ALASKA WORKERS' COMPENSATION BOARD

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

JOHN THOMAS, Employee, Claimant, v. CACHE CAMPER MANUFACTURING, Employer, and REPUBLIC INDEMNITY CO. OF AMERICA (RIG), Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202301752 AWCB Decision No. 23-0078 Filed with AWCB Anchorage, Alaska on December 18, 2023

Parts of John Thomas' (Employee) June 5, 2023 and August 11, 2023 claims -- for reemployment "stipend" benefits, a penalty and interest, and his request for a frivolous or unfair controversion finding -- were heard on November 28, 2023, in Anchorage, Alaska, a date selected on November 22, 2023. A November 22, 2023 stipulation gave rise to this hearing. Attorney Robert Bredesen represented Employee, who attended the hearing. Attorney Michelle Meshke represented Cache Camper Manufacturing and its insurer. (Employer). There were no witnesses. All participants appeared by Zoom. The record closed at the hearing's conclusion on November 28, 2023.

ISSUES

Employee contends he is in the reemployment process because he is participating in a vocational rehabilitation eligibility evaluation, and is entitled to "stipend" benefits while in the process.

Employer contends it controverted Employee's right to reemployment benefits on grounds his total inability to return to his employment at the time of injury is not a result of the injury, and because Employee was not disabled for 90 consecutive days. It further contends, while it may pay for the ongoing eligibility evaluation, it need not pay Employee "stipend" benefits.

1) Is Employee entitled to reemployment "stipend" benefits?

Employee contends Employer had no basis in fact or law to not pay him "stipend" benefits while he is in the reemployment process. Therefore, he contends he is entitled to a penalty.

Employer contends that since no mandatory eligibility evaluation need occur, no "stipend" benefits could be due and owed, and no penalty can be assessed.

2) Is Employee entitled to a penalty?

Employee contends he is entitled to statutory interest on "stipend" benefits he is owed.

Employer contends no "stipend" benefits are due and owing, so no interest can be awarded.

3) Is Employee entitled to interest?

Employee contends Employer had no basis to not pay him "stipend" benefits, and therefore, its controversion was frivolous or unfair.

Employer contends its controversion was supported by fact and law and there should be no frivolous or unfair controversion finding.

4) Did Employer make a frivolous or unfair controversion?

FINDINGS OF FACT

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

1) On April 4, 2023, adjuster Christina Miller notified the Workers' Compensation Division (Division) that Employee had been totally unable to return to his employment at the time of his

injury for 45 consecutive days as a result of the injury. The notice stated the 45 consecutive days began on February 7, 2023. (Employer's Notice of 45 Consecutive Days of Time Loss for Injuries Occurring on or After November 7, 2005, April 4, 2023).

2) On May 17, 2023, 99 days after the February 7, 2023 disability start date stated in the adjuster's April 4, 2023 notice, Dennis Chong, MD, examined Employee for an employer's medical evaluation (EME). He diagnosed a work-related cranial contusion, and opined "disability" from this "should have ended within one week." Dr. Chong opined Employee was medically stable, needed no further medical treatment, had "no ratable" permanent partial impairment (PPI), and "should be able to return to full duty work without restrictions." He concluded Employee "is not disabled." When asked, "If [Employee] is not able to return to work at this time, was his claim of workplace injury dated 01/21/2023 the substantial cause of his inability to work in his normal and customary occupation or is there an alternative explanation," Dr. Chong said, "Not applicable." He did not say "no" or state Employee's "inability to return to the employee's employment at the time of injury is not a result of the injury," or words to that effect. (Chong report, May 17, 2023).

3) By May 17, 2023, by Miller's own statement, Employee had already been disabled from his work for 99 consecutive days. (Observations).

4) On May 19, 2023, Miller filed a form admitting Employee had been totally unable to return to his employment for 90 consecutive days as a result of the work injury, and the 90 days began on January 27, 2023. Employee did not sign this form. (Employer's Notice of 90 Consecutive Days of Time Loss For Injuries Occurring on or After November 7, 2005, May 19, 2023).

5) Miller's May 19, 2023 Division-provided 90-day notice form was late. (Observations).

6) On May 22, 2023, Employer last paid Employee temporary total disability (TTD) benefits. It paid him no "stipend" benefits. (Agency file: Payments tab, May 26, 2023).

7) On May 26, 2023, Employer controverted "Reemployment Benefits," based on Dr. Chong's opinion, which said "the work injury would have resolved within 1 week post contusion." The notice added words not written by Dr. Chong and asserted, "the work injury was no longer the substantial cause of employee's disability or need for treatment." It also echoed Dr. Chong's opinion that Employee was no longer disabled and "should be able to return to work without restrictions." The denial notice did not differentiate between reemployment benefits payable to a reemployment specialist to conduct an eligibility evaluation, and "stipend" benefits payable to an injured worker under AS 23.30.041(k). (Controversion Notice, May 26, 2023).

8) On May 26, 2023, Employer reported to the Division it had paid Employee 13 weeks of temporary total disability (TTD) benefits from January 24, 2023 through May 22, 2023, at a $738.65 weekly rate, totaling $9,602.45 ($9,602.45 / $738.65 = 13). The Division's payment data in Employee's electronic file shows:

Filing Date	MTC Description	Payment Date	Payment Type	From Date	Thru Date	Rate	Amount	Lump Sum Payment Settlement Code
02/10/2023	Initial Payment	02/09/2023	Temporary Total	01/27/2023	01/30/2023	738.65	422.09	
02/13/2023	Full Suspension	02/09/2023	Temporary Total	01/27/2023	01/30/2023	738.65	422.09	
03/10/2023	Change	02/21/2023	Temporary Total	01/24/2023	03/06/2023	738.65	3,693.25	
02/23/2023	Reinstatement of Benefits	02/21/2023	Temporary Total	01/27/2023	02/20/2023	738.65	1,899.39	
05/26/2023	Full Suspension	05/22/2023	Temporary Total	01/24/2023	05/22/2023	738.65	9,602.45	

Filing Date	MTC	Reason Code	Payee	From Date	Thru Date	Issue Date	Payment Amount
02/10/2023	IP	Temporary Total	JOHN THOMAS	01/27/2023	01/30/2023	02/09/2023	422.09
02/23/2023	RB	Temporary Total	JOHN THOMAS	02/07/2023	02/20/2023	02/21/2023	1,477.30

(Agency file: Payments tab, May 26, 2023).

9) Thirteen weeks equals 91 days (13 weeks x 7 days = 91). (Observations).

10) On May 29, 2023, the Division, based on payment information the insurer had provided, notified Employee that Employer had paid him TTD benefits for 91 days beginning January 24, 2023, through May 22, 2023. Employer did not object. (Letter, May 29, 2023).

11) Fourteen days from May 22, 2023, was June 5, 2023; seven days from June 5, 2023, was June 12, 2023. (Observations).

12) On June 1, 2023, the Division sent a letter advising it had received evidence that Employee had "missed 90 consecutive days from work as a result" of his work injury. As "compensability" did "not appear to be in dispute," and as required by law the technician assigned Daniel LaBrosse to complete an eligibility evaluation. Employer did not object. (Letter, June 1, 2023).

13) On June 1, 2023, the RBA technician emailed notified Miller that Employee was referred to LaBrosse for the evaluation. Again, Employer did not object. (Email, June 1, 2023).

14) On June 5, 2023, in conformance with the RBA technician's letter, Miller sent LaBrosse required documents to begin the eligibility evaluation. (Letter, June 5, 2023).

15) On June 5, 2023, Employee pro se filed a June 2, 2023 claim for TTD, temporary partial and permanent total disability benefits, PPI benefits, and an unfair or frivolous controversions finding. (Claim for Workers' Compensation Benefits, June 2, 2023).

16) On June 7, 2023, Miller emailed the RBA technician, without service on Employee:

> There has been an error in assigning this claim for Voc Rehab: The employee has not been off work 90 consecutive days. He returned to work within the 90 days, and then was taken back off of work.
>
> Please disregard with moving forward on this claim.
>
> I apologize for the confusion. (Email, June 7, 2023).

17) On June 7, 2023, the RBA technician emailed LaBrosse, Miller and Employee, stating:

> I have just been informed by Christina Miller, adjuster, that Mr. Thomas shouldn't have been referred out for an evaluation as he did not miss the required 90 days for an evaluation. Please stop work on this case. (Email, June 7, 2023).

18) On June 14, 2023, Bredesen entered his appearance for Employee and wrote the RBA with Employee's concerns about the RBA technician's June 7, 2023 email:

> . . . He received an email from Ms. Charles that was sent to Specialist LaBrosse, instructing him to stop work on an eligibility evaluation. I write to follow-up on that. To begin with, I am not aware of any procedure to set aside an order under AS 23.30.041(c) other than an appeal to the Board, or a petition to modify.
>
> I do not have a file yet and therefore do not know when the evaluation was filed, nor do I know whether the insurer filed the required 45-day and 90-notices and, if they did, when they were filed. Would you please forward copies of those documents, if they were filed?
>
> Ms. Charles' email was in response to a communication with the adjuster, Christina Miller. Could I get a copy of that communication as well, and also be allowed an opportunity to respond? Ms. Miller apparently informed Ms. Charles that my client has not been unable to do the job at the time of injury for 90 consecutive days, which we disagree with. Thank you for your attention to this matter. (Entry of Appearance; letter, June 14, 2023).

19) On June 17, 2023, Miller sent a letter to LaBrosse with copies "of additional medical records for the reemployment eligibility evaluation in progress." (Letter, June 17, 2023).

20) On June 26, 2023, Employer again controverted reemployment benefits in reliance on Dr. Chong's May 17, 2023 report. This time, the controversion included a contention that, "The employee's total inability to return to [the employee's] employment at the time of injury is not the result of the injury." Again, the denial notice did not differentiate between reemployment benefits

payable to a specialist performing an eligibility evaluation, and "stipend" benefits payable to Employee. (Controversion Notice, July 26, 2023).

21) On July 12, 2023, Meshke sent a transmittal letter to the RBA, which included the June 26, 2023 controversion. (Letter, July 12, 2023).

22) On July 25, 2023, Bredesen sent the RBA another letter:

> I recently obtained a copy of the Board file and, upon reviewing it, request that you please provide further instruction to the assigned reemployment specialist (Dan LaBrosse), to proceed with the already-ordered eligibility evaluation. I also anticipate that the employer will object, and would like to elaborate on my views regarding 90-day notices and their significance.
>
> Within the Board file I found a written stipulation by the employer which admits that my client was entitled to an eligibility evaluation, pursuant to AS 23.30.041(c), as of late-April. Specifically, the insurer filed a 90-day notice. The standard 90-day form asks every employer: "Please advise if the employee has been off work for 90 consecutive days due to the date of injury. . . ." Here, the 90-day form, signed by the adjuster and filed with the Board on May 19, 2023, stipulated that "Yes, the employee has been off work since 01/27/23." The 90th day was April 27, 2023. Notably, the insurer has not petitioned the Board to set aside this written stipulation, under 8 AAC 45.050(f)(3). I further note that the employer paid TTD for more than 90-consecutive days, per the Compensation report dated May 2, 2029.
>
> Next, based upon the employer's written stipulation, an order awarding reemployment benefits did in fact issue under AS 23.30.041(c), on June 1, 2023. Employer never appealed that order. Obviously, the employer could not have done so, because the only statutory requirement for entitlement to reemployment benefits under AS 23.30.041(c) is that an injured worker be "totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury," which the employer admitted. Under Regulation 8 AAC 45.522, certain types of controversions, if in place as of the 91st day, will prevent an award of benefits under AS 23.30.041(c). However, no such controversions were in place as of April 28, 2023.
>
> Although the employer's *ex parte* communication succeeded in interrupting the eligibility evaluation, I note that the employer has continued to comply with the June 1st order. That order directed the adjuster to send medical records to the assigned reemployment specialist. On June 17th, 10 days after the email asking Specialist LaBrosse to pause his work in this case, the adjuster provided supplemental records to Specialist LaBrosse. This demonstrates that the employer understands that the reemployment process continues.

> Finally, I noticed that the employer recently filed a controversion notice purporting to deny the benefits awarded on June 1st (again, the employer never appealed the June 1st order), and the employer also specifically served a copy of that controversion notice upon you. We regard that controversion as untimely for reemployment purposes, since Regulation 8 AAC 45.522 only applies when a determination gets made under AS 23.30.041(c), and that happened on June 1st.
>
> We therefore consider the recent controversion to be unlawful, pursuant to *Martino v. Alaska Asphalt Construction,* AWCAC Decision No. 304 (June 22, 2023). There, the employer filed a 90-day notice admitting liability for reemployment benefits, then an eligibility evaluation was ordered based upon that written admission. Just like the present case, the employer later controverted reemployment benefits based upon EME opinion that the employee could return to work. The Appeals Commission affirmed a Board award of a 25% penalty under those same circumstances, reasoning:
>
> > Ms. Martino, by statute, was entitled to the eligibility evaluation because she had been off work for more than 90 days due to the work injury. Alaska Asphalt does not dispute this fact, nor could it, since it confirmed in March 2021 [via the 90-day notice] that she indeed had been off work for more than 90 days.
>
> I further note that the Board has found similar post-referral controversions (i.e., based upon EME opinion) to be unfair and frivolous. *See Seamon v. Matanuska Susitna Borough School District*, AWCB Decision No. 02-0045 (March 8, 2002).
>
> Finally, in case you might be wondering, Mr. Thomas was briefly released to light duty by his doctor in April. The employer purported to offer a different employment to him within those restrictions (i.e., light duty), but when he arrived (on April 14, 2023) the work was not actually limited to light duty. Within a few hours he went to the hospital emergency room. He has been off work entirely since then. Thank you for your attention to this matter. (Letter, July 25, 2023).

23) On August 11, 2023, Bredesen amended Employee's claim to include "stipend" and other benefits. (Claim for Workers' Compensation Benefits, August 11, 2023).

24) On August 14, 2023, Miller sent LaBrosse another letter with additional medical records for the eligibility evaluation "in progress." (Letter, August 14, 2023).

25) On August 25, 2023, Employee requested an informal reemployment conference with the RBA to discuss Employee's eligibility evaluation status. (Letter, August 25, 2023).

26) On August 28, 2023, the RBA wrote to the parties:

> On August 25, 2023 I received a request for an informal conference from employee attorney Robert Bredesen to discuss the status of John Thomas' eligibility

> evaluation. After review of the file I have determined that an informal conference will not be granted.
>
> Our electronic file indicates that on May 19, 2023 the adjuster filed an Employer's Notice of 90 Consecutive Days of Time Loss for Injuries Occurring on or after November 7, 2005 form on this case. On May 26, 2023 a Controversion Notice was filed by adjuster Christina Miller. On June 1, 2023 the eligibility evaluation was referred to Rehabilitation Specialist Daniel LaBrosse. On June 7, 2023 Ms. Miller notified the parties that the 90 day notice was sent out in error and that Mr. Thomas had not missed 90 consecutive days of employment. Ms. Miller stated that Mr. Thomas had returned to work within the 90 days and was then taken back off work. An email was sent to Mr. LaBrosse to stop work on the case due to this information. The parties were copied on this email. On June 14, 2023 a phone message was left for Ms. Miller by Workers' Compensation Technician Darlene Charles requesting the exact consecutive days of time loss. A response was not received.
>
> Records per regulation have been filed electronically by the adjuster on the following dates: 6/5/23, 6/19/23, 7/5/23, and 8/15/23 showing copy to Mr. LaBrosse, Mr. Thomas, and this office. Additionally, on July 25, 2023 employee attorney Robert Bredesen filed a letter stating that Mr. Thomas did not return to work in the job that he performed at the time of injury, stating it was a light duty job with restrictions.
>
> After consideration of the above information I have determined that the eligibility evaluation shall move forward as it appears Mr. Thomas did miss 90 consecutive days of employment. Mr. LaBrosse is asked to continue work on the eligibility evaluation immediately. (Letter, August 28, 2023).

27) On August 31, 2023, LaBrosse issued a report concluding he could not make a recommendation until Employee's attending physician responded to his inquiries. (Eligibility Evaluation Report, August 31, 2023).

28) On September 6, 2023, Employer controverted all disability and PPI benefits, medical and related transportation costs, reemployment benefits including "stipend," an unfair or frivolous controversion finding, a penalty, interest and attorney fees and costs. For the first time, Employer included its contention that Employee was not disabled for 90 consecutive days "regardless of causation." (Controversion Notice, September 6, 2023).

29) On September 7, 2023, Employer wrote the RBA:

> You indicated that it appears that Mr. Thomas did miss 90 consecutive days of employment and requested Mr. LaBrosse proceed with the eligibility evaluation. I filed my entry of appearance on 6/14/23 and was unaware of the RBA-designee's

> voice mail to the adjuster requesting an itemization of time loss. I checked with Ms. Miller, and she does not have a record of receiving a voice mail and recalls that all of her communications were through email.
>
> I am attaching a list of payments issued to Mr. Thomas. The most consecutive days of time loss that he received was from 4/3/23 to 5/22/23, which is less than 60 days.
>
> I request reconsideration of whether the eligibility evaluation should move forward, with this information in mind. (Meshke letter, September 7, 2023).

30) A chart attached to Employer's September 7, 2023 email purports to show disability payments to Employee as follows:

Payee / Provider Name	Transaction Description	Service Start Date	Service End Date	Invoice Number	Invoice Date	Check Number	Check Issue Date	Amount Billed	Amount Paid
Indemnity									
John Thomas	008 T.D. Payment - First And Final	01/27/2023	01/30/2023			1000582183	02/09/2023		$422.09
John Thomas	002 T.D. Payment - First	02/07/2023	02/20/2023			1000583217	02/21/2023		$1,477.30
John Thomas	009 T.D. Payment - Waiting Period	01/24/2023	01/26/2023			2000065188	03/08/2023		$316.56
John Thomas	004 T.D. Payment - Continuing	02/21/2023	03/06/2023			2000065190	03/08/2023		$1,477.30
John Thomas	004 T.D. Payment - Continuing	03/07/2023	03/20/2023			2000065394	03/17/2023		$1,477.30
John Thomas	004 T.D. Payment - Continuing	03/21/2023	04/03/2023			2000065815	04/03/2023		$1,477.30
John Thomas	004 T.D. Payment - Continuing	04/25/2023	05/08/2023			2000066735	05/09/2023		$1,477.30
John Thomas	004 T.D. Payment - Continuing	05/09/2023	05/22/2023			2000067072	05/22/2023		$1,477.30
Indemnity - Total		**8**							**$9,602.45**

31) On September 18, 2023, the RBA responded to Employer's September 7, 2023 letter:

> As the parties are aware employer attorney Michelle Meshke sent a letter on September 7, 2023 requesting reconsideration of whether the eligibility evaluation should move forward. I have reviewed the letter and the additional information provided by Ms. Meshke. As stated in my August 28, 2023 letter, the eligibility evaluation shall continue forward for the reasons I listed in my letter. Mr. LaBrosse is directed to continue his efforts to obtain the necessary information to bring this evaluation to a close. (Letter, September 18, 2023).

32) To date, Employer and its adjuster have not corrected any Electronic Data Interchange (EDI) filings to reflect alleged changes in benefits it paid to Employee. They have not petitioned for any relief from the RBA's decision to proceed with the eligibility evaluation. (Agency file).

33) The agency file contains no evidence that Employer has denied payment to LaBrosse for his reemployment services rendered in this case. (Agency file).

34) Employee contends the RBA "awarded" him reemployment benefits in her June 1, 2023 letter, notwithstanding Employer's late 90-day notice. He contends since Employer did not appeal or petition for modification of this "award," he is entitled to not only the eligibility evaluation, but

also the associated "stipend" because he has participated in the reemployment process vigorously. Employee contends Employer cannot unilaterally controvert because he is entitled to "stipend" as a matter of law. Consequently, he seeks an award of "stipend" benefits from May 23, 2023, and continuing until the reemployment process is completed, a penalty, interest and a finding that Employer made a frivolous or unfair controversion. He also contends Miller's 90-day form and EDI data sent to the Division were binding "stipulations" that Employee met the 90-day disability provisions in the Workers' Compensation Act (Act) and regulations. Employee contends Employer cannot unilaterally avoid this stipulation. Employee contends he is entitled to "stipend" because he has been disabled under AS 23.30.041(c), is vigorously pursuing reemployment benefits and is actively engaged in the reemployment process. As support for his position, he relies on *Martino*, *Carter* and *Vandenberg*. (Employee's Hearing Brief, November 21, 2023; record, November 28, 2023).

35) Employer contends the RBA's letter was not a "award" of compensation subject to appeal, because there is nothing in the Act or regulations making it an "award," or providing for such an appeal from an eligibility evaluation referral. It contends there are numerous reasons why Employer would move the eligibility process forward and presumably finance it by paying LaBrosse's bills, but not have to pay "stipend" benefits to Employee at the same time. For example, it contends costs for the eligibility evaluation are far less than the costs for both the evaluation and "stipend" benefits. Employer contends Dr. Chong's EME report, and its May 26, 2023 controversion, implicated an 8 AAC 45.510(b) exception, made applicable to 8 AAC 45.522(a) by reference. Specifically, while not initially using "magic words," which it contends are not required, Employer contends Dr. Chong's report and its May 26, 2023 controversion effectively stated that Employee's total inability to return to his employment at the time of injury is not a result of the work injury. Therefore, it contends the RBA should have referred the matter for a prehearing conference and a hearing. Notwithstanding the fact it voluntarily continues to presumably finance the eligibility evaluation, Employer contends it has no legal obligation to pay Employee "stipend" benefits. At hearing, it agreed no other 8 AAC 45.510(b) grounds apply, and it controverted Employee's right to "stipend" benefits, in part, because in its view Dr. Chong said Employee's total inability to return to work, is not the result of the injury. Employer also contends Employee was not disabled from his at-injury job for 90 consecutive days. Therefore, Employer seeks an order denying Employee's claim for "stipend" benefits, a penalty, interest and a frivolous

or unfair controversions finding. It relies on 8 AAC 45.510(b), *Goodfellow*; *Lawhorne*; and *Martino*. However, Employer's brief concedes that Employee only returned to work for Employer on light-duty accommodations, and did not return to his regular at-injury work. (Employer's Hearing Brief, November 20, 2023; record, November 28, 2023).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

> (1) this chapter be interpreted . . . to ensure . . . predictable delivery of . . . benefits to injured workers at a reasonable cost to the employers. . . .

The Board may base its decision not only on direct testimony and other tangible evidence, but also on its "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 23.30.008. Powers and duties of the commission**. (a) . . . Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
>
> (b) The administrator shall
>
> (1) enforce regulations adopted by the board to implement this section; . . .
>
> (c) . . . If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted.
> . . . .
>
> (k) . . . If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process. . . .

The following cases were decided before 2011 amendments to 8 AAC 45.510 and the associated addition of 8 AAC 45.522, both of which provided six grounds on which an employer could controvert that would stop the eligibility process from proceeding:

Rockney v. Boslough Construction Co., 115 P.3d 1240, 1243-44 (Alaska 2005), held the statutory presumption of compensability does not imply in every situation. It does not apply where the parties did not dispute the injured worker was entitled to a reemployment plan, but simply disputed the plan under which his benefits would be provided.

Lawhorne v. Alaska Garden & Pet Supply, Inc., AWCB Dec. No. 06-0213 (July 28, 2006), relied on the presumption analysis to deny a claim for stipend benefits. *Lawhorne* found the employee attached the presumption and an EME physician rebutted it with substantial evidence. It held the "legitimate controversion" of all benefits prior to the RBA's referral for an eligibility evaluation protected "the employer from any obligation to provide stipend benefits." It added this decision "is limited to stipend, not whether the eligibility process continues." In a "concurrence," inconsistent with the majority opinion, the designated chair in *Lawhorne* stated:

> . . . I find an employee is entitled to stipend while in the "process" and that an eligibility evaluation is a benefit (Gazcon). I find an eligibility evaluation is part of the "process." The Act envisions / strives for no gaps in benefits in its goal of providing a quick, speedy, efficient process. The eligibility evaluation process has statutorily defined time frames of 60 days with a possibility of a 30 day extension. Should the evaluation process stop, the stipend should accordingly also stop. In the present case I find that the employee should have received her stipend benefits while any eligibility evaluation was proceeding until the process was stopped, up to 90 days (60 plus 30). . . .

Carter v. B&B Construction, Inc., 199 P.3d 1150, 1159-60 (Alaska 2008) stated:

> With respect to Carter's argument that he became entitled to subsection .041(k) benefits before his reemployment plan was approved, we agree with the board's ruling that an employee may be eligible for subsection .041(k) benefits before approval or acceptance of a reemployment plan so long as he has begun the reemployment process. The board has explained that it has "consistently held that when PPI benefits are exhausted, [subsection .041(k)] stipend benefits are to be provided during the reemployment process, not just during the course of a reemployment plan" (citation omitted). This practice is in accord with *Raris* in which we observed that reemployment benefits "are paid contingent on the

> employee's participation in the development and execution of a reemployment plan" (citation omitted). In other words, employees become eligible for reemployment benefits when they begin participating in the reemployment process (citation omitted).
> . . . .
>
> When an employee exhausts PPI benefits before completion or termination of the reemployment process, AS 23.30.041(k) "provides a fall-back source of income" (citation omitted). Given this purpose, we think that the legislature did not intend that there should be a gap between the expiration of PPI benefits and the commencement of reemployment benefits for employees who are vigorously pursuing eligibility evaluations before their PPI benefits expire (citation omitted). We therefore conclude that the reemployment process begins when the employee begins his active pursuit of reemployment benefits. . . .

Goodfellow v. L.C. Wilson, Inc., AWCB Dec. No. 09-0141 (August 14, 2009) also relied on the presumption analysis. The employee contended since his reemployment eligibility evaluation was automatic following his 90-day inability to return to work because of his work injury, so too should his "stipend" payment be automatic; the employer disagreed. The employer had controverted "all benefits" prior to the referral for an eligibility evaluation. It also contended to require it to pay "stipend" benefits to the injured worker without first having a hearing deprived it of due process by taking its property without a hearing. As an example, the employer contended in some cases "the employee would not be eligible for retraining . . . as a matter of law." The employer in *Goodfellow* further contended that under then-current law there was "no presumption" for the injured worker's entitlement to reemployment benefits because referral for an eligibility evaluation was "automatic." However, the employer also contended if the statutory presumption analysis applied, it was entitled to controvert "stipend" benefits. *Goodfellow* applied the presumption analysis and focused primarily on whether the injury was "work-related" and found the EME and the Board's own physician found the injured worker had no PPI rating and could return to his usual work. It likened Goodfellow's case to *Lawhorne*. *Goodfellow* also held that "prior to depriving an entity of property, the parties must have an opportunity to be heard" particularly because the employer has limited ability to recover advance payments or overpayments.

Effective July 9, 2011, the Board through its rulemaking authority amended 8 AAC 45.510(b) and added 8 AAC 45.522(a) to address the issues raised in *Lawhorne* and *Goodfellow*. The following cases were decided after the amended and new regulations went into effect:

Vandenberg v. State of Alaska, AWCAC Dec. No. 240 (September 14, 2017), stated "However, *Carter* [199 P.3d 1150] also clearly established payment of stipend benefits between the exhaustion of TTD and PPI benefits and the start of a reemployment plan. The only requirement is that an employee be in the vigorous pursuit of reemployment benefits."

Unisea, Inc. v. Morales de Lopez, 435 P.3d 961, 964-75 (Alaska 2019) stated:

> If the injured worker is unable to return to the worker's prior employment for 90 consecutive days, the Reemployment Benefits Administrator (footnote omitted) is required to evaluate whether the worker is eligible for reemployment benefits. . . . Unisea initiated the reemployment eligibility process by filing a notice that Morales had not worked for 45 consecutive days. . . .

Martino v. Alaska Asphalt Services, *LLC*, AWCB Dec. No 22-0046 (June 29, 2022) (*Martino II*), found the employer did not timely controvert the employee's right to "stipend" benefits on any relevant ground including those listed in 8 AAC 45.510(b) and 8 AAC 45.522(a). At hearing, the employer contended its March 25, 2021 controversion, which denied only TTD benefits and a penalty, was a "controversion-in-fact" of stipend and other reemployment benefits. Unconvinced, *Martino II* rejected that contention because there was nothing in that controversion giving the employee, the Division or the RBA any indication that it or the EME's opinion upon which the controversion relied, was intended to deny the employee's right to reemployment benefits.

Moreover, even though the injured worker had undisputedly been disabled for more than 90 consecutive days as a result of the work injury, the adjuster in *Martino* never timely provided the RBA with notice as required by law, thus delaying the process and putting the onus on the injured worker to notify the RBA that she had been disabled for more than 90 days. The employee had to make her own inquiries with the RBA's office to alert the RBA to begin the reemployment process. After hearing the employer's "controversion in fact" argument at hearing, the employee contended only a specific controversion on 8 AAC 45.510(b) grounds, in place before the RBA ordered an eligibility evaluation, could stop the process from moving forward. Finding the employer failed to controvert timely on any ground that would prevent the evaluation process, *Martino II* awarded the injured worker "stipend" benefits for the time she was actively participating in the

reemployment process, as a matter of law, even though she was ultimately found not eligible for a retraining plan. The employer appealed.

In *Alaska Asphalt Services*, *LLC v. Martino*, AWCAC Dec. No 304 (June 22, 2023) (*Martino III*), the Commission affirmed *Martino II* in all respects. Moreover, it held the question if an injured worker is entitled to "stipend" benefits is a "legal question," which simply involves statutory interpretation. Therefore, the presumption analysis does not apply, as *Rockney* stated in respect to retraining plans. *Martino III* said *Rockney*'s rationale applies to both "retraining plans" and "eligibility evaluations." It held the eligibility evaluation was mandatory once the Division received notice the injured worker had been off work for more than 90 days because of the work injury, even in cases where no PPI rating had been provided yet to "exhaust." *Martino III* also addressed the "magic words" argument:

> Alaska Asphalt acknowledged that if an injured worker has been unable to return to work for 90 days or more, the law states an eligibility evaluation "shall be ordered" unless Alaska Asphalt controverted "on certain grounds." Although it did not use the precise language required by the regulation, Alaska Asphalt contended it "controverted and made clear" its position that Ms. Martino could return to work before it had notice she was requesting reemployment benefits and before the technician made a referral for an eligibility evaluation. It further asserted that
>
> While the March 25th controversion did not explicitly use the word "reemployment," at the time the controversion was filed Employer had no notice that Employee had sent an email seeking information about the reemployment process, and despite the timeline set in AS 23.30.041, neither a Board administrator, nor the employee herself, had sought to begin the reemployment process as of January 6, 2021 and did not provide notice to employer in the February email.
>
> Alaska Asphalt also claimed its April 26, 2021, amended controversion should have stopped the eligibility evaluation process, but "a referral was made despite the fact that a controversion in fact was in the record before the reemployment process began" (footnote omitted).
>
> Alaska Asphalt contended it properly controverted benefits to Ms. Martino and these controversions should have alerted the RBA to stop the eligibility evaluation process, even though it did not controvert "all benefits" nor use the specific language in 8 AAC 45.510.

On appeal, the employer contended its EME physician's opinion stating the employee could return to work at her time-of-injury job was essentially the same as him saying any inability to return to

work had nothing to do with her work injury, under 8 AAC 45.510(b). In the employer's view, this opinion should have stopped the RBA from beginning the reemployment process, and *Martino II* had improperly placed form over substance. However, *Martino III* disagreed and created a "bright line" rule. Citing 8 AAC 45.510(b) and 8 AAC 45.522(a), the Commission in *Martino III*, without additional analysis, stated plainly:

> These regulations, when read together, state explicitly the grounds upon which an eligibility evaluation may be denied or terminated. Precise grounds are stated.

The Alaska Supreme Court has approved "bright line" legislative rules and statutory interpretations. These "bright line" rules are important because in some statutes the Board lacks discretion to deviate from the rule, making appeals to "fairness and justice" in some instances unavailable. *American International Group v. Carriere*, 2 P.3d 1222, 1224-25 (Alaska 2000). *Carriere* stated regarding the Board's interpretation of a penalty statute:

> We think this is a reasonable interpretation. . . . Instead, it is appropriate that the board follow a bright line such as the "date of mailing" rule so that all parties can operate with some predictability. . . . The legislature chose a bright-line rule, we think wisely, to force insurers to take every possible step to ensure that a check is mailed promptly. . . .
>
> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury. . . . On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days. . . .
>
> (c)The insurer or adjuster shall notify the division in a format prescribed by the director that the payment of compensation has begun or has been increased, decreased, suspended, terminated, resumed, or changed in type. . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury. . . .

> (e) If any installment of compensation payable without an award is not paid within seven days after 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. . . .
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate . . . in effect on the date the compensation is due. . . .

A controversion notice must be filed "in good faith" to protect an employer from a penalty. "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992). *Leigh v. Alaska Children's Services*, AWCB Dec. 22-0025 (April 21, 2022) held that payment of previously controverted benefits results in a "*de facto* withdrawal of that controversion. . . ." *Leigh* is consistent with *Childs v. Copper Valley Electric Ass'n*, 860 P.2d 1184, 1191 (Alaska 1993), which stated:

> Here, CVEA controverted Childs's compensation in November 1988, and Childs had to file a claim to recover these benefits. Subsequently, CVEA voluntarily paid benefits for the period from October 1988 through April 1989. CVEA's payment, though voluntary, is the equivalent of a Board award, because the efforts of Childs's counsel were instrumental to inducing it. . . .

> **8 AAC 45.050. Pleadings.** (a) A person may start a proceeding before the board by filing a written claim or petition.
>
> (b) For claims and petitions under this subsection,
> . . . .
>
> (2) a petition is a written request for action by the board other than a claim. . . .
> . . . .
>
> (f) **Stipulations**.

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

8 AAC 45.120. Evidence. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. . . . 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. . . .

8 AAC 45.507. Notice of employee rights to reemployment benefits. . . .

(b) If the employee has been totally unable to return to the employee's employment at the time of injury for 90 consecutive days, as a result of the injury, the employer shall notify the administrator, in writing, on the 91st day. The notification must be completed on a form prescribed by the administrator.

8 AAC 45.510. Request for reemployment benefits eligibility evaluation. . . .

(b) The administrator shall consider a written request for an eligibility evaluation for reemployment benefits, unless the employer controverts on grounds the employee's injury did not arise out of and in the course of employment, on grounds the employee's total inability to return to the employee's employment at the time of injury is not a result of the injury, or on grounds identified under AS 23.30.022, 23.30.100, 23.30.105, or 23.30.250. If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference regarding the controversion no later than 30 days after the board receives the matter. If a claim is filed and if requested by the employee, the board will conduct a hearing no later than 90 days after the prehearing conference in accordance with 8 AAC 45.060(e) and 8 AAC 45.070(b)(3), limited to the grounds set out in this subsection. . . .

8 AAC 45.522. Ordering an eligibility evaluation without a request. (a) For injuries occurring on or after November 7, 2005, if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation, unless the employer controverts on grounds identified under AS 23.30.022, 23.30.100, 23.30.105, and 23.30.250, or 8 AAC 45.510(b). If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference and hold a hearing in accordance with 8 AAC 45.510(b). . . .

> **Rule 803. Hearsay Exceptions -- Availability of Declarant Immaterial**.
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . . .
>
> **(6)Business Records.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

ANALYSIS

1) Is Employee entitled to reemployment "stipend" benefits?

A) The RBA properly ordered an eligibility evaluation.

This issue involves interplay among closely related statutes and regulations. Assuming, at this point without deciding that Employee was disabled from his work for 90 consecutive days as a result of the work injury, the RBA was required to, and did, order an eligibility evaluation and assign a rehabilitation specialist to perform it. AS 23.30.041(c); *Martino III*. The RBA was also required to enforce regulations adopted to "implement" AS 23.30.041(c). AS 23.30.041(b)(1). The legal analysis in this section is based on the 90-day disability assumption, and on Dr. Chong's EME report and Employer's controversions based on it. As there is no relevant factual issue, the statutory presumption analysis does not apply to this legal issue. *Martino III*; *Rockney*.

When Miller advised the RBA that Employee had been disabled for 90 consecutive days, the RBA appropriately ordered an eligibility evaluation and assigned LaBrosse to the task. 8 AAC 45.522(a); AS 23.30.041(c); *Martino III*. The RBA also had to enforce 8 AAC 45.510(b) made applicable here by reference in 8 AAC 45.522(a), if applicable. AS 23.30.041(b)(1). These regulations provide six exceptions preventing the RBA from referring Employee to a reemployment specialist for an eligibility evaluation. These include Employer's controversion on

grounds: (1) Employee's injury did not arise out of and in the course of employment; (2) Employee's total inability to return to his employment at the time of injury is not a result of the injury; or that Employee violated (3) AS 23.30.022; (4) AS 23.30.100; (5) AS 23.30.105; or (6) AS 23.30.250. At hearing, Employer agreed exceptions (1), (3), (4), (5) and (6) do not apply. Employer said it relied on exception (2), based on Dr. Chong's EME report.

On May 17, 2023, Dr. Chong examined Employee and stated the substantial cause for Employee's then-current claimed symptoms was a preexisting predilection for chronic, widespread musculoskeletal pain complaints, and was not related to the work injury. He confirmed Employee had a work-related injury, which initially caused a contusion, but opined this had resolved after one week post-injury. Dr. Chong confirmed Employee had an injury that arose out of and in the course of his employment; therefore, "compensability" was not at issue. 8 AAC 45.510(b). He also provided causes other than the work injury for Employee's current, widespread pain complaints. Relevant to the instant legal issue, he stated Employee should be able to return to full-duty work without restrictions. Dr. Chong expressly stated Employee was "not disabled."

As Employer concedes, Dr. Chong did not use "magic words" to expressly state "the employee's total inability to return to the employee's employment at the time of injury is not a result of the injury." 8 AAC 45.510(b). It contends he did not have to. Had he done so, this hearing probably would not have been necessary. But Dr. Chong did say Employee was not disabled at all. One could argue that a reasonable inference from what he said in his EME report is that since Employee was not disabled at all, it follows that work-related causes could not be responsible for Employee's inability to return to work. *Rogers & Babler*.

However, the Commission in *Martino III* rejected that argument and established a "bright line" rule, likely to enhance predictability in these proceedings. *Carriere*. In *Martino III*, the employer argued its EME physician's opinion stating the employee could return to work at her at-injury job was essentially the same as saying any inability to return to work had nothing to do with her work injury, under 8 AAC 45.510(b). Employer here contends Dr. Chong said Employee could go back to work within one-week post-injury, implying that is the same as saying his inability to return to work is not the result of the injury. But expressly addressing this same argument in *Martino III*,

the Commission stated 8 AAC 45.510(b) and 8 AAC 45.522(a), read together, "state *explicitly* the grounds upon which an eligibility evaluation may be denied or terminated. *Precise* grounds are stated" (emphasis added). The relevant facts in *Martino II* and *III* and this case are similar. The only significant difference is that the employer in *Martino III* did not initially controvert reemployment benefits. Here, Employer did controvert them, at least the "stipend" part, but as stated in *Lawhorne*, the controversion must be a "legitimate controversion."

AS 23.30.041(c) and 8 AAC 45.510(b) presuppose Employee had "total inability" to return to his at-injury employment for 90 consecutive days. Here, that presupposition was based on Miller's certification so stating. Without Miller's certification, neither the statute nor the regulation would have been invoked because both require evidence he was "totally unable to return" to his at-injury employment for 90 consecutive days. But who decides if Employee met this requirement?

Both the statute and the relevant regulation imbue "the administrator" with a "shall" mandate to order an eligibility evaluation once Miller noticed her, on May 19, 2023, that Employee had been "totally unable to return" to his "employment at the time of injury for 90 consecutive days as a result of the injury." It follows that the RBA had authority to decide if Employee met this legal requirement. The RBA had a duty to make the 90-day disability determination and assign the matter to a specialist. AS 23.30.041(c); 8 AAC 45.522(a); *Unisea, Inc*.

But why does Dr. Chong's report and the controversion relying on it not stop the evaluation? Dr. Chong's report presents his opinion of Employee's *ability* to work; it ignores the question of what causes his adjuster-certified *inability* to work, and states the relevant question under 8 AAC 45.510(b) is "not applicable." Without someone drawing inferences from it, his report ignores the salient question: Is Employee's total inability to return to his at-injury work a result of the work injury? To be clear, Dr. Chong could and did opine Employee was not disabled and his disability ended after only one week. He could have also said his inability to return to his at-injury work was not a result of his work injury; but he did not say that. The correct answer to that question would have stopped the eligibility process from moving forward. 8 AAC 45.510(b).

As the Alaska Supreme Court stated in *Carriere*, establishing a "bright line" rule is desirable. Here, a "bright line" rule will promote "predictability." Alaska's legislature established a 90-day "bright line" rule in AS 23.30.041(c) for when a person is entitled to an eligibility evaluation -- "if the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury. . . ." According to *Martino III*, the Division through its rule-making authority similarly established a "bright line" for what specific, precise controversion grounds will deny an eligibility evaluation. Those six grounds are expressly set forth in 8 AAC 45.510(b) and 8 AAC 45.522(a).

The Alaska legislature wants the Act interpreted to ensure "predictable" delivery of benefits to injured workers. AS 23.30.001(1). This goal applies equally well to interpreting administrative regulations. *Martino III*. Injured workers, the RBA and panels should not have to draw inferences or interpret a physician's opinion, to apply 8 AAC 45.510(b) to a controversion notice.

On May 26, 2023, Employer controverted, among other things, Employee's right to "Reemployment Benefits" purportedly based on Dr. Chong's opinions. In that controversion, Employer contended "the work injury was no longer the substantial cause of employee's disability. . . ." In its June 26, 2023 controversion, issued just three days following the Commission's June 23, 2023 *Martino III* decision, Employer controverted and stated, "The employee's total inability to return to [the employee's] employment at the time of injury is not the result of the injury."

Thus, by June 26, 2023, Employer, unlike the employer in *Martino III*, had at least stated the appropriate ground to controvert reemployment benefits under 8 AAC 45.510(b) in a controversion. But the problem with Employer's stated ground is that Dr. Chong's report does not say what Employer's controversions say it says. It is not a "legitimate controversion." *Lawhorne*. Dr. Chong simply said Employee is not disabled. When the adjuster asked, "If [Employee] is not able to return to work at this time, was his claim of workplace injury dated 01/21/2023 the substantial cause of his inability to work in his normal and customary occupation or is there an alternative explanation," Dr. Chong said, "Not applicable." It was a simple question; he did not say "no"; rather, Dr. Chong said Employee was not disabled at all.

But in accord with *Martino III*, which is precedent, Dr. Chong's opinion does not implicate ground (2) from 8 AAC 45.510(b), because it fails to state that "the employee's total inability to return to the employment at the time of injury is not a result of the injury." AS 23.30.008(a); 8 AAC 45.510(b). Assuming without deciding that Dr. Chong's asserted facts are true, his missing, relevant opinion would not as a matter of law result in the RBA forwarding the matter for a prehearing conference and a hearing "in accordance with 8 AAC 45.510(b)." 8 AAC 45.522(a).

Reading the controversion and Dr. Chong's report together, it is unlikely the RBA technician or RBA would have appreciated that Dr. Chong or Employer were, as Employer now contends, attempting to implicate exception (2) from 8 AAC 45.510(b). The May 26, 2023 controversion requires the reader to draw inferences from Dr. Chong's report unnecessarily. *Rogers & Babler*. This highlights the Commission's "bright line" rule adopted in *Martino III*. A "legitimate controversion" under these circumstances is one legitimately supported by language from a medical report. The *Martino III* rule enhances "predictability," because it makes it predictable the RBA will either stop the eligibility process and refer the matter for a prehearing conference and hearing, or move the eligibility evaluation forward, without separate litigation over what the EME physician or the adjuster meant in their respective reports and controversions. *Lawhorne*.

Even after Employer brought the June 26, 2023 controversion to the RBA's attention on July 12, 2023, the language from the controversion, absent a medical opinion supporting it, would not prompt the RBA to suspend the eligibility evaluation and refer the case for a prehearing conference and hearing. The record does not disclose precisely what the RBA reviewed in conjunction with Employer's July 12, 2023 letter. Her August 28, 2023 and September 18, 2023 letters say she reviewed "the file." If she reviewed Dr. Chong's report, it does not support the controversion. The absence of an "explicit" and "precise" opinion in Dr. Chong's report upon which the controversion could legitimately rely injected unpredictability in what should be a self-executing process. *Martino III*. The Act must be interpreted to ensure predictability. Unpredictability also creates an unreasonable cost to employers who must litigate the issue. AS 23.30.001(1).

Employee contends Employer never appealed the June 1, 2023 order assigning an eligibility evaluation or petitioned to modify it, and thus has no grounds to attack it now. The agency file

shows Employer did not appeal or petition for modification. But as Employer pointed out, neither the Act nor the regulations provide a specific avenue for such an appeal. However, Employer had the procedural right to petition for relief, but did not. 8 AAC 45.050(a), (b)(2). The lack of a statute or regulation expressly addressing this situation injects further unpredictability into this convoluted process. This decision assumes Employer can raise its objection to the evaluation referral in its defenses, though this is far from clear. These points further highlight the need for "explicit" and "precise" language in EME reports and in controversion notices. *Martino III*.

B) The RBA correctly determined Employee was disabled for 90 consecutive days.

Employee also contends Employer stipulated he was disabled for 90 consecutive days from his work injury, and it cannot be relieved from the stipulation without filing a petition for relief. But the 90-day notice form to which Employee refers does not meet requirements for a stipulation because it was not "oral," and since it was written, not "signed by all parties." 8 AAC 45.050(f)(1). The 90-day form is Employer's "admission," not its stipulation.

Employer's 90-day notice by its own reporting was late. AS 23.30.041(c); 8 AAC 45.507(b). Employee contends had Employer timely filed its 90-day notice, the RBA's "order" assigning a reemployment specialist to perform an eligibility evaluation would have occurred prior to Employer's May 26, 2023 controversion. This is true. Employer should not be rewarded by failing to follow statutes and regulations explicitly intended to move the reemployment process forward promptly. *Martino III*.

Employee also contends the RBA "awarded" him reemployment benefits in her June 1, 2023 letter. This argument has some merit because AS 23.30.041(c) mandates that the RBA "shall," without a request, "order an eligibility evaluation," and gives only one exception -- where the parties have already stipulated to eligibility. The two regulations at issue here, 8 AAC 45.510(b) and 8 AAC 45.522(a), dramatically expand the grounds upon which the RBA will not order an eligibility evaluation. Nevertheless, 8 AAC 45.522(a) refers to the RBA "ordering an eligibility evaluation without a request," and uses the same "shall" mandate found in the statute. The RBA "*ordering*" an eligibility evaluation carries consequences including payment of the specialist's evaluation fees and paying "stipend" benefits to the injured worker under applicable circumstances.

The primary issue is whether Employee is entitled to "stipend" benefits. AS 23.30.041(k). This issue is confused because Employer continues to cooperate in and pay for the eligibility evaluation process, but refuses to pay "stipend" benefits to Employee. Employer contends Employee is not entitled to "stipend" benefits because they are reserved only in a situation where PPI benefits have been exhausted before Employee has completed the reemployment process. Here, it is undisputed that Employee has no PPI rating so there was no PPI benefits to exhaust. However, numerous cases state the axiom that injured workers should receive benefits while in the reemployment eligibility process. *Martino III*; *Carter*; *Vandenberg*. There can be no dispute that Employee was in the reemployment eligibility evaluation process. There is no functional difference between an injured worker receiving "stipend" benefits during the eligibility evaluation -- with or without a previously exhausted PPI rating. *Martino II, III*.

As Employer correctly noted, this case is distinguishable from some decisions addressing similar issues because the current 8 AAC 45.510(b), and 8 AAC 45.522(a), were not in effect when those cases were decided. However, *Martino III*, decided under current law, and with eerily similar facts to the instant case, appears to resolve this issue in Employee's favor. Moreover, contrary to Employer's argument, the panel found no decision stating "reemployment benefits" can be separated between (1) costs *paid* to the specialist, and at the same time (2) associated "stipend" benefits *not paid* to Employee under AS 23.30.041(k), while he is in the process.

At first glance it is odd that Employer would controvert "reemployment benefits" and continue to pay LaBrosse for his services while not paying Employee "stipend" benefits. As Employer stated at hearing, there may be several reasons for wanting the eligibility evaluation to go forward while not paying "stipend" benefits. One reason it stated is that eligibility evaluation fees are less expensive than "stipend" benefits. Another reason might be that Employer is confident Employee will be found not eligible. But Employer provided no law supporting its split-reemployment-benefit-payment theory under current statutes and regulations. Moreover, Employer did not controvert Employee's right to reemployment benefits on grounds he was not totally unable to return to his work for 90 consecutive days until September 6, 2023, months after Employee's right to "stipend" benefits became due as a matter of law. AS 23.30.155(a), (b).

As for the 90-day issue, the admissible evidence upon which this panel may rely is found in EDI information and Division-provided forms Miller filed as required by law. AS 23.30.155(c). These documents are "business records" because they are a report, record or data compilation of acts showing disability periods and payments made at or near the time the payments occurred, from the adjuster, a person with knowledge acquired in her regularly conducted business activity. Evidence Rul 803(6). There is no need for a "foundation" because the information came directly from the adjuster and is either reported directly to the Division through its EDI system, or on a Division-provided form. There is no reason to question the trustworthiness of this information. By contrast, the September 7, 2023 payment chart from Employer's attorney to the RBA conflicts with the evidence the adjuster previously filed or submitted through EDI. The chart, unlike the EDI data or Division-provided form, is "hearsay" and while admissible, "is not sufficient in itself" to support a finding of fact, and would not be admissible over objection in a civil action. 8 AAC 45.120(e). The adjuster did not testify at hearing to explain her alleged reporting error, or her payment chart she gave to her attorney, which was created for purposes of this litigation.

TTD benefit payments from the insurer may be one measure of Employee's total inability "to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury." AS 23.30.041(c). However, they are not the only measure, and their accuracy may be disputed. Employee contends when he returned to work for Employer post-injury, it was at a light-duty position, and not his normal employment "at the time of the injury." Employer has not disputed this contention. Therefore, even if Employer did not pay Employee TTD benefits for 90 consecutive days post-injury, this does not necessarily mean he was not disabled from his at-injury employment for 90 consecutive days. For these reasons, the RBA was correct to find Employee had been totally unable to return to his employment "at the time of injury" for 90 consecutive days, as a result of the injury, as stated by Miller's EDI certified filings and her 90-day notification form. The RBA's decision is supported by substantial evidence in the record as a whole.

In summary, based on Employer's controversion itself based on Dr. Chong's EME report, the lack of any opinion from it that Employee's total inability to return to his employment at the time of injury was not a result of the injury, and the RBA's correct finding that he was disabled for 90 consecutive days as required in AS 23.30.041(c), the RBA properly referred the eligibility

evaluation to LaBrosse. Once the eligibility evaluation started, Employer provided no valid medical evidence to stop it from going forward. The purported 8 AAC 45.510(b) ground alleged in Employer's relevant controversions is not supported by Dr. Chong's report. Therefore, since there was no valid factual or legal basis to stop the eligibility evaluation under these circumstances, Employee is entitled to "stipend" benefits from May 23, 2023, and continuing, at least until his evaluation is completed. His claim for "stipend" benefits will be granted.

2) Is Employee entitled to a penalty?

The Act's provisions are self-executing and benefits are payable "without an award" absent a timely controversion. AS 23.30.155(a), (b), (d). Employer stopped paying Employee TTD benefits effective May 22, 2023; he has no PPI rating yet from his physician. On May 19, 2023, Miller filed a form admitting Employee had been totally unable to return to his at-injury employment for 90 consecutive days as a result of the injury. Employer's obligation to pay Employee "stipend" benefits arose on May 23, 2023. *Martino III*. It had to either pay Employee's "stipend" benefits within 14 days, or controvert "legitimately." AS 23.30.155(a), (d); *Lawhorne*. Payment was late if not made within seven days of that date. AS 23.30.155(e). Employer's May 26, 2023 controversion was based solely on Dr. Chong's EME report. AS 23.30.155(d). It is undisputed that Employer has yet to pay Employee any "stipend" benefits.

A controversion must be filed "in good faith" to protect Employer from a penalty. "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion," the claimant would be found not entitled to benefits. *Harp*. Here, if the only evidence reviewed was Dr. Chong's EME report and the related May 26, 2023 controversion, Employee would be entitled to "stipend" benefits for the reasons analyzed in detail above. Moreover, Employer's May 26, 2023 and June 26, 2023 controversions did not controvert on the 90-day basis. Its September 6, 2023 controversion on the 90-day basis was too late to avoid a penalty. Therefore, since the controversions were not supported by Dr. Chong's opinions and were otherwise untimely, Employee's claim for a penalty will be granted. AS 23.30.155(a), (e).

Lastly, in its May 26, 2023 and June 26, 2023 controversions, Employer denied "Reemployment Benefits" in their entirety. However, once it concurrently began complying with the eligibility evaluation process on June 5, 2023, by sending required records to LaBrosse and paying his bills for the evaluation, Employer *de facto* "withdrew" its controversions and any protection they could have provided. *Leigh*. Only on September 6, 2023, did Employer controvert "reemployment benefits including . . . stipend." By then it was too late because "stipend" benefits were due to Employee but never paid or properly denied. AS 23.30.155(a), (e). Moreover, Employer's "voluntary" payment of a previously controverted benefit is "the equivalent of a Board award," when paid after Bredesen on June 14, 2023, wrote to the RBA objecting to the request to terminate Employee's eligibility evaluation, and the RBA agreed with his position. *Childs*.

3) Is Employee entitled to interest?

Because this decision grants Employee's claim for "stipend" benefits, those benefits were due effective May 23, 2023, and his claim for interest will be granted. AS 23.30.155(p).

4) Did Employer make a frivolous or unfair controversion?

Employer's relevant controversions were based on Dr. Chong's EME report. As discussed above, his opinion does not state Employee's total inability to return to his job at the time of injury is not a result of the work injury. *Martino III*. Employer's controversions are not supported by the medical evidence upon which they relied, and therefore do not state any relevant basis to stop the eligibility evaluation process from going forward under 8 AAC 45.510(b). The RBA properly relied on admissible evidence that Employee was disabled for 90 consecutive days as required under AS 23.30.041(c) and 8 AAC 45.510(b). Therefore, Employer made frivolous or unfair controversions and this matter will be referred to the Division Director under AS 23.30.155(o).

CONCLUSIONS OF LAW

1) Employee is entitled to reemployment "stipend" benefits.
2) Employee is entitled to a penalty.
3) Employee is entitled to interest.
4) Employer made frivolous or unfair controversions.

ORDER

1) Employee's request for "stipend" benefits under AS 23.30.041(k) is granted.
2) Employee's claim for a related penalty is granted.
3) Employee's claim for related interest is granted.
4) Employee's request for a frivolous or unfair controversion finding is granted.
5) The Division's adjudications section will refer this decision to the Division Director for referral to the Division of Insurance pursuant to AS 23.30.155(o).

Dated in Anchorage, Alaska on December 18, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Randy Beltz, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 John Thomas, employee / claimant v. Cache Camper Manufacturing, employer; Republic Indemnity Co. of America (RIG), insurer / defendants; Case No. 202301752; 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 December 18, 2023.

/s/
Rachel Story, Law Office Assistant I