ALASKA WORKERS' COMPENSATION BOARD

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

ALEJANDRO MUNOZ, Employee, Claimant, v. 60 NORTH SEAFOODS, LLC, Employer, and BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202311865 AWCB Decision No. 25-0012 Filed with AWCB Anchorage, Alaska on February 26, 2025

Portions of Alejandro Munoz's (Employee) June 6, 2024, claim, for "stipend" benefits, penalty, interest, a finding of unfair or frivolous controvert, and attorney fees and costs, were heard on January 28, 2025, in Anchorage, Alaska, a date selected on October 15, 2024. A September 10, 2024, hearing request gave rise to this hearing. Attorney Robert Bredesen appeared and represented Employee, who appeared and testified. Attorney Krista Schwarting appeared by Zoom and represented 60 North Seafoods, LLC, and its insurer (Employer). The record was kept open to receive Employee's fee affidavit and Employer's response and closed on February 3, 2025.

ISSUES

Employee contends he is entitled to "stipend" benefits "as a matter of law" during the reemployment eligibility evaluation. He contends Employer admitted he was unable to return to his employment for 90 consecutive days as a result of the work injury but never paid "stipend"

benefits. Employee contends that while Employer later controverted "reemployment benefits" and "all benefits" based upon Employer's medical evaluation (EME) reports, it never requested the Reemployment Benefits Administrator (RBA) to refer the matter to the Board to hold a hearing, as required under 8 AAC 45.510(b) and 8 AAC 45.522(a). He requests an order awarding "stipend" benefits beginning after Employer stopped paying temporary total disability (TTD) and temporary partial disability (TPD) benefits until June 24, 2024, when he was found ineligible for reemployment benefits.

Employer contends the presumption of compensability applies to the "stipend" benefit issue. It contends an EME physician opined there was no expected permanent impairment before Employee was referred for a reemployment eligibility evaluation and Employee failed to provide a prediction from his attending physician that there was an expected permanent impairment.

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

Employee requests an order awarding a penalty and interest on "stipend" benefits.

Employer contends Employee is not entitled to interest or a penalty as he is not entitled to "stipend" benefits.

2) **Is Employee entitled to interest and a penalty?**

Employee contends Employer's May 20 and June 27, 2024, controversions were unfair and frivolous. He contends Employer impermissibly controverted "stipend" benefits by failing to request the RBA to forward the matter to the Board to hold a hearing. Employee contends the May 14, 2024, controversion does not fall under 8 AAC 45.510(b) or 8 AAC 45.522 because Employer ignored its own admission in the 90-day letter and impermissibly relied upon an EME's opinion regarding Employee's release to his employment at the time of injury, rather than the attending physician as required in 8 AAC 45.900(i)(2). He requests an order finding Employer unfairly and frivolously controverted "stipend" benefits.

Employer contends all controversions are supported by sufficient evidence. It requests an order denying Employee's request for a finding of unfair or frivolous controvert.

3) Did Employer unfairly or frivolously controvert benefits?

Employee contends he is entitled to an award of attorney fees and costs for actual fees and costs.

Employer contends Employee is not entitled to attorney fees and costs as he is not entitled to "stipend" benefits, penalty and interest, and a finding of unfair or frivolous controvert.

4) 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 August 29, 2023, Employee reported he was injured while working for Employer on August 27, 2023. "I was offloading a boat as I am a dockworker for 60 North. My boss was playing with the crane not knowing that I was in a blind spot when he swung the crane and hit me with the hanging scale." He described the nature of the injury as "concussion and laceration" and the body parts affected as "right eye and area around." (Employee Report of Occupational Injury or Illness to Employer, August 29, 2023).

2) On August 29, 2023, Employee reported he was down in a fish hold and someone operating a crane taking the fish out of the hold swung the crane with a 100-pound scale attached to the boom and struck him on the right temporal/orbital area approximately 48 hours before at work. He lost consciousness for less than one minute and has since experienced a headache, blurry vision, dizziness, and nausea. Employee said it was very painful to turn his eye laterally and he had bruising over his right brow. He was prescribed Tylenol and Zofran as needed, and his physician recommended he be assessed in Anchorage the next day as the computerized tomography (CT) scanner was nonfunctional. Dr. Gloe filled out a Physician's Report and diagnosed orbital injury concussion, said Employe was not medically stable, was not released for work and estimated his length of disability was four to seven days. (Paul Gloe, MD, records, August 29, 2023).

3) On August 31, 2023, Employee went to the emergency room and reported a ten second loss of consciousness after being struck on the right temple. Since the incident, Employee has

experienced nausea, emesis, dizziness, headache, blurry/decreased vision, photosensitivity, and pain when looking to the right. He denied neck pain. A slit lamp examination showed global uptake of fluoresceine and a corneal abrasion but a negative seidel test with normal pressure and no clinical indication of entrapment. Employee's head and maxillofacial CT scans showed no acute intracranial abnormality and no acute facial bone fracture. He was diagnosed with a left eye corneal abrasion, for which he was prescribed erythromycin and referred to ophthalmology for follow up, and a concussion with loss of consciousness of 30 minutes or less, for which he was prescribed Zofran and was recommended to follow up with a primary care physician for further management. (Samuel Broder, DO, report, August 31, 2023; CT reports, August 31, 2023).

4) On September 1, 2023, Employee reported eye pain, flashes, and light sensitivity since he got hit on the right side of his face by a crane about six days earlier. He was diagnosed with a corneal abrasion and directed to use the erythromycin "through the weekend, then discontinue." (Matthew Guess, MD, chart note, September 1, 2023). Dr. Guess filled out a Physician's Report and said Employee would be medically stable as of September 2, 2023, he would not have a permanent impairment, and he was released for regular work on September 2, 2023. (Guess Physician's Report, September 1, 2023).

5) On September 7, 2023, Employee followed up with Dr. Gloe and reported having recurrent headaches, nausea, dizziness, difficulty concentrating, and becoming easily agitated. Dr. Gloe referred him for a neurological evaluation for post-concussive syndrome and restricted Employee from working. (Gloe records, September 7, 2023).

6) On September 11, 2023, Employee underwent a physical therapy evaluation. He reported intense headaches, light sensitivity, neck pain, and difficulty concentrating since the work injury. Employee was recommended to follow up with physical therapy for post-concussion care on cervical dysfunction, headaches and visual and vestibular deficits, when he returned to his hometown. (Brittany Vanderwerf, PT, DPT, initial evaluation notes, September 11, 2023).

7) On September 25, 2023, Employee filed a petition dated September 23, 2023, requesting review of the RBA's decision under AS 23.30.041 and reconsideration or modification. (Petition, September 23, 2023).

8) On September 25, 2023, Employee filed a claim dated September 23, 2023, seeking TTD and permanent partial impairment (PPI) benefits, medical and transportation costs, a compensation rate adjustment, a penalty for late paid compensation, interest, and attorney fees and costs. (Claim for

Workers' Compensation Benefits, September 23, 2023). He provided a new mailing address and telephone number. (Change of Address, September 25, 2023).

9) On October 2, 2023, the Workers' Compensation Division (Division) served notice of a November 3, 2023, prehearing conference; Employee was served at his last known mailing address provided on September 25, 2023. (Prehearing Conference Notice Served, October 2, 2023).

10) On October 23, 2023, Employer denied a compensation rate adjustment was owed as Employee's compensation rate was calculated using his prior earnings. (Controversion Notice, October 23, 2023). Employer answered Employee's claim, stating it was paying TTD benefits, Employee's request for PPI benefits was premature as no rating had been completed, it was denying attorney fees and costs as no attorney had entered an appearance, it had not denied medical or transportation costs, and no interest or penalty was owed because no benefits had been paid late. (Answer, October 23, 2023).

11) On October 24, 2023, Employer withdrew its October 23, 2023, controversion notice. (Withdrawal, October 24, 2023). It amended its October 23, 2023, answer and stated Employee's compensation rate will be updated and will be based upon his 2021 earnings and it will evaluate past payments to see if penalty or interest is owed. (Amended Answer, October 24, 2023).

12) On November 31, 2023, Electronic Data Interchange (EDI) reported a different mailing address for Employee. (Address Entry, November 31, 2023).

13) On November 2, 2023, the Workers' Compensation Board (Board) designee attempted to call Employee at his telephone number of record for a prehearing conference but was unable to leave a voicemail. The designee informed Employee that "the [September 25, 2023] petition may have been filed in error since there does not appear to be any evaluation from the Reemployment office on file. Please contact the board for any questions to 907-269-4980." (Prehearing Conference Summary, November 2, 2023).

14) On November 3, 2023, the Division served Employee with a copy of the November 2, 2023, Prehearing Conference Summary along with the "Workers' Compensation and You" pamphlet at the address provided by EDI, not Employee's last known mailing address. (Prehearing Conference Summary Served, November 3, 2023).

15) The "Workers' Compensation and You" pamphlet states:

> If you have been totally unable to return to your occupation at the time of injury for 60 to 89 consecutive days, you or the insurer may request an evaluation to

> determine your eligibility for reemployment benefits (retraining). The request will be approved if medical documentation is provided by you or the insurer documenting that your injury may permanently keep you from returning to your occupation at the time of injury. ("Workers' Compensation and You" pamphlet).

16) On November 3, 2023, Employer answered Employee's September 23, 2023, petition, and contended his request was premature because no decision by the RBA had been made. (Answer to Petition, November 3, 2023).

17) On November 28, 2023, adjuster Kelly Levine 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 August 30, 2023. (Employer's Notice of 90 Consecutive Days of Time Loss for Injuries Occurring on or After November 7, 2005, November 28, 2023).

18) On December 3, 2023, Employee's brain CT showed no acute intra or extracranial abnormalities and his cervical spine CT showed no acute abnormality. (CT reports, December 3, 2023).

19) On December 11, 2023, Jared Kirkham, MD, a physical medicine and rehabilitation specialist, performed a records review EME and diagnosed a right corneal abrasion, substantially caused by the work injury, and a "mild concussion/traumatic brain injury, substantially caused by the work injury." He opined Employee reached medical stability for all injuries sustained from the work injury three months post-injury on November 27, 2023. The corneal abrasion was expected to be resolved within 24 to 48 hours post-injury and the concussion would be expected to be resolved no later than three months post-injury. Dr. Kirkham said it was unlikely Employee sustained a cervical injury but even if he did sustain a mild cervical sprain/strain injury, it would also be expected to resolve within several weeks. He noted Employee did not seek any additional medical care after September 11, 2023, supporting resolution of his symptoms. Dr. Kirkham "did not anticipate any permanent impairment." (Kirkham EME report, December 11, 2023).

20) On December 12, 2023, Employer controverted benefits based upon Employee's failure to sign and return discovery releases. (Controversion Notice, December 12, 2023).

21) On December 12, 2023, a rehabilitation specialist was assigned to complete the reemployment evaluation. (Referral letter, December 12, 2023).

22) On December 19, 2023, Employer filed a medical summary with Dr. Kirkham's EME report. (Medical Summary, December 19, 2023).

23) On December 27, 2023, Employer denied TTD and TPD benefits after November 27, 2023, and contended Employee reached medical stability by November 27, 2023, based upon Dr. Kirkham's December 11, 2023, EME report. (Controversion Notice, December 27, 2023).

24) On February 19, 2024, Employee was diagnosed with a right shoulder muscle strain, right sided neck pain and recurrent headaches. He was prescribed butalbital, acetaminophen, and caffeine. (Stuart Meyers, MD, emergency room report, February 19, 2024).

25) On March 8, 2024, Dr. Kirkham issued an addendum EME report after reviewing additional medical records, including the December 2023 CT scans and the February 19, 2024, medical record. He stated his opinions in his prior report remained the same. Dr. Kirkham opined it was likely Employee's traumatic brain injury resolved no greater than three months post injury and noted the most recent CT scans were normal and there were no neurological deficits on exam. He stated the diagnosed migraine headaches are typically genetic in etiology and were unlikely to be related to his concussion and that the medical literature stated, " 'Post-traumatic headache . . . is one of the most controversial clinical entities in the headache field, due to its unclear pathophysiologic mechanisms and the role of associated psychological and medico-legal aspects.' (Russo et al. *Post-traumatic headaches: a clinical overview*. Neurological Sciences. 2014; 35 Suppl 1:153-6)." Dr. Kirkham said there were no signs of a postictal state and no neurological deficits on exam on February 19, 2024. He opined it was unlikely Employee was having true seizures, and any seizures would be unrelated to the work injury because according to medical literature, most seizures happen in the several days or weeks after a brain injury and a mild traumatic brain injury is unlikely to cause seizures. Dr. Kirkham found no medical reason why Employee would not be able to perform any of the occupations provided including, Deckhand, Wharf Laborer, Fisher, Packager, Landscaping Laborer, Overhead Crane Operator, or Front-End Loader Operator. He recommended Employee complete a neurological evaluation because if he did have seizures, it would limit his ability to perform any occupation involving driving, operating heavy equipment, or working from heights. (Kirkham addendum EME report, March 8, 2024).

26) On March 15, 2024, Employer filed Dr. Kirkham's March 8, 2024, EME report on a medical summary form. (Medical Summary, March 15, 2024).

27) On March 20, 2024, the RBA designee suspended "making a decision" regarding Employee's eligibility for reemployment benefits because the rehabilitation specialist was "unable to get predictions from [Employee's] provider at this time and could not move forward in completing"

the evaluation. The RBA designee directed the rehabilitation specialist to contact Employee again to inquire about the "status of his medical care" and if he has seen any providers and ask Employee to assist in obtaining predictions and if there are medical records for the rehabilitation specialist to considered. (Letter, March 20, 2024).

28) On March 26, 2024, Dr. Kirkham wrote, "Yes, able to perform" on position descriptions for Deckhand, Fishing Vessel; Laborer, Wharf; Fisher, Line; Packager, Hand; Laborer, Landscape; Overhead Crane Operator; Front-Loader Operator. (Kirkham response, March 26, 2024).

29) On March 28, 2024, Employer filed Dr. Kirkham's March 26, 2024 responses on a medical summary. (Medical Summary, March 28, 2024).

30) On April 18, 2024, Employer requested the rehabilitation specialist take Dr. Kirkham's opinions into account when providing the RBA with her reports. (Email, April 18, 2024).

31) On April 26, 2024, J. Gregory Zoltani, MD, examined Employee for a neurological EME and diagnosed a corneal abrasion, contusion to the head with concussion, and posttraumatic headaches, all historically related on a more probable than not basis, onset of seizure-like event of unclear etiology, possibly related to withdrawal of Xanax, unlikely related to trauma, and probable panic disorder with significant anxiety and depression, and history of bipolar disorder, predating and unrelated to the work injury. He opined that any ongoing need for treatment is the result of Employee's mental health disease as well as other psychosocial issues that are ongoing. Dr. Zoltani did not believe the work injury combined with or aggravated any of his preexisting and current mental health conditions. He said no further neurologic care was necessary and the work injury was not the substantial cause for any ongoing treatment from a mental-health standpoint. Dr. Zoltani ruled out the work injury as the substantial cause of Employee's symptoms, disability, and need for treatment because, "The natural history of a concussion event is one of improvement not worsening and I believe that his predating mental health issues are the major contributing cause of the need for ongoing mental health treatment as well as other psychosocial factors." He said there were no physical restrictions from a neurological standpoint, and he did not believe Employee was disabled from work activities due to the work injury as he expected the work injuries to resolve over six to eight weeks from the date of injury. Dr. Zoltani opined Employee had reached medical stability from a neurological standpoint, he did not incur a permanent impairment for the head contusion and concussion, and any further mental health treatment would not be related to the work injury. (Zoltani EME report, April 26, 2024).

32) On April 30, 2024, Employee sought TTD benefits, medical costs and a finding of unfair or frivolous controversion for "head trauma and retinal abrasion[sic]." Under "Reason for filing claim" Employee wrote, "Reemployment and coverage. I have been found ineligible for the re-employment benefits due to lack of medical information. I was scheduled with a doctor for an initial visit on 02/23/24 but was incarcerated on 02/21/24." (Claim for Workers' Compensation Benefits, April 30, 2024).

33) On May 3, 2024, Employer filed Dr. Zoltani's EME report. (Medical Summary, May 3, 2024).

34) On May 7, 2024, Employer emailed the reemployment section the May 3, 2024 medical summary. (Email, May 7, 2024). Employer did not ask the RBA to forward the case to the Board to conduct a prehearing conference and hold a hearing in accordance with 8 AAC 45.510(b). (Observation).

35) On May 14, 2024, Employer denied TTD and TPD benefits after October 22, 2023, reemployment benefits, PPI benefits, and all benefits after April 26, 2024, based upon Drs. Zoltani's and Kirkham's EME reports:

> Pursuant to the expert opinion of Dr. Zoltani, the employee would not have been disabled from any work activity from the work injury within six to eight weeks of this injury. Based on this opinion, the employer denies all TTD/TPD benefits after October 22, 2023.
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> Dr. Zoltani additionally indicated that from a neurological standpoint there would be no physical restrictions imposed on the employee as a result of the injury. Dr. Kirkham opined that he did not see any medical reason why [Employee] would not be able to perform any of the occupations provided, to include Deckhand, Wharf Laborer, Fisher, Packager, Landscaping Laborer, Overhead Crane Operator, or Front-End Loader Operator. Based on these opinions the employer denies reemployment benefits.
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> Additionally, the employer relies on the opinion of Dr. Zoltani that there would be no permanent partial impairment as it pertained to the contusion to the head. On December 11, 2023, Dr. Kirkham also opined that he did not anticipate any permanent impairment. Based on these opinions the employer denies PPI benefits.
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> On December 11, 2023, Dr. Kirkham opined that the corneal abrasion would be expected to resolve within 24 to 48 hours post-injury. A concussion would be expected to resolve no greater than three months postinjury. He opined that it was unlikely that the employee sustained a cervical injury, but even if he did sustain a mild cervical sprain/strain injury, this would also be expected to resolve within several weeks. Additionally, Dr. Zoltani opined that he did not believe any further

> neurological care was necessary and the industrial injury was not the substantial factor or cause for any ongoing treatment from a mental health standpoint. He indicated that the August 27, 2023, injury is not the current substantial cause of the need for any ongoing treatment. Dr. Zoltani indicated that he could rule out the work injury as the substantial cause of his symptoms, disability, and/or need for treatment, and could exclude the work event as being a causal factor in the symptoms, need for treatment, or disability. Based on these opinions, the employer denies all benefits after April 26, 2024. (Controversion Notice, May 14, 2024).

36) On May 20, 2024, Employer answered Employee's April 30, 2024, claim and denied TTD benefits after October 22, 2023, based upon Drs. Zoltani's and Kirkham's EME reports, denied an unfair or frivolous controversion was made as all controversion had been filed in good faith and were based upon substantial evidence, and denied medical costs after April 26, 2024, based upon Drs. Zoltani and Kirkham EME reports. (Answer, May 20, 2024).

37) On May 22, 2024, the reemployment specialist recommended Employee be found ineligible for reemployment benefits based upon Dr. Kirkham's prediction that Employee would have the permanent physical capacities to perform the physical demands for the jobs at the time of injury. The job titles selected for his job at the time of injury include Deckhand, Fishing Vessel, Overhead Crane Operator, and Front-End Loader Operator. Employee met the specific vocational preparation for Deckhand, Fishing Vessel but not for Overhead Crane Operator, and Front-End Loader Operator. (Reemployment Benefits Eligibility Evaluation, May 22, 2024).

38) On June 6, 2024, Employee's attorney entered his appearance on behalf of Employee. (Entry of Appearance, June 6, 2024). Employee sought TTD, TPD and PPI benefits, medical and transportation costs, a finding of unfair or frivolous controversion, a penalty for late paid compensation, interest, "stipend" benefits, and attorney fees and costs. (Claim for Workers' Compensation Benefits, June 6, 2024).

39) On June 24, 2024, the RBA designee found Employee ineligible for reemployment benefits based upon Drs. Kirkham's and Zoltani's EME reports. (Letter, June 24, 2024).

40) On June 27, 2024, Employer denied TTD and TPD benefits after October 22, 2023, reemployment benefits, PPI benefits, and all benefits after April 26, 2024, based upon Drs. Zoltani's and Kirkham's EME reports. (Controversion Notice, June 27, 2024). Employer answered Employee's June 6, 2024 claim denying TTD and TPD benefits after October 22, 2023, PPI benefits, and medical and transportation costs after April 26, 2024, based upon Drs. Zoltani's and Kirkham's EME reports, a finding of unfair or frivolous controversion as all controversions

had been filed in good faith and were based upon substantial evidence including Drs. Zoltani's and Kirkham's EME reports. It denied a penalty because all benefits owed were timely paid or controverted, any interest as it contended no further benefits were owed, and attorney fees and costs. (Answer, May 20, 2024).

41) On September 10, 2024, Employee requested a hearing on his June 6, 2024, claim. (Affidavit of Readiness for Hearing, September 10, 2024).

42) On October 15, 2024, the Board designee scheduled an oral hearing for January 28, 2025, on Employee's June 6, 2024, claim and set the issues for hearing as "Unpaid stipend (TBD) until 6/24/24 penalty, interest, unfair or frivolous controversion, and Attorney's fees and costs." (Prehearing Conference Summary, October 15, 2024).

43) On January 21, 2025, Employee contended he was entitled to reemployment benefits while being evaluated for eligibility. He contended *Carter* held employees become eligible for reemployment benefits when they begin participating in the reemployment process and that occurs when the employee begins active pursuit of reemployment benefits. Employee cited *Vandenberg*, *Martino II and II*, and *Cache Camper* in support of his contention that he is entitled to "stipend" benefits as a matter of law during an eligibility evaluation, regardless of outcome. He contends the May 20 and June 27, 2024, controversions were unfair and frivolous as Employer could not unilaterally controvert "stipend" benefits without requesting an action by the RBA to refer the dispute to the Board for hearing as required by 8 AAC 45.522(a). Employee contended Employer was required to continue to pay until the Board resolved the issue in its favor after the hearing required by regulation. He also contended that Employer ignored its admission contained in the 90-day notice that Employee was unable to return to his job at the time of injury for 90 days. Employee contended Employer's position is that he could have returned to his job within 90 days based upon the EME report. However, he contended 8 AAC 45.900(i)(2) does not permit Employer to controvert based EME physician's opinion regarding his ability to return to his job at the time of injury for 90 days because the definition of "totally unable" requires his attending physician to release him to work. (Employee's Hearing Brief, January 21, 2025).

44) On January 21, 2025, Employer filed a hearing brief contending the presumption of compensability applied to the "stipend" benefits issue. It contended Dr. Kirkham did not expect a permanent impairment. Therefore, it contended it rebutted the presumption and Employee failed to provide a prediction of permanent impairment to prove his claim. Employer contended

Employee is not entitled to penalty and interest, attorney fees and costs, and a finding of unfair or frivolous controvert because he is not entitled to "stipend" benefits. (Employer's Hearing Brief, January 21, 2025).

45) On January 22, 2025, Bredesen filed a fee affidavit billing 25.80 hours at $520 per hour, totaling $13,416 and $322.05 in costs. He provided a copy of his resume outlining his 20+ years' experience as a lawyer, including working in the workers' compensation field, Longshore and personal injury matters incident to workplace injuries. Bredesen explained he is a solo practitioner, and does not employ a paralegal, and is "only able to take on a limited number of cases at any given time" and any case requiring "depositions, settlement negotiations [,] and/or hearings will necessarily limit [his] ability to take on other new cases." He was awarded $520 per hour for work completed on or after January 1, 2023, in *Martino v. Alaska Asphalt Services, LLC*, AWCB Dec. No. 23-0040 (August 10, 2023), which was approved by the Commission in an order. (Affidavit of Counsel, January 22, 2025).

46) At hearing, the parties stated Employer either "input or issued" Employee 27 weeks and 6 days of "stipend" benefits, along with a penalty. (Record).

47) At hearing, Employee testified he was hit by the scale and knocked into the ice pit when Chris Johnston swung the crane it was attached to; he was knocked unconscious for 10 to 15 seconds. He kept working that day. The next day, he tried to work but he could not see out of his right eye while operating the crane, so he went to the hospital. Employee felt drowsy and had the biggest migraine he ever had, he thew up and his neck was "jacked." He was diagnosed with a concussion and sent to Anchorage for imaging. Employee had an x-ray and MRI at Providence Medical Center and he also saw an ophthalmologist for the retinal abrasion. He returned to Cordova but eventually traveled back to North Carolina, where he resided before he was hired to work in Alaska. Then Employee went to Nebraska. He experienced increasing neck pain and arm numbness while his headaches decreased. Employee did not work but helped his mom with her properties in Las Vegas and Arizona. He experienced increased stuttering, short-term memory problems, migraines, and neck pain from January through March 2024. Employee lost his house and his truck and ended up in a homeless shelter. He had a warrant in Iowa, and he turned himself in and was incarcerated for about two months; he was released in April. Employee saw a psychiatrist for panic attaches and had a seizure; he was on medication for a few weeks. He began working about a week and a half after he was released from incarceration. Employee worked temporary work and day labor for

PeopleReady. He has lived in Hawaii for the past six months and started working as a farm hand. Employee started an LLC in January 2024 and now works general contracting full-time. He still experiences headaches about once per week and neck pain, his arms "fall asleep," his hands cramp, and he feels shooting arm pain. (Employee).

48) Employee contended the 90-day letter is an admission of liability and the only exception provided in statute to permit reduction of "stipend" benefits is if an employee earns wages while participating in in the reemployment process. He cited *Cache Camper* to contend Employer's controversions were unfair and frivolous. (Employee).

49) Employer contended Dr. Kirkham stated Employee had no PPI and there was no rating in the record when the December 27, 2023, controversion was filed and served. It contended Employee has to have a PPI rating to be eligible for reemployment benefits. Employer contended its nonpayment of "stipend" benefits was made in good faith. (Employer).

50) On January 31, 2025, Employee's attorney filed a fee affidavit billing 4.20 hours at $520 per hour, totaling $2,184 for services rendered from the afternoon of January 22, two January 28, 2025, and $593.33 in costs. Thus, the total balance claimed for fees is $15,600 and for costs is $915.38. (Affidavit of Counsel, January 31, 2025).

51) On February 3, 2025, Employer stated it does not have specific objections to the contents of Employee's attorney's supplemental fee affidavit. (Response to Supplemental Fee Affidavit, February 3, 2025).

PRINCIPLES OF LAW

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

> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to 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 23.30.041. Rehabilitation and reemployment of injured workers. . . .

> (c) . . . If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. 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. . . .
> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. . . .
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> (f) An employee is not eligible for reemployment benefits if
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> (4) at the time of medical stability, no permanent impairment is identified or expected.
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> (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. . . .

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).
>
> The more difficult question is this: When does an employee begin participating in the reemployment process? The answer to this question potentially determines whether there was a delay in providing benefits, and thus whether and when interest began accruing on the benefits. The superior court concluded that Carter began participating in the reemployment process when he was assigned a rehabilitation specialist to perform his eligibility evaluation. Although this is not an implausible reading of AS 23.30.041(k), we conclude that it is incorrect.
> 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.
>
> Because Carter began to actively pursue reemployment benefits on April 27, 1993 when he requested an eligibility evaluation, and because he continued to actively pursue those benefits by petitioning the board for review of the division's May 4, 1993 "decision," by petitioning the board for a rehearing, and by appealing to the superior court, we conclude that the board did not err in awarding him reemployment benefits, beginning when his PPI payment was exhausted on July 14, 1994. . . .

Vandenberg v. State of Alaska, AWCAC Dec. No. 240 (September 14, 2017), stated "*Carter* 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 Alaska Workers' Compensation Appeals Commission (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. *Martino III* disagreed and created a "bright line" rule. Citing 8 AAC 45.510(b) and 8 AAC 45.522(a), *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 (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. . . .

In *Sierer v. Tri Star, Inc.*, AWCAC Dec. No. 307 at 15 (October 7, 2024), the claims adjuster filed the 90-day form on March 9, 2020, and on March 11, 2020, the RBA designee assigned an eligibility evaluation and a rehabilitation specialist. *Sierer* held the assessment triggered the employee's entitlement to stipend benefits even if there were no TTD or PPI benefits available at the time. *Id*. at 16. It stated that the 90-day form:

> is an admission by the employer that the employee has been out of work for 90 days due to a work injury and is entitled to an eligibility evaluation. When the employer supplies the RBA with the prescribed form, it admits that the employee has been unable to return to work at the time of injury for 90 days and, by statute, is entitled to an eligibility evaluation. The evaluation is mandatory.

Sierer remanded the case back to the Board to determine the amount of stipend benefits the employee was entitled to receive and further stated, "the payment of .041(k) stipend benefits during the period of the eligibility evaluation for reemployment benefits is not contingent upon a finding of eligibility. An employee is entitled to .041(k) stipend benefits during the evaluation process if no TTD or PPI benefits are available to the employee." *Id*. at 17.

In *Cache Camper Manufacturing v. Thomas*, AWCAC Dec. No. 309 (November 22, 2024), the employee was examined by an EME on the 99th consecutive day he was unable to return to his employment at the time of the injury. Two days later, the adjuster filed the 90-day form admitting the employee was unable to return to his employment for 90 consecutive days as a result of the work injury. The employer paid the employee TTD benefits three days later for the final time and did not pay "stipend" benefits. Four days later, the employer controverted "reemployment benefits" based upon the EME report, contending the employee's total inability to return to his employment at the time of injury is not the result of the work injury. Six days later, the employee was assigned a rehabilitation specialist, and the employer did not object. Approximately two months later, after argument between the parties and involving the RBA regarding whether the reemployment process should move forward, the employer controverted reemployment benefits, including "stipend benefits," contending for the first time that the employee was not disabled for 90 consecutive days regardless of causation. The EME physician diagnosed a work-related injury

and opined the disability from the work injury should have ended within one week, the employee was medically stable, had no ratable PPI and should be able to return to full duty without restrictions. The EME physician did not answer the employer's question that if employee is not able to return to work at this time, was his claim of workplace injury the substantial cause of his inability to work in his normal and customary occupation or was there an alternative explanation. The Board awarded the employee "stipend benefits" and found the employer had filed an unfair and frivolous controversion, requiring a referral to the Division of Insurance and imposed a penalty. The employer appealed on the issues of unfair and frivolous controversion and the referral to the Division of Insurance.

Cache Camper held the 90-day form is an admission by the employer that the employee has been out of work for 90 days due to a work injury and is entitled to an eligibility evaluation, the RBA is required to start the evaluation process for reemployment benefits and the employee is entitled to stipend benefits during the process if no other compensation is available. *Cache Camper* agreed that the first controversion was unfair and frivolous because it did not reflect the language in regulation 8 AAC 45.510(b) and because the language in the EME's report was insufficient to support the controversion. While the second controversion included the language, it relied upon the same EME report, and *Cache Camper* also agreed it was unfair and frivolous. It stated, "While it may not be necessary for an EME to state exactly the language in 8 AAC 45.510(b), the language must be close enough so that there can be do dispute that the EME meant that the employee's total inability to return to the employee's work at the time of the injury is not the result of the work injury." *Id*. at 17.

> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter; . . .

Kirby v. Alaska Treatment Center, 821 P.2d 127 (Alaska 1991), under previous rehabilitation statutes and regulations, held the presumption of compensability in AS 23.30.120 applied to a claim for vocational rehabilitation benefits. However, *Rockney v. Boslough Construction Co*., 115

P.3d 1240, 1243-44 (Alaska 2005), under previous statutes and regulations more like the current statutes and regulations stated:

> We have broadly interpreted the presumption to apply to "any claim for compensation under the workers' compensation statute" (citation omitted). Consequently, we have applied the presumption to any disputes over the employee's eligibility for benefits (citation omitted) including eligibility for reemployment benefits (citation omitted). Additionally, the presumption applies when an employer or insurer disputes who must pay for the benefits (citation omitted). Using the presumption in these cases "simplif[ies] proceedings before the Board and thus reduce[s] the hazards interinsurer disputes pose for the injured worker" (citation omitted).
>
> However, the presumption of compensability does not apply to Rockney's case because Alaska National and Boslough do not dispute Rockney's entitlement to reemployment benefits or their liability for those benefits. In effect, all the parties agree that Rockney's "claim comes within the provisions of this chapter" (citation omitted). Rockney is not seeking coverage; instead, he disputes the plan under which his benefits will be provided. Moreover, applying the presumption to evaluating reemployment plans does not promote the goals of encouraging coverage and prompt benefit payments.
>
> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

In *Underwater Const. v. Shirley*, 884 P.2d 156 (Alaska 1994), the Court observed:

> Alaska Statutes . . . outline the manner by which compensation payments are to be made. Compensation is "payable without an award, except where liability to pay compensation is controverted by the employer." AS 23.30.155(a). If payment of compensation is controverted, the employee is entitled to a hearing and a compensation order "rejecting the claim or making the award." AS 23.30.110(e). If an award is made, then compensation is "payable under the terms of an award." AS 23.30.155(f). . . . . [A]n employer seeking to modify or terminate payments made under a Board order must first seek the approval of the Board. AS 23.30.130(a).

Thus, when an employee was entitled to an express award of PTD benefits, it was an error to not make the award because such an award would require the employer to first seek modification and obtain board approval before terminating benefits. *Id*. at 161.

> **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. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation 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.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

The Board must consider the factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney's fee. *Rusch v. Southeast Alaska Regional Health Consortium*, 450 P.3d 784, 803 (Alaska 2019). In *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990) the Court stated attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingent nature of representing injured workers, to ensure adequate representation.

> **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. . . .
>
> **AS 23.30.395. Definitions.** In this chapter,
> . . . .

(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;

8 AAC 45.063. Computation of time. (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.

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).

(b) If a controversion notice has not been filed under (a) of this section, the administrator shall, no later than five working days after notice received under 8 AAC 45.507(b), send a letter to the parties identifying the name and address of the rehabilitation specialist selected in accordance with AS 23.30.041(c) to evaluate the employee.

8 AAC 45.900. Definitions. . . . .

(i) In AS 23.30.041(c) and this chapter,

> (2) "totally unable" means the employee has not been released by the attending physician to return to the employee's employment at the time of injury on either a modified or unmodified basis.

ANALYSIS

1) Is Employee entitled to "stipend" benefits?

The parties dispute Employee's entitlement to "stipend" benefits during the reemployment eligibility evaluation. While the parties agreed Employer either "input or issued" Employee 27 weeks and 6 days of "stipend" benefits shortly before the hearing, along with penalty, Employee is still entitled to a hearing and compensation order making the award. AS 23.30.135(a); *Shirley*.

On November 28, 2023, adjuster Levine advised the RBA that Employee had been totally unable to return to his employment for 90 consecutive days as a result of the work injury beginning on August 30, 2023, and the RBA ordered an eligibility evaluation and assigned a rehabilitation specialist on December 12, 2023, to complete the evaluation. Employee testified he continued working after he was injured on August 27, 2023, and he only worked part of the next day, August 28, 2023. August 29, 2023, was the first day Employee sought medical treatment and did not return to his job as a result of the work injury. Therefore, the 90th consecutive day Employee was totally unable to return to his job after his last partial day of work on August 28, 2023, was Sunday, November 26, 2023; the next day which is not a Saturday, Sunday, or a holiday was Monday, November 27, 2023. AS 23.30.041(c); 8 AAC 45.063(a). The adjuster provided the required 90-day notice on November 28, 2023. *Id*.

Employer contends Employee must have a PPI rating to be eligible for reemployment benefits and the presumption of compensability applies to the issue of whether Employee is entitled to "stipend" benefits. However, AS 23.30.041(c) requires the RBA to order an eligibility evaluation if "the employee is totally unable to return to the employee's employment at the time of injury for 90 consecutive days as a result of the work injury." There is no requirement for a PPI rating in AS 23.30.041(c). AS 23.30.041(d)(4) provides that an employee is not eligible for reemployment benefits if at the time of medical stability, no permanent impairment is identified or expected. However, the exclusionary grounds in AS 23.30.041(d) are considered by the rehabilitation

specialist during the reemployment eligibility evaluation, not when the RBA is mandated to order an evaluation under AS 23.30.041(c). The RBA was required to evaluate whether Employee was eligible for reemployment benefits even if there was no PPI rating. The RBA is only required to consider if "the employee is totally unable to return to the employee's employment at the time of injury for 90 consecutive days as a result of the work injury" and the six exceptions in regulations 8 AAC 45.510(b) and 8 AAC 45.552(a) when ordering an eligibility evaluation. The presumption of compensability does not apply to this issue because there is no relevant factual issue; it is a legal issue involving AS 23.30.041, 8 AAC 45.510 and 8 AAC 45.522. AS 23.30.120; *Rockney*.

Employee contends Employer impermissibly relied upon an EME's opinion in its May 14, 2024, controversion regarding Employee's release to his employment at the time of injury, rather than the attending physician as required in 8 AAC 45.900(i)(2). 8 AAC 45.900(i)(2) states "totally unable" "means the employee has not been released by in attending physician to return to the employee's employment at the time of injury on either a modified or unmodified basis" under AS 23.30.041(c). However, employers are still permitted to controvert based upon the listed grounds in 8 AAC 45.522(a) and 8 AAC 45.510(b) and an EME could express an opinion on those grounds (such as employee's injury did not arise out of and in the course of the employee's employment and employee's total inability to return to the employee's employment at the time of injury is not a result of the injury). Therefore, an employer may rely upon an EME's opinion to controvert "stipend" benefits.

Regulations 8 AAC 45.510(b) and 8 AAC 45.552(a) provide six exceptions preventing the RBA from referring Employee to a reemployment specialist for an evaluation. Dr. Kirkham's EME report was not filed or received by the RBA prior to the eligibility evaluation referral as it was filed on December 19, 2023, and the referral occurred on December 12, 2023. Employer did not controvert based upon Dr. Kirkham's EME report until December 27, 2023. At the time the RBA referred Employee for a reemployment evaluation, the only controversion in place was based upon Employee's failure to sign and return releases, which is not a ground preventing the RBA from referring Employee to a reemployment specialist for an eligibility evaluation under 8 AAC 45.510(b) and 8 AAC 45.552(a). There was no evidence or controversion in the record at the time the RBA referred Employee that contradicted Employer's November 27, 2023, 90-day form

admission that Employee was totally unable to return to his work for as a result of the work injury or demonstrated that his injury did not arise out of or in the course of employment. The grounds in 8 AAC 45.510(b) and 8 AAC 45.552(a) were not raised by Employer at the time the referral to the rehabilitation specialist was made or before the referral was made. Therefore, none of the grounds in 8 AAC 45.510(b) and 8 AAC 45.552(a) applied when the RBA referred Employee for a reemployment evaluation. The RBA properly referred Employee to the rehabilitation specialist for the evaluation based upon Employer's 90-day admission form. AS 23.30.041(c); *Unisea*; *Martino III*.

The EME report must use language close enough to the language in 8 AAC 45.510(b) so that there is no dispute that the EME meant that the employee's total inability to return to the employee's work at the time of the injury is not the result of the work injury. *Martino III*; *Carriere*; *Cache Camper*. Dr. Kirkham's December 11, 2023, EME report stated he "did not anticipate any permanent impairment" and that Employee reached medical stability on November 27, 2023, which was the 90th consecutive day Employee was totally unable to return to his employment at the time of injury. Dr. Kirkham's December 11, 2023, EME report did not address Employee's ability to return to his employment at the time of injury and whether or not any inability was a result of the injury. Employer had no basis to controvert "stipend benefits" on grounds Employee was not totally unable to return to his employment at the time of injury based upon Dr. Kirkham's December 11, 2023, EME report. Employer's December 27, 2023, controversion notice denied TTD and TPD benefits after November 27, 2023; it did not controvert reemployment benefits. Dr. Kirkham diagnosed a right corneal abrasion, substantially caused by the work injury, and a "mild concussion/traumatic brain injury, substantially caused by the work injury"; the ground that Employee's injury did not arise out of and in the course of employment did not apply. 8 AAC 45.510(b). Employer's December 27, 2023, controversion and Dr. Kirkham's December 11, 2023 EME report did not raise any of the grounds for an exception in 8 AAC 45.510(b) or 8 AAC 45.522(a), which could have triggered the RBA to forward the case to a hearing for termination of benefits. Nonetheless, Employer failed to pay Employee any "stipend" benefits until shortly before the January 28, 2025, hearing.

Employer controverted reemployment benefits on May 14, 2024, relying upon Dr. Zoltani's April 26, 2024, EME report and Dr. Kirkham's March 8, 2024, addendum EME report. In the March 8, 2024, addendum EME report, Dr. Kirkham said his previous opinions remained the same and it was unlikely that Employee's was having true seizures and if so, that the seizures were unrelated to the work injury. He found no medical reason Employee would not be able to perform the occupations of Deckhand, Overhead Crane Operator, or Front-End Loader Operator, which are the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (SCODRDOT) selected by the rehabilitation specialist for his job at the time of injury and the occupations of Wharf Laborer, Fisher, Packager, Landscaping Laborer, which are the SCODRDOTs selected by the rehabilitation specialist for other jobs Employee held in the past 10 years. He also wrote, "Yes, able to perform" on the position descriptions on March 26, 2024. Dr. Zoltani's April 26, 2024, EME report ruled out the work injury as the substantial cause of Employee's disability and need for treatment and said there were no physical restrictions from a neurological standpoint. He did not believe Employee was disabled from work activities due to the work injury as he expected the work injuries to resolve over six to eight weeks from the date of injury, and Employee did not incur a PPI for the head contusion and concussion.

The May 14, 2024, controversion notice denied "reemployment benefits" but it did not explicitly deny "stipend" benefits based upon a ground provided in 8 AAC 45.510(b). More importantly, Dr. Zoltani's EME report did not explicitly address whether the employee's total inability to return to his employment at the time of the injury was not the result of the work injury. He addressed Employee's physical restrictions, stated there were none, and said he did not believe Employee was disabled as he expected the injures to resolve by October 22, 2023, eight weeks after the injury at the latest (August 23, 2023, + 8 weeks = October 22, 2023). In a roundabout way, Dr. Zoltani may have possibly meant Employee was not totally unable to return to his occupation at the time of the injury as a result of the work injury because the injuries were resolved by October 22, 2023, at the latest. However, disability does not mean a total inability to return to the employment at the time of injury under the Act; it is defined as the incapacity to earn the wages which the employee was earning at the time of the injury in the same or any other employment because of the work

injury. AS 23.30.395(16). It is unlikely the RBA or its technician would realize Employer was attempting to argue the applicable ground under 8 AAC 45.510(b). *Martino III*; *Cache Camper*.

Dr. Kirkham's March 8, 2024, addendum EME report contained the same opinions in his December 11, 2023 EME report, which did not raise any of the grounds for an exception in 8 AAC 45.510(b) or 8 AAC 45.522(a). His review of the SCODRDOTs in the March 8, 2024 addendum EME report and on March 26, 2024, also did not raise any of the grounds for an in 8 AAC 45.510(b) or 8 AAC 45.522(a) because he did not address Employee's ability to return to his employment at the time of injury; only his ability to perform the physical demands of his job as described in the SCODRDOTs.

Employee was entitled to an eligibility evaluation and to stipend benefits during the process if no other compensation was available. *Cache Camper*. When the reemployment eligibility evaluation process begins, it must be determined. *Sierer* held assignment of the rehabilitation specialist triggered the employee's entitlement to "stipend" benefits if there were no TTD or PPI benefits available. In *Sierer*, the RBA designee assigned a rehabilitation specialist two days after the employer submitted the 90-day admission form. The Act provides the RBA with five working days to send a referral letter to the parties after receipt of the 90-day admission form if a controversion was not filed under 8 AAC 45.522(a), which would have been December 5, 2023 (November 28, 2023, + 5 working days = December 5, 2023). 8 AAC 45.522(b). Here, the referral letter was sent on December 12, 2023; thus, there was a seven-day delay. There is no explanation for the seven-day delay in the referral letter.

Carter held that the reemployment process begins when the employee begins his active pursuit of reemployment benefits because 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. *Vandenberg* stated C*arter* clearly established payment of "stipend benefits" between exhaustion of TTD benefits and the start of a reemployment plan as long as the employee vigorously pursued reemployment benefits. Employee first began pursuing reemployment benefits on September 25, 2023, when he filed a petition requesting review of the reemployment benefit administrator's

decision under AS 23.30.041 and reconsideration or modification. Employee could have requested an eligibility evaluation at 60 consecutive days of total inability to return to his employment at the time of injury, which would have been October 27, 2023, had he been properly instructed to do so (August 28, 2023, + 60 days = October 27, 2023). AS 23.30.041(c); 8 AAC 45.063(a).

At the November 2, 2023, prehearing conference, when Employee was unrepresented, the Division failed to inform him that he could request an eligibility evaluation at 60 consecutive days when Employee did not attend the prehearing conference and the summary only informed Employee his September 25, 2023, petition "may have been filed in error." While Division staff mailed the November 2, 2023, prehearing conference summary along with the "Workers' Compensation and You" pamphlet, which contains the additional pertinent information about the reemployment process, they were served upon an address provided by EDI and were not served properly to Employee's last known mailing address.

Employee requests an order awarding "stipend" benefits beginning after Employer stopped paying TTD and TPD benefits, until June 24, 2024, when he was found ineligible for reemployment benefits. Employer denied TTD and TPD benefits after November 27, 2023, in its December 27, 2023 controversion notice based upon Dr. Kirkham's December 11, 2023 EME report. Considering Employer's denial of TTD benefits after November 27, 2023, the RBA's late referral of Employee for an eligibility evaluation, Employee's early pursuit of reemployment benefits, and the Division's failure to adequately inform Employee how to pursue reemployment benefits, Employee's right to "stipend benefits" were due as a matter of law while he was actively pursuing reemployment benefits on November 28, 2023, when the adjuster Levine advised the RBA that Employee had been totally unable to return to his employment for 90 consecutive days as a result of the work injury beginning. AS 23.30.001(1); AS 23.30.41(c); AS 23.30.155(a), (b); 8 AAC 45.510(b); 8 AAC 45.522(a), (b); *Carter*; *Vandenburg*; *Cache Camper*. Employee is entitled to "stipend" benefits after Employer stopped paying TTD and TPD benefits, until June 24, 2024.

2) Is Employee entitled to interest and penalty?

Benefits are payable without an award unless an employer timely controverts. AS 23.30.155(a), (b), (d). On December 27, 2023, Employer controverted TTD and TPD benefits after November

27, 2023, and Employee had no PPI rating from his physician. On November 28, 2023, adjuster Levine filed a form admitting Employee had been totally unable to return to his employment at the time of injury for 90 consecutive days as a result of the work injury. Employer's obligation to pay Employee "stipend" benefits arose on November 28, 2023. It either had to pay Employee's "stipend" benefits within 14 days or controvert. AS 23.30.155(a), (d). Payment was late if not made within seven days of that date. AS 23.30.155(e). It is undisputed that Employer did not pay Employee any "stipend" benefits until shortly before the January 28, 2025, hearing, along with a penalty. Employer's voluntary payment is "the equivalent of a Board award." *Childs*.

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*. Employee would be entitled to "stipend" benefits based upon Drs. Kirkham's and Zoltani's and the December 27, 2023, and May 14, 2024 controversions for the reasons provided in detail above. Both controversions were too late to avoid a penalty. While Employer controverted "reemployment benefits" in the May 14, 2024, controversion, neither controversion denied "stipend" benefits. Because the controversions were not supported by Drs. Kirkham's and Zoltani's opinions and were untimely, Employee's claim for a penalty will be granted. AS 23.30.155(a), (e).

Because this decision grants Employee's claim for "stipend" benefits, those benefits were due effective November 28, 2023, and his claim for interest will be granted. AS 23.30.155(p).

3) Did Employer unfairly or frivolously controvert benefits?

Employer's controversions were based upon Drs. Kirkham's and Zoltani's EME reports. As analyzed above, their opinions do not state Employee's total inability to return to his job at the time of injury was not a result of the work injury. *Martino III*; *Cache Camper*. Employer's controversions were not supported by the medical evidence upon which they relied. Therefore, the controversions 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 upon on admissible evidence that Employee was disabled for 90 consecutive days as required under AS 23.30.041(c).

Therefore, Employer made frivolous or unfair controversions and this matter will be referred to the Division Director under AS 23.30.155(o).

4) Is Employee entitled to attorney fees and costs?

Attorney fees and costs may be awarded when an employer fails to pay benefits when due and an attorney is successful in prosecuting an employee's claim. AS 23.30.145(b). Employee's attorney successfully prosecuted his claim requesting "stipend" benefits, a penalty, interest, and a finding of unfair or frivolous controversion. Employer did not object to Employee's attorney fees and costs or contend they were unreasonable. This decision considered the *Rusch* factors based on Bredesen's affidavit with attachments. Bredesen obtained valuable benefits for Employee. Employee is entitled to reasonable attorney fees of $15,600 and $915.38 in costs. *Cortay*; *Bignell*.

CONCLUSIONS OF LAW

1) Employee is entitled to "stipend" benefits.
2) Employee is entitled to interest and penalty.
3) Employer unfairly and frivolously controverted benefits.
4) Employee is entitled to attorney fees and costs.

ORDER

1) Employee's request for "stipend" benefits is granted.
2) Employee's claim for penalty is granted.
3) Employee's claim for interest is granted.
4) Employee's request for a frivolous or unfair controversion finding is granted.
5) The Division's adjudication section will refer this decision to the Division Director for referral to the Division of Insurance pursuant to AS 23.30.155(o).
6) Employer shall pay Employee's attorney $15,600 in fees and $915.38 in costs.

Dated in Anchorage, Alaska on February 26, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Sara Faulkner, Member

/s/
Brian Zematis, 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 Alejandro Munoz, employee / claimant v. 60 North Seafoods, LLC, employer; Berkshire Hathaway Homestate Insurance Company, insurer / defendants; Case No. 202311865; 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 February 26, 2025.

/s/
Rochelle Comer, Workers' Compensation Technician