ALASKA WORKERS' COMPENSATION BOARD

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

MYLA BELCHER, Employee, Claimant, v. SODEXO REMOTE SITES PARTNERSHIP, Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201917486 AWCB Decision No. 21-0063 Filed with AWCB Anchorage, Alaska on July 19, 2021.

Employee Myla Belcher's January 23, 2020 claim was heard on June 10, 2021, in Anchorage, Alaska, a date selected on March 11, 2021. A December 17, 2020 hearing request gave rise to this hearing. Attorney Elliot Dennis appeared and represented Employee. Attorney Michael Budzinski appeared and represented Sodexo Remote Sites Partnership and Alaska National Insurance (collectively Employer). Employee appeared and testified. The record remained open for additional filings and responses and closed on June 18, 2021.

ISSUES

Employee contends she sustained a compensable injury on December 23, 2019 while working for Employer and is entitled to temporary total disability (TTD) benefits. She contends since Employer withdrew its controversions and accepted compensability of her work injury, she is entitled to TTD benefits from December 27, 2019, through February 25, 2021, when she became medically stable.

Employer contends it should not pay TTD benefits after August 10, 2020, because Christina Waters, PA-C, released her to part-time work on August 10, 2020; Owen Ala, M.D., found her to be medically stable in October 2020; and she received unemployment insurance payments from October 7, 2020, through February 15, 2021.

1) Is Employee entitled to TTD benefits after August 10, 2020?

Employee claimed permanent partial impairment (PPI) benefits; neither party addressed this issue.

2) Is Employee entitled to PPI benefits?

Employee contends she needs continuing medical care for her work injury. She seeks an order requiring Employer to pay for all medical benefits necessitated by her injury. Employee also contends Employer should pay directly to providers all work-related medical bills so they can reimburse for bills it paid; Employer agrees.

3) Is Employee entitled to medical benefits?

Employee contends she is entitled to a late-payment penalty on benefits owed from December 27, 2019, through January 14, 2020, because Employer neither paid TTD benefits nor had any controversions in place. In addition, she contends a penalty is owed because Employer's controversions were not filed in good faith.

Employer contends Employee is not entitled to penalties because she was not entitled to TTD benefits from August 10, 2020, and continuing, and facts or law support its controversion notices and TTD termination.

4) Is Employee entitled to a penalty?

Employee contends had Employer not controverted her claims, she would have received a reemployment evaluation; instead she had to personally pay for a job training program to

improve her employability. Employee seeks a $5,000 dislocation benefits; in the alternative, she seeks a reemployment eligibility evaluation order.

Employer contends because Employee was rated with a zero percent PPI, ordering a reemployment evaluation would not be reasonable.

5) Is Employee entitled to reemployment benefits?

Employee contends she is entitled to interest on unpaid TTD benefits.

Employer contends Employee is not entitled to interest as it timely paid TTD benefits or controverted her claims.

6) Is Employee entitled to interest?

Employee contends her attorney provided valuable services that will result in the award of benefits; consequently, she should be awarded attorney fees and costs. Employer contends attorney fees and costs Employee requested are excessive and should be reduced.

7) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On December 26, 2019, Employee reported she sustained bilateral hand injuries working for Employer on December 23, 2019. (First Report of Injury, December 30, 2019).

2) On January 3, 2020, Jared Kirkham, M.D., saw Employee and diagnosed subacute bilateral hand pain, numbness and tingling - clinically consistent with carpal tunnel syndrome. However, he said "the electrodiagnostic exam only showed carpal tunnel syndrome on the left and it was very mild, only affecting sensory fibers. The patient's symptoms are out of proportion to electrodiagnostic findings." Dr. Kirkham said it was also unclear "why there [was] no evidence of carpal tunnel syndrome on the right on electrodiagnostic testing." He ordered a cervical magnetic resonance imaging (MRI) to rule out critical spinal cord compression and myelopathy

and recommended Employee "work as tolerated" and did not place "any medical restrictions on her activities." (Kirkham report, January 3, 2020).

3) On January 14, 2020, Dr. Kirkham saw Employee and said there was no evidence of severe carpal tunnel syndrome, cervical radiculopathy, cervical myelopathy or musculoskeletal causes to her symptoms. He did not "have a good explanation for her ongoing bilateral hand pain, numbness and tingling," but "it is possible to have pain in the absence of significant musculoskeletal or neurological pathology." Dr. Kirkham reported, "I do not have any formal medical restrictions for her. I do not think that she will be damaging her body by working as a kitchen helper or doing any form of work activity." He released Employee to full duty work. (Kirkham report, January 14, 2020). Dr. Kirkham opined work was not the substantial cause of Employee's disability or need for medical treatment, but rather, psychosocial factors provided the best explanation for her condition. (Kirkham response, January 14, 2020).

4) On January 17, 2020, Employer denied all benefits based on Dr. Kirkham's January 14, 2020 opinion. (Controversion Notice, January 17, 2020).

5) On January 23, 2020, Employee claimed TTD and TPD benefits, medical costs, and a late-payment penalty. (Claim for Workers' Compensation Benefits, January 23, 2020).

6) On January 28, 2020, Dr. Kirkham saw Employee and reported: "[T]he cause of her symptoms is somewhat unclear. She does have very mild carpal tunnel syndrome on the left, but no evidence of carpal tunnel syndrome on the right per electrodiagnostic findings and overall her symptoms are out of proportion to objective pathology. I do suspect a component of nonspecific nerve sensitivity and chronic pain syndrome." Dr. Kirkham recommended Employee to "find a job that she is able to do with her pain limitations" and did not "restrict her work activities" as she was "primarily pain limited." (Kirkham report, January 28, 2020).

7) On February 6, 2020, Employer again denied all claims based on Dr. Kirkham's January 14, 2020 opinion. (Controversion Notice; Answer to Employee's Workers' Compensation Claim, February 6, 2020).

8) On February 13, 2020, Dr. Ala saw Employee and opined she "appears to have repetitive type injury consistent with carpal tunnel syndrome." (Ala report, February 13, 2020).

9) On March 9, 2020, Employee claimed TTD, TPD and PPI benefits, medical and transportation costs, a finding of unfair or frivolous controversion, interest and a penalty. (Amended Claim for Workers' Compensation Benefits, March 9, 2020).

10) On March 31, 2020, Employer denied all claims based on Dr. Kirkham's January 14, 2020 report. (Answer to Employee's Amended Workers' Compensation Claim; Controversion Notice, March 31, 2020).

11) On May 7, 2020, Dr. Ala opined work was the substantial cause of Employee's disability or need for medical treatment, and she had bilateral thumb trigger finger and carpometacarpal arthritis due to "repetitive work, gripping, lifting." (Ala response, May 7, 2020).

12) On May 22, 2020, Scott Tintle, M.D., saw Employee for an employer medical evaluation (EME) and diagnosed bilateral trigger thumb, left carpal tunnel syndrome and bilateral carpometacarpal osteoarthritis. He opined her disability or need for medical treatment due to these conditions were not work-related, but instead, were related to her age, gender, elevated body mass index, and hypothyroidism. (Title report, May 22, 2020).

13) On June 18, 2020, Employer denied all claims based on Dr. Tintle's May 22, 2020 opinion. (Controversion Notice, June 18, 2020).

14) On June 25, 2020, Employee underwent a left trigger thumb release. (Ala report, June 25, 2020).

15) On August 10, 2020, PA-C Waters saw Employee and reported: "No erythema, ecchymosis, or significant swelling. No signs of infection or active drainage. Incisions are well-healed. She is able to make a full composite fist without pain. Grip strength 4/5. Sensation intact in the superficial radial, medial, and ulnar nerve distributions. Capillary refill brisk in all five fingers of the right and left hand." (Waters report, August 10, 2020). PA-C Waters released Employee to "part-time employment up to 8 hrs/day." (Wellness Plan, August 10, 2020).

16) On October 5, 2020, Dr. Ala saw Employee and reported: "She continues to have full active range of motion of the thumb interphalangeal joint and metacarpophalangeal joint. No numbness or tingling. The incision is well-healed. . . . She states it occasionally locks in extension. I reviewed prior x-rays which demonstrate no signs of arthritic changes and no signs of fractures. The thumb does not show symptoms of trigger finger at this point and I recommend continued therapy, range of motion activities and occasional splinting." (Ala report, October 5, 2020).

17) On October 22, 2020, Dr. Ala stated work was the substantial cause of Employee's disability or need for medical treatment. He was uncertain whether Employee could do the kitchen job if Employer offered it to her and said "she probably wouldn't be able to. . . . I'd be

concerned that she would start dropping things[.]" He said typically four months after a trigger release, a patient would be medically stable; however, Employee was "still having problems with it. . . . [H]opefully, there continues to be improvement, but it kind of seems like she's kind of hit a plateau. . . . I guess I could say that she's hit medical stability, but it's not something I'm totally confident about. . . . I think I'd have to see her at least one more time to conclude that she's medically stable. . . . I'd predict she would be able to go back to full duty without restrictions." (Videoconference Deposition of Owen L. Ala, M.D., October 22, 2020).

18) On February 8, 2021, Employer denied all claims based on Drs. Kirkham's January 14, 2020 and Tintle's May 22, 2020 opinions. (Controversion Notice, February 8, 2021).

19) On February 25, 2021, Dr. Ala opined Employee reached medical stability in October 2020. He noted she completed treatment as of February 25, 2021, but "may need steroid injection or therapy" "if symptoms become worse in the future." Dr. Ala referred Employee to Sean Taylor, M.D., for a PPI rating. (Ala response, February 25, 2021).

20) On March 11, 2021, the parties agreed to an oral hearing on June 10, 2021, on TTD, TPD, PPI, medical and transportation costs, unfair or frivolous controversion, interest and penalty issues. (Prehearing Conference Summary, March 12, 2021).

21) On March 22, 2021, Dr. Tintle agreed with Dr. Ala that Employee reached medical stability "in October 2020 for the trigger thumbs." (Title report, March 22, 2021).

22) On May 24, 2021, Employer withdrew all controversion notices. It admitted Employee's "bilateral trigger thumb conditions" were work-related and her "preexisting carpometacarpal joint arthritis and bilateral carpal tunnel symptoms were work-related until those conditions reached pre-injury status in May 2020." (Notice of Withdrawal of Controversions, May 24, 2021).

23) On May 20, 2021. Dr. Taylor saw Employee and gave a zero PPI rating. (Taylor report, May 20, 2021).

24) From December 27, 2019, through January 14, 2020, Employer neither paid TTD benefits nor had any controversions in place. (Agency file).

25) Employee received unemployment insurance payments from October 7, 2020, through February 15, 2021. (Employee).

26) At hearing on June 10, 2021, the parties stipulated Employee's weekly TTD benefit rate is $505.67. Also, Employer agreed to reimburse providers for past medical bills Medicaid paid so

the providers can reimburse Medicaid. Employer paid TTD benefits from December 27, 2019, through August 10, 2020. (Record).

27) On June 7, 2021, the Department of Labor and Workforce Development, Division of Employment and Training Services, denied Employee's request to obtain her unemployment insurance records. (Notice of Filing Letter Denying Request for Unemployment Insurance File Material, June 15, 2021).

28) On June 11, 2021, Employee asked for $38,670.50 in attorney fees and $6,819.72 in costs, totaling $45,490.22. (Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees, and Costs; Affidavit for Award of Paralegal Fees Performed by Shona Embs, June 4, 2021; Supplemental Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees and Costs, June 11, 2021).

29) On June 16, 2021, Employer agreed to pay attorney fees and costs but disputed the following: (1) 6.7 hours spent on drafting a letter to Dr. Ala; instead it should 4.2 hours; (2) 3.5 hours spent on researching Dr. Kirkham's opinions in unrelated *Rogers* case; and (3) 3.8 hours spent on drafting a settlement letter, which was never sent. (Record; Employer's Objection to Claim for Attorney's Fees, June 16, 2021).

30) Lawyers regularly research doctors' opinions in other cases to weigh their credibility. (Observation).

PRINCIPLES OF LAW

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

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
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> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles' for:

> (1) the employee's job at the time of injury; or
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> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles.'
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(g) Within 30 days after the employee receives the administrator's notification of eligibility for benefits, an employee shall file a statement under oath with the board, on a form prescribed or approved by the board, to notify the administrator and the employer of the employee's election to either use the reemployment benefits or to accept a job dislocation benefit under (2) of this subsection. The notice of the election is effective upon service to the administrator and the employer. The following apply to an election under this subsection:

> (1) an employee who elects to use the reemployment benefits also shall notify the employer of the employee's selection of a rehabilitation specialist who shall provide a complete reemployment benefits plan; failure to give notice of selection of a rehabilitation specialist required by this paragraph constitutes noncooperation under (n) of this section; if the employer disagrees with the employee's choice of rehabilitation specialist to develop the plan and the disagreement cannot be resolved, then the administrator shall assign a rehabilitation specialist; the employer and employee each have one right of refusal of a rehabilitation specialist;
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> (2) an employee who elects to accept a job dislocation benefit in place of reemployment benefits and who has been given a permanent partial impairment rating by a physician shall be paid
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> > (A) $5,000 if the employee's permanent partial impairment rating is greater than zero and less than 15 percent. . . .
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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. . . .

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. *Bignell* required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id*. at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id*. at 973, 975. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), held "attorney's fees in workers' compensation cases should be fully compensatory and reasonable," so injured workers have "competent counsel available to them." Nonetheless, when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed. Fees incurred on lost, minor issues will not be reduced if the employee prevails on primary issues. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011). *Rusch & Dockter v. SEARHC*, 453 P.3d 784, 803 (Alaska 2019), held an award of attorney fees will only be reversed if it is "manifestly unreasonable" and explained "[a] determination of reasonableness requires consideration and application of various factors that may involve factual determinations, but the reasonableness of the final award is not in itself a factual finding." *Rusch & Dockter*. It held the board must

consider all of the following eight non-exclusive factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining the reasonableness of a fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

> **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. To controvert a claim, the employer must file a notice, on a form prescribed by the director. . . .
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> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment.
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> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

AS 23.30.155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). To avoid a penalty, a controversion must be filed in good faith. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352 (Alaska 1992). For it to be filed in good faith, the employer must possess sufficient evidence in support of the

controversion that, if the claimant does not introduce evidence in opposition to the controversion, the board would find the claimant not entitled to benefits. *Id*. However, "an insurer has a continuing obligation to consider new evidence that comes to its attention and to modify or withdraw controversions based on that new evidence." *Vue v. Walmart Associates, Inc*., 475 P.3d 270, 289 (Alaska 2020). Also, an opinion without a basis is mere speculation and cannot be the foundation of a valid controversion. *Id*.

Land and Marine Rental Co. v. Rawls, 686 P.2d 1187 (Alaska 1984), held a workers' compensation award, or any part thereof, shall accrue lawful interest from the date it should have been paid. Interest and penalty are mandatory.

> **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.

For workers' compensation purposes "total disability" does not necessarily mean a "state of abject helplessness. It means the inability because of injuries to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *J. B. Warrack Co. v. Roan*, 418 P.2d 986, 988 (Alaska 1966). For an employer to rebut the presumption of compensability, it must produce substantial evidence that work within an employee's abilities is regular and continuously available in the relevant labor markets described in the statute. *Leigh v. Seekins Ford*, 136 P.3d 214 (Alaska 2006). This burden may be satisfied with labor market surveys of the specific and relevant markets. *Id*.

> **AS 23.30.187. Effect of unemployment benefits.** Compensation is not payable to an employee under AS 23.30.180 or 23.30.185 for a week in which the employee receives unemployment benefits.

An employee is permitted to recover total temporary disability benefits under AS 23.30.185 as long as the employee repaid unemployment benefits received. *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227 (Alaska 2003).

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.**
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> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment. . . .

Unisea, Inc., v. Morales de Lopez, 435 P.3d 961, 972 (February 2019), held §190 is "silent about the timing for both rating of and payment for a permanent impairment." It explained §190(b) "provides that '[a]ll determinations of the existence and degree of permanent impairment shall be made strictly and solely' under the Guides; the legislature did not direct that an injured worker be evaluated for a permanent impairment at medical stability." *Id.*

> **AS 23.30.395. Definitions.** In this chapter,
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> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
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> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;
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> (29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition;
> . . . .

Runstrom v. Alaska Native Medical Center, 280 P.3d 567 (Alaska 2012) stated "'[o]nce an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary[.]'"

> **8 AAC 45.142. Interest.** (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. . . .

> **8 AAC 45.180. Costs and attorney's fees**. . . .
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> (b) A fee under AS 23.30.145 (a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145 (a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.
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> (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. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. . . .

ANALYSIS

1) Is Employee entitled to TTD benefits after August 10, 2020?

It is undisputed Employee sustained a compensable injury on December 23, 2019, while working for Employer. On May 24, 2021, Employer withdrew all controversion notices and admitted her "bilateral trigger thumb conditions" were work-related and her "preexisting carpometacarpal joint arthritis and bilateral carpal tunnel symptoms were work-related until those conditions reached pre-injury status in May 2020." It agreed to a weekly TTD rate of $505.67 and paid from December 27, 2019, through August 10, 2020. So, the question is whether Employee is entitled to TTD benefits after August 10, 2020.

a) Is Employee disabled?

Employee contends she has been totally disabled since the December 23, 2019 work injury because she has been incapable of earning the wages she was receiving at the time of injury in the same or any other employment. AS 23.30.395(16); *Runstrom*. Employer contends she has not been disabled because PA-C Waters released Employee to part-time work on August 10, 2020.

"Total disability" does not necessarily mean Employee is in a "state of abject helplessness." *Roan* at 988. Employee continuously reported pain in her hand. On October 22, 2020, Dr. Ala testified he was uncertain whether Employee could do the kitchen job if Employer offered it to her; he said "she probably wouldn't be able to. . . . I'd be concerned that she would start dropping things[.]" Due to her work injury, Employee is incapable to "perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Id*. To rebut the presumption of continued disability, Employer must demonstrate with substantial evidence that work within Employee's abilities is regularly and continuously available in the relevant labor markets; this burden may be satisfied with labor market surveys. *Leigh*. However, Employer neither offered Employee her job nor produced a survey to support its position; there is no evidence that work within her abilities is regular and continuously available where she resides. *Id*. Employer failed to produce substantial evidence to rebut the presumption that Employee continues to be totally disabled as defined in the Act. *Leigh*; *Runstrom*.

b) When did Employee become medically stable?

"Medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment. AS 23.30.395(28). Generally, injured workers are referred for a PPI rating once they are medically stable. Based on this, Employee contends TTD benefits should extend to February 25, 2021, because that was when Dr. Ala stated she reached medical stability and referred her to a PPI rating; she continued receiving physical therapy treatments until February 23, 2021.

There are two medical opinions regarding Employee's medical stability: one by Dr. Ala and the other by Dr. Tintle. Both state she became medically stable in October 2020; there are no other medical opinions providing Employee's medical stability date. Employee neglects the fact that on February 25, 2021, Dr. Ala stated she reached medical stability in *October 2020*, not on February 25, 2021. Also, a patient may be referred for a PPI rating any time after reaching medical stability; thus, simply because Employee was referred for a PPI rating on February 25, 2021, it does not mean she reached medical stability on that date. *Unisea*. Further, the fact that she continued receiving physical therapy treatments until February 23, 2021, does not mean she was not medically stable; palliative care may continue after medical stability. AS 23.30.395(29).

By contrast, Employer contends it should not pay any TTD benefits after August 10, 2020, because PA-C Waters released Employee to part-time work on August 10, 2020. However, PA-C Waters' release did not reflect Employee's medical stability, and Dr. Ala's opinion is given greater weight because he is a medical doctor. AS 23.30.122; *Smith*. On October 22, 2020, Dr. Ala was reluctant to state Employee was medically stable; he said, "[H]opefully, there continues to be improvement, but it kind of seems like she's kind of hit a plateau. . . . I guess I could say that she's hit medical stability, but it's not something I'm totally confident about. . . . I think I'd have to see her at least one more time to conclude that she's medically stable." Dr. Ala saw Employee one more time on February 25, 2021, and concluded she became medically stable in October 2020. Therefore, based on Dr. Ala's opinion, Employee became medically stable on October 22, 2020.

Lastly, Employer contends Employee is not entitled to TTD benefits from October 7, 2020, through February 15, 2021, because for that period, Employee received unemployment insurance payments; this is correct. AS 23.30.187. However, if she wishes to recover TTD benefits for this period, she may do so by repaying unemployment benefits received and providing proof that she did so. *DeShong*.

In short, because Employee was totally disabled and was not medically stable until October 22, 2020, she is entitled to TTD benefits from December 23, 2019, through October 7, 2020, when she began receiving unemployment insurance payments. AS 23.30.185. Thus, Employer will be

ordered to pay Employee TTD benefit from August 11, 2020, through October 22, 2020. If she wishes to recover TTD benefits from October 8 through 22, 2020, she must first repay unemployment benefits received for that period and provide proof of payment to Employer.

2) Is Employee entitled to PPI benefits?

Employee claimed PPI benefits. AS 23.30.190(b). Dr. Taylor gave a zero percent PPI rating. There is no other rating, and neither party addressed this issue. Employee's claim for PPI will be denied at this time without prejudice. She may seek PPI benefits in the future if Employee obtains a rating greater than zero.

3) Is Employee entitled to medical costs?

Employee contends she needs continuing medical care and treatment for her work injury. She seeks an order requiring Employer to pay for all medical benefits necessitated by her work injury. Employee also contends Employer should pay providers directly for her past medical bills Medicaid already paid so they can reimburse Medicaid. Employer agrees; therefore, it will be ordered to (1) provide continuing medical care for Employee's work injury and (2) pay past medical bills directly to her providers so they can reimburse Medicaid.

4) Is Employee entitled to a penalty?

Penalties are imposed when employers fail to pay compensation when due. AS 23.30.155(e); *Haile*. To avoid a penalty, a controversion must be filed in good faith. *Harp*. For it to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the claimant would not be entitled to benefits. *Id*. However, "an insurer has a continuing obligation to consider new evidence that comes to its attention and to modify or withdraw controversions based on that new evidence." *Vue*. Also, an opinion without a basis is mere speculation and cannot be the foundation of a valid controversion. *Id*.

(a) Late-payment penalty.

Employee contends she is entitled to a late-payment penalty because from December 27, 2019, through January 14, 2020, Employer neither paid TTD benefits nor had any controversions in place. Employer did not offer any evidence to the contrary. Thus, Employer will be ordered to pay a late-payment penalty under AS 23.30.155(e) based on its failure to either pay TTD benefits or have a valid controversion in place from December 27, 2019, to January 14, 2020. *Haile*; *Harp*.

(b) Penalty due to unfair or frivolous controversion.

Employee also contends Employer's controversions were not filed in good faith; therefore, she is also entitled to a penalty on this ground. She contends "having received Dr. Kirkham's [opinion], which do not provide causation explanation," Employer had "the ability to follow up and say 'you submitted a conclusory opinion to us with no factual support for that opinion.'" This is incorrect.

On January 14, 2020, Dr. Kirkham opined work was not the substantial cause of Employee's disability or need for medical treatment, but rather, psychosocial factors provided the best explanation for her condition upon his review of an electrodiagnostic exam and an MRI. He found no evidence of severe carpal tunnel syndrome, cervical radiculopathy, cervical myelopathy or musculoskeletal causes to her symptoms. Dr. Kirkham said he did not "have a good explanation for her ongoing bilateral hand pain, numbness and tingling," but "it is possible to have pain in the absence of significant musculoskeletal or neurological pathology." Dr. Kirkham concluded, "I do not have any formal medical restrictions for her. I do not think that she will be damaging her body by working as a kitchen helper or doing any form of work activity." Regardless of whether he was correct or not, Dr. Kirkham's opinion was based on his in-person examinations and review of an MRI and an electrodiagnostic examination; it was not a conclusory opinion without a basis that cannot be the foundation of a valid controversion. *Vue*. Employer relied on Dr. Kirkham's January 14, 2020 opinion to controvert Employee's benefits, and without evidence in opposition to the controversions, Employee would have been found not entitled to benefits. *Harp*.

Employee further contends that on January 28, 2020, Dr. Kirkham stated "the cause of her symptoms is somewhat unclear," and this proves his January 14, 2020 opinion is conclusory. However, Dr. Kirkham's January 28 opinion should be read as an addendum to his January 14 opinion, not in isolation. On January 28, Dr. Kirkham continued to explain and confirmed his original diagnosis: "She does have very mild carpal tunnel syndrome on the left, but no evidence of carpal tunnel syndrome on the right per electrodiagnostic findings and overall her symptoms are out of proportion to objective pathology. I do suspect a component of nonspecific nerve sensitivity and chronic pain syndrome." Dr. Kirkham told Employee to "find a job that she is able to do with her pain limitations" and did not "restrict her work activities" as she was "primarily pain limited." In short, Dr. Kirkham's subsequent opinion was not new evidence that warranted modification or withdrawal of controversions. *Vue*. Therefore, Employer filed its controversions in good faith, and Employee is not entitled to a penalty on this basis. AS 23.30.155(e); *Harp*.

5) Is Employee entitled to reemployment benefits?

Employee contends had Employer not controverted her claims, she would have received a reemployment eligibility evaluation; instead she had to personally pay for a job training program to improve her employability. Employee seeks a $5,000 dislocation benefits; in the alternative, she seeks a reemployment eligibility evaluation order. Employer contends because Employee was rated with a zero percent PPI, a reemployment evaluation would be unnecessary and unreasonable.

Employee is not entitled to a $5,000 dislocation benefits because she was rated with a zero PPI rating. AS 23.30.041(g)(2)(A). She is not entitled to reemployment benefits because no physician predicted she will have permanent physical capacities that are less than the physical demands of her job. AS 23.30.041(e). Employee's claim for reemployment benefits will be denied at this time without prejudice. She may seek reemployment benefits if in the future Employee obtains a physician's prediction that she will have permanent physical capacities that are less than the physical demands of her job.

6) Is Employee entitled to interest?

Interest is mandatory; Employee is entitled to interest on all past due benefits. AS 23.30.155(p); *Rawls*. Employer is directed to calculate interest in accordance to the Act and regulations.

7) Is Employee entitled to attorney fees and costs?

Employee contends her attorney provided valuable services that will result in an award of benefits; consequently, she should be awarded attorney fees and costs. AS 23.30.145(a); 8 AAC 45.180. Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(a); *Childs*. Employer does not oppose to an award of attorney fees and costs but contends what Employee requested is unreasonable.

Dennis' representation in this case was instrumental in obtaining significant benefits for Employee. These include helping her establish a compensable injury, obtaining past TTD benefits and medical costs reimbursement, ongoing medical care, a late-payment penalty, and interest, all of which were previously controverted. AS 23.30.145(a). Employer withdrew its controversions due to Dennis' representation. It is undisputed Employee is entitled to some attorney fees and costs; yet, Employer contends she should receive less than what she requested.

Reasonable and necessary costs may be awarded to a claimant if the costs relate to the issues upon which she prevails at hearing. 8 AAC 45.180(f). Attorney fees in these cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Bignell*. Fees incurred on minor issues on which an injured worker loses at hearing will not be reduced if he prevails on primary issues. *Porteleki*.

Dennis documented his attorney fees and costs incurred representing Employee in her mostly successful claim. He billed at $395 per hour and his paralegal costs at $175 per hour. Employer did not object to the time Dennis or his paralegal spent on this case or on their hourly rates, with only three exceptions: (1) 6.7 hours spent on drafting a letter to Dr. Ala, instead it should be 4.2 hours; (2) 3.5 hours spent on researching Dr. Kirkham's opinions in unrelated *Rogers* case; and

(3) 3.8 hours spent on drafting a settlement letter, which was never sent. Employer asks a total reduction of 9.8 hours (6.7 - 4.2 + 3.5 + 3.8 = 9.8).

Dennis addressed the required factors supporting his request for reasonable fees from Alaska Rule of Professional Conduct 1.1(a). *Rusch*. Based on Dennis' representations via affidavits, and lack of any contrary evidence from Employer and the above three objections, it is undisputed Dennis' time spent and hourly rate is reasonable and necessary. *Id*. For its first objection, Employer contends "a more reasonable time for [drafting a letter to Dr. Ala] would include 1.7 hours for the file review and initial letter preparation plus 2.5 hours to complete the letter, for a total of 4.2 hours," instead of 6.7 hours Dennis billed. It is unclear how Employer came up with these figures since it did not provide any evidence supporting such "reasonableness." As to the second objection, lawyers regularly research doctors' opinions in other cases to evaluate their credibility. *Rogers & Babler*. As Dennis deemed Kirkham's opinion to be adverse to Employee's claim, it was reasonable to conduct such research. As for Employer's third objection, lawyers also regularly draft settlement letters. *Id*. Sometime they get sent; sometimes they do not. It is a reasonable strategic decision a lawyer often has to make. Even if all three objections were valid and reasonable, the amount at issue is "minor" compared to what Employee obtained due to Dennis' work; thus, Employee's attorney fee and cost award will not be reduced. *Porteleki*. Employee's request for attorney fees and costs will be granted; Employer will be ordered to pay $38,670.50 in attorney fees and $6,819.72 in costs, totaling $45,490.22.

CONCLUSIONS OF LAW

1) Employee is entitled to TTD benefits after August 10, 2020.
2) Employee is not entitled to PPI benefits.
3) Employee is entitled to medical costs.
4) Employee is entitled to a late-payment penalty.
5) Employee is not entitled to reemployment benefits.
6) Employee is entitled to interest.
7) Employee is entitled to attorney fees and costs.

ORDERS

1) Employer shall pay Employee TTD benefits from August 11, 2020, through October 7, 2020. If she wishes to recover TTD benefits from October 8 through 22, 2020, she must first repay unemployment benefits received for that period and provide proof of payment to Employer.
2) Employee's request for PPI benefits is denied at this time without prejudice.
3) Employer shall provide continuing medical care for Employee's work injury and pay past medical bills directly to providers pursuant to the Alaska medical fee schedule so they can reimburse Medicaid.
4) Employer shall pay Employee a late-payment penalty on untimely paid TTD benefits from December 27, 2019, to January 14, 2020.
5) Employee's requests for a finding of unfair or frivolous controversions and related penalty are denied.
6) Employee's request for reemployment benefits is denied at this time without prejudice.
7) Employee is entitled to interest on all unpaid benefits.
8) Employer is awarded $38,670.50 in attorney fees and $6,819.72 in costs, totaling $45,490.22.

Dated in Anchorage, Alaska on July 19, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Robert Weel, Member

/s/
Pam Cline, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Myla Belcher, employee / claimant v. Sodexo Remote Sites Partnership, employer; Alaska National Insurance, insurer / defendants; Case No. 201917486; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on July 19, 2021.

/s/
Nenita Farmer, Office Assistant