Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage, Appellant, vs. Annie L. Miller and State of Alaska, Second Injury Fund, Appellees.	Final Decision Decision No. 197 July 1, 2014 AWCAC Appeal No. 13-020 AWCB Decision No. 13-0099 AWCB Case No. 200606082

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 13-0099, issued at Anchorage, Alaska, on August 20, 2013, by southcentral panel members Ronald P. Ringel, Chair and Patricia Vollendorf, Member for Labor.

Appearances: Trena L. Heikes, Office of the Municipal Attorney, for appellant, Municipality of Anchorage; Michael J. Jensen, Law Offices of Michael J. Jensen, for appellee, Annie L. Miller; Michael C. Geraghty, Attorney General, Toby N. Steinberger, Assistant Attorney General, and Eugenia Sleeper, Assistant Attorney General, for appellee, State of Alaska, Second Injury Fund.

Commission proceedings: Appeal filed September 5, 2013; briefing completed March 17, 2014; oral argument held on June 26, 2014.

Commissioners: David W. Richards, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellee, Annie L. Miller (Miller) sustained an injury to her back while working for appellant, the Municipality of Anchorage (MOA or the Municipality). In due course, Miller filed a workers' compensation claim and amended claim against the Municipality, which, in turn, put appellee, the State of Alaska, Second Injury Fund (SIF), on notice of Miller's claims. Following a hearing before the Alaska Workers' Compensation Board (board) on June 20, 2013, the board issued a decision which included a ruling that MOA

was liable for all of Miller's attorney fees.[1] MOA appealed the decision to the Workers' Compensation Appeals Commission (commission), contending that the SIF was liable for Miller's attorney fees incurred after November 8, 2012. We affirm.

2. Factual background and proceedings.

On April 20, 2006, Miller injured her back when she fell on stairs while at work for the Municipality.[2] She had a history of back injuries and surgeries dating back to an earlier period of employment with MOA,[3] and a back injury in 1998 while working for an employer in Indiana.[4]

The Municipality paid benefits for the 2006 injury, including temporary total disability (TTD) and medical benefits.[5] On several occasions in 2009 and 2010, MOA conducted surveillance on Miller; it believed Miller was able to do more than what she was telling her doctors.[6] Nevertheless, MOA continued to pay benefits.[7] On May 28, 2009, the Municipality filed notice of a possible claim against the SIF.[8]

Three years later, on June 11, 2012, Miller filed a claim seeking permanent total disability (PTD) benefits from January 5, 2010, forward, a penalty, and attorney fees and costs.[9] MOA answered Miller's claim on June 19, 2012, indicating that it would

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1 *See* n.50, *infra*.

2 Exc. 0021, 0048-49.

3 Exc. 0011.

4 Exc. 0019.

5 Exc. 0033-34. Appellant's Br. at 6.

6 Hr'g Tr. 106:1-12, Exc. 0032. In addition to the surveillance in 2009 and 2010, the Municipality conducted further surveillance of Miller in June and July 2012. Exc. 0032.

7 Hr'g Tr. 106:1-12, Exc. 0031-32.

8 Exc. 0323. When all the statutory requirements are met, the SIF reimburses employers for disability benefits paid after 104 weeks of disability when an employee with a preexisting permanent physical impairment suffers a work-related injury that results in compensation liability that is "substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury." AS 23.30.205(a).

9 Exc. 0029-30.

continue to pay TTD while it investigated Miller's PTD claim.[10] The Municipality also informed the SIF of its position on Miller's claim because it intended to seek reimbursement from the SIF for any PTD benefits. In an August 2, 2012, letter to the SIF, MOA stated that it "believes Ms. Miller has and continues to misrepresent her physical capacities in an effort to obtain benefits."[11] The letter enclosed the surveillance videos and portions of Miller's deposition that the Municipality believed were inconsistent with her actions in the videos.[12] On September 17, 2012, MOA and the SIF stipulated that MOA had met the requirements for SIF reimbursement, and that the SIF "shall be joined as a party to this proceeding and shall reimburse the employer all compensation payments in excess of 104 weeks of disability compensation in accordance with AS 23.30.205(a)."[13]

On November 2, 2012, Miller filed an amended claim seeking PTD benefits from January 5, 2010, or alternatively, TTD and permanent partial impairment (PPI) benefits, .041(k) stipend benefits, medical benefits for a spinal cord stimulator, and related transportation costs, a compensation rate adjustment, interest, and attorney fees and costs. Miller also sought penalties, maintaining that MOA 1) took a Social Security offset without a board order, 2) filed an unfair or frivolous controversion, and 3) failed to include pension contributions when calculating her compensation rate.[14]

On November 5, 2012, the Municipality filed a petition seeking an offset under AS 23.30.225(b) for the Social Security disability benefits that Miller was receiving.[15] The Social Security Administration had found Miller eligible for benefits as of September 2009, entitling her to a monthly benefit of $1,126.20 that increased to $1,136.10 in

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10 R. 0067-68.

11 Exc. 0031-32.

12 Exc. 0032.

13 Exc. 0035-36.

14 Exc. 0431-32.

15 Exc. 0335-36.

January 2010.[16] MOA also controverted all indemnity benefits; the controversion was filed on November 5, 2012, and dated October 31, 2012.[17]

Eventually, the SIF informed the Municipality that it did not wish to join with MOA in defending against Miller's claim.[18] At this point, MOA concluded that it did not make financial sense to incur attorney fees and costs defending against a claim for which it could receive SIF reimbursement.[19] On November 9, 2012, MOA explained its position in a letter to Miller's attorney:

> This will confirm our conversation yesterday regarding MOA's decision to align its position in this matter with its exposure. As you know, all future compensation benefits are the responsibility of the State of Alaska, Second Injury Fund. Thus, it makes no sense for MOA to defend against Ms. Miller's claim for PTD. I will be filing an Answer to the Amended Workers' Compensation Claim before leaving on Tuesday which will further clarify our position, to wit: MOA takes no position one way or the other regarding Ms. Miller's claim for any benefits under the Act. It does, however, deny liability for penalties raised in your Amended WCC (they appear groundless in any event). MOA is willing to pay your reasonable costs and attorney's fees through today once the matter has been concluded. I honestly do not know as of this writing what SIF is going to do. If they concede her claim, we will stipulate to your fees. If they contest it, I think we have to wait to pay until the matter is concluded. Please forward your affidavit of fees and costs through the present.
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> In light of the above, MOA is lifting the October 31, 2012[,] Controversion Notice and will commence payment of stipend benefits retroactively to the date they were terminated. I am sure you would concede a Social Security Offset is due and I will forward the calculations when I return. If SIF concedes PTD, we will, of course, convert all .041(k) to PTD and reimburse employee accordingly. . . .
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> As for any other controversions, it is up to SIF to instruct whether to lift or continue to deny the spinal cord stimulator and PTD. Thus, any further costs or fees incurred by you are the responsibility of the SIF as effective November 8, 2012[,] MOA takes no position with respect to any issues in this case aside from your attorney fees incurred to date. MOA will pay as

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16 Exc. 0026.

17 Exc. 0333.

18 Hr'g Tr. 110:15-21, Exc. 0250.

19 Exc. 0042.

directed by SIF and then obtain reimbursement from the fund in accordance with AS 23.30.205.[20]

On November 13, 2012, MOA answered Miller's amended claim, admitting she injured her back at work, but denying a hernia was work-related. The Municipality denied liability for disability or medical benefits, stating the SIF was responsible for those benefits. MOA admitted liability for attorney fees and costs through November 8, 2012.[21] That same day, the SIF and MOA stipulated that the Municipality paid 104 weeks of disability benefits as of February 7, 2010, and that the SIF would reimburse a specified total amount of disability and stipend benefits that MOA had paid since that date.[22]

About a month later, on December 5, 2012, MOA wrote to Miller's attorney to advise him that the SIF did not object to MOA's payment of PTD and thus, the Municipality would convert Miller's benefits to PTD retroactively to the date stipend payments began. MOA maintained that the PTD benefits "must be offset by PPI" and "reductions under social security and PERS disability will be due as well."[23]

A prehearing conference (PHC) was held on December 11, 2012, with attorneys for Miller, the Municipality, and the SIF in attendance.[24] The PHC summary stated that the Municipality was withdrawing all previous controversions and accepting Miller's PTD claim.[25] However, MOA wrote the board designee shortly thereafter asking that the summary be amended. The Municipality explained that the only controversions that it was withdrawing were "its 9/20/2012 controversion of the spinal stimulator and any regarding employee's claim for PTD."[26]

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[20] Exc. 0043-44.

[21] Exc. 0048-50.

[22] Exc. 0046-47.

[23] Exc. 0363.

[24] Exc. 0365.

[25] Exc. 0059.

[26] Exc. 0069.

The board designee noted in the summary that the issues of a compensation rate adjustment, penalty, interest, unfair controversion, and attorney fees and costs were unresolved, and a hearing was set to address those issues.[27] The summary listed the Municipality's November 2, 2012, petition for an offset under the heading "ER HAS FILED" with no notation that it was withdrawn.[28] The Municipality did not refer specifically to its offset petition in the letter requesting amendments to the summary, but it stated:

> Also omitted from the summary was the parties[']' discussions regarding employee's compensation rate. MOA and employee's counsel agree offsets must be taken for PPI, SSD [Social Security Disability] and PERS [Public Employees Retirement System] Occ. Disability benefits. Counsel for SIF advised she believed a further offset should be taken for PERS retirement benefits as well. MOA advised it would calculate any and all offsets and forward all calculations and payment ledgers to all parties for review. Employee's counsel further maintained a compensation rate increase may be due as a result of employer's contributions to employee's pension as such was not included in the original calculation of the compensation rate. MOA['s] counsel advised she had requested that information and would forward it to employee's counsel for review and assessment. MOA does not dispute employee's contention but lacks sufficient information to determine whether such an adjustment is due. Employee's counsel also raised a constitutional argument under *Gilmore* and advised he would follow up with a letter describing this argument.[29]

After the PHC, the Municipality's attorney and Miller's attorney exchanged a series of e-mails and letters discussing the compensation rate and offset issues in December 2012 and January 2013.[30] The SIF was copied on the correspondence, and responded in an e-mail on January 23, 2013, that it did not object to a proposed $839.69 compensation rate."[31] Moreover, on February 4, 2013, the SIF confirmed that it "does not object to the proposed March 2011 commencement date [for PTD] being

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27 Exc. 0059.

28 Exc. 0058.

29 Exc. 0069-70.

30 Exc. 0369-85.

31 Exc. 0135.

included in the parties' stipulation, subject to and with the understanding that the parties will also resolve the matter of outstanding attorney fees." The SIF clarified that this "also assumes that the full PPI offset will still be taken and will not be reduced."[32]

Finally, on February 28, 2013, the Municipality drafted a five-page letter to Miller and the SIF analyzing potential modifications to Miller's compensation rate, including a Social Security offset and the deduction for previously paid PPI benefits.[33] MOA concluded that even if Miller's compensation rate increased under AS 23.30.220(a)(10) when she became PTD, the rate would not change, because under AS 23.30.225(b), the calculation of the offset is based on Miller's average weekly wage "at the time of injury."[34] The Municipality stated a total of $24,783.11 in PPI benefits had been paid, and adjusted for inflation, the Municipality was entitled to recoup $26,103.15.[35]

Miller's attorney continued to disagree with the Social Security offset calculations after April 1, 2011, and whether the PPI benefits constituted an overpayment, writing letters on March 4, and March 13, 2013.[36] On March 20, 2013, the Municipality advised Miller's attorney:

> I am in receipt of your March 13, 2013[,] letter concerning the calculations of various offsets and overpayments. You continue to address such letters to me despite my request they be directed to the SIF's attorney. As I have repeatedly stated, they need to be addressed to SIF as it is SIF who is responsible for all future indemnity payments and not MOA. MOA has taken no position and has not resisted the payment of ANY benefits since we advised you that MOA was no longer defending the claim on November 8, 201[2]. MOA's efforts since have simply been to assist the SIF and Miller in coming to some sort of resolution on Miller's ever changing argument regarding the amount, commencement and offsets affecting her PTD benefits. . . .
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> . . . As you are also aware MOA has accepted responsibility for all reasonable fees incurred from your date of demand for PTD until MOA

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32 Exc. 0138.

33 Exc. 0140-44.

34 Exc. 0141.

35 Exc. 0143.

36 Exc. 0400-01, 0403-05.

> accepted the claim on November 8, 201[2]. I will hopefully get back with you later today regarding those fees. Since it appears Miller and the SIF cannot agree on the details of the offsets, MOA intends to simply resolve the fees and costs incurred during defense of the claim and thus dispense with any need for its further involvement while we await you and SIF to determine the details of the offsets and overpayments. . . .[37]

After further correspondence, the SIF responded to Miller's attorney on April 2, 2013, that the SIF "was not a party to your discussions" with the Municipality concerning the PTD commencement date and that the "SIF has taken no position regarding PTD commencement date."[38] In conclusion, the SIF stated, "[b]ased on recent correspondence between yourself and [the Municipality], it appears you have agreed on some, but not all, of the employer's offset calculations and are now looking to SIF to determine which position is correct. However, such matters are for determination by the Workers' Compensation Board, not SIF."[39]

At a PHC on April 3, 2013, attended by all the parties' attorneys, the remaining issues identified for hearing were the Social Security Disability Insurance (SSDI) offset (April 1, 2011, forward), PPI offset, and attorney fees and costs. The parties agreed to a new hearing date of June 20, 2013.[40]

That same day, the Municipality's attorney wrote a letter to the attorneys representing Miller and the SIF, advising:

> In speaking with [Miller's attorney], I understand SIF has accepted the SSDI and PPI offsets contained in his letter of March 29, 2013. MOA is concerned only because it does not believe the SSDI and PPI offsets are in accordance with the Act. However, because future liability for all indemnity lies with SIF, MOA takes no position regarding the SIF and Miller's agreement regarding those offsets. . . .

That same week, the Municipality and Miller signed a stipulation that, among other agreements, included the statement that "the Municipality of Anchorage disagrees with the PPI and the SSDI calculated after April 1, 2011[,] but takes no position with

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37 Exc. 0152-53.

38 Exc. 0409-10.

39 Exc. 0410.

40 Exc. 0413.

respect to the calculations as all future payments are being paid by the Second Injury Fund."[41] The SIF did not sign this stipulation, explaining in a letter to the Municipality that:

> You have asked that I execute, on behalf of the Second Injury Fund, a stipulation containing terms which the Municipality of Anchorage itself believes are incorrect under Alaska's Workers' Compensation Act. . . .
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> I understand that through your negotiations . . . MOA has agreed to pay amounts based on [Miller's attorney's] calculations, which MOA in fact disputes, so long as SIF will reimburse MOA for these payments. In other words, MOA will pay amounts based on calculations it does not believe are correct under the Act and thereafter seek reimbursement from SIF. . . . SIF will not waive its rights to challenge reimbursement claims sought by an employer in such a manner.
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> I have advised both you and [Miller's attorney] verbally, in writing, and again during the pre-hearing conference on April 3, 2013[,] that it is not for SIF to determine whether the employer's or the employee's SSDI and PPI offset calculations are correct. It is the employer's obligation to calculate and pay compensation in accordance with the Act. SIF's role is limited to reimbursement to the extent required under the Act. Consequently, SIF has previously confirmed (and you acknowledged in your December 20, 2012[,] letter [seeking amendments to a prehearing conference summary]), that [SIF] would not be involved as a party in a stipulation between the employer and employee relative to these issues.[42]

In April and May 2013, the SIF continued to reject stipulations because it "was not party to stipulations between an employer and an employee" and it would not waive any right it had under the Act by executing a stipulation.[43]

On May 22, 2013, MOA responded to the SIF, laying out its rationale for why the SIF was a party, and explaining that the Municipality stopped negotiating with Miller

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[41] Exc. 0418-19.

[42] Exc. 0420-22. The SIF's letter referenced the Municipality's letter seeking amendments after the December 2012 prehearing conference. In this letter the Municipality stated that the summary left out the parties' discussions regarding Miller's request that the parties stipulate to PTD benefits. Specifically, "MOA agreed to sign such a stipulation provided SIF would not object. SIF declined to consent to such a stipulation contending it was not a party to the claim and that such stipulations were between the employer and employee." Exc. 0069.

[43] Exc. 0423-27.

when it "ceased taking a position on Ms. Miller's claim . . . on November 8, 2012."[44] The Municipality asserted that its actions since that date were an attempt to help the SIF resolve the compensation rate issues with Miller. "These efforts have failed as each time SIF makes a decision on the issues, it later withdraws its position, refuses to sign the stipulation . . . and falls back on its inaccurate and somewhat frivolous legal theory that it is 'not a party,' is not 'liable' for benefits . . . ."[45] The Municipality explained that it would not take a position on any of the issues set for hearing, other than that the SIF was solely responsible for Miller's attorney fees and costs incurred since the Municipality conceded PTD liability.[46]

The Municipality submitted this letter, along with the last version of the stipulation, the one signed in early April by Miller and the Municipality, to the board on May 23, 2013.[47] This stipulation included a number of handwritten deletions and notations that were not initialed. Although the stipulation included a signature line for the SIF, the signature line had been crossed out and several of the deletions eliminated the SIF as a party to the agreement.[48] The board approved the stipulation, as modified, on May 29, 2013.[49]

The board held a hearing on June 20, 2013.[50] As a preliminary matter, Miller and the Municipality sought to have the stipulation set aside because they did not agree with the changes that eliminated the SIF from the agreement and they never intended

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44 Exc. 0235-36.

45 Exc. 0236.

46 Exc. 0237.

47 Hr'g Tr. 12:8-23.

48 Exc. 0253-056.

49 Exc. 0256.

50 As a result, it issued a Final Decision and Order, *Annie L. Miller v. Municipality of Anchorage, et al.*, Alaska Workers' Comp. Bd. Dec. No. 13-0099 at 1 (Aug. 20, 2013). The board had already issued an Interlocutory Decision and Order, *Annie L. Miller v. Municipality of Anchorage, et al.*, Alaska Workers' Comp. Bd. Dec. No. 13-0006 (Jan. 14, 2013), which resolved some procedural issues.

the board to approve the stipulation.[51] The Municipality explained that it was attached to the letter "just to provide the board with the full text of the evidence and where the parties were prior to this hearing . . . ."[52] The SIF argued MOA and Miller should be bound by the stipulation because "there's really no legal reason for a party to file a stipulation with the board unless it's going to sign it."[53] The board set aside the order approving the stipulation.[54]

Nevertheless, at hearing, the Municipality, Miller, and the SIF either agreed or did not object to part of paragraph 4 and all of paragraph 5 of the stipulation:

> 4. The parties hereby stipulate that the employee's gross weekly wage is $1,283.64. This results in a PTD rate of $839.69 per week. It is agreed that this rate becomes effective April 1, 2011. . . . [55]
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> 5. For the period April 1, 2009 to August 31, 2010, the employee's compensation rate after offset for PERS disability is $409.61 per week. For the period September 1, 2010 until April 1, 2011 the employee's compensation rate after the SSDI offset equals $722.86 per week. This is based on the SSDI initial award of $1,126.20 per month. Any overpayment made as a result of these compensation rates will be collected from continuing PTD compensation benefits 20% per weekly benefit payment.[56]

Although the Municipality acknowledged that the Social Security offset after April 1, 2011, and the PPI offset remained in dispute,[57] MOA maintained that it "withdrew everything on November 8th" and that "we haven't gone forward with the offset [petition]."[58] It did not take any position on these issues.[59] In its decision, the board agreed with Miller's calculations of the offset after April 1, 2011, concluding that

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51 Hr'g Tr. 11 – 17.

52 Hr'g Tr. 16:6-8.

53 Hr'g Tr. 17:15-17.

54 *See Miller*, Bd. Dec. No. 13-0099 at 23-24.

55 Hr'g Tr. 58:13 – 61:1.

56 Hr'g Tr. 62:25 – 64:5.

57 Hr'g Tr. 63:11-17.

58 Hr'g Tr. 64:15-23.

59 Hr'g Tr. 65:11-16.

MOA was entitled to an offset of $72.67 per week against Miller's weekly PTD benefits of $839.69.[60] The board also revised the amount of PPI that the Municipality could recoup from Miller.[61]

Finally, the board concluded that the SIF was not liable for Miller's attorney fees because the fund was a "limited reimbursement scheme for disability payments only" and the board lacked any statutory authority to hold the SIF liable for an employee's attorney fees.[62] The board ordered the Municipality to pay Miller's attorney fees and costs after November 8, 2012, because MOA resisted payment and Miller was successful on her claim.[63] Specifically, the board found that the Municipality "clearly" resisted payment of benefits after November 8, 2012:

> Even in its November 8, 2012 letter, Employer does not accept Employee's PTD claim; it contends SIF is liable[.] Employer states "all future benefits are the responsibility of SIF," "it makes no sense for MOA to defend," and "MOA takes no position" on Employee's "claims for any benefits under the Act." It agreed to "commence payment of stipend benefits" and "if SIF concedes PTD, we will of course convert all .041(k) benefits to PTD.
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> In its November 13, 2012 answer to Employee's amended claim it denies it is liable for any PTD benefits. Finally, on December 5, 2012, after being informed SIF had never objected to PTD benefits, Employer informed Employee's attorney it was reclassifying benefits as PTD benefits, but it was still asserting offsets for Social Security and previously paid PPI.[64]

Moreover, the board concluded that Miller was entitled to recover attorney fees because she was successful in seeking PTD benefits, and the Social Security and PPI recovery issues were decided in her favor.[65]

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60 *See Miller*, Bd. Dec. No. 13-0099 at 28.

61 *See id.* at 28-29.

62 *See id.* at 29-30.

63 *See id.* at 30-31.

64 *Id.*

65 *See id.* at 31.

The board awarded fees of $36,322, and costs of $1,775.61, which were itemized in two affidavits.[66] In addition, the board awarded fees for Miller's attorney's participation in the hearing, an additional 5.75 hours not reflected in the fee affidavits. The board calculated that at her attorney's hourly rate of $385.00, the representation at hearing earned Miller's attorney an additional $2,213.75 in fees for total fees of $38,535.75.[67] In addition the board ordered that the Municipality should pay statutory minimum fees under AS 23.30.145(a) when and if the statutory minimum amount exceeded $67,241.75, which was the sum of the fees the board awarded and the fees that Miller incurred through November 8, 2012, that the Municipality had already agreed to pay.[68]

The Municipality appealed the attorney fee award to the commission, arguing the SIF is liable for attorney fees and costs after November 8, 2012.

3. Standard of review.

We exercise our independent judgment when reviewing questions of law and procedure.[69] The issues presented in this appeal require the commission to interpret AS 23.30.205(a). Interpretation of a statute is a question of law to which the commission applies its independent judgment.[70]

4. Applicable law.

a. Statutes.

AS 23.30.040. Second injury fund.

> (a) There is created a second injury fund, administered by the commissioner. Money in the second injury fund may only be paid for the benefit of those persons entitled to payment of benefits from the second injury fund under this chapter. Payments from the second injury fund must be made by the commissioner in accordance with the orders and awards of the board.

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66 R. 0940-49, 1190-92.

67 *See Miller*, Bd. Dec. No. 13-0099 at 11, 33.

68 *See id.* at 33.

69 *See* AS 23.30.128(b).

70 *See, e.g., Anderson v. Alyeska Pipeline Service Co.*, 234 P.3d 1282, 1286 (Alaska 2010) and AS 23.30.128(b).

AS 23.30.205. Injury combined with preexisting impairment.

(a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.

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.

. . . .

b. Principles of statutory construction.

"The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."[71] A statute is interpreted according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose.[72] Statutes dealing with the same subject are *in pari materia* and are to be construed together.[73] "[A]ll sections of an act are to be construed together so that all have meaning and no section conflicts with another."[74] If one statutory "section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict, the specific section will control over the general."[75] Statutes which cause forfeiture are not favored and are narrowly construed.[76] "Administrative regulations which are legislative in character are interpreted using the same principles applicable to statutes. In the case of administrative regulations which deal with the same subject, their provisions should be considered together."[77]

5. Discussion.

This appeal requires the commission to engage in statutory interpretation. We begin our analysis by noting that AS 23.30.395(12) defines "compensation" as "the money allowance payable to an employee . . . as provided for in this chapter[.]" Based on this definition alone, one might conclude that attorney fees are not compensation because they are not paid to an employee. However, the Alaska Supreme Court

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[71] *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).

[72] *See Municipality of Anchorage v. Adamson*, 301 P.3d 569, 575 (Alaska 2013) (citations omitted).

[73] *See Benner v. Wichman*, 874 P.2d 949, 958, n.18 (Alaska 1994).

[74] *In re Hutchinson's Estate,* 577 P.2d 1074, 1075 (Alaska 1978).

[75] *Id*.

[76] *Forest v. Safeway Stores, Inc.*, 830 P.2d 778, 782, n.10 (Alaska 1992).

[77] *See State, Dep't of Highways v. Green*, 586 P.2d 595, 603, n.24 (Alaska 1978)(citation omitted).

(supreme court) has held that an employee's attorney fees are compensation in connection with employer reimbursement of overpayment of benefits under AS 23.30.155(j).[78] In reaching this holding, the supreme court reasoned:

> Alaska Statute 23.30.045(a) provides in part: "An employer is liable for and shall secure the payment to employees of the compensation payable under . . . [AS] 23.30.145 . . . . Alaska Statute 23.30.145 is the attorney's fees provision in the Act, thus it follows that attorney's fees are compensation in the context of employer liability.[79]

It might seem that this pronouncement by the supreme court, that an employee's attorney fees are compensation, would settle the issue whether MOA or the SIF is liable for any attorney fees incurred by Miller after November 8, 2012. Nevertheless, the inquiry is complicated by another supreme court decision.[80] *Busby* is a *per curiam* decision in which the supreme court adopted the superior court's decision on appeal from the board, which stated:

> At the outset the Court notes that the issue of the construction of the term "compensation" within the Alaska Workers' Compensation statutes has been addressed in *dicta* by the Alaska Supreme Court in *Williams v. Safeway Stores*, 525 P.2d 1087, 1089 n.6 (Alaska 1974). In that case, Justice Boochever commented on the difficulty of defining "compensation" within AS 23.30.130(a) and the chapter as a whole. Because of possible contrary interpretations of the term he concluded that the issue was ripe for legislative resolution. *Id.* The Court here recognizes similar ambiguity in construction of "compensation" in the present context of reimbursement of an insurance carrier by the Second Injury Fund under AS 23.30.205(a).
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> However, in construing "compensation" for this purpose the Court looks primarily to the Second Injury Fund statutes themselves. The Court notes that AS 23.30.040(b) mandates contribution by employers to the Second Injury Fund in proportion to the employee's entitlement to compensation

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[78] *See Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1067 (Alaska 1991). AS 23.30.155(j) provides in relevant part: "If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. . . . "

[79] *Croft*, 820 P.2d at 1067.

[80] *See Providence Washington Ins. Co. v. Busby*, 721 P.2d 1151 (Alaska 1986)(*Busby*).

> for *disability.* Similarly, the Court notes that the first clause of AS 23.30.205(a), authorizing the reimbursement payments at issue, speaks of "compensation liability for disability." The Court is persuaded that this language is indicative of a legislative intent to establish the Fund as a limited reimbursement scheme for disability payments *only*.
>
> Such a limitation is consistent with the fact that Second Injury Fund reimbursement does not begin until after 104 weeks of compensation are paid by a carrier. AS 23.30.205(a). It is also in accordance with the Alaska Supreme Court's narrow interpretation of the responsibility of the Second Injury Fund for rehabilitation payments under the former AS 23.20.191. *Alaska Pacific Assurance Co. v. Julien*, [sic] 513 P.2d 1097 (Alaska 1973).[81]

We think the holding in *Busby* is dispositive of the attorney fees issue in this appeal. First, *Busby* is on point insofar as it addresses the SIF's liability for attorney fees.[82] The decision unequivocally provides that, based on the wording of the statute, AS 23.30.205(a), the SIF is liable for and must reimburse the employer for disability payments only, assuming all other prerequisites for SIF liability have been met. Moreover, there is a commission decision,[83] which holds that the SIF is not liable for an employee's attorney fees. The commission's reasoning was that AS 23.30.145 refers only to an employer's liability for an employee's attorney fees,[84] it does not provide that an entity other than an employer, for example, the SIF, is liable for such fees.

The commission is inclined to follow *Busby* and *Kennecott* on the issue of SIF liability for an employee's attorney fees for the following reasons. First, the statute, AS 23.30.205(a), has not been amended in any relevant way since the *Busby* decision

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[81] *Busby*, 721 P.2d at 1152-1153 (*italics* in original).

[82] We distinguish cases such as *Second Injury Fund v. Arctic Bowl*, 928 P.2d 590 (Alaska 1996)(involved SIF payment of attorney fees on appeal pursuant to AS 23.30.145(c) and Appellate Rule 508(e)), *State of Alaska Workers' Comp. Benefits Guaranty Fund v. West*, Alaska Workers' Comp. App. Comm'n Dec. No. 145 (Jan. 20, 2011)(involved a different fund subject to a different statute), *Mumby v. State Supplemental Fund*, S-5070 1994 WL 166459424 (Alaska 1994)(involved a different fund and the decision is unpublished, *i.e.*, without precedential value).

[83] *See Kennecott Greens Creek Mining Co. v. Second Injury Fund*, Alaska Workers' Comp. App. Comm'n Dec. No. 80 (June 9, 2008) (*Kennecott*).

[84] *See Kennecott*, App. Comm'n Dec. No. 80 at 25.

was handed down, thus, there is no reason to construe it differently. Second, other principles of statutory construction support interpreting AS 23.30.205(a) as excluding SIF liability for an employee's attorney fees.

Among other things, a statute is to be interpreted according to its purpose. The supreme court has identified the purpose of AS 23.30.205(a): "The Second Injury Fund was created to encourage employers to hire and retain partially disabled employees."[85] In and of itself, this statement of purpose does not advance the analysis, however, it does not support a conclusion that the SIF is liable for an employee's attorney fees either.

Identifying the legislature's intent when it enacts a statute is another criterion for interpretation. The supreme court has done so, with respect to §.205(a). In *Busby*, it adopted the decision of the superior court, which provided in relevant part:

> [T]he Court notes that the first clause of AS 23.30.205(a), authorizing the reimbursement payments at issue, speaks of "compensation liability for disability." The Court is persuaded that this language **is indicative of a legislative intent** to establish the Fund as a limited reimbursement scheme for disability payments *only*.[86]

Thus, from the standpoint of legislative intent, the supreme court has announced that the statute is restricted in its application to SIF reimbursement of disability payments, which would not include attorney fees.

Finally, we do not view *Busby* and *Kennecott* as distinguishable from the instant matter in any relevant way. Although the underlying facts vary, all three of these cases involved the issue whether the SIF is liable for attorney fees. On the other hand, we think the *Croft* decision may be distinguishable. In the commission's view, *Croft* is legal authority for the proposition that attorney fees are compensation owed by an employer in the context of employer reimbursement for overpayment of benefits.

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[85] *Sea-Land Services, Inc. v. State, Second Injury Fund*, 737 P.2d 793, 795 (Alaska 1987) citing *Employers Commercial Union Ins. Group v. Christ*, 513 P.2d 1090, 1093 (Alaska 1973).

[86] *Busby*, 721 P.2d at 1152 (*italics* in original, **emphasis added**).

6. Conclusion.

We AFFIRM the board's decision that "[Miller's] attorney fees and costs shall be paid by [the Municipality,]"[87] based on the *Busby* decision. If, on appeal, the supreme court should reverse, distinguish, or otherwise elaborate on its holding in *Busby*, the commission would welcome such guidance for future appeals.

Date: *1 July 2014* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision. This decision becomes effective when distributed unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).[88] To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

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87 *Miller*, Bd. Dec. No. 13-0099 at 34.

88 A party has 30 days after the service or distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was served by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[89] and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal 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

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that this is a full and correct copy of Final Decision No. 197 issued in the matter of *Municipality of Anchorage vs. Annie L. Miller, and State of Alaska, Second Injury Fund*, AWCAC Appeal No. 13-020, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 1, 2014.

Date: *July 2, 2014*

Signed

K. Morrison, Appeals Commission Clerk

[89] *See* n.88, *supra*.