Alaska Workers' Compensation Appeals Commission

Kinley's Restaurant & Bar, Republic Indemnity Company, and Northern Adjusters, Inc.,
Appellants,

vs.

Michael S. Gurnett,
Appellee.

Final Decision
Decision No. 121 November 24, 2009

AWCAC Appeal No. 09-008
AWCB Decision Nos. 08-0263 and 09-0017
AWCB Case No. 200716426

Appeal from Alaska Workers' Compensation Board Decision No. 08-0263, issued on December 31, 2008, at Anchorage by southcentral panel members Judith DeMarsh, Chair, Janet Waldron, Member for Industry, and Tony Hansen, Member for Labor, and, on reconsideration, Decision No. 09-0017, issued on January 30, 2009, at Anchorage by southcentral panel members Judith DeMarsh, Chair, Janet Waldron, Member for Industry, and Tony Hansen, Member for Labor.

Appearances: Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, for appellants Kinley's Restaurant & Bar, Republic Indemnity Company, and Northern Adjusters, Inc. Steven Constantino, Esq., for appellee Michael S. Gurnett.

Commission proceedings: Appeal filed March 2, 2009. Oral argument presented August 4, 2009.

Appeals Commissioners: Jim Robison, Philip Ulmer, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

Michael Gurnett, a server at Kinley's Restaurant, was injured when he was struck on the head by a cooler door. Kinley's insurer paid compensation and benefits until it controverted compensation based on Gurnett's neurosurgeon's statement that he could return to work. The board decided the controversion was not made in good faith and ordered payment of a penalty. Kinley's and its insurer filed an unopposed petition for reconsideration of the award of a penalty against the employer for late payment of

compensation without a good faith controversion.[1] The board modified its decision on reconsideration, but maintained the award of a penalty based on compensation not paid from February 14, 2008, through April 30, 2008. Kinley's, its insurer, and its adjuster appeal the penalty award.

Appellants argue that reliance on a physician's release to return to work protects them from imposition of a penalty under AS 23.30.155(e).[2] Appellants argue that the

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[1] The appellee conceded that his workers' compensation claim did not include this penalty. Appellee's Br. 13.

[2] AS 23.30.155 provides in relevant part:

> **Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating
> (1) that the right of the employee to compensation is controverted;
> (2) the name of the employee;
> (3) the name of the employer;
> (4) the date of the alleged injury or death; and
> (5) the type of compensation and all grounds upon which the right to compensation is controverted.
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> (c) The insurer or adjuster shall notify the division and the employee on a form prescribed by the director that the payment of compensation has begun or has been increased, decreased, suspended, terminated, resumed, or changed in type. . . . If at any time 21 days or more pass and no compensation payment is issued, a report notifying the division and the employee of the termination or suspension of compensation shall be filed with the division and sent to the employee within 28 days after the date the last compensation payment was issued. A report shall also be filed with the division and sent to the employee within 28 days after the date of issuing a payment increasing, decreasing,

resuming, or changing the type of compensation paid. If the division and the employee are not notified within the 28 days prescribed by this subsection for reporting, the insurer or adjuster shall pay a civil penalty of $100 for the first day plus $10 for each day after the first day that the notice was not given. Total penalties under this subsection may not exceed $1,000 for a failure to file a required report. . . .

(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 or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.

* * *

(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

board's decision requires appellants to predict that a physician will not later change his opinion, requires appellants to obtain unanimity in physician opinion before controversion, and disregards the evidence that the physician had a job description from the employee. They argue the board imposed standards that exceed the requirements of the statute and the Supreme Court's decisions in *Harp v. Arco Alaska, Inc.*,[3] and *Dougan v. Aurora Electric, Inc.*[4] Appellee opposes and contends that appellants had a duty to obtain additional information regarding other aspects of his injury before controverting disability benefits.

The parties' contentions require the commission to address the question, "When is a controversion of temporary disability compensation based on a physician's statement that an injured worker is able to return to work made invalid?" The facts of this case, and the parties' arguments on appeal, also compel the commission to address the question, "Is the employer's insurer bound by the position adopted by the employer regarding the employee's ability to return to work?" Finally, the commission considers whether the board's decision imposes duties on an insurance adjuster that are inconsistent with its obligations to its insured and compliance with the Alaska Workers' Compensation Act (hereafter "Act").

The commission concludes that the board erred as a matter of law by weighing evidence in support of a controversion against evidence presented against it before

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> 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 specified in AS 09.30.070 (a) that is in effect on the date the compensation is due.
> (q) Unless compensation due the employee under this chapter is paid by negotiable instrument that is drawn on a state or federal financial institution, the employer shall increase the weekly rate of compensation due the employee under AS 23.30.175 by two percent.

[3] 831 P.2d 352 (Alaska 1992).

[4] 50 P.3d 789 (Alaska 2002).

determining if the controversion was valid. The commission holds that a notice of controversion's validity is assessed based on the evidence in the issuing adjuster's possession *at the time the controversion was mailed*. Therefore, a controversion based on the original physician opinion is not retroactively converted to a "bad faith" controversion because later the opinion was withdrawn. The commission concludes the board erred as a matter of law by assessing a penalty for nonpayment without a valid controversion retroactively to the date of the controversion.

The commission holds that an employee must select one attending physician for the injury, not one physician for each condition caused by the injury. The employee's direction to his employer to contact a physician regarding an ability to return to work is a selection of the attending physician. In this case, the adjuster was not required to inquire of all consulting physicians before controverting compensation. But, if a physician specifically qualifies an opinion on return to work by deferring to the attending physician, or the selected physician declines to serve as the attending physician, then the insurer must inquire of the default attending physician.

The commission holds that (1) if the employment has not been terminated and an employee's position is still available, (2) if the employer refuses in writing to accept the employee's physician's release to return to work in the employee's position, and (3), if the employer's refusal is based on a belief the employee cannot, because of the work injury, perform the essential functions of the position, then the employer's refusal to accept its employee's attending physician's release to return to work is an acceptance of liability for disability compensation that is binding on the insurer. If the insurer has, or when the insurer obtains, other substantial evidence that the employee can return to the same or other employment at similar wages or other evidence that the employee is not disabled, the insurer may assert a defense to liability based on that evidence. This holding does not apply when the employer offers temporary limited duty, alternate positions, or limitations on hours or duties consistent with medical advice or safety rules, even if it results in reduction in pay.

The commission finds that the record lacks evidence to apply these holdings. Therefore, the commission reverses the board's decision awarding a penalty under

AS 23.30.155(e) and remands the case to the board for further proceedings in light of this decision.

1. Factual background.

Michael Gurnett worked part-time at Kinley's Restaurant & Bar as a server. On September 26, 2007, he was filling ketchup containers near the door to a walk-in cooler. A chef kicked the door open, striking Gurnett on the forehead, causing blood to run into his eye and swelling. He developed headaches and dizziness, and went to the Providence Hospital emergency room two days later. A CT scan found no abnormality and he was told to see his physician in a week, but to return to the hospital if new symptoms appeared. On the fourth day after the injury, Gurnett went to a regularly scheduled eye exam. His optometrist, Dr. Brinkerhoff, referred him to a neuro-opthalmologist, Carl Rosen, M.D. Dr. Rosen ordered an MRI scan and additional scans were recommended by the radiologist, Dr. Moeller, including an MRI angiogram. On October 11, 2007, Dr. Rosen evaluated Gurnett. He referred Gurnett to Marshall Tolbert, M.D., a neurosurgeon, for evaluation and to rule out dissection of the carotid artery. Dr. Tolbert saw Gurnett on October 15, 2007, and diagnosed a traumatic dissection of the left distal cervical internal carotid artery, resulting in Horner's syndrome, but no abnormalities consistent with stroke. He recommended surgery to place a stent in the artery, which was nearly occluded.

The employer's physician, neurosurgeon Paul Williams, M.D., saw Gurnett on October 29, 2007. He agreed that the work injury was the substantial cause of the Horner's syndrome and stenosis of the carotid artery. He agreed that surgery, or anticoagulant therapy, were appropriate. On November 5, 2007, Dr. Tolbert announced he would perform surgery the next week. A second angiogram in preparation for the surgery revealed that the occlusion had healed itself; that is, that while it revealed a dissection had occurred, the artery showed no significant stenosis or pseudoaneurysm. Therefore, surgery was no longer needed. Dr. Tolbert later sent Gurnett back to Dr. Rosen to evaluate the Horner's syndrome.

On January 10, 2008, the adjuster wrote Dr. Tolbert to ask when Gurnett could return to work, if he was medically stable. A copy of a Department of Labor

occupational description form for server/waiter was attached, as well as the employer's job description. On January 19, 2008, Gurnett telephoned Dr. Tolbert, wanting to know when he could go back to work, and, according to Dr. Tolbert's office chart note, Gurnett was told he had no restrictions.[5] On February 12, 2008, Gurnett wrote to Dr. Tolbert, describing the hazards of his job in detail.[6] The next day, February 13, 2008, the adjuster received a letter from Dr. Tolbert, indicating that Gurnett was able to return to work: "Mr. Gurnett may resume his job. His restrictions include no chiropractic manipulations or activities with high impact to cervical region, such as snow machining, ATV riding . . ."[7] Temporary disability compensation was controverted based on this statement.

On February 26, 2008, Solomon Loosli at Kinley's Restaurant sent an e-mail to Gurnett that included a letter addressed to Dr. Tolbert addressing "some of your concerns, as to whether Michael Gurnett could come back to work at Kinley's Restaurant."[8] The letter said in part,

> [i]t would not be in Michael's or Kinley's best interest to continue his employment here, until some of the issues brought up in the work release letter I received from your office. [sic] Most poignantly, the diminished: depth perception, balance, and peripheral vision leave Michael, guests, and his coworkers at risk for further accidents. I have no other job positions open at this time that Michael would be able to work.[9]

On March 24, 2008, according to Dr. Tolbert's notes, Gurnett called Dr. Tolbert's office

> requesting work status. Advised he needs to obtain work release from Dr. Rosen per Dr. Tolbert standpoint he can return to work ċ no chiropractic manipulation or activities w/ high impact to

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[5] R. 0552. The note states: "T/C from pt wanting to know work status he c/o intermittent neck pain he indicates pt employer doesn't want him to RTW 2º to being on Plavix and risk of being cut. Per MT pt has Ø restrictions. SD." *Id.*

[6] R. 0553.

[7] R. 0352.

[8] R. 0033.

[9] R. 0033. There is no mention of diminished depth perception, balance, and peripheral vision in Dr. Tolbert's letter.

> cervical region. SD Spoke ċ Laurie @ Northern Adjusters. She sts her records state pt is able to RTW per MT she was advised Dr. Tolbert is not the only MD treating pt & she needs to check ċ Dr. Rosen office w/RE his restrictions.[10]

On April 14, 2008, Gurnett obtained a form letter from Dr. Tolbert, stating he was disabled from work from February 14, until a physical capacity evaluation (PCE) was completed.[11]

The adjuster sent Gurnett to a second employer medical examination by neurosurgeon Dr. Williams. On April 30, 2008, Dr. Williams provided an opinion that the injury was medically stable and that no permanent impairment was found. He believed that Gurnett could return to work, if he was not required to lift more than 50 pounds occasionally. A new controversion of temporary disability compensation based on Dr. Williams's opinion was mailed to Gurnett on May 19, 2009.

2. Proceedings before the board.

Gurnett filed a claim for temporary disability compensation, permanent partial impairment compensation, medical benefits, reemployment benefits eligibility, and a penalty on April 9, 2008.[12] The board heard the claim in November 2008 and issued a decision on December 31, 2008.[13] Regarding the penalty, the board found that

> [a]lthough the employer knew as of March 24, 2008 that it should contact Dr. Rosen to find out whether there were any work restrictions on the claimant, the employer apparently did not do so. . . . Dr. Tolbert made it crystal clear in his April 14, 2008 statement to the employer that the claimant was totally disabled from his job at the time of his injury as of February 14, 2008 and ongoing, until after he underwent a PCE. Nevertheless, the employer still refused to pay TTD benefits to

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[10] R. 0550.

[11] R. 0178. The letter has two dates, 4/14/08 and a "2" penned over the first "4," with the initials "SD" beside it. This suggests that someone other than Dr. Tolbert wrote "2" over the "4" – it is not clear that Dr. Tolbert directed the change. A letter on the same form in different handwriting, with a 2/14/08 date, is at R. 0179.

[12] R. 0022-23.

[13] *Michael S. Gurnett v. Kinley's Restaurant & Bar,* Alaska Workers' Comp. Bd. Dec. No. 08-0263 (Dec. 31, 2008) (J. DeMarsh, chair).

> the claimant. The employee claims penalties under AS 23.30.155(e) based on the employer's controversion of TTD benefits.
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> The employer argues it relied on Dr. Tolbert's initial, February 13, 2008 statement, as well as statements in Dr. Tolbert's medical records, but the employer offers no credible explanation of why it failed to contact Dr. Rosen concerning work restrictions, and why it failed to acknowledge Dr. Tolbert's explicit April 14, 2008 statement concerning the claimant's status as totally disabled from February 14, 2008 until after a PCE is completed.[14]

After discussing *Harp v. Arco Alaska, Inc*.[15] and the board's decision in *Lindekugel v. Easley*, Alaska Workers' Comp. Bd. Dec. No. 06-0321 (October 6, 2006), the board found

> . . . the controversion was not valid from the time the employer became aware it should contact Dr. Rosen concerning the claimant's disability and ability to return to his job at the time of injury, which is March 24, 2008. At the latest, the controversion was not valid as of April 14, 2008, when Dr. Tolbert stated unequivocally the claimant was totally disabled from February 14, 2008 until a PCE was completed. We conclude the employee is due a 25 percent penalty on all the TTD benefits not timely paid following the controversion, under AS 23.30.155(e) by operation of law. We shall order the employer to pay the claimant a 25 percent penalty on the TTD benefits from February 14, 2008 to July 29, 2008, the date when the employer began to pay the employee §.041(k) benefits. We shall also order the employer to pay a 25% penalty of the difference between TTD benefits and §.041(k) benefits already paid from July 29, 2008 until the date the employer commences payment of TTD benefits, pursuant to this Decision and Order.[16]

Kinley's, its insurer, and the adjuster (hereafter collectively referred to as "Kinley's") sought reconsideration of the board's penalty order.[17] The petition for reconsideration was unopposed.

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[14] *Id.* at 40.

[15] 831 P.2d at 358.

[16] *Michael S. Gurnett,* Bd. Dec. 08-0263 at 41-42.

[17] R. 0290-296.

On reconsideration, the board said

> As an initial matter, Dr. Tolbert's February 13, 2008 opinion was based upon an inaccurate job description, provided by the employer, that misrepresented the claimant's job at the time of injury as that of a server rather than a server and busser. We find the employer has a responsibility to provide correct and accurate information, such as job descriptions, to physicians from whom the employer is eliciting an opinion when the employer wishes to rely upon the opinion to controvert benefits. We find the employer improperly relied on Dr. Tolbert's February 13, 2008 statement the employee could return to work and that the controversion of TTD benefits based on that statement was not in good faith.[18]

The board went on to find that

> [i]n the instant matter, the employer was on notice as of March 24, 2008 that it needed more information from Dr. Rosen before it could be determined that the claimant could not return to his job at the time of injury, and on April 1, 2008, it had the evidence from Dr. Rosen that the claimant in fact was not able to return to his job at the time of injury. Therefore, we find that as of April 1, 2008, the employer's controversion was not in good faith under *Harp*.[19]

The board rejected the argument that Kinley's could continue to rely on Dr. Tolbert's statement of February 13, 2008, because it was repeated in his April 14, 2008, chart note, instead of the form letter stating Gurnett was disabled from work from February 14, 2008 until after the PCE was completed.[20] The board said

> Thus the employer relied on the portion of Dr. Tolbert's April 14, 2008 clinic note in which he stated the claimant was not disabled from work due to the carotid artery dissection, but disregarded both the portion of Dr. Tolbert's April 14, 2008 clinic note in which he stated he was deferring recommendations on the claimant's work status until Dr. Hadley had a chance to evaluate the claimant, and Dr. Tolbert's April 14, 2008 statement explicitly and clearly documenting Dr. Tolbert's opinion the claimant was

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[18] *Michael S. Gurnett v. Kinley's Restaurant & Bar,* Alaska Workers' Comp. Bd. Dec. No. 09-0017, 7 (Jan. 30, 2009) (J. DeMarsh, chair).

[19] *Id.* at 8.

[20] *Id.*

> disabled from work from February 14, 2008 until after a PCE had been completed. We find the employer cannot properly rely on one portion of a medical report while ignoring another portion that contradicts the employer's interpretation of the portion on which it chooses to rely. In addition, we find the employer cannot properly rely on the medical record where, as in the instant matter, there is a clear and explicit statement from the physician that contradicts the employer's selective interpretation of the medical record. In summary, we find the employer's controversion of TTD benefits was not in good faith after April 14, 2008.[21]

Finally, the board found that Dr. Williams' April 30, 2008, report was sufficient evidence to support the controversion.[22] The board concluded no penalties were due for compensation owed after April 30, 2008.[23] The board ordered Kinley's to pay a 25 percent penalty on compensation owed for the period from February 14, 2008, to April 30, 2008.[24] Kinley's appeals this order.

3. Standard of review.

The board's findings of fact will be upheld by the commission if supported by substantial evidence in light of the whole record.[25] The commission "do[es] not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of weight to be accorded evidence is the task assigned to the board, . . . The commission will not reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive."[26] A board determination of the credibility of a witness who testifies before the board is binding on the commission.[27]

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21 *Id.* at 8-9.

22 *Id.* at 9.

23 *Id.* This ruling is not appealed.

24 *Id.*

25 AS 23.30.128(b).

26 *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing AS 23.30.122).

27 AS 23.30.128(b).

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Act.[28] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[29] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[30]

4. Discussion.

a. The evidence is not weighed in determining if there is substantial evidence to support a controversion.

AS 23.30.155(d) provides in part, "If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due." AS 23.30.155(e) provides in part, "If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment."

The question whether a particular notice of controversion will protect an employer from a penalty under AS 23.30.155(e) has been the subject of much litigation. Since the Supreme Court's decision in *Harp v. ARCO Alaska, Inc.*,[31] the board has gone beyond determining if a controversion is filed in good faith as the test of the notice of controversion's validity. The board has held that a controversion not made in good

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[28] *Id.*

[29] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[30] *Cameron v. TAB Elec., Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 089, 11 (Sept. 23, 2008) (quoting *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

[31] 831 P.2d at 358 ("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.").

faith is frivolous and unfair for purposes of AS 23.30.155(o).[32] The fault in this logic was the subject of the commission's decisions in *Sourdough Express, Inc., v. Barron,*[33] *Municipality of Anchorage v. Monfore,*[34] and, to some extent, *Rockstad v. Chugach Eareckson*.[35]

In *Municipality of Anchorage v. Monfore*,[36] the commission examined a challenge to an award of penalty for a controversion that the board found was not in good faith under *Harp*.[37] In that case, the commission held that the board must examine the evidence in support of a controversion in isolation and without consideration of credibility, to determine if the evidence is sufficient to rebut a presumption of compensability of the compensation controverted.[38] Because the sufficiency of evidence to overcome the presumption is considered without determining credibility or weighing it against other evidence, evidence to support a controversion is also viewed in isolation, without determining weight or credibility.

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[32] *See, e.g., Ruth A. Nickels v. Noel & Nancy Napolilli*, Alaska Workers' Comp. Bd. Dec. No. 02-0055, 19, 2002 WL 485637 *11-12 (Mar. 28, 2002). AS 23.30.155(o) provides that 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 AS 23.30.

[33] Alaska Workers' Comp. App. Comm'n Dec. No. 069, 21-22 (Feb. 7, 2008) (concluding a bad-faith controversion occurs "if, after drawing all permissible inferences from the evidence in favor of a facially valid controversion, the board finds that it lacks any legal basis or that it was designed to mislead or deceive the employee.") (citations omitted).

[34] Alaska Workers' Comp. App. Comm'n Dec. No. 108, 5-6 (May 11, 2009) (noting that requiring the lack of "any legal basis" for a bad-faith controversion "was intended to convey such a complete absence of legal basis for a controversion that, even with every inference drawn in favor of validity, there is no possibility of mistake, misunderstanding, partial evidentiary support, or other conduct falling in the borderland between bad faith and good faith.").

[35] Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009).

[36] Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008).

[37] App. Comm'n Dec. No. 081 at 12.

[38] *Id*. at 19 (citations omitted).

Here the board decided the employer "offered no *credible* explanation" as to why it failed to contact Dr. Rosen – thus disregarding the explanation offered by the employer as not credible.[39] The board also decided that Dr. Tolbert's February 13, 2008, opinion was of less weight than his April 14, 2008 opinion.[40] The board engaged in improper weighing of the evidence offered in support of the controversion of February 13, 2008. The board failed to examine the evidence without determining credibility, as if no evidence were offered to contradict it, and decide if, assuming no evidence were offered to contradict it, the evidence would be sufficient to deny the claim for the controverted benefit. Therefore, the commission reverses the board's award of a penalty based on the finding that the February 13, 2008, controversion was not a good faith controversion.

b. The board was not required to examine if the controversion was frivolous or unfair to assess a penalty under AS 23.30.155(e); a referral under AS 23.30.155(o) requires a separate inquiry.

In *Sourdough Express*, the commission examined whether a notice of controversion that the board found was invalid would start the 2-year time bar in AS 23.30.110(c). The commission held that a controversion filed in bad faith would not start the 2-year time bar, but cautioned that not "every controversion that the board ultimately finds is insufficiently supported, and therefore subject to a *Harp* penalty under AS 23.30.155(e), is filed in bad faith."[41] "Between good faith and bad faith, . . ." the commission said,

> there is a borderland inhabited by honest mistakes, inadvertent processing errors, and petty misunderstandings that may subject the employer to a penalty, but are not the result of bad-faith conduct. Failure to file "in good faith" does not prove that the employer acted in "bad faith."[42]

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39 *Michael S. Gurnett,* Bd. Dec. No. 08-0263 at 40.

40 *Michael S. Gurnett,* Bd. Dec. No. 09-0017 at 7.

41 *Sourdough Express,* App. Comm'n Dec. No. 069 at 20.

42 *Id*. at 20-21.

In *Rockstad v. Chugach Eareckson*,[43] the commission considered the definition of bad faith again, in the context of a claim for attorney fees against an injured worker under AS 23.30.008(d), based upon the commission's holding in *Sourdough Express*. The commission pointed out that in *Sourdough Express* it had not equated frivolity with bad faith:

> The commission's emphasis of the word "*any*" in its two part test of what constitutes a bad faith controversion was intended to convey such a complete absence of legal basis for a controversion that, *even with every inference drawn in favor of validity*, there is no possibility of mistake, misunderstanding, partial evidentiary support, or other conduct falling in the borderland between bad faith and good faith. A licensed adjuster who files such an utterly frivolous controversion may be presumed to have done so in bad faith without proof of malign motive because the adjuster possesses a state license that (1) requires specialized education, training, and experience and (2) obligates the adjuster to meet certain performance standards related to professional responsibility.[44]

The commission rejected an argument that the ruling in *Sourdough* meant that all conduct in the borderland was necessarily frivolous or unfair.

> By saying that "clearly fairness and sufficient evidence to support the controversion are marks of good faith," the commission did not exclude all other "marks of good faith." The commission's use of the word "clearly" was intended to establish the farthest range between what is affirmatively "good" and what is undoubtedly "bad," recognizing that between the two poles is a borderland of conduct that may not be one or the other. Such conduct may be neutral (such as a mistake that is not of the adjuster's making or a misunderstanding shared by the parties), well-intentioned but mistaken, or careless, but not "bad." Some conduct in that borderland may be unfair, some conduct may result in a frivolous controversion, but to say that the commission held that all conduct in the borderland is unfair or results in frivolous controversions misreads the commission's holding.[45]

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43 App. Comm'n Dec. No. 108.

44 *Id*. at 5.

45 *Id*. at 6 (citation omitted).

The Supreme Court has repeated that good faith controversion will protect the employer from a penalty for nonpayment of benefits when due under AS 23.30.155(e).[46] However, an invalid, or ultimately unsuccessful controversion, does not mean that an adjuster must be subject to the penalties of AS 23.30.155(o). A controversion which is frivolous (completely lacking a plausible legal defense or evidence to support a fact-based controversion) or unfair (dishonest, fraudulent, the product of bias or prejudice) is necessarily lacking good faith, but a controversion lacking good faith because, for example, the evidence offered in support of the controversion is based on a mistaken understanding of the claimant's employment status, is not necessarily frivolous or unfair. Therefore, referral under AS 23.30.155(o) may be made only after a separate finding that the controversion was frivolous or it was otherwise unfair. Here, the board made no separate inquiry into the frivolity or unfairness of the notice of controversion issued on February 13, 2008. For this reason, the commission considers the board's comment that "had the claimant requested a finding of frivolous and unfair controversion, we would have . . . seriously considered making such a finding"[47] is a premature and needless disapproval. The commission cautions the board to avoid superfluous negative comment that may be detrimental to the process of fair, impartial adjudication to which all parties are entitled.

c. A physician's change of opinion supporting a controversion does not retroactively invalidate a controversion based on an earlier different opinion; retraction is effective when communicated.

The board decided that Dr. Tolbert's April 14 letter made the controversion issued based on his February 13 opinion no longer a "good faith" controversion. However, retraction of an opinion supporting a controversion does not mean that the there was no basis to controvert liability *when the notice of controversion was issued.*

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[46] *Irby v. Fairbanks Gold Mining, Inc.*, 203 P.3d 1138, 1147 (Alaska 2009); *Thoeni v. Consumer Electronic Servs.*, 151 P.3d 1249, 1259 (Alaska 2007); *Williams v. Abood*, 53 P.3d 134, 146 (Alaska 2002); *Dougan v. Aurora Elec. Inc.*, 50 P.3d 789, 794 (Alaska 2002).

[47] *Michael S. Gurnett,* Bd. Dec. No. 09-0017 at 9.

The good faith of a notice of controversion is assessed based on the evidence in possession of the employer (or employer's insurer) when the controversion was mailed.[48] Just as a good faith controversion cannot be based on evidence that has not reached the employer, the prior existence of evidence to support a controversion cannot be erased by a later change in an expert's opinion. By determining that the controversion was not in good faith, retroactively to before the change in opinion occurred, the board imposed an impossible task on the employer that is inconsistent with the obligation under AS 23.30.155(d) to provide notice of controversion within seven days of when payment is due. The obligation to provide notice within seven days serves to inform the employee promptly of what to expect in the future. The penalty ensures that notice of future expectations is not given so late as to amount to explanation for past non-payment.

Dr. Tolbert did not alter his opinion for almost 2 months. But, the board held that compensation due after February 13 was paid late (that is, not until the board awarded it) and that the employer had no reason to controvert payment for any part of that time. The board did not find that the February 13 release to work, if it had not been retracted or qualified, would not be adequate evidence on which to base a controversion. Therefore, the effect was that the board penalized the employer for not having predicted that Dr. Tolbert would change his opinion. The board also assumed that the later opinion was automatically entitled to greater weight.

An example illustrates the unreasonableness of the board's application of the statute. An employee's physician says an employee's injury is not work-related, and

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[48] *See Williams,* 53 P.3d at 146 ("[A]n employer must have sufficient evidence in order to make a good faith controversion."); *Dougan,* 50 P.3d at 794 ("[A]n employer must have evidence that would justify denial of a compensation award in order to make a good faith controversion."); *Harp*, 831 P.2d at 358 ("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."); *Monfore,* App. Comm'n Dec. No. 081 at 19 ("The employer must have responsible medical opinion or contradictory medical testimony to support the controversion (if based on a medical issue).").

she maintains that position for two years. The physician then retreats from her former opinion, stating it is possible that the injury is work-related. Is the employer subject to a penalty for two years of late-paid compensation because the employer did not know, two years earlier when the compensation was due and the controversion issued, that the physician would later change her opinion? No. If there is no other evidence to support a controversion, the change in opinion might remove the basis for continuing to controvert future compensation due, but it does not mean that the controversion originally issued lacked an evidentiary basis. To hold that it does would mean that the two opinions had been compared and the later opinion given greater weight than the earlier one. Evidence in support of a controversion is not weighed against later acquired evidence, even from the same source; its sufficiency is viewed in isolation from contradictory evidence. Evidence to support a controversion must be evidence that could rebut a presumption in favor of the claimed benefit and thus support a denial of the benefit if no contrary evidence were introduced. It need not be evidence that would predictably prevail against contrary evidence when the dispute is heard by the board.

> *d. Until the employee nominates another attending physician, the employer may rely on the only physician who was asked by the employee to express an opinion on disability to his employer.*

The appellee argues that the controversion was not in good faith because the employer failed to contact other physicians after March 24, 2008, when Dr. Tolbert's nurse told the adjuster "she needs to check [with] Dr. Rosen office re his restrictions."[49] The appellee also argues that an employer is required to ascertain the opinion of all the physicians who treat the various parts of the employee's injury. The appellants argue that they were entitled to rely on Dr. Tolbert because he was actively treating Gurnett.

AS 23.30.095(a) requires an employee to designate a single attending physician and to give "proper notification of the selection to the employer."[50] The purpose of this

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[49] R. 0550.

[50] AS 23.30.095(a) provides in part:

designation, as the commission said in *Witbeck v. Superstructures, Inc.*, is to provide coordinated care for the injury:

> . . . [T]he attending physician is explicitly charged with responsibility for "*all* medical and related" care; it logically follows that the attending physician is responsible for making referrals to specialists. Requiring the attending physician to make referrals furthers the policy of preventing costly, abusive

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> When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.

8 AAC 45.082(c) provides in part:

> Physicians may be changed as follows:
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> * * *
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> (2) Except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury. If an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician. An employee does not designate a physician as an attending physician if the employee gets service
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> (A) at a hospital or an emergency care facility;
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> (B) from a physician
>
> (i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;
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> (ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or
>
> (iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician.

> over-consumption of medical resources through duplication of services when an employee's care is directed by an ever-expanding number of specialists. Imposing responsibility to make referrals on the attending physician ensures the attending physician is fully informed of *all* the medical and related care the employee receives, that he or she is charged to provide by AS 23.30.095(a). The special responsibility of the attending physician to provide all medical and related care complements the emphasis given to the opinion of the attending physician in the two years following the date of injury. *Philip Weidner & Assoc. v. Hibdon*, 989 P.2d at 732. ("[W]here the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable.").[51]

Gurnett's first caregiver for the injury was the emergency department at Providence Hospital. 8 AAC 45.082(c)(2)(A) excuses employees from designating emergency care facilities as an attending physician by "getting treatment . . . from a physician for the injury." The next physician Gurnett saw was his usual optometrist, Dr. Brinkerhoff, with whom he had a regular appointment. Gurnett received advice and a service (referral to Carl Rosen, M.D.) for the injury from Dr. Brinkerhoff, but, as an optometrist, Dr. Brinkerhoff cannot qualify as Gurnett's attending physician.[52] Thus, the first physician to provide service and treatment, who is not be excused from the responsibility to act as attending physician under 8 AAC 45.082(c)(2), was Dr. Rosen. Dr. Rosen was the attending physician by operation of the regulation.

Until he filed his workers' compensation claim, Gurnett does not appear to have provided an alternative "proper notification of the selection to the employer," such as a notice in writing that he designated Dr. Rosen (or Dr. Tolbert) as his attending

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[51] Alaska Workers' Comp. App. Comm'n Dec. No. 014, 26 n.142 (July 13, 2006).

[52] An optometrist is a "physician" within the meaning of the Alaska Workers' Compensation Act, AS 23.30.395(31), but not within the meaning of an "attending physician," AS 23.30.395(3).

physician.[53] The medical records do not reveal that Gurnett asked Dr. Tolbert or Dr. Rosen to keep the other informed of his treatment. However, at the same time he filed his claim for compensation, Gurnett asked Loosli to address his letter about Gurnett's ability to work to Dr. Tolbert, not to Dr. Rosen. Gurnett cannot, on the one hand, ask his employer to address its concerns to one physician and, on the other hand, assert that the same physician is not able to provide an answer to the employer because he is not the attending physician. Because Gurnett identified Dr. Tolbert to the person he believed was his employer's general manager (Solomon Loosli) as the physician who could release him to work or not, the adjuster could rely on Gurnett's selection of Dr. Tolbert as his attending physician under AS 23.30.095(a) after the date of Gurnett's request to Loosli to contact Dr. Tolbert.

Thus, Dr. Tolbert's nurse, by telling both the adjuster and Gurnett to contact Dr. Rosen, might have intended to communicate that Dr. Tolbert was *unwilling* to be Gurnett's attending physician, but the question whether this conversation was adequate to convey Dr. Tolbert's unwillingness to be the attending physician was never decided by the board. The board found that the employer was "on notice of the necessity of contacting Dr. Rosen."[54] An employer is not required to contact any other physician than the one physician who is, as the law provides, "to provide *all* medical and related benefits." "Related benefits" include releases from and to return to work, limitations on activities, and referrals to consulting physicians. Because Gurnett directed his employer to obtain information and direct concerns to Dr. Tolbert, Dr. Tolbert must be considered his attending physician as of the day he gave that name to his employer.

Here the board made no findings that Dr. Tolbert had ceased to be Gurnett's attending physician on March 24, 2008, either because Dr. Tolbert declined to provide that service, or because Dr. Tolbert never accepted that he was anything other than a consulting physician. If, by March 24, 2008, Dr. Tolbert was not the attending

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[53] On his claim, filed Feb. 27, 2008, Gurnett listed two physicians, Dr. Tolbert and Dr. Rosen. R. 0022. Only one physician at a time may be the attending physician; Gurnett may not list two physicians as current attending physicians.

[54] *Michael S. Gurnett*, Bd. Dec. No. 09-0017 at 8.

physician, then the adjuster properly should have contacted the prior attending physician (Dr. Rosen) for Gurnett's work status. Until the adjuster was given notice that Dr. Tolbert was not the attending physician, it was not necessary for the adjuster to contact anyone but Dr. Tolbert – it was Dr. Tolbert's obligation, as the attending physician, to inform his patient and the employer if other consulting physicians had placed additional limitations on his patient's ability to return to work.

On remand, the board should determine if Gurnett properly changed his attending physician (by giving written notice 14 days in advance), or his selected attending physician refused to act in that capacity and Gurnett or the physician gave the adjuster or employer notice of refusal. If so, the adjuster was required to contact the prior attending physician for Gurnett's work status if it had no other evidence to support a controversion of compensation.[55] The commission cautions that it is Gurnett's responsibility to notify the adjuster and employer of his attending physician, to give proper notice of any changes, to ensure that his selected attending physician has all the information needed to fulfill his responsibilities, and to see that copies of treatment notes by consulting physicians are provided to his attending physician.

e. The employer's written assertion of a contrary position amounting to an acceptance of liability was binding on the insurer until other evidence was obtained.

On February 26, 2008, Solomon Loosli of Kinley's Restaurant communicated his position regarding Gurnett's ability to return to work in writing to Gurnett and his physician. Gurnett testified that Loosli was his supervisor and, he thought, a "general manager" for Kinley's. In response to questions in oral argument, the appellants asserted that the letter from Loosli had no effect on insurer liability because Gurnett was not disabled from working elsewhere, at other restaurants. Appellants also argued

[55] The commission notes that on the claim Dr. Rosen is listed first as the attending physician in type, but Dr. Tolbert's name is hand written. Because Gurnett gave Loosli Dr. Tolbert's name before he filed the workers' compensation claim, Dr. Tolbert must be assumed to be the attending physician. Merely listing Dr. Rosen as an attending physician on a workers' compensation claim *with Dr. Tolbert* does not adequately notify the adjuster of a change in physician under 8 AAC 45.082.

that their reliance on Dr. Tolbert's February 13 statement was justified because, even after being informed by Gurnett of his employer's concerns, Dr. Tolbert continued to release Gurnett to work.[56]

AS 23.30.185 requires payment of compensation for disability that is "total in character but temporary in quality." Disability is "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."[57] An unconditional written refusal of the employee's employer to accept an employee's return to work *because of the injury,* if the employment is available and the employment relationship has not been severed, manifests the legal position that the employee is incapable because of injury to earn the wages received at the time of injury in the same employment. Loosli did not comment on whether Gurnett could work in other restaurant settings.

The Act does not give an employee a right to return to the same employment upon obtaining a physician's release to return to work. However, the Act bars employer discrimination in *retention* policies or practices against an employee who has filed a claim for compensation in good faith or received benefits under the Act.[58] The Act explicitly permits an employer to base retention policies or practices on consideration of the employee's safety practices and the employee's physical and mental abilities.[59]

The question presented in this appeal is whether the employer's action, assuming it complies with AS 23.30.247(b), affects the contrary assertion by the employer's insurer of a legal defense to employer liability for disability compensation. The Supreme Court held that a fiduciary relationship is inherent in every insurance contract that gives rise to an implied covenant of good faith and fair dealing between the insurer and the insured.[60] An insurer has an obligation to investigate claims and to

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[56] The record is not clear as to when the adjuster learned of the Loosli letter.

[57] AS 23.30.395(16) (2008).

[58] AS 23.30.247(a).

[59] AS 23.30.247(b).

[60] *O.K. Lumber Co., Inc., v. Providence Washington Ins. Co.*, 759 P.2d 523, 525 (Alaska 1988) (citations omitted).

inform the insured of all settlement offers and the possibility of excess recovery.[61] As between the insurer and the workers' compensation claimant, however, there is no fiduciary relationship.[62] Instead, the insurer's duty is directed to the insured employer.

The Act requires that, in any policy for workers' compensation insurance, the "insurer assumes in full all the obligations to pay . . . imposed upon the insured under the provisions of this chapter."[63] The insurance policy is

> subject to the provisions of this chapter and its provisions relative to the liability of the insured employer to pay . . . benefits to and for said employees or beneficiaries, the acceptance of the liability by the insured employer, the adjustment, trial, and adjudication of claims for . . . compensation or death benefits, and the liability of the insurer to pay the same are considered a part of this policy contract.[64]

Thus, the insurer's contract, the insurance policy, is subject to "acceptance of liability by the insured employer."

Assuming that Gurnett's employment relationship with Kinley's had not been severed,[65] that Solomon Loosli's letter was within the scope of his authority to act for Kinley's and that Loosli wrote the letter for the reasons testified to by Gurnett,[66] by representing to Gurnett and to the physician that released him to work that Gurnett was unable, because of his work injury, to return to his employment at the time of

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[61] *Id.* (citing *Kranzush v. Badger State Mut. Casualty Co.*, 103 Wis.2d 56, 307 N.W.2d 256, 259 (Wis. 1981)).

[62] *Seybert v. Cominco Alaska Exploration,* 182 P.3d 1079, 1090 (Alaska 2008).

[63] AS 23.30.030(1).

[64] AS 23.30.030(2).

[65] Gurnett testified that he was not sure if he was hired as a permanent employee. Hrg. Tr. 55:9-12. He worked 25-35 hours a week, sometimes as few as 20 hours if business was slow. Hrg. Tr. 55:1-3. Thus, it is possible Gurnett was a temporary part-time worker.

[66] The letter, an unsigned e-mail addressed to Gurnett, was generated at Gurnett's request (Hrg. Tr. 90:4-25), but Gurnett did not testify he gave the e-mail to the insurer's adjuster. No evidence was presented that Loosli sent the letter to Kinley's insurer or adjuster.

injury, Kinley's adopted the position that Gurnett was incapable of earning the wages earned at the time of injury in the *same* employment.[67] This is an "acceptance of

[67] The employer's and insurer's inconsistent positions also satisfy the tests for quasi-estoppel or implied waiver. A quasi-estoppel occurs when the "existence of facts and circumstances makes the assertion of an inconsistent position unconscionable." *Smith v. Marchant Enterprises, Inc.,* 791 P.2d 354, 356 (Alaska 1990). Quasi-estoppel is meant to protect the "sanctity of the oath" and the "integrity of the judicial process." *Id.* The inconsistency of asserting that Gurnett is too disabled to work at his employment, but challenging his right to temporary total disability compensation because he *can* work in the same employment mars the integrity of the process and raises doubts as to the sanctity of the oath. The commission agrees that the insurer may assert a separate defense that the employee is not disabled from other employment or the same employment in different settings, but in this case the evidence to support the defense is inconclusive. Loosli referred only to Kinley's and not other workplaces. Dr. Tolbert might have been referring to working as a waiter generally, but, because he had been given a description of his duties at Kinley's by Gurnett, it is also possible he referred to Kinley's. The possible inferences that may be drawn from Dr. Tolbert's and Loosli's statements are best left to the board to determine.

The circumstances in this case are also similar to those that supported a finding of implied waiver or equitable estoppel in *Milne v. Anderson,* 576 P.2d 109 (Alaska 1978):

> An implied waiver arises where the course of conduct pursued evidences an intention to waive a right, or is inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party. To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver.

Id. at 112. Equitable estoppel also applies when the assertion of a position by word or conduct is reasonably relied upon by another party resulting in prejudice. *Schmidt v. Beeson Plumbing and Heating, Inc.,* 869 P.2d 1170, 1175 n.7 (Alaska 1994).

In *Milne*, the defendant was aware of but did not object to the plaintiffs' removing of personal property from the land he purchased from them, later borrowed money from them and still later refused to repay the loan on the basis that he owned the property they took. 576 P.2d at 112. The court concluded that the defendant's silence when the plaintiffs removed the property impliedly waived his right to later try to offset the value of the property against the loan as well as estopped him from raising the inconsistent claim that he owned the removed property. *Id*. at 112-13. Here, if Loosli had the authority to bind the employer and the other conditions discussed above existed, the employer's unconditional assertion that Gurnett is too disabled to return to

liability by the insured employer" for disability compensation. The insurance policy is "subject to" the employer's acceptance of liability, therefore, until the insurer possessed other evidence that Gurnett was not disabled, the insured employer's acceptance of liability was binding on the insurer.

In reaching this conclusion, the commission relies on its understanding of the Act as a whole. The intent of the Act is to ensure the quick, efficient, fair and predictable delivery of compensation benefits "at a *reasonable* cost" to employers.[68] One method of limiting costs to employers is to return injured workers to employment as soon as possible. Parts of the Act are designed to encourage workers to return to work quickly; for example, payment of temporary benefits ceases once an employee is medically stable[69] and availability of temporary partial disability compensation encourages a return to wage earning before the disability has fully receded.[70] The Act also bars an employer from discriminating against an employee in retention because the employee has reported an injury,[71] but it does not give a former employee the right to return to

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his job is an implied waiver of its right to claim he is not temporarily disabled in the absence of other evidence showing Gurnett is not disabled.

The commission's holding here does not conflict with the principle that payment of compensation by an insurer or employer without an award is not a waiver of defenses to liability. *See Schmidt*, 869 P.2d at 1176-77 (holding that the mere failure to assert defenses in answer to a workers' compensation claim did not impliedly waive the employer's right to assert those defenses); *Wausau Ins. Cos. v. Van Biene*, 847 P.2d 584, 589 (Alaska 1993) (holding insurer did not waive right to claim Social Security offset from workers' compensation benefits by not inquiring further about whether claimant received Social Security benefits or otherwise seeking to enforce the offset for three years because it had informed the claimant orally and in writing that it would enforce any offsets); *S&W Radiator Shop v. Flynn*, Alaska Workers' Comp. Appeals Comm'n Dec. No. 016, 14-18 (Aug. 4, 2006) (holding board did not make specific findings required for implied waiver or estoppel and rejecting argument that because employer paid for surgery to implant a plate and screws, it should pay for their removal).

68 AS 23.30.001(1).

69 AS 23.30.185.

70 AS 23.30.200.

71 AS 23.30.247.

work for the employer, either by taking an available vacancy or requiring a former position to be made vacant. The Act provides reemployment benefits that are directed toward the speedy return to employment.[72] But, the Act also requires an insurer to assume in full all the employer's obligations to pay benefits due under the Act.[73] It is inconsistent with these purposes and the design of the Act to interpret AS 23.30.030(2) in a manner that allows the insurer to avoid payment where the employer has, in writing, disavowed the defense (that the employee can return to the same employment) to liability for disability compensation asserted by its fiduciary.

Because the AS 23.30.247(b) provides that § .247 "may not be construed so as to create employment rights not otherwise in existence" and nothing in the Act gives the employee a right to return to his or her former employment upon obtaining a release to work, the commission's holding is limited. The commission holds that if (1) an employee's position is still available and the employment has not been terminated, (2) the employer refuses in writing to accept the employee's physician's release to return to work in the employee's position, and (3), the employer's refusal is based on a belief the employee cannot, because of an undisputed work injury, perform the essential functions of the position, then the employer's written refusal to accept its employee's physician's release to return to work in its employee's position manifests acceptance of liability for disability compensation. The employer's acceptance of liability is binding on the insurer until the insurer obtains substantial evidence that the employee can return to the same or other employment at similar wages or other evidence that the employee is not disabled by the work injury. This holding does not apply when the employer offers temporary limited duty, alternate positions, or limitations on hours or duties consistent with medical advice or safety rules, even if a

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[72] AS 23.30.041. *See Binder v Fairbanks Historical Preservation Found.*, 880 P.2d 117, 122 (Alaska 1994) (noting legislative history reflects that "one of the primary goals in revising the vocational rehabilitation system was to control the costs of rehabilitation" and "to return injured workers to the work force as expeditiously as possible" because of studies showing that the longer an employee is out of the work force, the less likely that the worker will successfully return to it).

[73] AS 23.30.030(1).

reduction in pay results. This holding also does not apply when there are other grounds to controvert benefits than that the employee is no longer disabled by a work-related injury.

Because the parties did not frame the issue to the board as one of employer acceptance of liability that binds the insurer, the insurer and adjuster had no opportunity to present evidence on the issue. The record is incomplete as to whether Solomon Loosli had authority to act on Kinley's behalf to hire or fire employees or otherwise bind Kinley's in regard to personnel matters. The record does not state if Gurnett was still employed by Kinley's on February 26, 2008, and if the position was still vacant. The record is unclear as to whether Loosli's e-mail was sent to the adjuster before April 30, 2008.[74] The commission's reversal vacates the board's order for a penalty under AS 23.30.155(e) after February 26, 2008, and the commission will remand to the board to take evidence and make a decision in light of the commission's opinion.

5. Conclusion.

The commission concludes that the board erred in retroactively applying Dr. Tolbert's April 14, 2008, change of opinion to the controversion filed on February 13, 2008. The commission concludes that the employer's insurer is not required to contact any physician regarding the ability to return to work except the attending physician, but whether the employer's adjuster had notice of a change of attending physician is a question the board did not answer. However, the commission concludes that there is some evidence that the employer, by writing the e-mail to Dr. Tolbert at Gurnett's request, might have accepted liability for compensation on February 26, so that the insurer was bound by the insured employer's acceptance until it obtained other evidence April 30, 2008.

The commission therefore REVERSES the orders awarding penalties for late paid compensation due from February 14, 2008, through April 30, 2008. The commission

[74] AS 23.30.155(e) permits the board to excuse late payment after a showing that the payment was not made "owing to conditions over which the employer had no control."

REMANDS this case to the board to rehearing and redetermination in light of this decision. The board may take additional evidence.

Date: *24 Nov. 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision in this appeal from Alaska Workers' Compensation Board Decision No. 08-0263 awarding a penalty for late payment of compensation and Decision No. 09-0017 denying a petition to reconsider the award of penalty for late payment of compensation due from Feb. 14, 2008, through Apr. 30, 2008. The commission reversed the board's orders awarding the penalty on compensation due from Feb. 14, 2008, through Apr. 30, 2008, and remanded the case back to the board with instructions to rehear the claim for this penalty and decide the matter again. Other parts of Decision No. 08-0263 were not appealed and are not affected by this decision. The commission has not retained jurisdiction. **This is a final administrative decision.**

Proceedings to appeal a final commission decision must be instituted in the Alaska Supreme Court within 30 days of the distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission. To see the date of distribution, look in the "Certificate of Distribution" box on the last page.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision is distributed. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal (or petition for review or hearing) to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after distribution or mailing of this decision.

CERTIFICATION

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the text of the Final Decision in the matter of *Kinley's Restaurant & Bar, Republic Indemnity Company, and Northern Adjusters, Inc., vs. Micahel S. Gurnett,* AWCAC Appeal No. 09-008, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on November 24, 2009.

Date: *December 8, 2009*

Signed
B. Ward, Appeals Commission Clerk