Alaska Workers' Compensation Appeals Commission

Sofia Morales de Lopez, Appellant, vs. Unisea, Inc. and Alaska National Insurance Company, Appellees.	Final Decision Decision No. 236 July 7, 2017 AWCAC Appeal No. 16-011 (Cons.) AWCB Decision Nos. 16-0050, 16-0069, and 16-0071 AWCB Case No. 201307999

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 16-0050, issued at Anchorage, Alaska, on August 8, 2016, by southcentral panel members Matthew Slodowy, Chair, Mark Talbert, Member for Labor, and Amy Steele, Member for Industry; Final Decision and Order No. 16-0069, issued at Anchorage, Alaska, on September 12, 2016, by southcentral panel members Matthew Slodowy, Chair, Stacy Allen, Member for Labor, and Dave Kester, Member for Industry; and Final Decision and Order No. 16-0071, issued at Anchorage, Alaska, on August 22, 2016, by southcentral panel members Matthew Slodowy, Chair, Mark Talbert, Member for Labor, and Amy Steele, Member for Industry.

Appearances: Eric Croft, The Croft Law Office, for appellant, Sofia Morales de Lopez; Richard L. Wagg, Russell Wagg Meshke & Budzinski, PC, for appellees, Unisea, Inc. and Alaska National Insurance Company.

Commission proceedings: AWCAC Appeal No. 16-009 filed September 1, 2016; AWCAC Appeal No. 16-011 filed October 6, 2016; appeals consolidated November 1, 2016, under AWCAC Appeal No. 16-011 (Cons.); briefing completed February 22, 2017; oral argument held April 21, 2017.

Commissioners: James N. Rhodes, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

This appeal arises out of three decisions issued by the Alaska Workers' Compensation Board (Board) involving Sofia Morales de Lopez (Ms. Morales) and Unisea, Inc. and Alaska National Insurance Company (Unisea).[1] The Alaska Workers' Compensation Appeals Commission (Commission) consolidated the appeals of these three decisions in an Order dated November 1, 2016. The decisions concerned questions of payment of permanent partial impairment (PPI) benefits, unfair and frivolous controversions, interest, payment of temporary total disability (TTD) benefits after a failure to attend a scheduled Employer's Medical Evaluation (EME), and attorney fees and costs. Oral argument was heard on April 21, 2017. The Commission affirms in part and reverses in part the three decisions.

2. *Factual background and proceedings.*[2]

On June 23, 2013, Ms. Morales fell while sorting fish for Unisea. She fell from the third floor breaking her right ankle, three ribs, and fracturing her left knee.[3] Her injury was accepted and benefits commenced, and she was paid TTD from June 24, 2013, through August 7, 2015.[4]

On January 10, 2014, Ms. Morales was found eligible for reemployment benefits based on her doctor's prediction she would have a permanent partial impairment when

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[1] *Morales de Lopez v. Unisea, Inc. and Alaska National Insurance Company*, Alaska Workers' Comp. Bd. Dec. No. 16-0050 (Aug. 8, 2016)(*Morales I*); *Morales de Lopez v. Unisea, Inc. and Alaska National Insurance Company*, Alaska Workers' Comp. Bd. Dec. No. 16-0069 (Sept. 12, 2016)(*Morales II*); *Morales de Lopez v. Unisea, Inc. and Alaska National Insurance Company*, Alaska Workers' Comp. Bd. Dec. No. 16-0071 (Aug. 22, 2016)(*Morales III*).

[2] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[3] *Morales I* at 2, No. 1.

[4] *Id.* at 5, No. 15.

medically stable and would not be able to return to her job at the time of injury or any other job she had held in the past ten years.[5]

On March 3, 2014, Ms. Morales elected to receive the job dislocation benefit rather than reemployment benefits.[6] The Board received Ms. Morales' election form on March 28, 2014, and served it on Unisea on April 3, 2014.[7] Ms. Morales received a PPI rating of 5% on November 4, 2014.[8] This dislocation benefit was not paid until February 17, 2016.[9]

On November 3, 2014, Ms. Morales saw psychiatrist Michael Friedman, D.O., for an EME at his office at 901 Boren Avenue, Suite 1910, Seattle, Washington.[10] Ms. Morales, who uses a walker and a wheelchair and speaks limited English, was accompanied by her friend, Rubisela Hinojos, who provided assistance to her and acted as her interpreter.[11] When Ms. Hinojos and Ms. Morales arrived at suite 1910, the office was open and unoccupied, but after waiting about five minutes, Dr. Friedman appeared and Ms. Morales left with him for the evaluation.[12] Ms. Morales knew that she was required to attend the evaluation, and that her benefits could be stopped if she did not do so.[13]

Dr. Friedman issued his report under a caption or heading "ExamWorks, Independent Medical Examination," and his report stated:

> The claimant was and continues to be in need of psychiatric treatment following the June 23, 2013 injury. . .

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5 *Morales II* at 3, No. 2.

6 *Id.*, No. 3.

7 *Id.*

8 *Morales I* at 3, No. 3; *Morales II* at 4, No. 6.

9 *Morales I* at 5, No. 11.

10 *Morales I* at 2, No. 2; *Morales II* at 3, No. 4.

11 *Morales II* at 3, No. 4.

12 *Id.*; Rubisela Hinojos Dep., Oct. 26, 2015, at 9:21 – 10:14.

13 Sofia Morales de Lopez Dep., Oct. 26, 2015, at 8:2-7.

> Psychiatrically, I would anticipate the claimant's condition should resolve within six to eight months. . .

Responding to whether Ms. Morales had incurred a ratable permanent partial impairment, Dr. Friedman stated, "She is not in a position in which she is ratable . . . ."[14] Regarding whether additional palliative care was reasonable or necessary, Dr. Freidman stated "[t]he claimant has not reached psychiatric stability."[15]

On November 4, 2014, Ms. Morales saw neurologist Mark Holmes, M.D., and orthopedic surgeon Eugene Toomey, M.D., as part of the EME process. Their report states:

> The patient has received five percent impairment of the lumbar spine . . . and the discussion is covered [sic] how we came to that rating. The work injury was the substantial cause of this permanent impairment under the Alaska guidelines . . . .
>
> We do not believe this patient is in need of further treatment and that she is fixed and stable from her injuries . . . .
>
> No further palliative care is needed.[16] (Emphasis added.)

On February 17, 2015, Unisea controverted further medical treatment for Ms. Morales' neck, back, and right foot as well as further personal attendant care based on the November 4, 2014, EME report by Drs. Toomey and Holmes.[17] The Controversion Notice does not mention PPI benefits, and Unisea did not pay either the job dislocation benefit or the 5% PPI rating until February 17, 2016.[18]

On June 3, 2015, Ms. Morales filed a claim seeking unspecified TTD benefits, medical costs, transportation costs, and a "personal care attendant."[19]

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[14] *Morales II* at 3-4, No. 5.

[15] *Id.*

[16] *Morales I* at 3, No. 3; *Morales II* at 4, No. 6.

[17] *Morales I* at 3, No. 4; Controversion Notice is dated February 10, 2015, and was filed on February 17, 2015, with the Board; R. 000004.

[18] *Morales I* at 5, No. 15.

[19] *Morales II* at 4, No. 8.

On June 23, 2015, Unisea again controverted medical benefits relating to Ms. Morales' neck, back, and right foot, transportation benefits, and a personal care attendant based on the November 4, 2014, EME report by Drs. Toomey and Holmes.[20] This Controversion Notice does not mention the PPI rating.

Ms. Morales filed another claim for medical costs, interest, and attorney fees and costs on July 10, 2015.[21] She sought medical treatment for the lower back injury and treatment for PTSD (post-traumatic stress disorder), as well as "any other reasonable benefits that may be owed under the Act . . . ."[22]

On July 14, 2015, Unisea's adjuster wrote Ms. Morales, stating Ms. Morales was to check in at Dr. Friedman's office at 901 Boren Avenue, Suite 711, Seattle, Washington, for another EME and provided her with a travel itinerary.[23] In the section of the itinerary titled "Independent Medical Examination Information," the location is listed as the "Office of Dr. Michael Friedman," at Suite 711 but did not identify this suite as ExamWorks.[24] Moreover, under the "Ground Transportation" section of the itinerary, Dr. Friedman's office is listed as suite 1910 (the same office where Ms. Morales saw Dr. Friedman in November 2014).[25] On August 5, 2015, Unisea sent Ms. Morales a revised itinerary which in two places identifies the appointment as occurring at Dr. Friedman's office, Suite 1910.[26]

On August 7, 2015, Ms. Morales and Ms. Hinojos flew to Seattle for the EME and were met by a transportation service.[27] Before going to Dr. Friedman's office, they

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20 *Morales I* at 3, No. 5; Controversion Notice is dated June 23, 2015, and was filed with the Board on June 24, 2015; R. 000005.

21 *Morales I* at 3, No. 6.

22 *Id.*

23 *Morales II* at 4, No. 9.

24 *Id.*; R. 000126.

25 *Morales II* at 4, No. 9.

26 *Id.*; R. 000129.

27 *Morales II* at 5, No. 10.

stopped at their hotel and dropped off their luggage.[28] The transportation service then dropped them off at 901 Boren Avenue prior to the scheduled time for the evaluation.[29] Because they had left the itinerary in their luggage, they checked the building directory, which listed Dr. Friedman's office as suite 1910. Ms. Morales and Ms. Hinojos went to suite 1910 (the site of the first EME) which, as on the prior occasion, was again open and unoccupied.[30] They entered and waited.[31] After the scheduled time for the evaluation, when no one had appeared, Ms. Hinojos contacted Ms. Morales' attorney's office and asked what to do.[32] The staff attempted to contact Unisea's attorney, but reached no one at the office. About one-half hour after the scheduled time, Ms. Morales and Ms. Hinojos left Dr. Friedman's office.[33] While waiting in the lobby of the building for transportation to the hotel, they were approached by a man who identified himself as the interpreter who had been hired for the evaluation.[34] He explained they had been waiting in suite 711, the ExamWorks office, but the evaluation had been cancelled when Ms. Morales did not show up.[35] He also stated they had wondered if Ms. Morales was waiting in the wrong office, but no one went to Suite 1910 to check.[36] Ms. Morales was willing to complete the evaluation on August 7, 2015, but the examination had been canceled. She was also willing at all times to attend a rescheduled EME.[37]

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28 *Morales II* at 5, No. 10.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*; Hinojos Dep. at 20:4-10, 22:12-13; Morales Dep. at 13:17-25.

36 Hinojos Dep. at 20:4-10, 22:3-5.

37 Morales Dep. at 14:1-17.

Ms. Morales was being paid TTD payments at the weekly rate of $244.00 and she received benefits from June 24, 2013, through August 7, 2015.[38] On August 14, 2015, Unisea controverted all benefits, stating "[Ms. Morales] refuses to submit to a properly notified examination requested by [Unisea]."[39] On September 24, 2015, Ms. Morales filed a workers' compensation claim (WCC) for medical treatment, to "reinstate TTD from 8/12/2015 and continuing," unfair or frivolous controversion, penalty, interest, and attorney fees and costs.[40] This WCC did not seek PPI benefits. Also on September 24, 2015, Ms. Morales filed a petition for a finding of unfair or frivolous controversion. The petition states:

> Ms. Sofia Morales De Lopez is seeking a Board finding that the controversion of 08-12-2015 is frivolous and lacks a factual basis. The insurance company has controverted her benefits based on an allegation that she refused to attend an EME. Ms. Morales de Lopez and her interpreter went to the address given to her, waited, and left only when she and her interpreter could not find the EME doctor, due to either reasonable mistake or the fault of the EME doctor. It has now been over 30 days and the insurance company has made no attempt to reschedule the evaluation. She has not refused to attend under AS 23.30.095(e) and Ms. Morales De Lopez is willing to attend if the insurer reschedules.[41]

On November 13, 2015, Ms. Morales attended the rescheduled EME with Dr. Friedman. Dr. Friedman's report states:

> The claimant has had extensive psychiatric treatment. She describes her condition as having plateaued. More probable than not, she is at medical stability. . .
>
> The claimant would correspond to a 10 percent Mental and Behavioral Disorders (M&BD) impairment in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition. . .
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> I do not believe additional psychiatric treatment will prove curative. . .

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38 *Morales I* at 5, No. 15.

39 *Morales II* at 5, No. 12.

40 *Id.*, No. 13.

41 R. 000045.

> The only treatment I am recommending is the consideration of the use of a second generation antipsychotic. I do not feel there are any additional evaluations necessary.[42]

On February 8, 2016, in response to a request from Unisea, Dr. Friedman clarified his rating:

> In accordance with the AMA, 6th edition, page 355, section 14.5c, the purpose in including all 3 of the BPRS, GAF and PIRS scales is provided on a broad assessment of the patient with M&BD. The BPRS focuses solely on symptom severity, the PIRS on role function, and the GAF is a blend of the 2. Clearly, interview, review of records, mental status exam, along with assessment of these 3 scales will provide an excellent basis for arriving at a strongly supportable impairment rating. . .
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> In accordance with the AMA, 6th edition, the 10 percent M&BD would equate to a psychiatric 10 percent whole person impairment rating. As noted in the clarification request, Ms. Lopez was previously rated at 5 percent whole person impairment. The [G]uides are not particularly clear on a combination of psychiatric and physical impairments, however, as these equate to whole person impairment and if in fact the medical 5 percent whole person (which is outside the scope of my expertise) has been rated, then the current whole person impairment after my examination would combine to 15 percent whole person impairment. . .[43]

On March 7, 2016, Ms. Morales filed a WCC seeking a penalty on late-paid PPI, a Board finding that the election of job dislocation benefits Ms. Morales signed on March 3, 2014, was not valid, interest, and attorney fees and costs.[44] She stated in part that on November 4, 2014, at the request of Unisea, she saw Drs. Toomey and Holmes who rated her physical injuries at 5% PPI.[45] Unisea did not pay this rating until February 17, 2016, when a check was mailed to Ms. Morales that included $8,500 for the 5% PPI rating.[46] She noted that 470 days, or 1 year, 3 months, and 13 days had elapsed between the November 4, 2014, report and the check date.[47] Ms. Morales further claimed that on

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42 *Morales I* at 4, No. 9.

43 *Id.*, No. 10.

44 *Morales I* at 5, No. 11.

45 *Id.*

46 *Id.*

47 *Id.*

November 13, 2015, she saw Dr. Friedman for her mental injury and he rated her mental condition at 10% PPI.[48] On February 17, 2016, the check sent by Unisea to Ms. Morales also included $17,700 for the additional PPI.[49] She noted that a period of 96 days or 13 weeks and 4 days had elapsed between Dr. Friedman's November 13, 2015, examination and the check date.[50]

On April 25, 2016, Unisea again filed a Controversion Notice, controverting reemployment benefits, attorney fees and/or costs, penalties and/or interest."[51]

A hearing was set for May 17, 2016, on the issues of whether Ms. Morales' failure to attend the August 7, 2015, EME should affect her TTD benefits, medical costs, transportation costs, penalty, interest, unfair controversion, and attorney fees and costs. A second hearing was set for June 22, 2016, to address the issues of penalty, interest, unfair controversion, and attorney fees and costs.[52]

On May 13, 2016, the parties stipulated to mediation and to cancel the hearing set for May 17, 2016. The parties also stipulated that "[a]t the conclusion of the mediation, the insurer agrees to pay to [Ms. Morales] past TTD benefits from 08/08/15 through 11/13/2015. [Ms. Morales] will receive $3,416.00. The payment will be made regardless of the outcome of the mediation."[53]

On June 1, 2016, Ms. Morales' attorney sent an email to Unisea's attorney about scheduling the mediation. The email concluded with the following statement:

> I do not want to postpone or cancel the hearing on the penalty for the (ridiculously) late payment of PPI nor the upcoming prehearing to set a hearing on the reemployment/dislocation issue. We have a fundamental disagreement on these issues and need the board to resolve it for us.[54]

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48 *Morales I* at 5, No. 11.

49 *Id.*

50 *Id.*

51 *Id.*, No. 12.

52 *Morales II* at 7, No. 18.

53 *Id.*, No. 19.

54 *Id.*, No. 20.

On June 17, 2016, Ms. Morales filed an affidavit of attorney fees and costs.[55]

On June 22, 2016, the Board heard Ms. Morales' March 7, 2016, claim for penalty and interest on late-paid PPI, an unfair controversion of PPI benefits, and attorney fees and costs. At the hearing, the parties agreed to defer argument over the amount of attorney fees and costs until it had been determined if Ms. Morales was entitled to an award.[56] The record was reopened at the Board's request and closed on July 8, 2016, after additional medical reports were filed.[57]

On August 8, 2016, the Board issued *Morales I*, holding Ms. Morales' PPI had been paid timely.[58] Consequently, Ms. Morales was not entitled to a penalty, interest, or attorney fees and costs related to the PPI benefits, and Unisea had not unfairly controverted the PPI benefits.[59] On August 16, 2016, Ms. Morales timely filed a petition for reconsideration of *Morales I*, contending the Board erred in *Morales I* by relying primarily on *Lowe's HIW, Inc. v. Anderson*, Alaska Workers' Comp. App. Comm'n Dec. No. 130 (Mar. 17, 2010). Ms. Morales contended *Anderson* is incorrect, and is contrary to the Alaska Workers' Compensation Act (Act) and the 1988 amendments. The Board, on August 22, 2016, declined to reconsider *Morales I*.[60]

At the August 16, 2016, hearing, Ms. Morales argued Unisea had unfairly controverted her TTD benefits, contending she had not refused to attend the August 7, 2015, EME; rather, her failure to attend was due to a misunderstanding as to the suite number where the evaluation was to take place. Ms. Morales sought TTD from August 8, 2015, through November 13, 2015, when the EME was rescheduled, along with penalty, interest, and attorney fees and costs. She also asked to withdraw her March 3, 2014, election of a job dislocation benefit, asserting that Unisea, by delaying payment of the

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55 *Morales II* at 7, No. 21.

56 *Id.*, No. 22.

57 *Id.*

58 *Morales I* at 13.

59 *Id.*

60 *Morales III* at 4.

dislocation benefit until February 17, 2016, lost its right to enforce the election. Lastly, Ms. Morales explained she was only seeking Board-ordered mediation if she was not awarded the TTD she sought.[61] Ms. Morales did not file an affidavit of attorney fees and costs prior to the August 16, 2016, hearing, relying on her understanding of the agreement reached in the hearing in *Morales I*.[62]

The Board issued *Morales II* on September 12, 2016, and awarded statutory attorney fees under AS 23.30.145(a) because Ms. Morales had not filed an affidavit of fees pursuant to 8 AAC 45.180(b).[63] The Board declined to order mediation and did not estop Unisea from relying on Ms. Morales' election of a job dislocation benefit.[64] The Board awarded TTD from August 7, 2015, through November 13, 2015, plus interest, and found Ms. Morales did not unreasonably refuse to attend the EME on August 7, 2015.[65] However, the Board declined to find Unisea had unfairly or frivolously controverted her TTD benefits, and did not award a penalty.[66]

Ms. Morales appealed *Morales I* and *III* on September 1, 2016, and *Morales II* on October 6, 2016. The Commission finds the job dislocation benefit was untimely paid and awards interest and a penalty on the late payment. The Commission states its holding in *Anderson* that PPI benefits are not due to an injured worker while the worker is receiving TTD benefits is limited to injured workers who are or may be engaged in the reemployment process. The 5% PPI rating performed in November 2014 and the 10% PPI rating performed in November 2015 were not paid until February 17, 2016. These payments were late and were not controverted. Because payment of both PPI ratings was not controverted and not paid until February 17, 2016, a penalty is owed. The Commission affirms the Board's finding Ms. Morales did not unreasonably refuse to attend

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61 *Morales II* at 8, No. 25.

62 *Morales II* at 18-19.

63 *Id.*

64 *Id.* at 19.

65 *Id.*

66 *Id.*

the EME. Unisea's contention that she refused to attend the EME and continued to refuse was without basis in fact, making it unfair and frivolous. Unisea acted in bad faith and a penalty on the unpaid TTD is owed. Since additional benefits are owed to Ms. Morales, the issue of attorney fees is remanded to the Board for consideration.

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission if supported by substantial evidence in light of the record as a whole.[67] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[68]

On questions of law and procedure the Commission does not defer to the Board's conclusions; rather the Commission exercises its independent judgment.[69] In this matter, the issues turn on interpretation of AS 23.30.190 (payment of PPI), AS 23.30.041(g) (payment of dislocation benefit), and AS 23.30.095(e) (refusal to attend an EME). The Commission substitutes its judgment for that of the Board in interpreting and applying these statutes. Statutory interpretation involves the principle that "where one section deals with a subject in general terms and another deals with the same subject in a more detailed way, the two should be harmonized, if possible."[70] Further, statutory interpretation should be done "according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose."[71]

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[67] AS 23.30.128(b).

[68] *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[69] AS 23.30.128(b).

[70] *Bockus v. First Student Servs.*, 384 P.3d 801, 811 n.24 (Alaska 2016)(citing *In re Hutchinson's Estate*, 577 P.2d 1074, 1075 (Alaska 1978).

[71] *Id.* at 807 (citing *Louie v. BP Exploration (Alaska), Inc.*, 327 P.3d 204, 206 (Alaska 2014)(citation omitted).

4. Discussion.

a. When is a job dislocation benefit payable?

When exactly must a job dislocation benefit be paid is a question of statutory interpretation on which the Commission exercises it independent judgment.[72] AS 23.30.041 reads in pertinent part:

> (g) Within 30 days after the employee receives the administrator's notification of eligibility for benefits, an employee shall file a statement under oath with the board, on a form prescribed or approved by the board, to notify the administrator and the employer of the employee's election to either use the reemployment benefits or to accept a job dislocation benefit under (2) of this subsection. The notice of the election is effective upon service to the administrator and the employer. The following apply to an election under this subsection:
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> . . . .
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> (2) an employee who elects to accept a job dislocation benefit in place of reemployment benefits and who has been given a permanent partial impairment rating by a physician shall be paid
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> (A) $5,000 if the employee's permanent partial impairment rating is greater than zero and less than 15 percent;
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> (B) $8,000 if the employee's permanent partial impairment rating is 15 percent or greater but less than 30 percent; or
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> (C) $13,500 if the employee's permanent partial impairment rating is 30 percent or greater;
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> (3) the form provided by the division for election must specify that the employee understands the scope of the benefits and rights being waived by the election; the board shall serve a copy of the executed election form on the administrator and the employer within 10 days after receiving the form from the employee; a waiver and election effective under this subsection discharges the employer's liability for the benefits or rights under this section that were not elected; a waiver may not be modified under AS 23.30.130; the administrator may not accept an election to accept a job dislocation benefit by an employee who has not signed a form that conspicuously notes the benefit being waived. (Emphasis added.)

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[72] AS 23.30.128(b).

The Legislature requires that the Act "be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter . . . ."[73]

Prompt payment of dislocation benefits falls squarely within this mandate. By statute, AS 23.30.041(g)(2), "an employee who elects to accept a job dislocation benefit in place of reemployment benefits and who has been given a permanent partial impairment rating by a physician shall be paid . . . $5,000 if . . . the rating is greater than zero and less than 15 percent . . . ." (Emphasis added). The benefit is to be paid once the employee "has been given **a**" PPI rating. "A" PPI rating does not indicate the rating must be the final whole person rating. Since this statute is more specific than AS 23.30.190 as it details how reemployment benefits, including payment of PPI, are to be made, AS 23.30.041(g) controls when and how a dislocation benefit is to be paid.

Ms. Morales signed the reemployment election waiver on March 3, 2014. She was given **a** PPI rating (the first of two) on November 4, 2014. Unisea owed payment for the dislocation waiver within 21 days of the rating. Unisea's delay is in direct contravention of the Act's directive to be "quick, efficient, fair and predictable." Here it met not one of these criteria. The failure of Unisea to pay Ms. Morales the minimum dislocation benefit it knew it would owe when she received the first PPI rating on November 4, 2014, does not comport with the directive for the Act to be interpreted "to ensure the quick, efficient, fair, and predictable delivery . . . of benefits." Unisea knew it would owe Ms. Morales at least $5,000. Unisea did not controvert this payment and did not pay Ms. Morales this benefit until February 17, 2016, nearly a year and a half later. Unisea's argument that it was obligated to wait until a complete whole person rating was received is without merit, as it knew in November 2014 it owed her at least $5,000 in dislocation benefits.

Perhaps, more importantly, Unisea never bothered to tell Ms. Morales why it was not paying the dislocation benefit. Unisea knew it owed Ms. Morales at least 5% in PPI benefits and $5,000 based on the PPI rating in job dislocation benefits. It was in no

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[73] AS 23.30.001(1).

danger of overpaying either benefit to Ms. Morales because Unisea knew it would never owe her less than 5% in PPI benefits and $5,000 in job dislocation benefits. The total in PPI and job dislocation benefits might increase if, when she reached medical stability for the mental condition, additional PPI was rated. Unisea knew that at a minimum it owed her at least the 5% in PPI benefits and the associated job dislocation benefit and this fact was not going to change. These benefits should have been paid in December 2014.

b. Payment of PPI.

The issue of when PPI benefits are due following a rating is a question of law for which the Commission does not defer to the Board's interpretation, but rather reviews and decides the question anew.[74] AS 23.30.190 provides for payment of PPI and states:

> (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.
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> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.
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> (c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. If the combination of a prior impairment rating and a rating under (a) of this section would result in the employee being considered permanently totally disabled, the prior rating does not negate a finding of permanent total disability.

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[74] AS 23.30.128(b).

In 1988, the Alaska Legislature revised the method for calculating the partial impairment to a person caused by the work injury. Prior to 1988, AS 23.30.190 referred to "permanent partial disability" and the calculation was based on a percentage of the employee's average weekly wages and was paid biweekly. The actual permanent disability was determined by reference to a list of valuations for various body parts.[75] In 1988, the statute above was enacted. It provided "the percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part . . . converted to the percentage of the impairment to the whole person" utilizing the AMA *Guides to the Evaluation of Permanent Impairment* (*Guides*)[76] The Legislature also authorized payment of the rating in a lump sum, unlike the previous requirement that ratings be paid in installments.

The Alaska Supreme Court (Court), in *Sumner v. Eagle Nest Hotel*, noted the change in type and payment of permanent partial benefits.[77] Prior to 1988, an employee received permanent partial disability benefits which were paid in installments.[78] In 1988, the type changed to the PPI benefits which are based on a percentage of impairment to the whole person. The payment method also changed to payment in a lump sum unless the injured worker is in the reemployment process.[79] In *Sumner*, the Court held an employer has 21 days from receipt of a PPI rating to analyze it and pay or controvert payment.[80] Here Unisea did not pay or controvert the PPI rating given on November 4, 2014, nor did it pay or controvert the PPI rating performed in November 2015, until February 17, 2016. In *Hammer*, the Court stated "[t]he statute and regulation provide specificity regarding *how* a permanent partial impairment is to be determined, not *when*

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75 AS 23.30.190 (1983).

76 AS 23.30.190 (2000) (emphasis added).

77 *Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 631 (Alaska 1995).

78 *Id.*

79 *Id.;* AS 23.30.190; *Anderson*, App. Comm'n Dec. No. 130.

80 *Sumner.*

payment for a permanent partial impairment is due . . . . [W]e concluded that payment becomes due upon receipt of a PPI rating . . . ." (Emphasis in original.)[81]

Under the *Guides*, 6th Edition, impairment ratings reflect the severity of impairment and resulting functional limitations on the whole person.[82] Each organ or body system is rated and then the impairments among various organ or body systems are combined using the Combined Values Chart, which allows the examiner to account for the effects of multiple impairments, resulting in a final impairment value.[83] Applying the *Guides*, the resulting final impairment value is always equal to or less than the collective sum of all the impairment values taken individually.[84] Related but separate conditions are rated separately, and impairment ratings are combined, unless criteria for the second impairment are included in the rating for the primary condition.[85] Only permanent impairment may be rated according the *Guides*, and only after the status of "Maximum Medical Improvement" (MMI) is reached in the examiner's opinion.[86] The examiner's findings must indicate the medical condition is static and well stabilized for the person to have reached MMI.[87] "Impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. This will depend on the underlying pathology . . . ."[88]

However, nothing in the above mandates that a body part (organ or system) that has reached MMI must wait to be rated until another organ or system has reached MMI. The *Guides* only require that after all organs or systems have reached MMI and been

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81 *Hammer v. City of Fairbanks*, 953 P.2d 500, 506 (Alaska 1998).

82 AMA, *Guides to the Evaluation of Permanent Impairment,* 6th Edition (2008) at 2.2a.

83 *Id.* at 2.2c.

84 *Id.*

85 *Id.* at 2.2d.

86 *Id.* at 2.2c.

87 *Id.*

88 *Id.* at 2.3c.

rated properly then all ratings are to be combined to determine a whole person impairment rating. Each organ or system (or body part) must be rated individually. The *Guides* actually discuss how to do ratings of multiple body parts or systems using an organ transplant as an example, discussing that there may be a rating separate from the actual transplant because the pharmaceuticals necessary for the transplant may also cause a permanent impairment.[89] The transplant is rated separately from the pharmaceuticals and then the two ratings combined. Implicit in this example is an understanding that the two components may reach MMI at different points in time. Furthermore, at 2.7c there is discussion as to how various impairment ratings are to be combined. Nowhere in the discussion do the *Guides* state the ratings must be done simultaneously, just that ultimately multiple ratings must be combined to achieve a whole person rating. Moreover, the Act requires that any prior whole person ratings be considered when reaching a current PPI rating.[90]

The use of the *Guides* to perform ratings is completely separate from any legal consequence of the ratings in the form of benefits that the ratings may produce.

In *Anderson*, the Commission held that when an injured worker is in the reemployment process and is receiving TTD benefits, the lump sum PPI payment should be withheld until the worker reaches medical stability.[91] This ruling insures that the injured worker will continue to receive benefits while in the reemployment process. In fact, AS 23.30.041 anticipates a worker will enter the reemployment process prior to reaching medical stability. The Act provides that the reemployment process may be started when an employee has been unable to work for 45 consecutive days and mandates a referral to a reemployment specialist for an evaluation when an employee has been out of work for 90 days. The Act further provides that when an employee is in the reemployment process when the employee reaches medical stability, TTD benefits

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89 *Guides* at 2.5e.

90 AS 23.30.190(c).

91 *Lowe's HIW, Inc. v. Anderson, supra*.

will cease and PPI benefits will be paid out biweekly until either the reemployment process is completed or the PPI benefits are exhausted.[92]

However, when an employee has elected to take dislocation benefits the situation is different. There is no longer a need to postpone payment of the PPI benefits because the employee will not need the benefits during completion of a reemployment plan. This is the situation in which Ms. Morales found herself. In March 2014, Ms. Morales withdrew from the reemployment process by electing to take dislocation benefits.[93] That decision by Ms. Morales is final and binding and Unisea knew she would not be eligible for reemployment benefits.[94] Her decision put Unisea on notice of its obligation to pay the dislocation benefit and any PPI rating as soon as a PPI rating was received.[95] Unisea neither paid nor controverted the dislocation benefit nor the 5% PPI when the rating was performed in November 2014. These benefits were not paid until February 2016. The Commission's holding in *Anderson* specifically applies to an injured worker in the reemployment process. It does not apply where the injured worker has elected to take the dislocation benefit. Thus, both the $5,000 dislocation benefit and the 5% PPI benefit were due to Ms. Morales 21 days after receipt by Unisea of the November 4, 2014, rating.

c. Refusal to attend an EME.

Whether Ms. Morales refused to attend an EME is both a question of fact and of law. The Board found that Ms. Morales went to the building where the EME was to occur. The Board found that Ms. Morales went to one of the offices where Dr. Friedman, the EME physician, conducted examinations and that this office was listed on the building's directory as the office for Dr. Friedman. The Board found that Ms. Morales came to a

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92 AS 23.30 041(k) provides "[i]f an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages . . . ."

93 *Morales II* at 3, No. 3; AS 23.30.041(g).

94 AS 23.30.041(g)(3).

95 AS 23.30.041(g)(2) and (3).

realization that there must be another office for Dr. Friedman after waiting in the office for over half an hour. The Board found that Ms. Morales was "willing to complete the evaluation" that same day or whenever Unisea asked her to go again to see Dr. Friedman. These are factual findings that must be affirmed if supported by substantial evidence in the record as a whole.

The record, including the depositions of Ms. Morales and Ms. Hinojos, supports these findings. The record also supports a finding that Ms. Morales went to the office where Dr. Friedman had conducted the first EME in November 2014. The record supports a finding that the itinerary and letter sent to Ms. Morales for the August 2015 EME contained contradictory office suite numbers for the EME, using both his private office suite number and the suite belonging to ExamWorks. Further, the letter did not specifically identify the site of the EME was going to be at the offices of ExamWorks and not at Dr. Friedman's private practice office. The record supports a finding that Dr. Friedman and the interpreter knew, or should have known, that Ms. Morales was sitting in Dr. Friedman's other office. Dr. Friedman was in the best position to know that he had conducted the prior EME in his private office and that he now utilized two offices. He knew, or should have known (and could easily have checked) that Ms. Morales was very probably waiting in his other office. In fact, the interpreter hired for the EME conveyed this possibility to Ms. Morales and Ms. Hinojos when he encountered them in the lobby of the building as they were leaving. Yet, neither Dr. Friedman nor the interpreter bothered to check.

The only evidence Unisea provided in support of its contention Ms. Morales "refused" to attend the EME is the fact that Ms. Morales did not go the ExamWorks office where Dr. Friedman was waiting. Unisea offered no evidence of any continuing "refusal"

to attend the EME since she, through her attorney, advised Unisea she was immediately ready and willing to attend the EME that day or any other day Unisea arranged for the EME.[96]

The pertinent statute regarding attendance at EMEs states:

> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination. Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter. **If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited.** The board in any case of death may require an autopsy at the expense of the party requesting the autopsy. An autopsy may not be held without notice first being given to the widow or widower or next of kin if they reside in the state or their whereabouts can be reasonably ascertained, of the time and place of the autopsy and reasonable time and opportunity given the widow or widower or next of kin to have a representative present to witness the autopsy. If adequate notice is not given, the findings from the autopsy may

[96] The letter sent to Ms. Morales for the successfully completed EME in November 2015, specifically and in several places, mentioned the EME would be at the offices of ExamWorks and the letter was provided to her in both English and Spanish. The original letter for the August 2015 EME was in English only.

be suppressed on motion made to the board or to the superior court, as the case may be (emphasis added).[97]

What constitutes a refusal is a question of interpretation of statutory language and, thus, the Commission may address this issue independently of the Board's findings. "Refusal" has been defined as "the denial or rejection of something offered or demanded."[98] Refusal also means "to show or express a positive unwillingness to do or comply with (as something asked, demanded, expected)".[99] Refusal involves an affirmative decision and action, not merely a mistake. A mistake does not equate to refusal.

Ms. Morales did not "refuse" to attend the EME. She made a reasonable and all too human mistake by believing the site of the first EME to be the site of the second EME. This was a mistake. She did not act irrationally or defiantly or willfully. It is a natural inclination to think that an examination in the same building where she had been previously examined would be in the same office as the first examination. It was foreseeable and reasonable for Ms. Morales to go to the same office for the second EME that she had gone to for the first EME. Furthermore, she immediately attempted to ameliorate her mistake by calling her attorney to find out if she was in fact in the wrong place. Her attorney also did not apparently notice the two different offices and so could not point out to her that the appointment was in a different office. Unisea's attorney was also unavailable to point out the correct office for the EME.

Moreover, the statute provides that when the obstacle or refusal is removed benefits are no longer suspended. Here, Ms. Morales immediately indicated her clear willingness to attend the EME whenever it was rescheduled. The obstacle was immediately removed, and there no longer existed a reason for any suspension of benefits. Furthermore, Unisea could have invoked AS 23.30.155(j) if it thought it should be repaid for the expenses incurred by the missed EME. Unisea could have asked the

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97 AS 23.30.095(e).

98 *Black's Law Dictionary* at 1307 (6th Ed. 1990).

99 *Webster's Third New International Dictionary* at 1910 (2002).

Board to require Ms. Morales to allow it to recoup the expense of scheduling a new EME by withholding 20% of all future payments. It did not do this. It stood by its position that Ms. Morales refused to attend a properly noticed EME and, therefore, it could withhold benefits. This was in bad faith.

Even after Ms. Morales attended the rescheduled EME in November 2015, Unisea refused to pay her the withheld TTD until February 2016. By November 2015, any obstacle or even a refusal by Ms. Morales to attend an EME had been removed when she actually attended the second EME with Dr. Friedman. The withheld TTD was due and owing to her. Failure to pay timely the withheld TTD was an act in bad faith.

d. Were any of the controversions filed by Unisea unfair, frivolous, or in bad faith?

What constitutes bad faith or an unfair or frivolous controversion requires interpretation of law. AS 23.30.155 provides in part:

> (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 . . . .
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> (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.

The regulation at 8 AAC 45.182 states:

> (a) To controvert a claim the employer shall file form 07-6105 in accordance with AS 23.30.155(a) and shall serve a copy of the notice of controversion upon all parties in accordance with 8 AAC 45.060 . . . .
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> . . . .

> (d) After hearing a party's claim alleging an insurer or self-insured employer frivolously or unfairly controverted compensation due, the board will file a decision and order determining whether an insurer or self-insured employer frivolously or unfairly controverted compensation due. Under this subsection, (1) if the board determines an insurer frivolously or unfairly controverted compensation due, the board will provide a copy of the decision and order at the time of filing to the director for action under AS 23.30.155(o); or (2) if the board determines a self-insured employer frivolously or unfairly controverted compensation due, the board will, at the time its decision and order are filed, provide a copy of the decision and order to the commissioner's designee for consideration in the self-insured employer's renewal application for self-insurance.
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> (e) For purposes of this section, the term "compensation due," and for purposes of AS 23.30.155(o), the term "compensation due under this chapter," are terms that mean the benefits sought by the employee, including but not limited to disability, medical, and reemployment benefits, and whether paid or unpaid at the time the controversion was filed.

The Court held in *Harp v. ARCO Alaska, Inc.*, "[a] controversion notice must be filed in good faith to protect an employer from imposition of a penalty . . . . For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits."[100] In *Harris v. M-K Rivers*, the Court clarified that if "a controversion does not delay payment, even if made in bad faith" it does not provide the basis for a penalty.[101]

Statutes are to be interpreted "according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose."[102] Moreover, the Act is "a system in which payments are made without need of Board intervention unless a dispute arises. If the employer disputes payment, it is

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[100] *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352, 358 (Alaska 1992), citing *Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37 (Alaska 1974), "However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed."

[101] *Harris v. M-K Rivers*, 325 P.3d 510, 518 (Alaska 2014).

[102] *Id.*

required to file a timely controversion notice . . . . The workers' compensation system also recognizes that it is appropriate to require an employer, who gets the benefit of protection from tort liability by participating in the system, to bear the cost of a worker's injury . . . . Under this compensation system, payments 'due' under the act are more appropriately characterized as '[p]ayable immediately or on demand,' not '[o]wed as a debt.'"[103]

In *Hammer*, the Court imposed a penalty when medical benefits were not paid when due and the employer had not filed a controversion notice.[104] A controversion notice affords an injured worker information that a benefit is not going to be paid. The notice provides an injured worker, if she so chooses, with the information and opportunity to ask the Board for a determination that the benefit is or is not due. A controversion notice means that an injured worker is not left guessing about whether or when a benefit will be paid.

In this matter, Unisea was in bad faith several times. The first time, Unisea failed to pay Ms. Morales the mandatory dislocation benefit which was due after she accepted the dislocation benefit in lieu of pursuing reemployment benefits and filed the signed form with the Board. "[A]n employee who elects to accept a job dislocation benefits . . . and who has been given a permanent partial impairment rating . . . shall be paid (A) $5,000 if the employee's permanent partial impairment rating is greater than zero and less than 15% . . . ."[105] Here, Unisea knew when Ms. Morales was given a 5% PPI for her physical injury in November 2014 it owed Ms. Morales at a minimum a $5,000 dislocation benefit, but it neither paid her the benefit nor controverted payment. Its nonpayment was a controversion in fact and in bad faith. Unisea knew it owed at least a minimum $5,000 in dislocation benefits to Ms. Morales and did nothing. Unisea finally paid the dislocation benefit in February 2016. Unisea owes a penalty on the late paid job dislocation benefit.

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103 *Harris* at 518-519.

104 *Hammer*, 953 P. 2d 500, 506 (Alaska 1998).

105 AS 23.30.041(g).

Another instance of bad faith by Unisea occurred when it adamantly and stubbornly refused to pay TTD benefits after the missed August 2015 EME. Unisea persistently contended Ms. Morales "refused" to attend the EME. The facts are she was present in the building where the exam was to take place, and went to the office where the prior exam had taken place. The EME physician (who knew he used two offices) and his interpreter knew or suspected Ms. Morales went to the wrong office, but failed to check. She contacted her attorney to find out what might be wrong and neither her attorney nor Unisea's attorney (who was unavailable) were able to direct her to the correct office. More importantly, she immediately agreed to attend another EME as soon as it could be arranged, including that day. Nonetheless, Unisea waited until November 2015 to reschedule the EME and failed to pay the delinquent TTD benefits until February 2016. This, again, is bad faith. A penalty is owed on the TTD benefits.

A penalty is also owed on the unpaid PPI because Unisea failed to make payment within 21 days after the November 13, 2015, rating. Unisea did not controvert payment, later stating it did not pay because it was seeking clarification of what the whole person rating would be. This is contrary to the directive of the Court in *Sumner.*[106] Instead Unisea, once again, left Ms. Morales wondering about payment of her benefits. Unisea waited to confirm that combining the November 2014 5% rating with the November 2015 10% rating, resulted in a 15% whole person rating. Unisea paid the 15% PPI rating on February 17, 2016. This payment was late and Ms. Morales is owed a penalty.

e. Is Unisea estopped from any reliance on the waiver of reemployment benefits?

Ms. Morales now contends that she should be exonerated from her waiver of reemployment benefits. AS 23.30.041 states in pertinent part:

> (g) Within 30 days after the employee receives the administrator's notification of eligibility for benefits, an employee shall file a statement under oath with the board, on a form prescribed or approved by the board, to notify the administrator and the employer of the employee's election to either use the reemployment benefits or to accept a job dislocation benefit under (2) of this subsection. The notice of the election is effective upon

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106 *Sumner,* 894 P.2d at 631.

service to the administrator and the employer. The following apply to an election under this subsection:

(1) an employee who elects to use the reemployment benefits also shall notify the employer of the employee's selection of a rehabilitation specialist who shall provide a complete reemployment benefits plan; failure to give notice of selection of a rehabilitation specialist required by this paragraph constitutes noncooperation under (n) of this section; if the employer disagrees with the employee's choice of rehabilitation specialist to develop the plan and the disagreement cannot be resolved, then the administrator shall assign a rehabilitation specialist; the employer and employee each have one right of refusal of a rehabilitation specialist;

(2) an employee who elects to accept a job dislocation benefit in place of reemployment benefits and who has been given a permanent partial impairment rating by a physician shall be paid

(A) $5,000 if the employee's permanent partial impairment rating is greater than zero and less than 15 percent;

(B) $8,000 if the employee's permanent partial impairment rating is 15 percent or greater but less than 30 percent; or

(C) $13,500 if the employee's permanent partial impairment rating is 30 percent or greater;

(3) the form provided by the division for election must specify that the employee understands the scope of the benefits and rights being waived by the election; the board shall serve a copy of the executed election form on the administrator and the employer within 10 days after receiving the form from the employee; a waiver and election effective under this subsection discharges the employer's liability for the benefits or rights under this section that were not elected; a waiver may not be modified under As 23.30.130; the administrator may not accept an election to accept a job dislocation benefit by an employee who has not signed a form that conspicuously notes the benefit being waived.

An employee, here Ms. Morales, must decide within 30 days of a finding of eligibility for reemployment benefits whether to proceed with the reemployment process or select the job dislocation benefit. This is a one-time option which is final and not modifiable due to change in condition, change in residence, or mistake in determination of a fact, once the choice is served upon the administrator and the employer.

The Court has defined "quasi estoppel" to apply where "the existence of facts and circumstances mak[es] the assertion of an inconsistent position unconscionable."[107] The doctrine is intended to preserve the "sanctity of the oath" and the integrity of the judicial process.[108]

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 . . . ."[109] The Court, in *Milne*, further stated "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."[110]

Ms. Morales was required by statute to select reemployment benefits or job dislocation benefits within 30 days of receiving notice of eligibility for reemployment benefits. She filed the Job Dislocation Election form on March 28, 2014, and it was served on Unisea on April 3, 2014.[111] The statute at AS 23.30.041(g) is clear that a waiver is effective upon filing it with the Board and it may not be modified pursuant to AS 23.30.130 (the provision in the Act allowing the Board to make modifications). There is no basis for setting aside a waiver. Once she selected the job dislocation benefit, Unisea was obligated to pay her the dislocation benefit as soon as she received a PPI rating. Even though Unisea did not pay her job dislocation benefit for almost two years, and did not

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107 *Smith by Smith v. Marchant Enter., Inc.,* 791 P.2d 354, 357 (Alaska 1990).

108 *Id.*

109 *Wausau Ins. Cos. v. Van Biene*, 847 P.2d 584, 588 (Alaska 1993) (citing *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978).

110 *Id.*

111 Election to Either Receive Reemployment Benefits or Waive Reemployment Benefits and Receive a Job Dislocation Benefit Instead, R. 000142.

controvert payment of this benefit, there is no basis for setting the job dislocation waiver aside.[112] Unisea is not estopped from relying on the Election Waiver by Ms. Morales.

f. Attorney fees and failure to file affidavit.

In *Morales I*, counsel for Ms. Morales filed an affidavit of attorney fees. Counsel for Unisea objected to the affidavit contending a portion of the time spent was unrelated to the issues for hearing in *Morales I* and that no credentials were presented for one of the billers, a Jaycee Croft.[113] Ms. Morales' counsel agreed a substantial portion of the fees were for other issues and then stated he did not "want to waive the entitlement [to fees] by not submitting, as the act requires, a fee affidavit."[114] The Hearing Officer then asked if counsel wished to withdraw his affidavit and wait for the decision.[115] If the Board awarded fees the parties could then discuss the amount.[116] Counsel for Ms. Morales agreed as long as he was not waiving his right to seek fees.[117]

At the hearing on August 16, 2016, counsel for Ms. Morales reminded the Board that at the prior hearing he had withdrawn his affidavit of fees pending the ultimate resolution of Ms. Morales' case.[118] Therefore, he had not filed a new affidavit of fees, on the understanding that position was still in effect with the Board. Unisea's counsel argued that the agreement pertained only to the issues in *Morales I* and counsel for Ms. Morales had now waived any new request for attorney fees by failing to file timely a new affidavit of fees. The Board found that although there was discussion of deferring argument on

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[112] Check to Ms. Morales, including job dislocation benefit, dated February 17, 2016 (R. 000147); controversions dated February 10, 2015 (R. 000004) and June 23, 2015 (R. 000005). The first controversion to refer to the job dislocation benefit is the Controversion dated April 22, 2016, contending no benefits were owed due to Ms. Morales' failure to attend the EME on August 7, 2015 (R. 000011).

[113] Hr'g Tr. at 24:18 – 26:22, June 22, 2016.

[114] *Id.* at 27:2-11.

[115] *Id*. at 28:4-9.

[116] *Id*.

[117] *Id* at 28:10-16.

[118] Hr'g Tr. at 6:5-21, Aug. 16, 2016.

fees in the hearing in *Morales I* there was "no discussion or agreement regarding the filing of fee affidavits at future hearings."[119] The Board then awarded statutory minimum fees only on the value of the benefits awarded in *Morales II*. Attorney fees were not awarded in *Morales I.*

AS 23.30.145 states:

> (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.
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> (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 they become 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.
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> (c) If proceedings are conducted for review of a compensation or medical and related benefits order before a court, the court may allow or increase an attorney's fees. The fees are in addition to compensation or medical and related benefits ordered and shall be paid as the court may direct.

The regulation at 8 AAC 45.180 provides:

> (a) This section does not apply to fees incurred in appellate proceedings.
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> (b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee

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[119] *Morales II* at 18.

from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

(c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed. Board approval of an attorney fee is not required if the fee

(1) is to be paid directly to an attorney under the applicant's union-prepaid legal trust or applicant's insurance plan; or

(2) is a one-time-only charge to that particular applicant by the attorney, the attorney performed legal services without entering an appearance, and the fee does not exceed $300.

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the In statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.

(2) In awarding a reasonable fee under AS23.30.145 (b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services

> performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

The Act, including both the statute at AS 23.30.145 and the regulation at 8 AAC 45.180, makes explicit that if an attorney is seeking fees in excess of the statutory minimum, an affidavit must be filed timely. If no affidavit is filed or an inadequate one is filed, then the Board can award only the minimum statutory fee. Ms. Morales' attorney filed and withdrew his affidavit in *Morales I* and did not file a new affidavit in *Morales II*. On its face therefore, the Board's decision not to award actual fees is supported by substantial evidence.

However, the Board, on remand, may find that good cause exists to excuse the failure to comply with the regulation requiring an affidavit of fees three days prior to hearing, because there is seemingly an agreement in *Morales I* to defer the question of fees to the end of the hearings. At issue with the affidavit filed in *Morales I* was time included for the issues that were heard in *Morales II.* This lends some credence to the contention of counsel that the agreement should also pertain to the hearing in *Morales II.*

In *Circle De Lumber Co. v. Humphrey*, the Court stated "[t]he procedural requirements of both subsections can be set aside only 'if manifest injustice to a party would result from a strict application of the regulation' they may not be set aside 'merely to excuse a party from failing to comply . . . or to permit a party to disregard the requirements of the law.'"[120]

The Commission remands this issue to the Board for reconsideration since additional benefits have been awarded by this decision. The question for the Board is whether a strict application of the regulation would result in a manifest injustice. Ms. Morales' counsel did not file a new affidavit prior to the second hearing. His failure to do so may or may not result in a manifest injustice, due to the question of whether his withdrawal of his affidavit at the first hearing was part of an agreement to allow the

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[120] *Circle De Lumber Co. v. Humphrey*, 130 P.3d 941, 953 (Alaska 2006)(citing 8 AAC 45.180(d)(1).

attorney fees issue to be decided after all the hearings were completed. However, counsel for Ms. Morales is an experienced workers' compensation attorney and has full knowledge of the Act and its regulations. Therefore, his failure to file a new affidavit may not be excused simply because counsel does not agree with the regulation.

5. Conclusion.

The Commission AFFIRMS the finding that Ms. Morales did not refuse to attend a properly noticed EME and TTD was owed with interest. The Commission REVERSES the finding that the dislocation benefit was timely paid and that no penalties were owed. The Commission finds a dislocation benefit is due after a properly signed election is filed with the Board and served and a PPI rating is provided. The Commission's holding in *Anderson* is limited to persons who are or may be engaged in the reemployment process. The Commission finds that the dislocation benefit here was untimely paid and, since no controversion was filed, the lack of payment was in bad faith. The Commission further finds both PPI ratings were untimely paid following the November 13, 2015, EME and a penalty is due. The Commission finds that Unisea unfairly and frivolously withheld payment of TTD following the August 7, 2015, missed EME and a penalty is owed on the unpaid TTD. The Commission REMANDS the issue of attorney fees to the Board for reconsideration since additional benefits have been awarded to Ms. Morales.

Date: *7 July 2017* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme

Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

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

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). 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, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 236 issued in the matter of *Sofia Morales de Lopez vs. Unisea, Inc. and Alaska National Insurance Company,* AWCAC Appeal No. 16-011 (Cons.), and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 7, 2017.

Date: July 10, 2017

Signed

K. Morrison, Appeals Commission Clerk