State Legislature, spoke as the sponsor of SB 323. He paraphrased from the following written sponsor statement [original punctuation provided]:
>
> Senate Bill 323 revises the Workers' Compensation Act as it applies to subcontractors, contractors and project owners. The two principal modifications are as follows:
>
> 1. Responsibility for payment of compensation is extended up the chain of contracts to include project owners; and,
> 2. Injured parties in receipt of benefits under the Workers' Compensation Act would be barred from "double dipping" via a tort liability claim.
> . . . .
>
> Senate Bill 323 encourages parties participating in a project to identify and enforce strict safety standards for the benefit of all employees rather than deflecting responsibility through the use of indemnity agreements as is common practice currently. At the same time, it ensures that injured employees receive all benefits available under the Alaska Workers' Compensation Act.
> . . . .
>
> JACK MILLER, Attorney at Law (of counsel), Eide, Miller & Pate, PC, representing the Alaska State Chamber of Commerce. . . . This legislation extends the aforementioned public policy to enhance the guarantee that injured workers have of collecting workers' compensation benefits all the way up the line to the project owner and extends the exclusivity protection against tort claims through the

> project owner. Therefore, the guarantee of recovering workers' compensation benefits now goes beyond the direct employer, the contractor, and all the way up to the project owners. [This legislation] enhances the guarantee that injured workers will recover workers' compensation benefits. The entire workers' compensation (indisc.) the acknowledgement are entitled to reasonable compensation for their injuries and the entire workers' compensation benefits system is geared toward making the individual whole based on the injury. Furthermore, workers' compensation treats work-related injuries as compensable, which goes all the way up the contracting chain under SB 323, regardless of anyone's negligence or fault in causing the injury along with the enhanced financial guarantee. . . .
> . . . .
>
> Furthermore, SB 323 will enhance the guarantee that workers injured on the job will be able to recover the full benefits of the Workers' Compensation Act. (House Labor & Commerce Standing Comm. Meeting Minutes, S.B. 323, Tape No. 04-48 Side A, No. 1768 (House Labor & Commerce Comm. File, S.B. 323 (April 27, 2004)).

In *Thorsheim v. State of Alaska*, 469 P.2d 383 (Alaska 1970) the court said in respect to §045(a):

> The purpose of this legislation was to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principle contractor, who has it within its power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers. (*Id*. at 386-87).

In *Lovely v. Baker Hughes Oilfield Operations, Inc*. 459 P.3d 1162, 1169-71 (Alaska 2020), the Alaska Supreme Court addressed §045(a) and stated:

> The legislature has expressed an intent that the Act be interpreted to provide the "predictable delivery" of compensation coverage to injured workers "at a reasonable cost" to employers who provide this coverage (footnote omitted). . . . The analysis begins with the statutory definitions, not whether someone is "liable . . . or potentially liable."

"It has become quite common to speak of the general contractor's liability as that of the 'statutory employer' to a 'statutory employee.'" 6 Lex K. Larson, *Larson's Workers' Compensation*, §70.03 (Matthew Bender, Rev. Ed.).

> **AS 23.30.055. Exclusiveness of liability.** The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover

> damages from the employer or fellow employee at law or in admiralty on account of the injury or death. . . . In this section, "employer" includes, in addition to the meaning given in AS 23.30.395, a person who, under AS 23.30.045(a), is liable for or potentially liable for securing payment of compensation.

Taylor v. Southeast-Harrison Western Corp., 694P.2d 1160 (Alaska 1985), said the Act's sections should not be viewed "in isolation" because they are "part of a comprehensive scheme." (*Id*. at 1162). The exclusive remedy provision is "merely one feature of a program designed to provide compensation in a wide variety of cases." It also noted the Act serves "the goal of securing adequate compensation for injured employees without the expense and delay inherent in a determination of fault as between the employee and employer." (*Id*.). The Act's goal is to secure "guaranteed expeditious compensation" for injured workers. The workers' compensation "scheme is essentially a trade-off," where the employer "renders itself absolutely liable for the scheduled and fixed compensation liability to the injured employee" regardless of the employer's negligence or the employee's contributory negligence. In return, the injured worker gives up his other remedies at law, including the right to seek punitive damages. (*Id*.). "The Workers' Compensation Act provides many benefits. . . . All, however, are part of the overall plan." (*Id*. at 1163).

> **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 file with the division a report setting out
>
> (1) the name, address, and business of the employer;
> (2) the name, address, and occupation of the employee;
> (3) the cause and nature of the alleged injury or death;
> (4) the year, month, day, and hour when and the particular locality where the alleged injury or death occurred; and
> (5) the other information that the division may require.
>
> . . . .
>
> (f) An employer who fails or refuses to file a report required of the employer by this section or who fails or refuses to file 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.

In *Christie v. Rainbow King Lodge,* AWCB Decision No. 94-0113 (May 12, 1994), the claimant was injured in a plane crash while working for his employer. He completed an injury report within five days but, for reasons never explained, his employer filed the injury report with the division 54 days late. *Christie* ordered the employer and Alaska National to pay a penalty under §070(a).

> **AS 23.30.075. Employer's liability to pay.** (a) An employer under this chapter, unless exempted, shall either insure and keep insured for the employer's liability under this chapter in an insurance company or association duly authorized to transact the business of workers' compensation insurance in this state, or shall furnish the division satisfactory proof of the employer's financial ability to pay directly the compensation provided for. . . .

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

> (c) Subject to the provisions of this section, an employee employed by an employer 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. . . .

Established in 2005, the Fund can provide "compensation benefits" to injured workers in specified circumstances: (1) the worker's employer has no compensation coverage and (2) the employer fails to "pay compensation and benefits due to the employee under the [the Act]." *Atkins v. Inlet Transportation & Taxi Service, Inc.,* 420 P.3d 1124, 1127-28 (Alaska 2018).

> **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 23.30.145. 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. . . . 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. . . .

In *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978), the Alaska Supreme Court held a claim may be controverted by resistance and a formal controversion is not always needed.

In *State, Department of Highways v. Brown*, 600 P.2d 9 (Alaska 1979), the carrier argued attorney fees were not required because it paid the claimant's disability benefits "voluntarily" and the board never entered an "award." In response, *Brown* said:

> Through the efforts of Brown's attorney in obtaining substantial medical evidence establishing that Brown's injury was work-related after all, the case had reached the point where the carrier apparently concluded that any further resistance to, or controversion of, Brown's claim for compensation would be futile. Under these circumstances, it is fair to presume that the carrier believed that if the claim were controverted further, the ultimate result would be a decision by the board awarding Brown the compensation to which he was entitled. In this situation, the carrier's payment of compensation can fairly be construed as the equivalent of "awarding" such compensation to Brown in the general sense of granting that which is merited or due. (*Id*. at 12).

In *Shirley*, 884 P.2d 156 (Alaska 1984), an employer appealed the board's award of attorney fees under §145(a). The employer claimed the award was improper because it never "controverted" benefits. The employer began paying the injured worker TTD benefits after his injury; these payments continued. Eventually, physicians concluded he would not be employable. The injured worker filed a claim for PTD benefits. In its answer to the claim, the employer said the insurer was awaiting clarification from another medical expert to determine whether or not the injured worker was permanently and totally disabled; meanwhile, it would continue to pay TTD benefits. The insurer's answer also "reserve[d] the right to raise further defenses after discovery." (*Id*. at 158). In response to the worker's claim for attorney's fees, the insurer said: "no benefits have been controverted. All benefits due and owing under the Alaska Worker's Compensation act have been

accepted and paid." The insurer also contended that since TTD and PTD rates are generally the same, this decision had no effect on the "amount" paid. Eventually, the insurer received its medical report and, based thereon, converted the injured worker's status from TTD to PTD.

At hearing, the board found the worker had been PTD status and the insurer had "controverted in fact" his entitlement to PTD benefits. The board required the insurer to pay statutory minimum attorney's fees on all disability benefits paid after the date it determined he was PTD status. The employer appealed. (*Id*. at 158).

On appeal, the employer contended it never controverted any "amount of compensation" owed to the injured worker, so the board should not have awarded attorney fees. The injured worker contended the insurer controverted his claim by "never unqualifiedly accepting Shirley's claim for permanent total disability compensation." *Shirley* held once the injured worker's attending physician said he was medically stable and would not be able to pursue gainful employment, without contrary evidence, the insurer should have changed his status from TTD to PTD. *Shirley* held the insurer's refusal to change his status constituted a controversion "in whole or in part" under §145(a). It held the insurer's controversion of the worker's permanent disability status affected the total amount he could collect during his lifetime; therefore, an "amount" was controverted. (*Id*. at 159).

In *Alaska International Constructors v. Kinter*, 755 P.2d 1103 (Alaska 1988), a welder hurt his back and received continuing temporary disability benefits. He filed a claim for PTD benefits, prevailed and the board awarded attorney fees. *Kinter* stated:

> By its answer, Alaska International put into issue the question whether Kinter was entitled payments from Alaska International at all. Thus, Kinter's attorney presumably was forced to research the question and prepare to argue that Alaska International was in fact liable for all benefits it had been paying. (*Id*. at 1106).

The employer contended attorney fees were not awardable under these circumstances because it had been paying the injured worker TTD benefits at the same weekly rate as PTD benefits. It argued there was no "*amount* of compensation controverted and awarded" (*id*.; emphasis in original). *Kinter* concluded that despite its TTD payments to the injured worker, the employer's

answer revealed unambiguously that the employer in fact denied any liability to him at all. *Kinter* held any payments the employer made after the answer were not voluntary because the answer "establishes that Alaska International was reserving the right to deny *any* liability on Kinter's claim" (emphasis in original). *Kinter* held "all the amounts paid after the Answer was filed were controverted." It affirmed the board's award of statutory minimum attorney fees to the claimant's lawyer and said the insurer was "essentially making payments 'under protest.'" (*Id*. at 1106-07).

In *Summers v. Korobkin Construction*, 814 P.2d 1369, 1370 (Alaska 1991), an employer paid an injured worker's medical expenses but had "refused to acknowledge" that he had "a valid and compensable claim, and reserved the right to assert affirmative defenses against future claims." The worker sought a hearing to determine his injury's compensability. Just prior to hearing, the employer withdrew its "reservation of rights" to past-paid medical expenses but still "refused to acknowledge" the compensability of the injured worker's injury or to waive any defenses to his claim. At hearing, the worker asked for an order determining the claim was compensable or a ruling stating the employer had waived its right to contest compensability. The board declined to hear the matter, finding there was nothing in dispute. On appeal, the court noted the Act "creates a comprehensive system of compensation for injured workers." (*Id*. at 1371). The court reversed the board, noting the injured worker "who has been receiving treatment for an injury which he or she claims occurred in the course of employment, is entitled to a hearing and prospective determination on whether his or her injury is compensable." (*Id*. at 1372-73). If the injured worker prevails, the employer is still able to controvert the claim "at a future hearing, if the grounds for controversion arise after the initial hearing." (*Id*. at 1372).

In *Childs v. Copper Valley Electric Association*, 860 P.2d 1184 (Alaska 1993), an injured worker inhaled toxic fumes during a fire at work. The employer controverted. After the claimant's lawyer filed a claim, the employer "voluntarily but belatedly paid" some benefits that were at issue following receipt of reports from its employer's medical evaluator. (*Id*. at 1190). The board did not award attorney fees for claimed benefits the employer paid prior to hearing. On appeal, *Childs* reversed and held attorney fee awards under the Act should be "*fully* compensatory and reasonable." (*Id*.; emphasis in original). *Childs* reasoned the employer controverted compensation and the injured worker filed a claim to recover these benefits. *Childs* held the employer's voluntary

payment under these circumstances "is the equivalent of a Board order, because the efforts of Childs's counsel were instrumental to inducing it." (*Id*. at 1191). Because the employer had delayed disability payments, attorney fees and costs were also awardable because his attorney's efforts were necessary to induce the employer to finally pay the benefits. (*Id*. at 1192).
Shirley, 884 P.2d 156 (Alaska 1994) held a change from TTD to PTD status is "very important to an employee since TTD payments end with medical stability while PTD benefits do not." Further, an employer retains the right to controvert ongoing TTD benefits due to medical stability, where by contrast, if a board order determines an injured worker is PTD status, the employer must first adduce evidence of a change in disability status before it could controvert PTD benefits.

In *State of Alaska, Department of Corrections v. Wozniak,* AWCAC Decision No. 276 (March 26, 2020), the commission concluded the board was correct to find a controversion-in-fact where the employer refused to change the employee's benefits from TTD to PTD. As to continuing statutory fees on ongoing benefits for the worker, *Wozniak* affirmed the board's attorney fee award based on the employer's initial resistance and subsequent agreement. It also credited the board's decision to award continuing statutory attorney fees based on *Shirley*, and emphasized how important it is to obtain a board order finding an injured worker PTD status to avoid the employer controverting benefits without a hearing.

Rusch v. Southeast Alaska Regional Health Consortium, 450 P.3d 784, 803 (Alaska 2019), held the statutory presumption of compensability does not apply to the amount and reasonableness of attorney fees sought by claimants in workers' compensation claims where "the parties did not dispute claimant's entitlement to attorney's fees; they dispute the fees' reasonableness."

> **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. . . .
> . . . .
>
> (c) The insurer or adjuster shall notify the division . . . that the payment of compensation has begun or has been increased, decreased, suspended, terminated, resumed, or changed in type. . . . If the division is not notified within the 28 days prescribed by this subsection for reporting, the insurer or adjuster shall pay a civil

> penalty of $100 for the first day plus $10 for each day after the first day that the notice was not given.
> . . . .
>
> (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. . . .

In *Parker v. Alaska Bussell Electric Co.*, AWCB Decision No. 82-0179 (August 5, 1982), a claimant sought attorney fees on a penalty he successfully obtained under §155(f). In awarding the attorney fees, *Parker* said, "We find that penalties are compensation under our Act."

In *Hakensen v. Wick Construction*, AWCB Decision No. 85-0254 at 3-5 (September 3, 1985), the Second Injury Fund petitioned the board for an order assessing late reporting penalties on an employer and insurer under §155(c). The insurer had paid the employee a penalty under §155(e) but failed to report the penalty payment to the division. The board relied on AS 23.30.265(8), now renumbered §395(12), which defined "compensation":

> We find that a 20 percent late payment penalty assessed under AS 23.30.155(e) constitutes 'compensation' for the purpose of the Alaska Workers' Compensation Act. We rely on the definition of 'compensation' cited above. This finding is based upon the fact that the 20 percent is paid directly to the employee and because the 20 percent penalty is provided for in the Alaska Worker's Compensation Act (Chapter 30, Title 23 the Alaska Statutes).

> We also believe that the 20 percent late payment penalty should be considered compensation because of an apparent dual purpose of the penalty. We find that late reporting penalties serve not only as an inducement to employers and insurers to make timely payments to disabled employees but they also constitute a form of additional benefits to the employee and compensation for financial hardships brought about by the late payment. It is a commonly known fact that when an employee is unable to continue employment due to a work-related injury or disease, the paychecks stop. Delay in payment of compensation benefits often result in additional negative income to employees such as loss of interest on savings, penalties and/or interest for the late payment of mortgage payments, rent, or other financial obligations, etc. In this respect, we believe the 20 percent late payment penalty constitutes additional compensation to the employee, due to the employer's or insurer's failure to take timely action.
>
> . . . .
>
> We have considered respondents' arguments that AS 23.30.155(c) refers to the 20 percent late reporting penalty as an 'additional amount' and that had the legislature intended the penalty to be considered compensation, it could have written the statute to reflect that fact. In view of our determination which was based on other grounds, that the late reporting penalty is compensation, we find this argument unpersuasive. The language of AS 23.30.155(c) does not reveal whether the legislature intended that the late reporting penalty should be considered 'compensation' or not. For the reasons previously stated, we believe the penalty payments should be considered compensation and therefore, subject to the reporting requirements contained in AS 23.30.155(c). We note that respondents have advanced arguments in support of their position based upon their interpretation of the 'Alaska Workers' Compensation Manual 'and the examples contained therein on how to prepare compensation reports. The manual, which is a publication of the state of Alaska, Department of Labor, division of workers compensation instructs the insurer at p. 34-35 to report 20 percent late payment penalties and report them as compensation. There is nothing inconsistent between that manual provision in our decision that late payment penalties constitute 'compensation.'

In *Castillo v. J.J. Welcome, Inc.*, AWCB Decision No. 86-0204 at 4-5 (August 8, 1986), an injured worker sued a third-party tortfeasor that caused his work-related injury. When the third-party case settled, the workers' compensation insurer demanded subrogation under §015(g) for all benefits it paid to the employee including penalties under §155(e). The employee resisted paying, among other things, the §155(e) penalty and the parties submitted the issue to the board, which held:

> An AS 23.30.155(e) penalty is clearly a money allowance payable to an employee or his dependence. We have also previously concluded that AS 23.30.155(e) penalties are compensation for the purpose of awarding attorney's fees under AS 23.30.145(a) and for the purposes of awarding penalties for late payment of an

> award under AS 23.30.155(f) (citations omitted). However, in view of the obvious difficulties with the use of the term 'compensation' in the Act, we must always determine the meaning of 'compensation' in a particular section with regard to the purpose of this section (emphasis in original). . . .
> . . . .
>
> Because of the purposes of AS 23.30.105 and 155(e) and the lack of specific inclusive language in either statute, we conclude that an AS 23.30.155(e) late-payment penalty should not be considered compensation under AS 23.30.105(e)(1)(C) and therefore is not reimbursable under AS 23.30.015(g). . . . To require an employee to reduce his third-party settlement to reimburse and employer's late-payment penalty would result in the employee receiving less than he would have received had no workers' compensation claim been involved (citation omitted). This is so because the employer's failure to timely pay compensation benefits and consequent statutory penalty could not possibly be the basis for requiring a third party to pay damages. Moreover, to allow an employer to recoup a penalty from an employee's third-party settlement would defeat the statutory purposes for the penalty.

In *Providence Washington Ins. Co. v. Busby*, 721 P.2d 1151, 1152 (Alaska 1986) the Alaska Supreme Court held "compensation" does not include medical benefits or attorney fees for the purposes of Second Injury Fund (SIF) reimbursement, because the statutory language of "compensation liability for disability" and the provision determining employer contributions to the SIF based on the employee's entitlement to disability demonstrated an intent to limit reimbursement to "disability" payments. However, the SIF still may be required to pay attorney fees when it, rather than the employer, pursues litigation. *Second Injury Fund v. Arctic Bowl*, 928 P.2d 590 (Alaska 1996).

In *Croft*, 820 P.2d 1064, 1066 (Alaska 1991), the employer paid interim disability and attorney fees pending appeal. The claimant's case was eventually dismissed under a statute of limitations and the superior court held the employer was entitled to full reimbursement including attorney fees paid to the claimant's lawyer. The claimant's attorney objected, noting attorney fees were "compensation," and the employer could only recover them as an overpayment by withholding from the injured worker's future benefits under §155(j). Since the worker's claim was barred under a statute of limitations defense, he was entitled to no future benefits from which anything could be recovered. The employer appealed. *Croft* ruled in the claimant's favor, noting the statutory definition of "compensation," and said:

> "Compensation" is defined in the Act as "the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter" (citation omitted). . . . We conclude that the phrase "payable to employee" in [former] AS 23.30.265(8) does not limit "compensation" to payments made directly to the employee. . . .

In *Childs*, 860 P.2d 1184 (Alaska 1993), the court held medical benefits were "compensation" even though they were not typically paid in installments as are most benefits under the Act.

In *Gazcon v. Peter Pan Seafoods, Inc.,* AWCB Decision No. 99-0174 at 4-5 (August 13, 1999), an injured worker sought interest on a §155(e) penalty. The interest regulation required interest at the statutory rate on any "installment of compensation" past due until it is paid. The employer argued a §155(e) penalty is not "compensation" subject to interest. *Gazcon* held:

> . . . "Compensation" is defined by the Act as "the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter." AS 23.30.395(8). We find the language of AS 23.30.395(8) does not exclude subsection 155(e) penalties. We conclude AS 23.30.155(e) penalties are a "money allowance payable to employee" by operation of law, when other benefits due pursuant to the Act, without an award, are not timely paid. We come to this conclusion for the following reasons:
>
> We do not dispute Employer's characterization of Section 155(e) penalties as being punitive in nature. Penalties are meant to penalize, or threatened by means of a civil pecuniary "fine," the late payment of benefits on which injured workers rely to pay their own living expenses while recuperating from industrial injuries. We find, however, Employer's characterization is not comprehensive.
>
> The legislature has, by virtue of subsection 155(e), designated injured employees as the beneficiaries of penalties imposed under either subsection 155(e) or (f). The legislature could have, as an alternative, designated the general fund or a specific agency (*e.g.*, Division of Insurance) as the recipient of penalties collected for late payment of workers' compensation benefits (subsection 155(e)) or awards (subsection 155(f)). Instead, the legislature decided the persons most affected by the late or sporadic payment of benefits are the injured workers themselves. Injured workers must continue to pay their mortgage and utility bills on time, regardless of the employer's actions. By enacting section 155(e), the legislature decided that such people be the beneficiaries of any "fines" imposed for late payment of workers' compensation benefits.
>
> . . . We find the subsection 155(e) envisions a policy whereby the injured worker is meant to have access not only to the usual, and timely, compensation to which he

> is entitled, but also to an additional 25 percent in the event the payment is late. This counterbalances the financial havoc and personal distress the untimely payment of benefits thrust upon him.
>
> In summary, we find the purpose of subsection 155(e) is two-fold. Subsection 155(e) both punishes the employer inappropriately withholding compensation due, and simultaneously regresses the unexpected financial burden an injured worker suffers because of the employer's conduct. For these reasons, we find subsection 155(e) penalties are a "money allowance payable to an employee" and therefore fall within the definition of "compensation" on which interest is payable under our regulation (citations omitted).

In *Circle De Lumber Co. v. Humphrey*, 130 P.3d 941 (Alaska 2006), the board ordered the employer to pay interest on past disability benefits. When the employer failed to pay the awarded interest, the employee sought and obtained additional interest and a penalty under §155(f) on the defaulted interest; the employer appealed. *Humphrey* held interest awards are intended to encourage employers to make timely payment of compensation benefits and are not imposed to punish employers. Interest is primarily intended to fairly compensate an injured worker for the time value of money lost over time during which he did not have access to the money owed him. In respect to the board's award of a penalty on interest *Humphrey* also said:

> Because we uphold the board's interest awards, we also uphold the board's imposition of a penalty under AS 23.30.155(f) against Circle De for the defaulted interest payments on Humphrey's TTD benefits. (*Id*. at 951 n. 73).

In *State of Alaska, Workers' Compensation Benefits Guaranty Fund v. West*, AWCAC Decision No. 145 (January 20, 2011), the appeals commission decided if the Fund was liable to an injured worker for attorney fees, penalties and interest under AS 23.30.082. In deciding the Fund was liable for attorney fees and interest, but not penalties, *West* interpreted §082 "according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose." (*Id*. at 2). In so doing, *West* determined §§045, 075 and 082 dealt with the same subject matter, namely an employer's or the Fund liability for compensation and benefits, and construed them together *in pari materia*. (*Id*. at 3). *West* concluded under §082, "compensation and benefits" encompass the compensation or benefits for which an employer is liable under §045(a), including only §§041, 095, 145 and 180-215. (*Id*.). *West* concluded attorney fees and interest are "compensation" for which the Fund was liable under §082; it concluded penalties are not "compensation" or "benefits" the Fund had to pay under §082.

West noted §082 was silent on the penalty issue and neither expressly authorized the Fund to pay penalties nor expressly precluded it from paying them. It further noted neither §070(f) nor §155(e) were specifically referenced in §045(a) as "compensation payable." *West* found no Alaska Supreme Court case characterizing penalties as "compensation," as was the case with attorney fees, and found no reason to consider penalties as "compensation" pursuant to case law. Lastly, in construing §082, *West* found the statute was intended to ensure injured workers were made whole either by their employers or the Fund. It reasoned penalties were similar to punitive damages and served to punish and deter wrongdoing. Consequently, *West* said:

> Here, there has been no wrongdoing on the part of the Fund, only Midway. Therefore, the rationale for the payment of penalties is missing where the Fund is the obligor. Furthermore, as a practical matter, the legislature may not have considered the Fund's payment of penalties as advancing its goal of making injured workers whole, especially where the source of the money to pay claims against the Fund, in part, is the public coffers. (*Id*. at 6).

In finding the Fund was responsible for interest, *West* rejected the Fund's argument that "interest is always interest and compensation is always compensation." It concluded:

> It is our opinion that the Fund is taking too narrow a view on this issue (footnote omitted). By definition, "compensation" is "the money allowance payable to an employee . . . as provided for in this chapter" (footnote omitted). Once interest accrues under AS 23.30.155(p), with or without a board award, it forms part of the money allowance payable to an employee. At that point, it can be considered compensation. (*Id*. at 7).

West said interest has characteristics of compensation that makes an employee whole. (*Id*.). It cited the §395(12) "compensation" definition and noted it was "broadly worded" but did not consider or construe that definition *in pari materia* with other statutes in its analysis. (*Id*. at 3).

In *Schroeder v. Auto Electric Sales & Service, Inc*., AWCB Decision No. 15-0121 (September 28, 2015), an injured worker sought interest and a §155(f) late-payment penalty on a late-paid §155(e) late-payment penalty. *Schroeder*, relying primarily on *West* found penalty provisions applied only to "compensation," denied the interest and penalty-on-penalty claim. *Schroeder* reasoned since §155(e) applied only to "compensation," and "because this decision finds a penalty is not

'compensation,' no interest is owed" on a late-paid penalty either. *Schroeder* did not cite or interpret the §395(12) "compensation" definition.

In *Unisea, Inc. v. Morales de Lopez,* 435 P.3d 961 (Alaska 2019), the Alaska Supreme Court said if an employer fails to timely pay compensation it may be subject to a penalty. The court affirmed the commission's award of a §155(e) penalty against Alaska National.

> **AS 23.30.165. Lien.** (a) Each employee and beneficiary entitled to compensation under the provisions of this chapter has a lien for the full amount of the compensation the person is entitled to. . . .
>
> **AS 23.30.170. Collection of defaulted payments.** (a) In case of default by the employer in the payment of compensation due under an award of compensation . . . the person to whom the compensation is payable may . . . apply to the board making the compensation order for a supplementary order declaring the amount of the default. . . .
>
> **AS 23.30.395. Definitions.**
>
> In this chapter,
> . . . .
>
> (12) "compensation" means the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter;
> . . . .
>
> (20) "employer" means the state or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state; . . .
>
> **8 AAC 45.050. Pleadings**. . . .
> . . . .
>
> (c) Answers.
> . . . .
>
> (3) An answer must be simple in form and language. An answer must state briefly and clearly the admitted claims and the disputed claims so that a lay person knows what proof will be required at the hearing. . . .
> . . . .

(f) **Stipulations**.

(1) If a claim or petition has been filed and the parties agree that there is no dispute as to any material fact and agree to . . . of a party, a stipulation of facts signed by all parties may be filed, consenting to the immediate filing of an order based upon the stipulation of facts. . . .

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). . . .
. . . .

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

(1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the claim or petition; . . .

8 AAC 45.180. Costs and attorney's fees. . . .
. . . .

(f) the board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. . . .

West Publishing Company, *Black's Law Dictionary*, Abridged Ed. (1987) at 520 defines "money": "In usual and ordinary acceptation it means coins and paper currency used as circulating medium of exchange . . . . See also . . . Legal tender . . . ." Oxford Online Dictionary defines "allowance" as: "The amount of something that is permitted especially within a set of regulations or for a specified purpose." "Payable" means: "Capable of being paid; suitable to be paid; admitting or demanding pavement; justly due; legally enforceable. . . ." West Publishing Company, *Black's Law Dictionary*, Abridged Ed. (1987) at 587. "Indemnity . . . benefits" are not defined in the Act but in context generally means "the benefit payable under an insurance policy." *Black's Law Dictionary*, 6th Edition, at 769.

"Dictum is not holding." To be binding precedent, a previous appellate decision must actually resolve "the issue before us." *Joseph v. State*, 26 P.3d 459, 468-69 (Alaska 2001). "The law of the case doctrine 'maintains that issues previously adjudicated can only be reconsidered where

there exist 'exceptional circumstances' presenting a 'clear error constituting a manifest injustice.'" *Groom v. State, Dept. of Transportation*, 169 P.3d 626 (Alaska 2007).

ANALYSIS

1) Was the decision to proceed with the hearing absent Employer correct?

On November 8, 2019, the division served Employer at its correct address with a hearing notice for the December 4, 2019 hearing. Employer did not appear at the hearing, and without objection from any party the hearing proceeded without it. When Employer failed to appear for hearing on the designated date and time, the discretionary decision to proceed with the hearing absent Employer was in priority order and was correct. 8 AAC 45.070(a), (f)(1).

2) Was the oral order dismissing the Fund as a party correct?

The Fund contended *Elattar I* found an employer-employee relationship and assessed liability for Employee's injuries against Employer. It assumed since Employer was uninsured, Diamond and Alaska National became solely liable for Employee's workers' compensation benefits under §045(a). No party disputed the Fund's position and none objected to its dismissal. In short, the parties stipulated to dismissing the Fund. 8 AAC 45.050(f)(1). An oral order at hearing dismissed it. However, the order did not release the Fund from liability because an oral agreement to dismiss a party is an "agreement in regard to a claim" and is "void" unless there is an approved settlement agreement. There is no settlement here under §012(a). *Lindekugel*. Diamond and Alaska National contend they have no liability for penalties or interest awarded in *Elattar I* or *III*. If they are right, they will not be liable for interest or penalties and liability for those benefits would revert to Employer who may not pay them. Then, if Employer fails to pay "additional awards" or "amounts" commonly called "penalties," or interest, the Fund's liability for at least interest would need to be revisited. AS 23.30.070(f); AS 23.30.155(e); AS 23.30.082(c); *West*.

3) Are Diamond and Alaska National liable for penalties, interest, attorney fees and costs awarded in *Elattar I* and *III*?

Elattar I awarded Employee disability and medical benefits along with an "additional award" under §070(f) and an "additional amount" under §155(e), as well as interest under §155(p) against

Employer, who was uninsured for Employee's injury. *Elattar III* modified the §070(f) payee. No party appealed either *Elattar I* or *III*. Employer has paid nothing; Diamond, the "contractor-over," and Alaska National concede liability to pay "compensation" to the extent it is designated in §045(a). They deny liability for penalties, interest and attorney fees on legal grounds. Employee seeks all benefits awarded in *Elattar I* and *III* from Diamond and Alaska National. These are primarily legal questions and some also appear to be issues of first impression.

(A) Penalties and interest.

While well-established statutory interpretation rules are important, this decision must first apply the Act's explicit instruction on how the Act is interpreted, which reveals the legislature's specific intent. The Act is interpreted to ensure quick, efficient, fair and predictable delivery of "indemnity and medical benefits" to injured workers at a reasonable cost to employers. AS 23.30.001(1). Whether Diamond and Alaska National have to pay penalties and interest awarded in *Elattar I*, as modified slightly in *Elattar III*, is a question implicating quickness, efficiency, fairness, and predictability of delivering indemnity and medical benefits to Employee, and affects cost to Diamond. The legislature's specific mandate applicable to the Act trumps other general statutory construction principles. *Nelson*.

The parties' positions highlight difficulties with the legislature's use of the word "compensation" in the Act. This is not a new problem as demonstrated in cases cited in the Principles of Law section. Nevertheless, the analysis begins with the statutory definitions. *Lovely*. The Act defines "compensation" in plain language as the "money allowance payable to an employee" as provided in the Act; it "includes" funeral benefits. AS 23.30.395(12). This definition requires little statutory interpretation or construction: "Money" is a common word meaning currency used as the circulating medium of exchange or "legal tender." *Black's Law Dictionary* at 520. "Allowance" in this context means an amount permitted within regulations or for a specific purpose. *Oxford Online Dictionary*. "Payable" means justly due or legally enforceable. *Black's Law Dictionary* at 587. Words that have acquired a particular and appropriate meaning through legislative definition "shall be construed according to the particular and appropriate meaning." AS 01.10.040(a). Because the "compensation" definition contains "includes," under Alaska law this statutory definition must be construed as stating "including but not limited to. . . ." AS 01.10.040(b). The

legislature has expressly stated what "compensation" means in plain language; Alaska law makes it clear that the Act's "compensation" definition is broad and inclusive.

Workers' compensation benefits are paid with "money." *Rogers & Babler*. The Act in §§070(f), 155(e) and 155(p) permits additional compensation and interest against employers; therefore, money awarded in *Elattar I* and *III* under these subsections are "allowances" provided for in the Act for specific purposes -- to provide an incentive for prompt payment, to provide additional money to injured workers to offset financial hardships brought on by delayed payments and to compensate injured workers for the time-value of money. *Hakensen*; *Gazcon*. The Act authorizes these benefits, which are legally enforceable through liens, supplementary default orders and collections; therefore, "penalties" and interest are also "payable." AS 23.30.165; AS 23.30.170. It would make no sense for the Act to provide "penalty" and interest awards that could not be enforced or collected; if it did, these sections and awards based upon them would be a nullity and superfluous. Every section has meaning and must be given effect. *Nelson*. As a matter of law, an "additional award" under §070(f), an "additional amount" under §155(e) and interest under §155(p) are "compensation" as defined in the Act.

Diamond and Alaska National rely on §045(a) to support their view that neither has to pay penalties or interest awarded in *Elattar I* and *III*. Both reason since §§070(f), 155(e) and 155(p) are not designated in §045(a), there is an inference under the principle *expressio unius est exclusio alterius* that their omission should be understood as their exclusion, leading to the conclusion that they are not "compensation" and they need not pay them. *Croft*.

There are problems with this position; it is instructive to review §045(a)'s language in context rather than just one sentence in isolation. *Taylor*. Section 045(a) has three separate but interrelated provisions: (1) An *employer* is liable for and shall secure payment to employees of the compensation payable under §§041, 050, 095, 145, and 180-215; (2) If the *employer* is a *subcontractor* and fails to secure payment of the compensation to its employees, the *contractor* is liable for and shall secure payment; and (3) If the *employer* is a *contractor* and fails to secure payment of the compensation to its employees or the employees of a subcontractor, the *project owner* is liable for and shall secure payment of the compensation to employees of the contractor

and employees of a subcontractor, as applicable. Presumably, the phrase "the compensation" has the same meaning in each sentence. *Cummings*.

Diamond and Alaska National focus exclusively and improperly on sentence (2) "in isolation"; but this sentence is "merely one feature of a program designed to provide compensation in a wide variety of cases." *Taylor*. Sentence (1) cannot be overlooked in construing §045(a). This first sentence makes *all employers* liable to secure and pay injured workers the enumerated compensation. Employer's "secure" compensation generally by purchasing insurance or obtaining a certificate of self-insurance. AS 23.30.075(a); *Rogers & Babler*. "Employer" includes anyone employing someone in connection with a business or industry within the Act's scope, carried on in Alaska under §395(20). In other words, all "employers" -- self-insured, insured or uninsured -- have liability to pay their injured workers compensation as listed in §045(a). However, does sentence (2) state or suggest employers have no liability to pay other benefits awardable under the Act but not listed in sentence (1), whether those benefits are called "compensation" or something else? Diamond and Alaska National would say "yes." But employers must, and do, insure for all obligations under the Act. AS 23.30.030(1).

A §070(f) or §155(e) "penalty," which the legislature deemed an "additional award" or "additional amount," respectively, and interest, are awarded in workers' compensation cases against Employers and insurers routinely when warranted. *Rogers & Babler*. Alaska National has even been ordered to pay them. *Christie*; *Morales de Lopez*. Yet adopting Diamond's and Alaska National's §045(a) interpretation would mean no employer would ever have to pay these or any benefits awardable under the Act but not designated in §045(a). For example, in this case Employer would not have to pay penalties and interest awarded in *Elattar I* and *III* because the genesis for these awards, §§070(f), 155(e) and 155(p) are not listed in §045(a). This interpretation conflicts with the clear requirements for paying money prescribed in §§070(f), 155(e) and 155(p) and render these sections superfluous; again an unacceptable way to interpret and construe these statutes *in para materia* with the Act. *Nelson*.

Stated differently, sentences (2) and (3) in §045(a) are both anchored to sentence (1). In overlooking sentence (1), Diamond and Alaska National isolate sentence (2) and contend, since

§§070(f), 155(e) and 155(p) are not listed in §045(a), Diamond as the "contractor-over" and Employee's statutory "employer," and Alaska National as its insurer have no liability to pay these benefits. Their isolation analysis would be the same if sentence (3) applied. If a contractor-over or project owner do not have to pay anything not designated in sentence (1), then neither do *any* employers. Under their analysis, Diamond and Alaska National would join the host of all other Alaska "employers," none of whom have to pay statutorily awarded penalties or interest under the Act. As shown above, their statutory interpretation is far too narrow. *Nelson*.

Mindful that "compensation" under §395(12) includes the money allowance payable to an injured worker, the Act creates a "comprehensive scheme" to provide injured workers with "adequate compensation" without expense and delays "inherent in a determination of fault as between the employee and employer." *Taylor*. The legislature determined "penalties" and interest are part of this "comprehensive scheme" and "adequate compensation." Injured workers give up their right to sue their employers and any contractor-over for negligence for a work injury in exchange for guaranteed compensation under §055. Diamond is insulated from civil liability for negligence for Employee's injury because it is the contractor-over and under §055 is expressly considered an "employer" protected by the Act's exclusivity provision. In that sense, as it conceded, Diamond is also a statutory "employer." AS 23.30.395(20); 6 Larson. *Larson's Workers' Compensation* at 70.03. Among the rights injured workers forfeit under the Act is the right to "seek punitive damages." *Taylor*. The Act's compensation scheme, however, provides an "additional award" in §070(f) and an "additional amount" in §155(e) in part to incentivize and penalize employers or insurers for unjustified failure to report injuries or pay benefits without an award and in part to compensate injured workers for practical effects like an inability to pay for housing, arising from tardy payments; it provides interest under §155(p) for the time value of late-paid benefits. *Hakensen*; *Gazcon*; *Humphrey*.

On occasion, agency decisions have considered various benefits payable under the Act "compensation" for some purposes but not for others: *Parker* concluded a §155(f) penalty was "compensation under our Act" when the claimant sought attorney fees on a successful penalty claim. *Hakensen* found a §155(e) penalty was "compensation" as defined in the Act and found penalties served two purposes: (1) as an inducement to employers and insurers to make timely

payments; and (2) as an additional benefit and compensation to the injured worker for unexpected financial hardships brought about by late payment. *Hakensen* also held late-payment penalties under §155(e) had to be included on the compensation report or the insurer would be subject to civil penalties under §155(c). *Castillo* held §155(e) late-payment penalties were "clearly a money allowance payable to an employee" but were not "compensation" under §015(e)(1)(C) and thus not subject to subrogation under §015(g). *Castillo* distinguished itself from contrary cases and noted requiring an injured worker to reduce his third-party settlement to reimburse his employer's late-payment penalty would result in him receiving less than he would have received had there been no workers' compensation claim. It further found the employer's failure to timely pay benefits and the associated penalty could not possibly have been the basis for requiring a third-party to pay damages; there was simply no nexus. Moreover, *Castillo* found allowing the employer and insurer to recover a late-payment penalty from a third-party settlement would defeat one obvious purpose for the penalty -- to incentivize prompt payment.

The Alaska Supreme Court in *Busby* held "compensation" did not include medical benefits or attorney fees for SIF reimbursement purposes because the applicable statute demonstrated an intent to limit reimbursement to only "disability" payments. However, *Arctic Bowl* held the SIF may be required to reimburse attorney fees when it pursues litigation. In *Croft*, the court held attorney fees were "compensation" and, once the claimant's case was dismissed on statute of limitations grounds, the employer could only recover overpaid attorney fees by withholding money from the injured worker's non-existent future benefits, under §155(j). *Croft* cited the statutory "compensation" definition and noted the phrase "payable to employee" did not limit "compensation" to "payments made directly to the employee." By contrast, the court in *Childs* held medical benefits were "compensation" even though they were not paid in installments. It also noted interpreting "compensation" to include medical benefits served an important public policy goal of creating an incentive for an insurance carrier to pay medical benefits timely.

Gazcon, an agency decision, cited the Act's "compensation" definition and held it did not exclude §155(e) penalties. It agreed penalties were meant to penalize an insurer for late-paid benefits but also found, because the additional amounts awarded under §155(e) are payable to the injured worker rather than to a general fund, the legislature decided injured workers needed additional

benefits in such circumstances so they could "continue to pay their mortgage and utility bills on time" regardless "of the employer's actions." In *Humphrey*, the Alaska Supreme Court affirmed an order requiring the employer to pay a §155(f) penalty and post-judgment interest on a late-paid interest award. *Humphrey* shows the court considers both interest and penalties "compensation" under the Act and subject to late-payment penalties under §155(f).

In *West*, the commission held interest is "compensation" but penalties are not when addressing what the Fund has to pay under §082. The commission used the analysis championed by Diamond and Alaska National in the instant case. Though citing §395(12)'s "compensation" definition in a footnote, *West* did not further construe or discuss it in resolving the §082 issue other than to say that once interest accrued it became a money allowance payable to an injured worker and at that point was considered "compensation." *West* did not explain why the same would not be true for an accrued penalty. It also mentioned no "wrongdoing" on the Fund's part, implying it would be unfair to saddle the Fund with liability for benefits created by an employer's failures over which the Fund had no control.

West is distinguishable from the instant case. Fund money exists for a different purpose and is funded differently than insurance money payable under §045(a). The Fund is a backup source for benefits when an uninsured employer fails to pay benefits and there is no other recourse for the injured worker. *Atkins*. By contrast, workers' compensation insurance's sole purpose is to compensate injured workers. *Taylor*. Unlike Alaska National's insurance policy funded by Diamond's premiums, including additional premiums when subcontractors like Employer are uninsured, under §082(a) the Fund gets its money from civil penalty payments from uninsured employers, income on investments, money the department gives it and legislative appropriations. Nothing in the Act gives the Fund a duty or authority to ensure employers purchase workers' compensation insurance. Therefore, the Fund truly has no control over employers. By contrast, Diamond contractually had a right and a duty to require Employer to purchase workers' compensation insurance and demand proof of coverage under NCCI Rule 2(H).

Further, *West* noted the punitive reason for penalties but did not acknowledge the "additional award" or "additional amount" concepts mentioned in §§070(f) and 155(e). It did not analyze the

additional role "penalties" play, which is to "counterbalance the financial havoc and personal distress the untimely payment of benefits thrust" upon an injured worker. *Gazcon*. *Schroeder* denied an injured worker's claim for interest and a penalty on a late-paid §155(e) penalty, relying primarily on *West*, and found §155(e) applied only to "compensation" and reasoned since a penalty is not "compensation," no interest or penalty was awardable. *Schroeder*, did not cite or construe §395(12)'s "compensation" definition and did it consider the court's *Humphrey* decision. Lastly, *West* did not address whether penalties or interest were "compensation" under §045(a) in the context presented in this case. Diamond relies on *West* dictum, which is not a holding. *Joseph*.

One noteworthy take-away from the above-referenced representative cases addressing this "compensation" issue is: Decisions that considered and analyzed the Act's §395(12) "compensation" definition held penalties and interest were "compensation" (*Parker*; *Hakensen*; *Gazcon*; *Croft*; *Humphrey*), and those that did not consider or analyze it held they were not (*West*; *Schroeder*). Outliers like *Castillo* distinguished cases like *Parker* because penalties as "compensation" did not logically fit with subrogation requirements under §015. *Busby* held medical benefits and attorney fees were not "compensation" for SIF reimbursements because the applicable statute referred to reimbursables as only "compensation liability for disability." Even then, both could be considered "compensation" if the SIF initiated litigation. *Arctic Bowl*.

Many Act provisions deal with "compensation." Keeping in mind §001(1), the Act's provisions should be construed *in pari materia* to produce "a harmonious whole" within the Act. *Shirley*. In interpreting and construing relevant statutes, this decision tries to give effect to the legislature's intent. *Shehata*. The Act must be interpreted according to "reason, practicality, and common sense" in light of its purpose and legislative history. *Harris*. The §395(12) "compensation" definition read together with §§070(f), 155(e) and 155(p) "additional award," additional amount" and "interest" language suggests these benefits are all "compensation" under the Act.

Alternately, if Diamond is correct and an "additional award," "additional amount" and interest are not "compensation" for §045(a) purposes, one would not expect to find §§070(f), 155(e) and 155(p) in that section. In other words, if these statutory benefits are not really "compensation," it is not surprising they are not listed in a section entitled, "Employer's liability for compensation."

However, their absence from the designated statutes in §045(a) does not lead to a conclusion that Diamond and Alaska National need not pay benefits awarded in *Elattar I* and *III* under §§070(f), 155(e) and 155(p); §045(a) does not state the contractor-over does not have to pay these benefits.

At best, there is a statutory-construction presumption that they do not have to pay §§070(f), 155(e) and 155(p) benefits because they are not listed in §045(a). *Croft*. But that presumption is overcome when the Act is read *in pari materia* to produce "a harmonious whole" and one considers "reason, practicality, and common sense." *Shirley*. The *exclusio* rule is "cautiously applied." There is also an exception to the rule, where expanding a statutory provision creates beneficial results or is necessarily incidental to power and rights granted under the Act. *LeResche*. Including penalties and interest as something Diamond has to pay results in them being paid, and harmonizes §§070(f), 155€ and 155(p) with §045(a). Diamond's contention is unreasonable, impractical and nonsensical because it results in *no* employer ever having to pay §§070(f), 155(e) and 155(p) benefits solely because they are not listed in the statute that tells parties what all employers must insure for and pay in appropriate situations. There is no way to construe §045(a) as Diamond suggests and harmonize it with the Act without engaging in mind-bending mental gymnastics.

For example, if benefits payable under §§070(f), 155(e) and 155(p) are not considered "compensation," could parties effectively settle claims for these benefits in an approved settlement agreement? Section 012(a) references settlement agreements discharging an employer's liability for "compensation." Are benefits under §§070(f), 155(e) and 155(p) dischargeable when the parties settle if they are not "compensation"? Section 015 provides employers with a subrogation right for "compensation" it paid, against an injured worker's recovery in a third-party claim. Is an employer or insurer subrogated under §§015(e), and (g) to recover interest paid from the injured worker's third-party settlement if interest is not "compensation"? Must penalties and interest be paid periodically, promptly and directly to the person entitled to them under §155(a) if they are not compensation? Does an injured worker have a lien for penalties and interest under §165(a)? Can he collect defaulted awards under §170(a)-(b)? If not, how does he recover these benefits? Can he sue the employer for them in civil court? No; the Act is his exclusive remedy under §055.

Moreover, there are other problems with Diamond's position on the contractor-over statute. The Act must first be interpreted to ensure "quick" delivery of "indemnity and medical benefits" to injured workers at a reasonable cost to employers under §001(1). The Act does not define "indemnity"; in context they are benefits paid under an insurance policy. *Black's Law Dictionary*.

What are commonly call "penalties," are actually "additional awards" or "amounts" of compensation because they are paid in "addition to" and levied upon "indemnity benefits." They are included in the Act under a section called, "Payment of compensation." Adopting Diamond's position would mean it would have to pay Employee's PTD and medical benefits in accordance with the Act, but would not have to pay penalties or interest. The Fund would have to pay interest but not penalties pursuant to *West*. Employee could not obtain its penalties by suing Diamond because it is protected under §055(a), and he would be left to try to obtain the penalties from Employer directly. Employer is a limited liability company that may not have sufficient assets to satisfy *Elattar I*'s and *III*'s penalty awards. If in the future, Employee has disputes with Diamond over indemnity or medical benefits, including late-payment issues along with any associated penalties and interest, he will have to file three claims against three parties for three different benefit categories and presumably have three separate hearings because there would be no need for all parties to participate in all three claims since their potential liabilities would all differ. Were this decision to accept Diamond's position on the §045(a) issue, the result in this and all similar cases would not be "quick." For these same reasons, Diamond's position on §045(a) is not efficient or predictable either, as required under §001(1).

Diamond's position also runs contrary to §025(b), which states all insurance policies under the Act are "conclusively presumed to cover all the employees and the entire compensation liability of the insured employer." The law makes a distinction between an "insured" employer and an un-insured one. Diamond is the "*insured* employer" in this case under §045(a). Therefore, it follows that it should be liable all "compensation" payable under the Act.

The last legislative mandate is to interpret the Act to ensure it is "fair." While Alaska National implies it is not fair to make it pay for its insured's errors or omissions, it collected additional premiums from Diamond to cover this exact situation. In other words, Alaska National has been

compensated for the additional exposure. Its policy requires Alaska National to pay all benefits awarded against its insured and reserves the right to recover benefits not customarily paid, from Diamond. Further, notice of Employee's injury to Diamond, by statute and by Diamond's insurance contract with Alaska National, constitutes notice to Alaska National. Diamond knew about Employee's injury when it happened because Gallo was present. Therefore, its knowledge is imputed to Alaska National under the contract and §030(3).

Alaska National contends the real issue is not knowledge of the injury, but knowledge that Employer had no insurance. It asserts Gallo had no knowledge that Employer had no insurance, "none, zero." Alaska National contends there is no legal requirement that a contractor-over file an injury report on someone else's injured employee under §070(a). This decision need not reach that question. The facts are not disputed; Diamond knew the day after Employee's injury that Employer had no insurance and knew or should have known the injury at least "may" be covered under Diamond's insurance. The Diamond-Alaska National insurance policy required Diamond to report to its insurer "at once if injury occurs that may be covered" by Alaska National's policy. The Act states: "The obligation of the insurer is not affected by a default of the insured employer after the injury, *or by default in giving a notice required by this policy*." AS 23.30.030(4) (emphasis added).

Diamond never informed Alaska National there was an injury or that the injured worker's employer had no workers' compensation insurance. Had it done so, Alaska National could have investigated the situation and could have either rejected coverage or accepted the case and immediately started paying benefits. Guardian, a stranger to this system, was left to obtain guardianship and do his best in obtaining medical care for Employee. As Diamond's witnesses testified, the sooner a catastrophically brain-injured patient gets medical care the better the result. Instead, Employee got whatever benefit Medicaid provided him and his family got no benefits at all for four months. If there is a dispute between Diamond and Alaska National over the latter paying benefits awarded in *Elattar I* and *III* based on the former's errors or omissions, that dispute is best decided by those parties in a civil action where a court can construe the parties' relative liability under their insurance contract. Therefore, construing the Act to make Diamond and Alaska National liable for §§070(f), 155(e) and 155(p) benefits is eminently "fair." *Thorsheim*.

Lastly, legislative history on this statute prior to 2004 is scant. Minutes from 2004 legislative hearings show no discussion about specific benefits a contractor-over or project owner had to pay under §045(a). Rather, the bill's sponsor said the amendment adding "project owners" as liable parties "ensures that injured employees receive *all benefits available* under the Alaska Workers' Compensation Act" (emphasis added). He further added "the entire workers' compensation benefits system is geared toward making the individual whole based on the injury" and argued the project owner amendment "will enhance the guarantee that workers injured on the job will be able to recover *the full benefits of the Workers' Compensation Act*" (emphasis added). (House Labor & Commerce Standing Comm. Meeting Minutes, S.B. 323, Tape No. 04-48 Side A, No. 1768 (House Labor & Commerce Comm. File, S.B. 323 (April 27, 2004)). This history, read in conjunction with the above analyses, also suggests expanding §045(a) to include all benefits payable under the Act including penalties and interest. *Shehata*. Alternately, even without expanding §045(a), the Act read as a harmonious whole, and to form an efficient, dignified and certain remedy in a simple and speedy fashion, requires Diamond and Alaska National to pay all benefits awarded in *Elattar I* and *III*. AS 23.30.001(1); §005(h); *Shirley*, *Gordon*; *Hewing*. This decision will so order.

(B) Attorney fees and costs.

Guardian claims Diamond and Alaska National are liable for attorney fees and costs awarded in *Elattar I*. Diamond and Alaska National concede attorney fees are payable under the contractor-over provision because the attorney fee statute §145 is specifically enumerated in §045(a). Nevertheless, they both deny liability for attorney fees contending neither controverted Employee's right to benefits and moreover, Alaska National immediately began paying benefits as soon as it learned Employee had been injured while working for an uninsured sub-contractor on Diamond's job. Diamond and Alaska National contend they are not liable for attorney fees under either a controversion or untimely payment theory because they did not controvert Employee's right to benefits or his claim, and because Alaska National timely paid all benefits due and owing once it found out about its potential liability. Therefore, while Diamond's and Alaska National's liability under §045(a) is not at issue, their liability under §145(a) remains disputed.

Elattar I decided the underlying attorney fee and cost issue and no party appealed it. It is, therefore, the law of the case at least vis-à-vis Guardian versus Employer. *Groom*. All parties agree Diamond's and Alaska National's liability to pay benefits flow from *Elattar I* and §045(a); they also agree attorney fees are designated as a benefit payable by the contractor-over in that statute. The first impression issue here is whether Diamond and Alaska National have a legal basis to challenge their liability for *Elattar I* attorney fees and costs notwithstanding *Elattar I*'s finality and §045(a)'s inclusion of attorney fees as a benefit a contractor-over must pay.

Guardian filed two claims and requested a hearing on only the claim against Employer, which was set for October 24, 2019. He then sought to add his claim against Diamond as an issue for that hearing. Diamond opposed and a designee declined to set both claims on for the October 24, 2019 hearing. At the October hearing, Diamond demanded its right to participate, citing possible problems with collateral estoppel; it was allowed to participate fully. Not only did Diamond appear at and participate in the *Elattar I* hearing, it advocated on Employer's behalf even though *Elattar I*, given the bifurcated hearings, was technically not binding on Diamond or Alaska National because they reserved their right to re-argue all issues decided at the *Elattar I* hearing at a December hearing. The December 4, 2019 hearing was set to address Guardian's claims against Diamond. In other words, Diamond and Alaska National had two complete bites at the entire apple. At the December hearing Diamond presented no evidence or argument disputing *Elattar I* and only presented evidence and argument directed to its liability under §045(a).

At first glance, as the undisputed contractor-over, Diamond has statutory liability to pay attorney fees awarded in *Elattar I* because the attorney fee award has not been appealed and because attorney fees are expressly included in benefits a contractor-over must pay in a case where a worker is injured while employed by an uninsured subcontractor under §045(a) and the parties are bound by *Elattar I* under §030(3). Litigation costs awarded in *Elattar I* do not arise under statute but are provided for by regulation. AS 23.30.005(h); 8 AAC 45.180(f). While no party appealed *Elattar I*, no party presented new evidence at the December hearing regarding costs and no party argued against a cost award against Diamond and Alaska National. On this basis, Guardian will prevail on his request for *Elattar I* attorney fees and costs against Diamond and Alaska National.

Alternately, Diamond and Alaska National present a novel argument contending that attorney fees and costs awarded in *Elattar I* are subject to a collateral attack from the contractor-over. It is unclear under what theory this basis derives. Guardian seeks statutory minimum fees under §145(a), and costs. He contends Diamond and Alaska National controverted-in-fact by failing to unequivocally accept the claim as compensable and stipulate to compensability. Guardian contends Alaska National's voluntary payment under a reservation of rights equals a controversion-in-fact. Alaska National disagrees, contending no attorney fees are owed because Diamond and Alaska National never resisted paying benefits, never filed a formal controversion notice and while "[n]obody's claiming Gallo did everything right," Alaska National "did everything right." Diamond and Alaska National's position is incorrect on the facts and the law.

(1) The facts.

Diamond has taken an inconsistent position on attorney fees and is at odds with Alaska National's most recent position. In its December 20, 2018 answer, Diamond and Alaska National denied all liability for "any attorney fees." However, in their closing argument at the December 2019 hearing, they contended "reasonable fees would be entirely appropriate and would have been voluntarily paid by Alaska National if presented by Mr. Bredesen." In its February 21, 2020 briefing, Alaska National represented by separate counsel contended neither Diamond not it were liable for attorney fees. Since the closing argument stated Diamond's and Alaska National's position on the attorney fee issue, and Diamond still has the same counsel on this issue, this decision presumes Diamond disputes Guardian's entitlement to statutory fees on legal grounds; it appears Alaska National now disputes any attorney fee award also based on legal arguments. Thus, the statutory presumption of compensability does not apply to this attorney fee issue. *Rusch*.

The facts pertaining to the attorney fee and cost issue are undisputed, though the factual and legal conclusions drawn from them are at issue. On November 6, 2018, Guardian filed a claim against Employer and the Fund. The Fund, not Diamond, notified Alaska National that there had been an injury, the alleged employer had no insurance and Diamond was liable as the contractor-over. Guardian's initial claim, and no one or nothing else, put Alaska National on notice, which resulted in significant benefits for Employee. Diamond correctly notes the Act contains no express provision requiring it to file an injury report on Employee's behalf when it learned about his injury

while he was employed by an uninsured subcontractor. Arguably, once Diamond became the "statutory employer" under §§045(a) and 055, the notice requirements in §070(a) adhered to Diamond by inference. But this decision need not reach that question because Diamond had a contractual obligation in its insurance policy to report this injury to Alaska National. Instead, it did nothing. McFarland's uncertain recollection that she may have asked Diamond why it did not file an injury report or advise her about the injury, but if she did ask she could not recall its response, is not credible. AS 23.30.122; *Smith*. Given her understanding about how critical prompt medical treatment is for catastrophic head injuries, it is inconceivable she would not have asked Diamond why it never told Alaska National about this injury and uninsured employer, which had clear legal implications under the Act for Diamond and Alaska National.

On December 4, 2018, Guardian claimed benefits against Diamond and Alaska National. Contrary to Alaska National's argument, it did not immediately begin paying PTD benefits, but by December 17, 2018, began "voluntarily" paying TTD benefits totaling $2,420 and continuing at $110 per week; TTD benefits cease on the date of medical stability. *Shirley*. Though Diamond said it would have agree Employee was PTD if asked, Diamond was asked in Employees' claim to admit or deny and had an opportunity and a duty to either accept the claim and Employee's PTD status by admitting it, or deny it in its answer. 8 AAC 45.050(c)(3). Instead, Diamond's December 20, 2018 answer said Employee provided no evidence he was Employer's "employee" and noted Employer denied an employee-employer relationship. Diamond stated the employee-employer defense was "a complete defense" to Guardian's claim for benefits against all parties. It further stated Alaska National initiated benefit payments "pending resolution" of the employee-employer dispute. Alaska National denied it owed late-payment penalties and attorney fees. Lastly, Alaska National reserved its right to assert additional affirmative defenses without limitation.

Despite the plain language in Diamond's answer, it contends there was no reservation of rights and nothing in the answer suggests Diamond or Alaska National would ever terminate Employee's ongoing benefits. When asked if the answer accepted or denied liability for Guardian's claim, McFarland evaded and said she was unfamiliar with the terms "accepted or denied," and to her cases are either "compensable," or "not compensable." Lamson's testimony was similar. McFarland's and Lamson's testimony is not credible. AS 23.30.122; *Smith*. First, the terms

"accepted or denied" in reference to claims are commonly used in workers' compensation. *Rogers & Babler*. Second, at the October *Elattar I* hearing, Diamond in its arguments and Alaska National's adjuster Harvey used the terms "accept," "accepting" and "accepted" in reference to Employee's claim at least four times. However, by December, McFarland and Lamson, also Alaska National employees, were unfamiliar with these terms, which were "foreign," and Diamond argued the phrase "accepted claim" does not exist in workers' compensation law.

Alaska National's contention that the answer contains no reservation of rights and no opportunity to controvert benefits based on the employee-employer relationship issue is not persuasive. For example, it is possible Employee may someday have full mental capacities and a clear recollection to articulate facts relative to the employee-employer issue, which could conceivably modify *Elattar I* and completely alter the employee-employer conclusion. It is inconceivable that under such hypothetical circumstances Diamond and Alaska National would not file a petition for modification and seek to controvert their liability based on newly discovered evidence. Furthermore, as Diamond stated at the *Elattar I* hearing "we are neither denying nor accepting that he [LXS Carpentry] is an employer." Neither Diamond nor Alaska National "unqualifiedly" accepted Guardian's claim. Lamson admitted if evidence about the employee-employer relationship had sent Alaska National "in a different direction," they would have "dealt with it." Presumably, that is still Alaska National's position consistent with its reservation of rights.

On July 30, 2019, when Guardian asked to add his claim against Diamond to the October 2019 hearing set to address only his claim against Employer, Diamond objected on a technicality; they insisted Guardian file a separate hearing request on the second claim even though the claims in both instances were identical; as it turned out the only additional issue was Diamond's and Alaska National's liability for penalties, interest and attorney fees under §045(a). Guardian made a similar request at the October 7, 2019 prehearing conference and at the October 24, 2019 *Elattar I* hearing. At the October 7, 2019 prehearing conference, Diamond again objected and said Guardian had never stated why he needed a hearing against Diamond; Guardian explained he needed a decision and order determining compensability and awarding benefits against Diamond to make it more difficult for it to later controvert. At the October 24, 2019 hearing, Diamond objected based on the October 7, 2019 prehearing summary order but nevertheless demanded its right to participate

fully in the *Elattar I* hearing even though the resultant decision and order had no collateral estoppel effect on it, and Diamond could present new witnesses and re-argue the entire case in December.

The *Elattar I* hearing disclosed that Gallo and Bullock were present when Employee fell and Bullock knew the next day that Employer had no workers' compensation insurance. Contrary to Diamond's argument at the October 24, 2019 hearing that there was no evidence, "none, zero," that Gallo knew Employer had no workers' compensation coverage, Gallo was both aware of the injury and that Employer had no insurance. Yet Gallo and Diamond did nothing. Because they did nothing, Employee eventually hired an attorney. Lamson's December testimony that she had "no idea" why it took four months for Alaska National to find out about the injury and coverage issues is not credible. AS 23.30.122; *Smith*. She knew exactly why it took four months: because Gallo and Diamond never reported it.

At the *Elattar I* hearing, Diamond also argued it was participating at hearing only because Employer had taken a position it had not adopted; *i.e.*, Employer disputed the employee-employer relationship, but apparently Diamond did not. Nonetheless, Diamond still raised defenses against Guardian's claim and did not admit or deny the dispositive factual and legal issues in its answer, briefing or arguments at hearing. Instead, it litigated on Employer's behalf at the *Elattar I* hearing.

Alaska National contended at the *Elattar I* hearing that if Bredesen had just given it an opportunity to talk to Guardian "we might not be here today." It contends it declined to depose Guardian or engage in other discovery to avoid having to pay Bredesen attorney fees. Yet, Diamond and Alaska National participated fully at the *Elattar I* hearing and actively advocated positions supporting Employer's defenses and undercutting Guardian's claims; their attorney repeatedly objected to evidence and witnesses. Even then, Diamond and Alaska National, initially said "depending upon this finding" on the employee-employer relationship it might stipulate to some allegations raised in Guardian's claim. At hearing, for the first time Diamond and Alaska National finally stipulated to Employee's PTD status and to his past and ongoing medical care being reasonable, necessary and work-related. Nothing prevented them from stipulating to these issues prior to the *Elattar I* hearing. 8 AAC 45.050(f)(1). Diamond's contention it merely "commented" on the evidence

without taking a position is contrary to the record and is decidedly unpersuasive. It made a powerful closing argument on Employer's behalf.

The December 4, 2019 hearing occurred because Diamond did not agree to have Guardian's claims against it heard at the October 24, 2019 hearing. Yet, Diamond presented no evidence addressing any issue decided in *Elattar I*; this shows there was no need for a separate hearing. Its arguments and evidence were limited to Diamond's and Alaska National's liability to pay penalties, interest and attorney fees under §045(a). These issues could have easily been presented and argued at the *Elattar I* hearing. Diamond continued to litigate against Guardian's position. On March 6, 2020, Diamond was the only party to argue against Guardian's December 6, 2019 petition seeking reconsideration of the *Elattar I* payee for the §070(f) penalty, even though the result did not directly affect Diamond. In short, Diamond and Alaska National resisted and actively litigated against Guardian's claim against Employer and against them, at every turn. The voluntary payment of benefits does not change the facts and law applicable to an attorney fee award.

(2) The law.

Diamond makes numerous policy-related arguments against Guardian's request that it and Alaska National be required to pay attorney fees in this instance; it also invokes "fairness" considerations. But Diamond's arguments overlook the fact that it did not act properly in this case and its failure to act required Guardian to hire an attorney to protect Employee's rights. Diamond did absolutely nothing to affect Employee's receipt of benefits following his injury. As between an insurer and an injured worker, "notice to or knowledge of the occurrence of the injury on the part of the insured employer is notice or knowledge on the part of the insurer"; the "insured employer," in addition to the uninsured one, is "bound by and subject to the orders, awards, judgments, and decrees made against the insured employer." AS 23.30.030(3). Though Diamond was not Employee's "employer" as defined in §395(20), it conceded it became his employer as defined in §045(a) and gained protection against a civil action as his employer under §055. Diamond became the "insured employer" in this case under §045(a) because Employer was not insured. Any "fairness" issues based on attorney fees and costs payable because Diamond failed to act appropriately is a matter best determined between Diamond and Alaska National in a civil action interpreting their insurance contract and respective duties and obligations.

It is unclear why Diamond would consider "reasonable fees" appropriate for Guardian given its position on the attorney fee issue. Either Guardian is entitled to attorney fees against Diamond and Alaska National as a matter of law or not. AS 23.30.145(a) provides for statutory minimum attorney fees on "compensation" if a claim has been "controverted, in whole or in part." Fees under this section are allowed only on the amount "of compensation controverted and awarded." It is undisputed Diamond never filed a formal controversion notice before hearing, though it did file one immediately after hearing; the significance if any of that filing will not be addressed here.

"Resistance" is one method to controvert a claim; a formal controversion notice is not always required. *Houston*. "Voluntary" benefit payment does not preclude an award of attorney fees. *Brown*. As in *Brown*, Alaska National reviewed the evidence it had obtained from the Fund's adjuster and any other sources, considered the presumption of compensability, and made a tactical decision to begin paying benefits while at the same time neither admitting nor denying Employee was entitled to them. It knew Guardian had an attorney because the Fund's adjuster told Harvey when he called Alaska National in November 2018 to report the injury and Employer's lack of insurance. Alaska National's voluntary payment "can fairly be construed as the equivalent of 'awarding such compensation" because Alaska National determined it was probably "merited or due" under the circumstances and further resistance would be "futile." *Brown*.

This case is similar to *Shirley*. The employer in that case began paying the injured worker benefits but resisted changing his TTD status to PTD status; eventually, the employer changed payments to PTD benefits. It claimed "no benefits had been controverted" just as Diamond contends in this case. A hearing determined the employer had controverted-in-fact the employee's entitlement to PTD benefits and was required to pay statutory minimum attorney fees. On appeal, *Shirley* held that without contrary evidence the insurer should have changed the worker's status from TTD to PTD. Its refusal to change his status constituted a controversion under §145(a) and justified the attorney fee award. Here, it took Guardian's claim against Employer who did nothing to provide benefits to Employee, and the Fund to get Diamond's and Alaska National's attention; his claim against Diamond asked it and Alaska National to either admit or deny his claims so Guardian new "what proof will be required at the hearing." 8 AAC 45.050(c)(3).

Though Alaska National started paying minimal TTD benefits and some medical expenses (much had already been paid by Medicaid), its answer raised various defenses and neither affirmatively accepted nor denied relevant allegations made in Guardian's claim. Alaska National's answer created the litigation Alaska National claims it was trying to avoid. The answer "put into question" whether Employee was entitled to benefits from Employer, and by statutory implication from Diamond, at all, notwithstanding Alaska National's voluntary payments. Alaska National's answer expressly reserved its right to deny any liability on Guardian's claim; thus, its voluntary payments were controverted. *Kinter*; *Childs*. Since Diamond, which had knowledge of the injury and Employer's lack of insurance did absolutely nothing, it controverted-and-fact Employee's entitlement to all benefits, even those paid voluntarily prior to Alaska National's answer. Guardian made it clear that without a stipulation and order he needed a decision and order against Diamond to prevent it from unilaterally controverting ongoing benefits; he was correct. *Wozniak*.

Though Diamond argued Guardian's position on the need for a decision and order was "bizarre," his position was correct and well-recognized in workers' compensation law. In *Summers* the employer paid medical expenses but "refused to acknowledge" the injured worker had a "valid and compensable claim, and reserved the right to assert affirmative defenses against future claims." This is exactly what Diamond and Alaska National did in this case. While Diamond retains its right to controvert in the future, because *Elattar I*, based on the parties stipulations at hearing, determined Employee is PTD status, and based on the facts and law found an employee-employer relationship "the employer must first adduce evidence of a change in the worker's disability status before it could controvert permanent total disability benefits." *Shirley*.

The safeguards *Elattar I* provided Employee are critical; once *Elattar I* made factual findings and orders concerning employee status, disability and medical care, no party could unilaterally controvert and cut off Employee's benefits without first petitioning for relief and presenting its evidence at a hearing. For example, had Guardian not pressed for and obtained the *Elattar I* decision, any party could have unilaterally controverted Employee's rights to benefits and cut him off. "Unilaterally" does not mean without law or facts to support a controversion; it means on its own without a hearing. Guardian would then have the burden to file a claim and proceed to hearing to obtain additional benefits; but during the time it took to accomplish this and obtain a decision

and order Employee would be receiving no benefits. Given *Elattar I*, Employee's benefits continue unless and until another decision and order decides the moving party's grounds to controvert are warranted and benefits should cease. *Shirley*; *Wozniak*.

Elattar I also awarded costs; no party appealed it. *Groom*. Diamond did not expressly address its liability for costs at hearing. The contractor-over statute does not mention costs. However, the legislature gave the division authority to adopt rules for hearing panels under §005(h). Costs are routinely awarded and paid by insurers. *Rogers & Babler*. They are awarded pursuant to regulation 8 AAC 45.180(f). The law requires employers to carry insurance "to cover . . . the entire compensation liability of the insured employer. . . ." AS 23.30.030(b). To exclude litigation costs as something an employer or contractor-over has to pay would make no sense. The "ultimate social philosophy behind compensation liability" is to resolve work-related injuries "in the most efficient, most dignified, and most certain form." *Gordon*. Process and procedure in these cases are supposed to be as summary and simple as possible under §005(h). If litigation costs awarded against an uninsured employer could not be recovered from a contractor-over, the injured worker would be left to obtain collection from the uninsured employer in yet another claim. Such a requirement would thwart the legislature's intent in every respect.

Whitehurst testified Friedman was "intimately involved" in decision making in this case. Friedman's expenses are the bulk of costs awarded in *Elattar I*. Whitehurst's credible testimony supports the cost award in *Elattar I* and no other evidence detracts from it. AS 23.30.122; *Smith*.

Given the above analysis, Guardian's request for attorney fees and costs from Diamond and Alaska National will be granted. This decision is based on (1) the unambiguous language in §045(a) that requires a contractor-over to pay attorney fees, and (2) on the above analysis regarding litigation costs. It is also based (3) on the facts and the law, which demonstrate that Diamond and Alaska National resisted the claim notwithstanding Alaska National's voluntary payments, refused to admit or deny Guardian's claims, actively advocated against his claims at the *Elattar I* hearing, stipulated to Employee's PTD status and the reasonableness and necessity of his past and ongoing medical care only after Guardian filed a claim against them and began to present his relevant evidence at hearing, and reserved all defenses giving Diamond and Alaska National the right to

unilaterally controvert benefits in the future but for the *Elattar I* decision. Guardian's attorney successfully prosecuted his claims. Alaska National's litigation tactics required an additional hearing, which lengthened the time for legal services and increased case complexity. The benefits to Employee are dramatic and life-long as all parties agree he will probably be PTD status and require daily assisted-living attention from skilled providers for the rest of his life.

CONCLUSIONS OF LAW

1) The decision to proceed with the hearing absent Employer was correct.
2) The oral order dismissing the Fund as a party was correct.
3) Diamond and Alaska National are liable for interest, penalties, attorney fees and costs awarded in *Elattar I* and *III*.

ORDER

1) The remaining disputed issues from Guardian's December 4, 2018 claim against Diamond and Alaska National, heard at the December 4, 2019 hearing, are granted.
2) Diamond and Alaska National are liable for interest, penalties, attorney fees and costs as awarded in *Elattar I* and *III* and in accordance with this decision.

Dated in Anchorage, Alaska on May 1, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert C. Weel, Member

/s/
Justin Mack, 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 Ezzeldin Elattar, employee and Alan Miller, guardian v. Gallo d/b/a Diamond Construction, Alaska National Insurance Co., defendants; Case Nos. 20187732J; 201818004J; and 201816325; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on May 1, 2020.

/s/
Nenita Farmer, Office Assistant