ALASKA WORKERS' COMPENSATION BOARD

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

ONOFRE CURAMEN GAJONERA, Employee, Claimant, v. STATE OF ALASKA, Self-Insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 201814454 AWCB Decision No. 21-0091 Filed with AWCB Anchorage, Alaska on September 23, 2021

Employee Onofre Gajonera's July 6, 2021 claim was heard on September 21, 2021, in Anchorage, Alaska, a date selected on August 11, 2021. An August 11, 2021 stipulation gave rise to this hearing. Employee appeared, testified and represented himself. Assistant Attorney-General Henry Tashjian appeared telephonically and represented the State of Alaska (Employer). The record closed at the hearing's conclusion on September 21, 2021.

ISSUE

Employee contends the four percent permanent partial impairment (PPI) rating Employer paid him is too low. He contends his doctor said his PPI rating should be at least eight percent.

Employer contends it paid Employee the only PPI rating provided in his case. It contends his request for additional PPI benefits must be denied for his failure to prove a higher rating.

Is Employee entitled to additional PPI benefits?

FINDINGS OF FACT

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

1) On August 16, 2018, Employee injured his left shoulder when he slipped and grabbed bracing on scaffolding with his left hand so he would not fall. (First Report of Injury, October 4, 2018).

2) Between May 2, 2019 and August 11, 2021, Employee had seven walk-in meetings with Division staff at which he asked numerous questions concerning his case. During this same time, he had two telephone meetings with Division staff regarding his case. No contacts show Division staff ever advised him he needed to obtain a PPI rating, or how to obtain one. (ICERS Communications tab, May 2, 2019, through August 11, 2021).

3) On May 25, 2019, David Glassman, M.D., orthopedic surgeon, examined Employee for an employer's medical evaluation. He provided a four percent whole-person PPI rating pursuant to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*Guides*). Dr. Glassman explained how he came to his PPI rating with reference to the *Guides*. (Glassman report, May 25, 2019).

4) On September 3, 2019, Employee requested temporary total disability, temporary partial disability, medical costs and a second independent medical evaluation. (Claim for Workers' Compensation Benefits, September 3, 2019).

5) On November 12, 2019, the parties attended the first conference with a Board-designee. The designee advised Employee the division had technicians available if he had questions; the designee gave Employee a "Workers 'Compensation and You" pamphlet, a "flow chart" for the adjudications process and a list of workers' compensation attorneys. At this time, Employee had not yet claimed PPI benefits. (Prehearing Conference Summary, November 12, 2019).

6) On July 6, 2021, Employee requested additional PPI benefits. He stated, "PPI check inaccurate. Still have uncashed check. Disagree with rating." (Claim for Workers' Compensation Benefits, July 6, 2021).

7) On August 11, 2021, the parties attended the second conference with a Board-designee. They set Employee's two claims on for a September 21, 2021 hearing. The conference summary contains no discussion advising Employee he had to produce evidence to support his PPI benefit claim at hearing. (Prehearing Conference Summary, August 11, 2021).

8) On September 13, 2021, the parties appeared for the third conference with a Board-designee. The parties agreed to amend the issues for the September 21, 2021 hearing to include only

Employee's July 6, 2021 claim for PPI benefits. This time the designee was having difficulty understanding Employee, who speaks English as a second language, and used an interpreter service. The summary contains no discussion advising Employee he had to produce evidence to support his PPI benefits claim at hearing. (Prehearing Conference Summary, September 13, 2021).

9) At hearing Employee said he received a check from Employer for Dr. Glassman's four percent PPI rating. However, he had not cashed the check because he feared cashing it would waive his right to seek additional PPI benefits. The check became "stale" and Employer issued a replacement check, which Employee has still not cashed. Employee said his attending physician Ken Paisley, D.O., told him the EME rating was too low and he had at least an eight percent PPI rating for his left upper extremity. However, when Employee asked Dr. Paisley's office to put this opinion in writing, Dr. Paisley's secretary told Employee Dr. Paisley did not want to be involved in his case. Employee thereafter made no further efforts to seek a higher PPI rating from Dr. Paisley or from any other physician. (Employee).

10) Employee said he was aware if he made a claim for something he "had to prove it." He knew this even before he began working at his current job at the Nesbitt courthouse. (Employee).

11) When asked why he thought he was entitled to additional PPI benefits, Employee said his arm was not back to normal following shoulder surgery and he still has weakness and pain. Employee admitted he had no higher PPI rating than four percent. (Employee).

12) With few exceptions, Employee was easy to understand and understood what he was asked at hearing though his answers were sometimes non-responsive. (Judgment; observations).

13) Employer contends Employee filed a claim for PPI benefits, agreed he was ready for a hearing on his claim, and appeared at hearing without evidence supporting a PPI rating higher than the four percent it had already paid him. It contends Employee's statement that Dr. Paisley suggested an eight percent PPI rating is inadmissible hearsay that cannot be relied upon to award benefits. Employer further contends the *Settje* case has similar facts and holds that Employee's claim must be denied because he presented no evidence supporting it. (Record).

PRINCIPLES OF LAW

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). The statutory presumption of compensability in AS 23.30.120 does not apply when an injured worker is not "seeking coverage," because applying the presumption in such cases does not promote the goals of encouraging coverage or prompt benefit payment to the injured worker. *Rockney v. Boslough Construction Co*., 115 P.3d 1240, 1244 (Alaska 2005).

In *Richard v. Fireman's Fund*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court said:

> We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

Richard cited with approval from cases from other states in which the courts declared: "The Workmen's Compensation Act was enacted for the benefit of the employee. The Industrial Accident Board is a state board created by legislative act to administer this remedial legislation, and under the act the Board's first duty is to administer the act so as to give the employee the greatest possible protection within the purposes of the act."

In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316, 319-21 (Alaska 2009), the Alaska Supreme Court addressed this same issue and said:

> A central issue inherent to Bohlmann's appeal is the extent to which the board must inform a *pro se* claimant of the steps he must follow to preserve his claim. . . .
>
> In *Richard* . . . we held that the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation (footnote omitted). We have not considered the extent of the board's duty to advise claimants. . . .

Bohlmann further stated:

> Here, the board at a minimum should have informed Bohlmann how to preserve his claim. . . . Its failure to recognize that it had to do so in this case was an abuse of discretion (footnote omitted). . . .

In *Egemo v. Egemo Const. Co*., 998 P.2d 434, 441 (Alaska 2000) an injured worker claimed disability benefits for future surgery when he was not yet disabled. *Egemo* held the board was wrong to dismiss a prematurely filed a claim and said:

> In our view, when a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice that it may be refiled when it becomes timely. (Footnote omitted).

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality . . . the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
>
> (b) All determinations of the . . . 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. . . .

In *Stonebridge Hospitality Associates*, *LLC v. Settje*, AWCAC Decision No. 153 (June 14, 2011), the Alaska Workers' Compensation Appeals Commission addressed an injured worker's claim for additional PPI benefits. At hearing, the board had held the claim was not ripe for adjudication because the worker had not yet obtained a PPI rating from her attending physician. Reversing the Board's decision on appeal, *Settje* held the worker's PPI benefits claim was ripe for adjudication because the PPI issue was clearly identified, the party's interests on the issue were adverse, the injured worker knew she needed to obtain a higher PPI rating but she nonetheless appeared at hearing on the PPI issue without having obtained a higher rating. *Settje* held, "a PPI rating is necessary to obtain an award of PPI benefits."

> **8 AAC 45.120. Evidence**. . . .
> . . . .
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> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

ANALYSIS

Is Employee entitled to additional PPI benefits?

Employee contends he is entitled to additional PPI benefits; Employer contends it already paid benefits for the only PPI rating in evidence. AS 23.30.190(a). The parties do not dispute Employee's entitlement to PPI benefits; they only dispute the amount. This is similar to *Rockney*, where the parties did not dispute the injured worker's entitlement to the benefit at issue but only disputed one aspect related to it. Therefore, the statutory presumption of compensability does not apply to this claim.

Addressing Employee's claim, at first glance an argument could be made that the Division failed to properly advise Employee that he needed to obtain a higher PPI rating before he requested, and appeared at, a hearing on his PPI benefit claim. *Richard*; *Bohlmann*. As a layman, Employee may not have known he had the burden to prove his claim for additional PPI benefits by obtaining and presenting a higher PPI rating at hearing. *Rogers & Babler*. Arguably, absent advice from Division staff, Employee's claim was premature and should be held in abeyance or dismissed without prejudice so he could be informed about his burden of proof. Having been advised, he could then refile his claim after he at least had an opportunity to obtain a higher PPI rating. *Egemo*.

However, Employee's hearing testimony was clear: he has long known that a person who files a claim has to "prove it." He knew this even before he began working at the court system. Employee explained in detail how he tried to get Dr. Paisley to put his comments regarding an eight percent PPI rating in writing so Employee could use it as evidence at hearing. After several attempts, Employee learned through Dr. Paisley's secretary that Dr. Paisley was not going to assist and would not be putting a PPI rating in writing. At that point, Employee gave up on pursuing a higher PPI rating; he conceded he made no additional effort to obtain a rating from Dr. Paisley or from any other physician. Thus, any Division staff error in not expressly advising Employee that he needed to obtain a higher PPI rating, and how to obtain one, had no effect in this case. Employee said already knew he had the burden of proving his claim for a higher PPI rating.

Absent any mitigating circumstances, the law on this issue is clear. Employee's testimony that Dr. Paisley told him he had an eight percent PPI rating is hearsay and cannot be used over Employer's objection as evidence to support a factual finding or a PPI benefit award. 8 AAC 45.120(e). This rule is especially applicable here because, even if Dr. Paisley made the statement Employee attributes to him, Employer has no way to know how Dr. Paisley came to this higher PPI rating or if he even used the AMA *Guides* to calculate it. AS 23.30.190(b).

Like the claimant in *Settje*, Employee claims additional PPI benefits; the parties acknowledged the PPI issue; the issue was contested at hearing; and he presented no evidence supporting a higher PPI rating. *Settje* held "a PPI rating is necessary to obtain an award of PPI benefits." Employee knew he had the duty to provide a higher PPI rating, tried to get one, failed, and took no additional action. Therefore, he failed to meet his burden of proof and his claim for additional PPI benefits will be denied. *Settje*. Employee may cash the PPI check; this will have no effect on his rights, even should he decide to appeal this decision.

CONCLUSION OF LAW

Employee is not entitled to additional PPI benefits.

ORDER

Employee's July 6, 2021 claim is denied.

Dated in Anchorage, Alaska on September 23, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

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 Onofre Curamen Gajonera, employee / claimant v. State f Alaska, self-insured employer / defendant; Case No. 201814454; 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 September 23, 2021.

/s/
Nenita Farmer, Office Assistant