

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

SAMANTHA L. ATLAS,	)	
	)	INTERLOCUTORY
Employee,	)	DECISION AND ORDER
Claimant,	)	
	)	AWCB Case No. 201617084
v.	)	
	)	AWCB Decision No. 20-0072
STATE OF ALASKA,	)	
	)	Filed with AWCB Anchorage, Alaska
Self-Insured Employer,	)	on August 17, 2020
Defendant.	)	
_____	)	

The State of Alaska's July 11, 2019 petition to increase its recovery of an overpayment of benefits was heard in Anchorage, Alaska on February 6 and June 18, 2020, dates selected on December 31, 2019 and April 8, 2020. An August 28, 2019 affidavit of readiness for hearing gave rise to this hearing. Non-attorney Barbara Williams appeared and represented Samantha L. Atlas (Employee) who appeared and testified. Assistant Attorneys General Lars Johnson and Adam Franklin appeared and represented State Of Alaska (Employer). Witnesses included Paul Craig, Ph.D., Barrington Coke, and Ashley Moser. The record closed at the hearing's conclusion on June 18, 2020.

## ISSUES

Employee contended she should have been able to call additional witnesses she had subpoenaed. Employer asked for an offer of proof the subpoenas had been properly served and objected to one of Employee's proposed witnesses as unduly repetitious. The designated chair orally ruled the subpoenas had not been properly served and the witnesses would not be compelled to testify and sustained Employer's objection to Employee's other proposed witness.

***1. Were the oral rulings on Employee's proposed witnesses correct?***

Employee objected to consideration of a transaction log and a list of indemnity payments filed by Employer because they were not in the font Employee had requested the Division use when sending her printed material. Employee acknowledged she had not made the same request of Employer or its adjuster, and the designated chair overruled the objection. In essence, Employee was asking that the hearing be continued and that Employer be ordered to produce the documents in a different font.

***2. Was the oral ruling denying a continuance correct?***

Employer contended it had had erroneously paid Employee disability payments for periods of time when she was working, and asked that it be allowed to recover the overpayments by withholding more than 20 percent of future disability payments. Employee opposed an accelerated recovery, stating she had questions about the calculation of the overpayment, and contended she had not been provided with the medical care she seeks.

***3. Should Employer be allowed to withhold more than 20 percent of future compensation to recover its overpayment?***

**FINDINGS OF FACT**

A preponderance of the evidence establishes the following facts and factual conclusions:

1) Employee worked for Employer as a Psychiatric Nurse Assistant III at Alaska Psychiatric Institute (API). Her work week consisted of three 12 and one-half hour days, Saturday, Sunday, and Monday, followed by four days off. On November 19, 2016, an altercation occurred between two patients. When she attempted to intervene, she was punched in the head and abdomen. (Report of Occupational Injury, November 20, 2016; Timesheets).

2) EMS reported Employee had been punched twice in the chest, and fell backwards, but caught herself, and she had not lost consciousness. The first responder was concerned about Employee's shortness of breath. (Anchorage Fire Department, Prehospital Care Report, November 19, 2016).

3) Employee was taken to the Alaska Regional Hospital (ARH) emergency room where she was diagnosed with chest wall contusion. She denied any head injury or loss of consciousness and the examining physician found no evidence of a head injury. A CT scan of Employee's head showed no abnormalities. She was discharged with instructions to see her primary care doctor and restricted from work for three days. (ARH, Emergency Department Records, November 19, 2016).

4) On November 25 2016, Employee returned to the ARH emergency room complaining her gait had "been off," and she had shortness of breath and dizziness. She said that while her assailant could have hit her more than once, she had not been hit in the head. The doctor noted a tender spot on her occipital scalp, and noted she may have hit her head when she fell to the ground; he diagnosed a concussion with loss of consciousness of 30 minutes or less, and again restricted her from work for three days. (ARH, Emergency Department Records, November 25, 2016).

5) On November 29, 2016, Employee told Harbir Makin, M.D., she was knocked unconscious for a brief period, but was not aware of having a head injury. Dr. Makin diagnosed a probable concussion and recommended an eye examination to rule out retinal detachment. He restricted Employee from work for one week. (Dr. Makin, Chart Note, November 29, 2016).

6) Employee's weekly TTD compensation rate is \$1,211.00, or \$2,422.00 for each two-week benefit period. (Employer, Wage Documentation Request; Online Benefit Calculator Printout).

7) On December 6, 2016, Employee told Dr. Makin she was still having intermittent headaches and fear and anxiety for no reason. Dr. Macon diagnosed a concussion with posttraumatic headaches, and recommended an appointment with a different ophthalmologist who could see her sooner. He released Employee to work as of December 7, 2016. (Dr. Makin, Chart Note, December 6, 2016).

8) It is unclear from the record whether Employee returned to work on December 6 or 7, 2016, but she was paid TTD from November 20, through December 5, 2016. (Employer Transaction Log, Check Nos. 330036 and 359185).

9) On December 15, 2016 Employee went to Mari Hately, M.D., at US HealthWorks. Employee told Dr. Hately she had been knocked unconscious in the assault at work and did not wake up until she was in the ambulance on the way to the emergency room. Employee reported

she had been having headaches, mood and vision changes, and a decrease in short-term memory since the incident. She said she had tried going back to work, but the staff felt she was having too many problems and sent her home. Dr. Hately restricted Employee from work until she could be seen for a follow-up visit. (Dr. Hately, Chart Note, December 15, 2016).

10) On December 20, 2016, Employee had not significantly improved, and Dr. Hately referred her to an ophthalmologist and for an MRI. Dr. Hately continued to restrict Employee from work. (Dr. Hately, Chart Note, December 20, 2016).

11) On December 20, 2017, Employer resumed paying Employee TTD. (Employer Transaction Log, Check No359753).

12) On December 23, 2016, Employee had an MRI of her brain that showed no acute or significant abnormalities. (MRI Report, December 23, 2016).

13) On December 24 2016, Dr. Hately referred Employee to a neurologist. (Dr. Hately, Chart Note, December 24, 2016).

14) On January 4, 2017, Employee was seen by a neurologist, Scot Hines, M.D. Employee could not tell Dr. Hines a lot about the assault, but she may have struck her head on the floor without a significant loss of consciousness. Employee reported having problems with short-term memory, lack of focus, lightheadedness, and nausea. Dr. Hines concluded Employee might have a mild traumatic brain injury (TBI), but it was not her most significant issue. He diagnosed anxiety, depression, and an element of posttraumatic stress disorder and said she may need to see a behavioral health expert or psychiatrist. Dr. Hines did not recommend further neurological workup or testing. (Dr. Hines, Chart Note, January 4, 2017).

15) On January 6, 2017, Dr. Hately added PTSD to her diagnoses of TBI and concussion with loss of consciousness. She restricted Employee from work for an additional 14 days. (Dr. Hately, Progress Report, January 6, 2017).

16) On January 7, 2017, Employee was seen by Alyxandria Morey, O.D. The physical examination of Employee's eyes was normal, but her visual field and optic nerve could not be evaluated because Employee was unable to focus on the target or did not cooperate. (Dr. Morey, Chart Note, January 7, 2017).

17) On January 20, 2017, Dr. Hately found Employee had not significantly improved and kept her off work for 18 more days. (Dr. Hately, Progress Report, January 20, 2017).

- 18) On February 6, 2017, Dr. Hately restricted Employee from work for an additional 30 days and transferred her care to family nurse practitioner (FNP) Katherine Hardy. (Dr. Hately, Progress Report, February 6, 2017).
- 19) On February 15 2017, FNP Hardy took Employee off work indefinitely. (FNP. Hardy, Progress Report, February 15, 2017).
- 20) On March 11, 2017, Employee was seen by Eugene Wong, M.D. and Michael Fraser, M.D. for an employer's medical evaluation (EME). The doctors examined Employee and reviewed her medical records since the work injury. They opined the injury caused only contusions and stated that Employee's perception of her physical symptoms may be colored by her emotional response to the assault. They did not believe Employee had any cognitive residual from a TBI, but was showing psychiatric symptoms. They recommended neuropsychological testing. (Drs. Wong and Fraser, EME Report, March 11, 2017).
- 21) On March 13, 2017, Employee was seen by Laura Kompkoff, O.D. who provided a mild prescription for Employee's right eye, with hope it would relieve her dizziness, headaches, and photophobia. (Dr. Kompkoff, Chart Note, March 13, 2017).
- 22) On March 17, 2017, FNP Hardy continued to restrict Employee from work. (FNP Hardy, Progress Report, March 17, 2017).
- 23) On May 11, 2017, FNP Hardy released Employee to limited duty work. Employee was allowed to work four hours, with the following two days off, and she was not be involved in direct patient care. (FNP Hardy, Progress Note, May 11, 2017).
- 24) On May 26, 2017, Employee was seen by Christopher Albert, PA-C, at Tower Orthopedics for right shoulder and arm pain. PA Albert stated the pain was likely secondary to neck trauma sustained in the assault at work. (PA Albert, Chart Note, May 26, 2017).
- 25) On May 30, 2017, Employee worked four hours. She was also paid for seven and one-half hours for the Memorial Day holiday on May 29, 2017. (Timesheet, May 16-31, 2017).
- 26) On May 31, 2017, Employee reported to FNP Hardy that she had returned to work the previous day. (FNP Hardy, Chart Note, May 31, 2017).
- 27) On June 1, 2017, Employee again worked four hours. (Timesheet, June 1-15, 2017).
- 28) Despite the fact Employee had worked on May 30 and June 1, 2017, she was paid her full TTD rate for the two-week period from May 21 through June 3, 2017, although it was

categorized as temporary partial disability (TPD). (Employer Transaction Log, Check No. 356064).

29) Ashley Moser, the adjuster on Employee's claim states the TPD for the period from May 21 to June 3, 2017 should have been \$2,052.77, which would mean Employee was overpaid \$369.73. (Moser, Affidavit, June 19, 2019). However, because there is no evidence of Employee's earnings for the period, TPD cannot be calculated. (Observation).

30) On June 29, 2017, FNP Hardy changed Employee's work restrictions allowing her to work six hours with the next two days off. (Progress Note, FNP Hardy, June 29 2017).

31) On July 14, 2017, Employee worked three hours. (Timesheet, July 1-15, 2017).

32) On July 19, 2017, Employee was paid \$2,328.44 in TPD for the period from July 2, through July 15, 2017. (Employer Transaction Log, Check No. 3366742). Again, because there is no evidence of Employee's earnings for the period, TPD cannot be calculated. (Observation).

33) On July 20, 2017, Alfred Lonser, M.D., performed a right stellate ganglion block for complex regional pain syndrome. (Dr. Lonser, Operative Note, July 20, 2017).

34) On July 24, 2017, Employee reported no relief from the ganglion block injection. (Dr. Lonser, Chart Note, July 24, 2017).

35) On August 21, 2017, FNP Hardy released Employee to full duty work on August 26 and 28, with a return to a full schedule on September 1, 2017. (FNP Hardy, August 21, 2017).

36) Employee worked a full shift on August 26 and August 28, 2017. (Timesheet, August 16-31, 2017). Because there is no evidence of Employee's earnings for the period, TPD cannot be calculated. (Observation).

37) Employee resumed her regular weekly full-time schedule on September 2, 2017 and worked full-time from September 2, 2017 through July 15, 2018. (Timesheets)

38) Employee's return to work on September 2<sup>nd</sup> was overlooked, and Employer continued to pay Employee TTD from September 2, 2017 through July 15, 2018. (Moser; Observation; Employer Transaction Log, Check Nos. 368319, 368554, 368862, 369040, 369259, 369601, 369850, 370697, 79066, 371818, 372629, 372990, 373562, 373857, 374526, 375050, 375508, 376029, 376692, 377094, 377535).

39) On December 12, 2017, FNP Hardy issued a progress report stating Employee could return to work on December 16, 2017, nothing in her chart note indicates Employee was being

restricted from work, and December 12, through 15, 2017 were Employee's regularly days off.(FNP Hardy, Progress Report, December 12, 2017; Timesheet, December 1-15, 2017).

40) On February 7, 2017, FNP Hardy issued a progress report stating Employee could return to work on February 10, 2017, and her chart note indicates Employee was being restricted from direct contact with patients. February 7 through 9, 2018 were Employee's regularly days off. (FNP Hardy, Progress Report, February 7, 2018; Timesheet, February 1-15, 2018).

41) By providing a return to work day a few days in the future, FNP Hardy was not restricting Employee from work, but was authorizing her return on her next scheduled workday. (Observation; Inference).

42) Although Employee occasionally missed work during this time, there is no evidence a physician restricted her from working or that the absences were due to her work injury. (Timesheets, September 1-15, 2017 through July 1-15, 2018; Observation)

43) From September 2, 2017 through July 15, 2018 is 45 weeks and two days. At Employee's weekly compensation rate of \$1,211.00, this resulted in an overpayment of TTD of \$54,841.00 ( $\$1,211.00 \times 45 \frac{2}{7}$ ). (Observation).

44) On March 28, 2018, M. Sean Green, M.D., a neurologist performed a records-review EME. Dr. Green stated the medical records at the time of injury are the most reliable guide to the damage caused by a work injury. Based on the records, he concluded Employee's chronic pain and pseudo-neurologic symptoms were not plausibly related to the work injury, and the work injury was only the substantial cause of her sternal contusion. Dr. Green questioned the diagnoses of "serious" TBI and PTSD, and recommended Employee be evaluated by a forensic psychiatrist and forensic neuropsychologist. (Dr. Green, EME Report, March 28, 2018).

45) On July 20, 2018, Employee was seen by Bradley Sparks, M.D., who recommended arthroscopic surgery to address impingement and a partial thickness rotator cuff tear in Employee right shoulder. (Dr. Sparks, Chart Note, July 20, 2018).

46) Around August 2, 2018, Employee contacted the prior adjuster asking about five TTD checks she had not received. (Moser Affidavit, January 8, 2020).

47) Also on August 2, 2018, the adjuster confirmed Employee had returned to work on September 2, 2017. (Moser Affidavit).

48) On August 3, 2018, Employer voided five checks to Employee:

Check number 370450 for TTD from December 3 to December 16, 2017,

Check number 371818 for TTD from January 29, 2018 to February 11, 2018,  
Check number 372629 for TTD from February 12 to February 25, 2018,  
Check number 373857 for TTD from March 26 to April 8, 2018,  
Check number 375050 for TTD from April 23 to May 6, 2018.

On Employer's transaction log, the voiding of the checks is indicated by a negative amount. Each of the checks was for \$2,422.00. (Employer, Transaction Log).

49) Because Employee had been working during the periods covered by the voided checks, Employer did not re-issue them. (Moser). Because the checks were not cashed and were not reissued, the \$54,841.00 overpayment is reduced by the total of the five checks, or \$12,110.00 resulting in an overpayment of \$42,731.00. (Observation).

50) On August 3, 2018, the adjuster spoke with Employee, confirmed she had returned to work, and that there had been an overpayment of benefits. Employee said she would send a money order for the overpayment, but the adjuster told her to wait. (Moser Affidavit).

51) On August 9, 2018, Employee told the adjuster she had mailed a check for \$24,044.00. (Moser Affidavit).

52) On August 10, 2018, the claims manager spoke to Employee and explained that after the overpayment was calculated, Employer would recoup the overpayment by withholding 20 percent of future disability payments. The claims manager explained Employer could not accept the check she had mailed and would return it to her. (Moser Affidavit).

53) On August 23, 2018, Ms. Moser wrote to Employee returning her check and explaining that under AS 23.30.155(j) it could only recover an overpayment by withholding 20 percent from future disability payments. Ms. Moser stated Employee would be notified when the overpayment was calculated and when the recovery began. (Moser, Letter to Employee, August 23, 2018).

54) On August 23, 2018, Bradley Sparks, M.D., operated on Employee's shoulder. He restricted Employee from work for three weeks. (Creekside Surgery Center, Operative Report, August 23, 2018; Dr. Sparks, Work Release, August 22, 2018).

55) September 4, 2018 Ms. Moser spoke to Employee about her shoulder surgery. She asked Employee to email her any work status notes she received from the doctor, and Employee agreed. (Moser, Affidavit).

56) On September 5, 2018, Employee was paid \$1,937.60 in TTD for the period from August 23, to September 5, 2018. This is her normal biweekly TTD of \$2,422.00 reduced by 20 percent or \$484.40. (Employer, Transaction Log, Check No. 379224; Observation).

57) On September 12, 2018, Ms. Moser asked Employee to let her know if she is released to work. (Moser, Affidavit).

58) On September 19, 2018, Employee was paid \$1,937.60 in TTD for the period from September 6, 2018 through September 19, 2018. Again, there was a 20 percent reduction of \$484.40 from her normal rate. (Employer, Transaction Log, Check No. 379742; Observation).

59) On September 18 and 19, 2018, Employee was seen by Paul Craig, Ph.D., for a neuropsychological EME. In describing the work injury, Employee stated she had lost consciousness during the assault. Dr. Craig opined Employee had preexisting somatic symptom disorder aggravated by the November 2016 work injury. He also diagnosed PTSD as a result of the November 2016 assault, as well as other assaults that had happened at work, but he found no evidence of TBI or concussion. He recommended behavioral therapy and stated Employee would not be medically stable until she received such treatment. (Dr. Craig, EME Report, September 19, 2018).

60) On October 3, 2018, Employee was paid \$1,937.60 in TTD for the period from September 20, 2018 through October 3, 2018. This was a reduction of \$484.40 from her normal rate. (Employer, Transaction Log, Check No. 380225; Observation).

61) On October 4, 2018, Ms. Moser spoke to Employee who said she had not yet been released to work. (Moser, Affidavit).

62) On October 17, 2018, Dr. Sparks released Employee to work without restrictions. (Dr. Sparks, Chart Note, October 17, 2018).

63) On October 17, 2018, Employee was paid \$1,937.60 in TTD for the period from October 4, 2018 through October 7, 2018. This was again a reduction of \$484.40 from her normal rate. (Employer, Transaction Log, Check No. 380844; Observation).

64) Employee was paid \$276.80 in TTD for October 18 and 19, 2018. This is twice her daily rate ( $\$1,211.00 \div 7$ , or \$173.00) less 20 percent (\$69.20). (Employer, Transaction Log, Check No. 381583; Observation).

- 65) On October 18, 2018, FNP Hardy released Employee to return to work on October 20, 2018, but she was limited to a “36’ work week” and she was required to wear the glasses recommended by the ocular therapist. (FNP Hardy, Progress Report, October 18, 2018).
- 66) On October 29, 2018, Ms. Moser notified Employee she had received Dr. Spark’s work release and asked if Employee had returned to work. (Moser, Affidavit).
- 67) On October 31, 2018, Employer controverted further TTD benefits based on FNP Hardy’s October 18, 2018 work release. (Controversion Notice, October 31, 2018).
- 68) On November 2, 2018, Ms. Moser wrote to Employee explaining an audit of her claim showed she had been incorrectly paid TTD from August 26, 2017 to July 15, 2018, resulting in and overpayment of \$43,942.00. The letter explained that under AS 23.30.155(j), Employer would reduce future disability payments by 20 percent until the overpayment was recovered. (Moser, Letter to Employee, November 2, 2018).
- 69) On November 5, 2018, Ms. Moser spoke to Employee who said she had worked October 20 and 21, but not October 22, 27, 28, 29 or November 3, 4, or 5, 2018, but Employee confirmed she had not been taken off work by a doctor. (Moser, Affidavit).
- 70) On November 6, 2018, FNP Hardy released Employee to light duty work with restrictions for eight weeks. She explained Employee “may need additional time out as approaching 2<sup>nd</sup> anniversary of injury. If increase in anxiety or stress (exposure to threatening environments), then remove to admin. position without direct patient care.” FNP Hardy also referred Employee to the Rehabilitation Institute of Washington’s (RIW) TBI clinic. (FNP Hardy, Return to Work Release and Progress Note, November 6, 2018).
- 71) Employer was unable to accommodate the restriction in FNP Hardy’s November 6, 2018 work release, and it restarted TTD that day. (Moser, Affidavit, Employer Transaction Log, Check 382486).
- 72) On November 19, 2018, FNP Hardy released Employee to work with the restriction of “glasses per ocular therapy - 36’ workweek.” (FNP Hardy, Progress Note, November 19, 2018).
- 73) On December 1, 2018, Employee returned to full-time work despite FNP Hardy’s November 6, 2018 restriction. Employee did not inform the adjuster she had returned to work. (Moser Affidavit).

74) On December 5, 2018, Jared Kirkham, M.D., rated Employee as having a three percent permanent partial impairment (PPI) due to her right shoulder. (Dr. Kirkham, Impairment Rating, December 5, 2018).

75) On December 6, 2018, FNP Hardy responded to a letter from Employer asking for clarification of when Employee had been restricted from work. FNP Hardy responded Employee had been totally restricted from work from November 19, 2016 through May 30, 2017, and released to restricted duty from May 30, 2017 to the present. FNP Hardy did not specify what the restrictions were, only that they were “per WC forms, FMLA forms per employer – restrictions in place continue.” (FNP Hardy, Response to Letter, December 6, 2018).

76) On December 7, 2018, Employer paid Employee \$3,875.20 in TTD for the period from November 6 through December 3, 2018. This amount is 28 days at Employee’s daily TTD rate of \$173.00 less 20 percent or \$34.60 for a net of \$138.40 per day. Because Employee had returned to work on December 1, 2018, she was overpaid three days, or by \$415.20. The 20 percent reduction from November 6 through November 30, 2018 was \$865.00. (Employer, Transaction Log, Check No. 382486; Observation).

77) Employee continued to work full time from December 1 through December 16, 2018. (Moser Affidavit).

78) On December 14, 2018, Employee was paid \$1,937.60 in TTD for the period from December 4, 2018 through December 17, 2018. As Employee worked all but one day during this time, she was overpaid for 13 days. At her daily TTD rate of \$173.00 less 20 percent or \$34.60, she was overpaid \$138.40 per day. For the 13 days that totals \$1,799.20. And Employer recouped \$34.60 from TTD paid for December 17, 2018. (Employer, Transaction Log, Check No. 38669; Observation).

79) On December 20, 2018, FNP Hardy took Employee off work until she had returned from RIW. (FNP Hardy, Progress Report, December 20, 2018).

80) On December 27, 2018, Employee was paid \$1,937.60 in TTD for the period from December 18, 2018 through December 31, 2018. This was again a reduction of \$484.40 from her normal rate. (Employer, Transaction Log, Check No. 382965; Observation).

81) Changes to the \$42,371.00 net overpayment from August 3, 2018 through December 31, 2018 can be summarized as follows:

Net Overpayment on 8/3/2018	\$42,371.00
-----------------------------	-------------

SAMANTHA L. ATLAS v. STATE OF ALASKA

Overpayment Recouped:		
	9/5/2018	\$484.40
	9/19/2018	\$484.40
	10/3/2018	\$484.40
	10/17/2018	\$484.40
	11/1/2018	\$69.20
	12/7/2018	\$865.00
	12/14/2018	\$34.60
	12/27/2018	<u>\$484.40</u>
Total Recouped		3,390.80
Additional Overpayments:		
	12/7/2018	415.20
	12/14/2018	<u>\$1,799.20</u>
Total Add'l. Overpayments		<u>\$2,214.40</u>
Net Overpayment as of 12/31/2018 (Observation).		\$41,194.60

82) On January 28, 2019, Employer issued check number 383862 to Employee for \$1,937.60 for TTD from January 15, 2019 through January 28, 2019. On February 13, 2019, Employer voided check number 383862, and on February 14, it issued check number 384389 for \$1,937.60 to Employee for TTD from January 15, 2019 through January 28, 2019. (Employer Transaction Log, Check Nos. 383862 and 384389).

83) On March 19, 2019, Employer paid the three percent PPI (\$5,310.00) less 20 percent, or \$1,062.00. (Employer Transaction Log).

84) On April 11, 2019, Employee filed a claim for TTD, permanent total disability (PTD), permanent partial impairment (PPI), medical and transportation costs, a compensation rate adjustment, attorney fees and costs, and a finding of an unfair or frivolous controversion. (Claim, April 11, 2019).

85) In May 2019, Employee requested the Division provide accommodations under the Americans with Disabilities Act. One request was that written information be in either Lexi or Comic Sans font. The Division agreed to do so, except for official decisions and notices which would follow established procedures. (Employee, ADA File).

86) On June 26, 2019, Employer filed a petition seeking to increase the percentage of ongoing disability payments it could recoup to forty percent. (Petition, June 26, 2019).

87) On January 8, 2020 Ashley Moser signed an affidavit stating she worked for Penser North America (Penser), Employer's adjuster, and she was the adjuster assigned to Employee's claim. Attached to the affidavit were two documents Ms. Moser had created, a "Timeline of TTD and Overpayment," and a "Contact Timeline re: Work Status.) (Moser, Affidavit, January 9, 2020).

88) On January 21, 2020, Employee filed evidence for the February 6, 2020 hearing, including Ms. Moser's January 8, 2020 Affidavit, Employee's timesheets from January 1, 2017 through June 30, 2018, a spreadsheet showing all disability payments to Employee from November 20, 2016 through July 15 2018, and whether Employer believed there was an under or overpayment or recovery for each and the total remaining overpayment, and Employer's transaction log showing all payments made in Employee's case from November 21, 2016 through August 2, 2019, including check numbers, dates, amounts, and the purpose of the expenditure. (Employee, Hearing Evidence, January 21, 2020).

89) On January 29, 2020, Employee's non-attorney representative requested seven subpoenas requiring Penser North America/Angie Farnsworth, Penser North America/Ashley Moser, Penser North America/Carolyn Corey, Penser North America/Memoree Polleys, Penser North America/Michael Robinson, Penser North America/Monica Gant, and Penser North America/Records Custodian to appear at the February 6, 2020 hearing. All of the subpoenas showed the Penser's Anchorage address. The subpoenas were signed and returned to Employee's non-attorney representative the same day. (Subpoenas).

90) No affidavit showing proof of service of the subpoenas was filed. (Record).

91) As a preliminary issue for the February 6, 2020 hearing, Ms. Williams asked for a "roll call" to determine who had appeared in response to the subpoenas. Ashley Moser and Memoree Polleys were present. Employer questioned whether Monica Gant and Angie Farnsworth had been served as Employer believed they no longer lived in Alaska. Ms. Williams stated all of the individuals had been served at Penser's office. The designated chair asked if the subpoenas had been served individually, and Ms. Williams stated the subpoenas had been taken to Penser's office, and Memoree Polleys accepted service on behalf the other individuals. The designated chair explained that subpoenas have to be personally served on the individuals, and one individual could not accept service on behalf of someone else. Ms. Williams showed photos of Penser's office and stated Barrington Coke had served the subpoenas. Employer asked for an

offer of proof as to the relevance of the other witnesses' testimony. Employee contended all the individuals had played a part in the overpayment of benefits and Employer was now saying the overpayment was Employee's fault. The designated chair pointed out that AS 23.30.155(j) did not state that an employer's right to recover an overpayment depended on fault and asked why fault was relevant. Ms. Williams did not answer the question, rather, she responded there was no accounting of the overpayment. The designated chair ruled that Ms. Moser would testify, but no decision would be made as to the other individuals until they were called. (Record).

92) Dr. Craig testified that in his September 2018 report he had recommended 40 weeks of cognitive behavioral therapy for Employee's psychological conditions. (Dr. Craig).

93) Ashley Moser is the claims adjuster for Penser assigned to Employee's case since August 2018. Shortly after taking over the case, she discovered Employee had been overpaid. She prepared a timeline of events listing payments from the transaction log and entries from the adjusters' log. It lists dates or date ranges, whether Employee was working or receiving disability benefits, and narrative explanations. The bulk of the overpayment to Employee occurred from December 17, 2017 to July 15, 2018 when Employee was working full-time but continued to receive TTD. Ms. Moser calculated the total overpayment as of August 10, 2018 was \$43,860.63. She explained that just prior to taking over Employee's case, Employee had called reporting she had not received five TTD checks; the prior adjuster determined Employee had been working during those time periods and voided the checks on August 3, 2018. Ms. Moser explained the entries in the transaction log for August 3, 2018 were not when the TTD checks were issued, but when the checks were voided. She pointed out the check numbers matched the numbers for corresponding entries when the checks were issued. The entries voiding the checks are shown as a negative number and the status is "voided." The entries when the checks were issued are positive numbers, and when the checks are voided, their status changes from "issued" to "voided." The five voided checks were not included in Employer's overpayment calculation. When the overpayment was determined, Penser drafted a letter to Employee explaining the overpayment, how it would be recovered, and informing her that she could call if she had any questions. Ms. Moser never received a request from Employee for more information. She stated that in February 2019 Employee reported a lost check that was cancelled and reissued on February 14, 2019 because Employee was entitled to TTD for the period. The contacts with Employee in the "Contact Timeline re: Work Status" attached to Ms.

Moser's January 8, 2020 affidavit included all contacts in the adjuster's file regarding work status. At the conclusion of Ms. Moser's testimony, the designated chair asked if there were more questions for her, and Ms. Williams responded, "No." (Moser; Record).

94) Barrington Coke lives with Employee and is her fiancé. He also works at API and has known Employee since 2011. He and Employee rent an apartment, they have no children, dependents, or pets living with them. He understands Employee has not received any workers' compensation benefits for some time. He pays the rent of \$1,100.00 and pays for gas and food. Utilities run from \$60.00 to \$80.00 per month, and Employee sometimes contributes to those expenses. He does not have a clear idea of Employee's financial obligations and she may have obligations he is not aware of. Mr. Coke took the subpoenas to the front desk at Penser's office and the receptionist called for the office manager. Ms. Polleys appeared and he gave them to her. (Coke).

95) Employee stated she and Mr. Coke live together, but keep their finances separate. She buys a lot of the groceries, pays for a storage unit she shares with Mr. Coke, a cell phone and iPad, medicines, car repair expenses and gas. The bill for the cell phone and iPad is from \$230.00 to \$250.00 per month, and electricity may be as high as \$170.00. Groceries run from \$300.00 to \$400.00 per month. In addition, she is making payments on some old medical bills that are in collection. She recalls that in August 2018, someone at Penser asked her about checks, and she told them she didn't remember receiving them. Employee stated she wanted a list of when Employer began recouping the overpayment and what she had been provided "didn't look like the same numbers." (Employee).

96) On February 6, 2020, Employee was testifying at the end of the hearing day. The designated chair stated the subpoenas, and the issue of whether the individuals would testify would carry over to the continuation of the hearing. (Record).

97) Notice of the June 18, 2010 hearing was sent to Employee's representative and Employer's attorney by certified mail on May 5, 2020. The notice stated:

Hearings start at 9:00 a.m. Alaska Standard Time. Cases are heard on a trailing calendar. Call the day before for an approximate hearing time. (Hearing Notice, May 5, 2020).

98) On June 10, 2020, Employer filed an updated version of the spreadsheet it had filed on January 21, 2020 showing disability payments to Employee. The updated spreadsheet includes

payments made from July 15, 2018 through June 2, 2020. (Employer, Demonstrative Documentary Evidence, June 10, 2020).

99) After December 31, 2018, when the balance of the overpayment was \$41,194.60, it continued to decrease as Employer recouped additional amounts. Employer recouped \$1,062.00 from the March 13, 2019 PPI payment. For the period from January 1, 2019 to June 2, 2020, Employer made 37 TTD payments. Thirty six of those payments were for 14-day periods, and Employee was paid \$1,937.60, meaning Employer recouped \$484.40 from each payment, or \$17,798.40. The 37<sup>th</sup> TTD payment was for a 15-day period, and was reduced by \$519.00. As a result, the balance of the overpayment at the time of the June 18, 2020 hearing was \$21,815.20. (Observation).

100) At the beginning of the June 18, 2020 hearing, the designated chair noted Employee had been testifying when the February 6<sup>th</sup> hearing was continued. Ms. Williams said she expected to have more questions for Employee but wanted to recall Ms. Moser, who was not present, for a “refresher,” and she had some follow-up questions for Ms. Moser about the overpayment. The designated chair explained that Ms. Moser had appeared, testified, and been released. Ms. Williams said Memory Polleys could answer the questions about the adjuster’s notes and calculations, but she noted Ms. Polleys was also not present, and she stated the parties had not received notice of the hearing time. Employer’s attorney stated Ms. Moser and Ms. Polleys were available if needed. The designated chair declined to recall Ms. Moser as a witness. (Record).

101) Ms. Williams then noted that none of the seven individuals who had been subpoenaed were present, and the designated chair had stated the subpoenas would carry over; the designated chair clarified that while he had said the subpoenas carried over, he had also said there had been no ruling on whether the individuals had been properly served or would be permitted to testify over Employer’s objections. The designated chair pointed out that there was no evidence that several of the witnesses had been properly served and that could be addressed. Ms. Williams said Mr. Coke testified he had served all of the subpoenas on Ms. Polleys at Penser’s office. The designated chair asked Ms. Williams who she wanted to call. She named Donna Malone, Carolyn Corey, and Michael Robinson. The designated chair stated he saw no evidence Ms. Malone had been served and asked how she was served if she did not live in Alaska. Ms. Williams again stated Ms. Polleys had accepted service on behalf of all of the subpoenaed individuals. The designated chair explained that was not adequate service, and Ms. Malone had

to have been served personally. The designated chair asked if Ms. Williams wanted to call Ms. Polleys now, because it appeared she had been served. Ms. Williams asked that Carolyn Corey, and Penser's records custodian be called because Ms. Polleys had accepted service on their behalf. The designated chair again explained that Ms. Polleys could not accept service on behalf of other individuals. (Record).

102) The designated chair suggested Ms. Williams call Ms. Polleys. Employer's attorney objected and asked for an offer of proof that the testimony would not be unduly repetitive or irrelevant to the issue for hearing. He pointed out Employee had not pointed out any evidence that checks had not been paid or received as shown in Employer's exhibits. Ms. Williams stated Employee was a person with disabilities to whom the Division had granted accommodations that included providing written information in a form she can read and understand and the information Employer provided her, particularly the transaction log and overpayment spreadsheets, was not in a font she could easily read. Ms. Williams was offended that the Division was not making accommodations and the information in Penser's transaction log was not in a font Employee could read. The designated chair noted the transaction log was not prepared by the Division, and asked if Employee had requested accommodations from Employer or Penser. Ms. Williams said she had not. The designated chair stated it would require a substantial alteration of the Division's procedures to continue the hearing at this point and direct the Employer to produce the document in another font. Ms. Williams talked over the designated chair as he tried to respond to her. (Record).

103) Ms. Williams reiterated her request to call Ms. Polleys, and Employer's attorney again asked for an offer of proof as to her testimony. Ms. Williams stated she would be asking about the overpayments, and Employer's attorney pointed out Ms. Moser had testified extensively about the cancelled checks and the calculation of the overpayment and been questioned exhaustively. Ms. Williams again stated there were discrepancies in the records in that numbers did not match, timecards that did not have Employee's signature on them, and it was unclear whether Employee had been reimbursed for out-of-pocket expenses. When asked to identify a number that did not match up, Ms. Williams said the voided checks don't add up for the days she worked. The designated chair stated the issue of the voided checks had been clearly addressed – Ms. Moser had gone over it. Ms. Williams pointed to the May 4, 2018 check (Check No. 375050), and said it had been voided but there was no replacement check and it could not be

matched to an entry voiding it. The designated chair ruled Ms. Polleys' testimony would be repetitive and redundant and would not aid in the resolution of the issue. Employee had no other witnesses. (Record).

PRINCIPLES OF LAW

**AS 23.30.001. Intent of the legislature and construction of chapter.**

It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter...

(3) this chapter may not be construed by the courts in favor of a party;

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

**AS 23.30.135. Procedure before the board.**

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

**AS 23.30.155. 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 . . . .

. . . .

(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.

AS 23.30.155(j) permits withholding up to 20 percent of future compensation installments and can be invoked at an employer's discretion. *Davenport v. K&L Distributors, Inc.*, AWCB Decision No. 92-0180 (July 22, 1992). It does not, however, provide any criteria or factors that should be considered in determining whether higher rate of withholding is appropriate. *Barnett v. Lee's Custom Designs*, AWCB Decision No. 99-0146 (July 8, 1999) considered the financial hardship the employee would suffer as result of withholding at a higher rate. *Decker v. Price/Northland J.V.*, AWCB Decision No. 930304 (November 24, 1993), considered the length of time employee was expected to be disabled and whether the overpayment could be recouped within that time at 20 percent. And *Bathony v. State*, AWCB Decision 98-0101 (April 22, 1998), considered the fact the overpayment arose or was exacerbated by the employee's resistance to providing correct information to the employer.

*Patton v. Crowley Holdings, Inc.*, AWCB Decision No. 201901294 (December 12, 2019), held that stopping payment on checks before the funds had been made available to an employee by his bank was not a recoupment under AS 23.30.155(j) because there had not yet been a payment since the employee had not received the checks.

**AS 23.30.185. Compensation for temporary total disability.**

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

**AS 23.30.200. Temporary partial disability.**

(a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

**8 AAC 45.074. Continuances and cancellations**

(a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing

has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

**8 AAC 45.120. Evidence**

(a) Witnesses at a hearing shall testify under oath or affirmation. The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . . .

(b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.

(c) Each party has the following rights at hearing:

(1) to call and examine witnesses;

(2) to introduce exhibits;

(3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;

(4) to impeach any witness regardless of which party first called the witness to testify; and

(5) to rebut contrary evidence.

(d) . . . Irrelevant or unduly repetitious evidence may be excluded on those grounds.

....

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing.

#### **8 AAC 45.054. Discovery**

....

(c) The board or division will issue subpoenas and subpoenas duces tecum in accordance with the Act. The person requesting the subpoena shall serve the subpoena at the person's expense. Neither the board nor the division will serve subpoenas on behalf of a party.

#### **AS 44.62.430. Subpoenas; witness fees.**

(a) Before the hearing begins the agency shall issue subpoenas and subpoenas duces tecum at the request of a party in accordance with the rules of civil procedure. After the hearing begins the agency hearing a case or a hearing officer sitting alone may issue subpoenas and subpoenas duces tecum.

(b) A subpoena issued under (a) of this section extends to all parts of the state and shall be served in accordance with the rules of civil procedure. A witness is not obliged to attend at a place out of the house district in which the witness resides unless the distance is less than 100 miles from the place of residence, except that the agency, upon affidavit of a party showing that the testimony of the witness is material and necessary, may endorse on the subpoena an order requiring the attendance of the witness.

**Alaska Rule of Civil Procedure 45. Subpoena**

....

(c) Service. A subpoena may be served by a peace officer, or any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to the person the fees for one day's attendance and the mileage prescribed by rule. When the subpoena is issued on behalf of the state, a municipality, a borough, a city, or an officer or agency thereof, fees and mileage need not be tendered. A subpoena may also be served by registered or certified mail. In such case the clerk shall mail the subpoena for delivery only to the person subpoenaed and, unless not required under this rule, shall enclose a warrant or postal money order in the amount of the fees for one day's attendance and of the mileage prescribed by rule. The returned delivery receipt shall be so addressed that it is returned to the party requesting the subpoena or that party's attorney. Proof of service shall be made by affidavit.

ANALYSIS

*1. Were the oral rulings on Employee's proposed witnesses correct?*

Employee contended the Penser employees had been properly subpoenaed and should have been required to testify. Service of administrative subpoenas, such as workers' compensation subpoenas, is complicated; it involves the Workers' Compensation Act, the Administrative Procedures Act, and the Alaska Rules of Civil Procedure. Under AS 44.62.430(b), an administrative subpoena "extends to all parts of the state;" it is not effective if served outside the State of Alaska. A subpoena must also be served in accordance with the rules of civil procedure. Civil Rule 45(c) sets out several requirements: 1) service must be by someone who is not a party and is at least 18 years of age; 2) service must be made by delivering a copy of the subpoena to the person or by registered or certified mail; 3) fees for one day's attendance and mileage must be tendered to the person; and 4) an affidavit attesting to service must be filed.

Here, the subpoenas were served by Mr. Coke, who is not a party and was over 18 years of age. While he did not file a proof of service affidavit, he testified under oath about serving the affidavits. According to his testimony, he delivered all of the subpoenas to Ms. Polleys at Penser's office. He did not deliver copies of the subpoenas to the other individuals. Consequently, they were not properly served. The rule does not allow one person to accept service of a subpoena on behalf of another for good reason. Failure to comply with a validly issued subpoena can have significant legal consequences. The requirement of personal service ensures the named individual actually received the subpoena. Despite the fact Ms. Moser was not properly served, she was called as a witness by Employer, and Employee questioned her extensively.

It is unclear whether Ms. Polleys was properly served, as there is no evidence she was proffered a witness fee and mileage. But her testimony was not excluded because she had not been properly served, it was excluded because it would have been unduly repetitious. When asked what Ms. Polleys would testify to, Ms. Williams stated there were numbers that did not match, timecards that did not have Employee's signature on them, and it was unclear whether Employee had been reimbursed for out-of-pocket expenses. When asked to identify a number that did not match up, Ms. Williams said the voided checks don't add up for the days she worked. The designated chair stated the issue of the voided checks had been clearly addressed – Ms. Moser had gone over it repeatedly. Ms. Williams pointed to the May 4, 2018 check (Check No. 375050), and said it had been voided but there was no replacement check and it could not be matched to an entry voiding it. As to the voided checks, Ms. Moser clearly explained that the five checks voided on August 3, 2018 (Check Nos. 370450, 371818, 372629, 373857, 375050) which had been issued for TTD for times when Employee was working, and, as a result, they were not reissued. Ms. Moser matched the August 3, 2018 entries voiding the checks to the entries in the transaction log when the voided checks were issued. The issuance and voiding of each check is clearly shown. Ms. Moser also addressed check number 383862, which was issued on January 28, 2019 and voided on February 13, 2019. She showed in the transaction log that check number 384389 had been issued on February 14, 2019 for TTD for the same time period. Ms. Moser's testimony was clear, easily understood, and credible.

Any testimony by Ms. Polleys as to the voided checks would have been redundant. Employer's transaction log clearly shows what checks were issued for disability benefits and those issued for other purposes, such as reimbursement of out-of-pocket expenses. Any testimony as to what the checks were issued for would have been redundant. Finally, Employee's timesheets were prepared by Employer, not Penser, and Ms. Polleys would have no personal knowledge as to their contents. Employee did not identify any information that Ms. Polleys could provide that had not been provided by Ms. Moser or was not already in the record. Her testimony was properly excluded as unduly repetitious. The decision to not compel the witnesses who were not properly served to testify was correct.

***2. Was the oral ruling denying a continuance correct?***

Employee's request at the June 18, 2020 hearing that Employer and Penser be required to produce the transaction log and the lists of disability payments in the font she had asked the Division to use, was, in effect, a request for a continuance.

It is unclear when Employee received Employer's transaction log and the list of disability payments showing overpayments and recoupments, but she filed them as evidence on January 21, 2020. Employee did not object to the format of the documents or the font used until well into the second day of hearing. The list of disability payments filed by Employer on June 10, 2020 is essentially the same list that Employee filed on January 21<sup>st</sup>, updated to show TTD payments during the intervening time.

Continuances are not favored, particularly late in the hearing, and under 8 AAC 45.074(b) they may only be granted for good cause. Three of the possible showings of good cause in 8 AAC 45.074(b)(1) might potentially apply. Under (K), a continuance can be granted when, despite a party's due diligence in completing discovery, later filed evidence necessitates they be given an opportunity to obtain rebuttal evidence. That is not the situation here. Employee had the information, she only seeks the document in a different font or format, and her request was not timely. Under (L), a continuance can be granted when, due to surprise, excusable neglect, or the board's additional evidence or arguments are necessary to complete the hearing. That is also not

the situation here. Employee had the documents for five months prior to the June 18, 2020 hearing. And under (N), a continuance can be granted when irreparable harm may result despite a party's due diligence. That is also not the situation here, Employee did not exercise due diligence by failing to request an ADA accommodation from Employer or Penser for five months. The decision not to continue the hearing so Employer and Penser could refile the exhibits in a format that complied with an accommodation the Division had granted was correct.

***3. Should Employer be allowed to withhold more than 20 percent of future compensation to recover its overpayment?***

Employer's explanation of the payments made to Employee and its calculation of the overpayment and recoupment are clear. Its transaction log shows the date each check was issued, the check number, what it was issued for, and for disability benefits, the time period covered by the check. Given the number of payments to Employee, the log is several pages long, but it is a simple matter to match up an entry voiding a check with the entry showing the issuance of the check. The lists of disability payments filed in January and June 2020 are likewise easy to understand. They show the dates for which the disability was being paid, the weeks or days in the period, the amount paid, the amount owed, the amount of any overpayment, the amount of any recoupment, and a running balance of the overpayment.

Under AS 23.30.155(j), it is not necessary to determine the exact amount of an overpayment to determine whether an Employer should be allowed to recover the overpayment at an accelerated rate. However, because one of the factors the Board has considered in determining whether to allow an accelerated recovery is how long it would take an employer to recover the full amount, an approximation of the overpayment is needed. Employer's July list of indemnity payments shows the balance of the overpayment was \$23,111.23 as of June 2, 2020. This decision calculated the overpayment as of June 18, 2020 was \$21,815.20, but that figure does not include periods when Employee was TPD and may have been overpaid, because the calculation of TPD requires the wages earned during the period, and that information is not in the file. For purposes of determining whether Employer should be allowed to recover the overpayment by withholding more than 20% of future payments, \$21,815.20 will be used as the current balance.

In *Bathony*, one factor was whether the overpayment arose or was exacerbated by the employee's resistance to providing correct information to the employer. Here, both parties share some responsibility for the overpayment. The bulk of the overpayment occurred between September 2, 2017 and July 15, 2018. This may have happened because Employer changed adjusters, or because medical providers were dilatory in providing work releases, but Employee was not responsible. However, even after the overpayment had been discovered and Employer began withholding 20 percent of her disability checks, Employee returned to work on December 1, 2018 without informing the adjuster. As a result, she was overpaid from December 1 to December 20, 2018. Because the overpayment is not exclusively due to the actions of one party or the other, this factor will not be considered.

*Barnett* considered the financial hardship the employee would suffer as result of withholding at a higher rate. Mr. Coke testified he paid the rent. Employee testified she paid for her phone and iPad, which were up to \$250.00 per month; she paid the electric bill, which could be as high as \$170.00 per month, and groceries could be \$400.00 per month. That totals \$820.00 per month, but while she did not give amounts, she also pays for a storage unit, past medical bills, and some car expenses. With the current reduction of 20 percent, Employee's biweekly TTD of \$2,422 is reduced to \$1,937.20 or roughly \$3,875.20 per month. A reduction of 40 percent would mean she would receive \$1,453.20 biweekly, or roughly \$2,906.40 per month. Even if Employee's monthly expenses are three times the \$820.00 she identified, that would be \$2,460.00 per month, which is still \$446.40 per month less than what she would receive in TTD. Increasing the recoupment to 40 percent will not cause Employee to suffer a serious financial hardship.

*Decker* considered the length of time the employee was expected to be disabled and whether the overpayment could be recouped within that time at 20 percent. In his report, Dr. Craig stated Employee needed 40 weeks of cognitive behavioral therapy before she would be medically stable, at which time her entitlement to TTD would end. Recognizing that Dr. Craig's prediction, is just that – a prediction, Employee is expected entitled to TTD for 40 more weeks. Recouping 20 percent, or \$484.40 every two weeks, means Employer would recoup \$9,688.00 in 40 weeks, far less than the current overpayment of \$21,815.20. If Employer is allowed to recoup 40 percent of future payments, it would recoup twice that amount, or \$19,376.00 in 40 weeks.

Even withholding 40 percent, Employer will not recoup the entire overpayment unless Employee is disabled for just over 45 weeks. Given that Employer will not be able to recover the overpayment with the time Employee is expected to be disabled by withholding 20 percent of each payment and the fact that increasing the withholding to 40 percent will not cause Employee serious financial hardship, Employer will be allowed to increase its withholding to 40 percent.

CONCLUSIONS OF LAW

1. The oral rulings on Employee's proposed witnesses were correct.
2. The oral ruling denying a continuance was correct.
3. Employer will be allowed to withhold 40 percent of future compensation to recover its overpayment.



PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of SAMANTHA L. ATLAS, employee / claimant v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201617084; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on August 17, 2020.

\_\_\_\_\_  
/s/  
Nenita Farmer, Office Assistant