Alaska Workers' Compensation Appeals Commission

Ocean Beauty Seafoods, Inc. and Liberty Insurance Corporation, Appellants, vs. Elizar Quimiging, Appellee.	Final Decision Decision No. 296 October 4, 2022 AWCAC Appeal No. 21-013 AWCB Decision No. 21-0093 AWCB Case No. 201711244

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order on Reconsideration and Modification No. 21-0093, issued at Juneau, Alaska, on September 30, 2021, by southern panel members Kathryn Setzer, Chair, and Bradley Austin, Member for Labor.

Appearances: Rebecca Holdiman Miller, Holmes Weddle & Barcott, PC, for appellants, Ocean Beauty Seafoods, Inc. and Liberty Insurance Corporation; Elliott T. Dennis, Law Offices of Elliott T. Dennis, LLC, for appellee, Elizar Quimiging.

Commission proceedings: Appeal filed November 1, 2021; briefing completed May 3, 2022; oral argument held July 11, 2022.

Commissioners: James N. Rhodes, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Ocean Beauty Seafoods, Inc. and its insurer, Liberty Insurance Corporation (Ocean Beauty) appealed from the Alaska Workers' Compensation Board's (Board) Decision No. 21-0093 (*Quimiging III*) regarding benefits awarded to Elizar Quimiging.[1] The Board's decision was issued on reconsideration of Decision No. 21-0054 (*Quimiging I*) which was

[1] *Quimiging v. Ocean Beauty Seafoods, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 21-0093 (Sept. 30, 2021) (*Quimiging III*).

not identified in Ocean Beauty's notice of appeal.[2] However, since *Quimiging III* was in response to Ocean Beauty's petition for reconsideration of *Quimiging I*, the Alaska Workers' Compensation Appeals Commission (Commission) has reviewed both decisions in reaching its conclusions.

2. Factual background and proceedings.[3]

On August 3, 2017, Mr. Quimiging's left hand was caught in a drum winch while working for Ocean Beauty.[4] Ted Schwarting, M.D., diagnosed dislocations of the left long finger and ring finger proximal interphalangeal joints with at least ninety degrees of rotational deformity of the middle phalanx at the proximal phalanx.[5] Dr. Schwarting performed surgery including finger pin fixation.[6] On September 7, 2017, Dr. Schwarting removed all of the pins from Mr. Quimiging's left hand.[7]

Mr. Quimiging saw Michael Y. Lin, M.D., in follow up on September 19, 2017, and told him he was about to travel to the Philippines for a vacation, which he took annually during the off season.[8] Dr. Lin recommended occupational therapy for aggressive range of motion exercises of the left index, ring, and small fingers, and middle finger extensor tendon rehabilitation. He advised it was best for Mr. Quimiging to defer his travel to the Philippines and to concentrate on rehabilitating his hand because if he did not, his hand

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[2] *Quimiging v. Ocean Beauty Seafoods, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 21-0054 (June 25, 2021) (*Quimiging I*). *Quimiging v. Ocean Beauty Seafoods, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 21-0066 (July 23, 2021) (*Quimiging II*) is an Interlocutory Decision and Order on Reconsideration and Modification granting reconsideration and modification and allowing for additional briefing and an oral hearing.

[3] 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.

[4] R. 120.

[5] R. 226-227.

[6] R. 228-229.

[7] R. 267.

[8] R. 2302-2304.

would be permanently stiff and he would be left with a minimally functional hand. Dr. Lin showed Mr. Quimiging how to perform passive assisted range of motion exercises.[9]

On January 2, 2018, Dr. Lin opined that Mr. Quimiging had been noncompliant with treatment instructions because he had declined aggressive therapy and instead traveled overseas to the Philippines.[10] Dr. Lin ordered occupational therapy for aggressive range of motion exercises and predicted Mr. Quimiging would be "permanent and stationary" in two months and would have significant permanent impairment due to finger stiffness.[11]

Ralph N. Purcell, M.D., an orthopedic surgeon, examined Mr. Quimiging on May 9, 2018, for an Employer's Medical Evaluation and diagnosed a left-hand crush injury with multiple lacerations, multiple proximal interphalangeal dislocations, left long finger extensor mechanism disruption, left long finger and left little finger proximal interphalangeal joint capsular disruption, and post-status left hand arthrofibrosis. He opined the work injury was the only cause of Mr. Quimiging's present disability and need for medical treatment. Dr. Purcell recommended manipulation under anesthesia of the involved left-hand joints and possible capsulotomies and tenolysis. Mr. Quimiging had dramatically sub-optimal treatment and would potentially benefit from occupational therapy post-operatively. Dr. Purcell stated Mr. Quimiging was not medically stable if he wished to pursue further surgical treatment. He opined Mr. Quimiging did not have the physical ability to return to full-duty work in the job held at the time of injury and restricted him from lifting more than ten pounds with his right hand only.[12]

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9 R. 2302-2304.

10 R. 274-275. This might have been a misunderstanding of the cultural needs for Mr. Quimiging to undertake this travel. In deposition, he testified that he went to the Philippines to take care of his aging mother. Deposition of Elizar Quimiging, Jan. 14, 2020, at 36:9-12, 50:6-10. *See also*, Alaska Supreme Court letter (undated) signed by Chief Justice Joel H. Bolger, Justice Daniel E. Winfree, Justice Peter J. Maassen, and Justice Susan M. Carney in response to the death of George Floyd (http://www.courts.alaska.gov/media/docs/sc-2020-stmt.pdf).

11 R. 274-275.

12 R. 322-335.

The Board, on January 8, 2019, approved the parties' stipulation to cancel the January 8, 2019, hearing. The stipulation also provided:

> The employer agrees to pay sixty-eight (68) weeks of past temporary total disability (TTD) benefits at the rate of $285.58, for a total sum of $19,419.00. The employer further agrees to payment of ongoing TTD benefits at the weekly rate of $285.58 until the employee is medically stable.
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> The employer agrees to pay reasonable and necessary future medical and transportation benefits to include the employment of a nurse case manager who will work with the employee and his attorney in an effort to locate a hand surgeon and occupational therapist for the purpose of providing the employee with rehabilitative treatment of the employee's injured left hand.[13]

The Board then approved, on January 17, 2019, the partial Compromise and Release Agreement (C&R) submitted by the parties which stated in pertinent part:

> Going forward, the employer agrees to pay reasonable and necessary future medical and transportation benefits to include the employment of a nurse case manager who will work with the employee and his attorney in an effort to locate a hand surgeon and occupational therapist for the purpose of providing the employee with rehabilitative treatment for the employee's injured left hand.
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> To resolve interim disputes among the parties with respect to temporary total disability, penalties, interest, and claims for unfair or frivolous controversion, the employer will pay the employee the sum of $19,419.00 for 68 weeks of past temporary total disability benefits at a weekly rate of $285.58. The employer will continue TTD benefits at the weekly rate of $285.58 until the employee's condition reaches medical stability.[14]

On July 26, 2019, the reemployment benefits administrator (RBA) designee found Mr. Quimiging eligible for reemployment benefits.[15] Ocean Beauty, on August 2, 2019, requested review of the RBA-designee's decision.[16]

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13 R. 741-743.

14 R. 760-771.

15 R. 1264-1265.

16 R. 785.

From April 8, 2019, through August 15, 2019, Mr. Quimiging underwent occupational therapy at St. Joseph's Medical Center.[17]

The parties then filed a stipulation to cancel the October 22, 2019, hearing which the Board approved. Ocean Beauty agreed to pay travel costs and per diem for Mr. Quimiging to travel to Anchorage so he could obtain a second opinion regarding additional treatment, to meet with Loretta Cortis, a reemployment specialist, for plan development, and to meet with his attorney and attend his deposition. Ocean Beauty also agreed to pay for an independent interpreter for all appointments and provide transportation to his appointments with a transport provider with the ability to accommodate Mr. Quimiging's language barriers.[18]

In deposition on January 14, 2020, Mr. Quimiging stated he was unable to make many hand therapy visits in California. He also explained that he had traveled to the Philippines between September and December 2017 to care for his family member. While there he did home therapy and range of motion exercises. Mr. Quimiging reported no significant improvement in range of motion and function and progressively worsening pain. He did not use his left hand for any activity.[19]

Mr. Quimiging began treating with Jason R. Gray, M.D., who observed skin contracture with loss of flexion and extension creases to Mr. Quimiging's ring, long, and small finger, especially over the proximal interphalangeal joints; thumb and index finger full range of motion; slight red shiny discoloration of the affected digits; cold and clammy forearm and hand skin; and hypersensitivity. Mr. Quimiging was unable to actively extend all fingers. Dr. Gray diagnosed chronic regional pain syndrome (CRPS) and prescribed gabapentin and occupational hand therapy specializing in CRPS. He advised against surgical intervention as Mr. Quimiging was at risk of worsening symptoms due to CRPS. Dr. Gray believed Mr. Quimiging had the capacity for "improved sensory disturbances as well as range of motion of the affected digits" with intensive therapy for several months

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17 R. 2377-2412.

18 R. 1031-1033.

19 Quimiging Dep. at 35:19 – 37:5, 42:5-19.

to a full year, but Mr. Quimiging would never regain full functional status and range of motion.[20] He prescribed hand and wrist therapy three times per week for six months.[21]

Beginning on January 30, 2020, Mr. Quimiging's attorney several times requested Ocean Beauty to ensure that a nurse case manager (NCM) be assigned to help Mr. Quimiging begin the treatment recommended by Dr. Gray.[22] On January 31, 2020, his attorney wrote to Genex asking for another Tagalog-speaking NCM to be assigned.[23] Then on February 13, 2020, his attorney asked Ocean Beauty's attorney to make arrangements for an NCM to assist with Mr. Quimiging's treatment as agreed to in the stipulation.[24] Further, on March 3, 2020, Mr. Quimiging's attorney wrote Ocean Beauty's attorney asking for a response to the request for an NCM.[25] Finally, on March 18, 2020, Millie Tuccillo, an NCM from Essential Medical Management, LLC, was asked if she would be willing to take on Mr. Quimiging's case.[26]

On the reemployment side, Ms. Cortis, on April 16, 2020, issued a letter stating a reemployment plan could not be developed at that time due to COVID-19. She noted Mr. Quimiging spoke Tagalog, did not speak English, and had a sixth-grade education. She stated he would require remedial schooling to learn English to become employable; however, the Stockton School for Adults was unable to test Mr. Quimiging as it was closed due to COVID-19.[27]

On July 14, 2020, Mr. Quimiging, due to COVID-19, visited with Dr. Gray by telemedicine with a Tagalog translator. Dr. Gray again observed skin contracture with loss of flexion and extension creases in the ring, long, and small fingers, especially over

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20 R. 2464-2466.

21 R. 2467.

22 R. 860-861.

23 R. 862-863.

24 R. 2142.

25 R. 2143.

26 R. 2142.

27 R. 1256-1259.

the proximal interphalangeal joints, full range of motion of the thumb and index finger, and slight red shiny discoloration of the affected digits. Dr. Gray again diagnosed CRPS and advised against any surgical intervention due to risk of worsening symptoms. He discussed manipulation under anesthesia, but felt there would be no substantial difference from Mr. Quimiging's awake range of motion. Dr. Gray suggested amputation at or below the level of the traumatic injuries to potentially eliminate the pain source. He referred Mr. Quimiging to a pain management specialist for neuropathic pain medications or specific or regional nerve blocks, and he requested Mr. Quimiging's attorney to assist Mr. Quimiging with finding a pain management specialist near his home.[28]

On July 20, 2020, Mr. Quimiging's attorney wrote a letter to Michael Ali, M.D., at Trinity Occupational Health asking him to review the attached medical records and to assist Mr. Quimiging with obtaining Dr. Gray's recommended pain management treatment.[29] Dr. Gray, on July 21, 2020, referred Mr. Quimiging for pain management due to his limited range of motion and CRPS.[30] From February 19, 2020, through August 31, 2020, Mr. Quimiging completed occupational therapy at St. Joseph's Medical Center.[31]

On September 2, 2020, Mr. Quimiging's attorney wrote a letter to Co Occupational Medical Partners asking them to review the attached medical records and to assist Mr. Quimiging with obtaining Dr. Gray's recommended pain management treatment.[32]

On January 29, 2021, Ocean Beauty denied permanent total disability (PTD) benefits, medical costs, transportation expenses, and attorney fees and costs.[33]

Dr. Gray, on February 4, 2021, in deposition, stated he diagnosed Mr. Quimiging with CRPS due to significant contracture of the skin with loss of flexion and extension

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28 R. 2585-2587.

29 R. 942-944.

30 R. 2753.

31 R. 2643-2747.

32 R. 945-946.

33 R. 102.

creases, joint stiffness, cold and clammy skin, and hypersensitivity to touch.[34] He referred Mr. Quimiging to pain management in July 2020 because he was struggling to improve with occupational therapy.[35] Dr. Gray would prefer for Mr. Quimiging to receive pain management near his home in California over traveling to Alaska, as it would ensure better compliance and travel was complex as he needed a translator.[36] Dr. Gray expected regional and local nerve blocks to be considered by the pain management physician.[37] Mr. Quimiging needed multimodal treatment, involving pain management, to help him accelerate and improve his progress with therapy.[38] Dr. Gray did not see any substantial change in Mr. Quimiging's range of motion in July 2020 during the telemedicine appointment.[39] Manipulation under anesthesia was a treatment option, but after two-and-a-half years of significant stiffness, there was a low probability of substantial improvement.[40] Mr. Quimiging's three fingers were basically nonfunctional, aside from functioning as a "post" or something to press and lever against, but he avoided letting things touch them and could not use them due to hypersensitivity which caused significant pain.[41] If Mr. Quimiging saw a pain management specialist and made no improvement, then he had probably stabilized a year to a year-and-a-half previously.[42] Dr. Gray did not know if Mr. Quimiging was going to improve and he was probably medically stable in the past, but he should be provided an opportunity for additional treatment.[43] Mr. Quimiging's function might improve with pain management because it

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34 Deposition of Jason Gray, M.D., Feb. 4, 2021, at 5:17 – 6:20.

35 *Id*. at 7:2-15.

36 *Id*. at 9:2-6, 40:16 – 41:25.

37 *Id*. at 9:7-21.

38 *Id*. at 13:23-25.

39 *Id*. at 20:11-23.

40 *Id*. at 21:7-25.

41 *Id*. at 37:12 – 38:11.

42 *Id*. at 42:13 – 43:2.

43 *Id*. at 43:3-12.

might eliminate the pain causing him to avoid use of the hand.[44] Dr. Gray explained Mr. Quimiging "may become unstable" as he may improve with other treatment modalities.[45] He became medically stable on January 14, 2020, but added this did not make any sense "because then he's not medically stable by definition if there is capacity for instability."[46] There would not be any improvement until a pain management specialist provided treatment.[47] Dr. Gray thought Mr. Quimiging had the potential to be gainfully employed as a janitor with one functioning single upper extremity and his left thumb and index finger, and he recommended a permanent partial impairment (PPI) rating and work-hardening evaluation to assess his functional capacity to answer whether he could return to work as a janitor.[48] After a work-hardening program, Dr. Gray would be willing to review the job titles and specific tasks and indicate whether he agreed or not that Mr. Quimiging had the physical capacity to perform the job titles.[49] He typically sent patients to Eric Olson, M.D., and Shawn Johnston, M.D., for pain management evaluation, treatment, and impairment ratings.[50]

On February 24, 2021, Ocean Beauty requested modification of the RBA-designee's eligibility determination based upon Dr. Gray's deposition testimony that Mr. Quimiging could return to work as a janitor, a position held by Mr. Quimiging within ten years of the injury.[51] Also, on February 24, 2021, Ocean Beauty denied temporary total disability (TTD) benefits, PTD, and reemployment benefits, contending Mr. Quimiging was not entitled to TTD benefits because Dr. Gray stated he reached medical stability, and he was

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[44] Gray Dep. at 43:18-23.

[45] *Id*. at 43:24 – 44:18.

[46] *Id*. at 44:19-25.

[47] *Id*. at 45:5-11.

[48] *Id*. at 27:6-22, 28:21 – 29:7 (there is no evidence in the record that Dr. Gray had the SCODRDOT job description required by AS 23.30.041(e) when he made this statement.

[49] *Id*. at 46:8-19.

[50] *Id*. at 42:2-12.

[51] R. 837.

not entitled to reemployment and PTD benefits as Dr. Gray stated he would be able to return to work as a janitor.[52]

On March 1, 2021, Mr. Quimiging, through counsel, requested an order enforcing the stipulation and partial C&R. He contended Ocean Beauty should be required to provide an NCM to find a hand surgeon and therapist.[53] Again, on March 16, 2021, Mr. Quimiging requested orders directing Ocean Beauty to continue to provide benefits as stipulated, awarding penalties for its late payments, and for a finding of unfair and frivolous controversion.[54]

On March 8, 2021, Ocean Beauty's attorney emailed Mr. Quimiging's attorney:

> My office called ASI and learned how we get him in for a PPI rating and pain management per Dr. Gray. Attached is a letter to send if you agree. My client agrees to ASI and will pay for the travel I assume is needed for the rating appt. Let me know if you are ok with the letter and we will get the apt made. Thank you.[55]

On March 9, 2021, Ocean Beauty's attorney emailed Deb Hanson, RN, CCM, asking if she could assist in finding "a place in California where the recommended course of pain management can continue per Dr. Johnston or Olsen's direction. Would you be interested?"[56] Ms. Hanson replied and stated she could assist with this matter.[57]

On March 16, 2021, Mr. Quimiging requested orders directing Ocean Beauty to continue to provide benefits as stipulated, awarding penalties for its late payments, and "imposing penalties on [E]mployer for bad faith wrongful termination of benefits without obtaining an order."[58] He specifically requested an order for past and ongoing TTD

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52 R. 105.

53 R. 865.

54 R. 890, 878-880.

55 R. 950.

56 R. 1958.

57 R. 1958.

58 R. 890, 878-880.

benefits, medical and transportation costs, penalties for late-paid TTD, and penalties for not seeking a Board order before terminating TTD benefits.[59]

On March 22, 2021, Ocean Beauty opposed Mr. Quimiging's petitions contending it was in legal compliance with the parties' stipulation. It contended the NCM ceased work after treatment at St. Joseph's Medical Center commenced. Ocean Beauty noted Mr. Quimiging's attorney failed to find a pain management specialist after Dr. Gray requested he assist Mr. Quimiging. Ocean Beauty asserted it was following the approved stipulation's terms when it stopped paying TTD benefits and ceased NCM services. Ocean Beauty also stated there was no current dispute regarding Mr. Quimiging's medical stability. It contended it was not reasonable or necessary for Mr. Quimiging to frequently travel to Alaska for medical treatment. Ocean Beauty asserted no penalties were due because Mr. Quimiging was not entitled to TTD benefits after medical stability, and it stopped TTD benefits after medical stability pursuant to the stipulation which, therefore, cannot be considered to be bad faith. It also stated there was no provision in the Alaska Workers' Compensation Act (Act) authorizing penalties for bad faith conduct.[60] On March 24, 2021, Ocean Beauty reported it stopped paying TTD benefits on February 23, 2021, and began paying AS 23.30.041(k) benefits (.041(k) benefits) on February 24, 2021, at the weekly rate of $249.88.[61]

On April 1, 2021, Dr. Gray answered questions from Mr. Quimiging's attorney: (1) Mr. Quimiging would not have the permanent physical capacities equal to or greater than the physical demands of the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT) job description for janitor, (2) his participation in a work-hardening program is reasonable and necessary for him to "participate in a reemployment program and/or reenter the workforce," and (3) it was appropriate for Mr. Quimiging to participate in a work-hardening program if he went to

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59 R. 878-880.

60 R. 896-902.

61 R. 68-69.

Anchorage to see Dr. Olson for pain management.[62] Dr. Gray also disapproved the SCODRDOT description for janitor as not being within Mr. Quimiging's physical capacities.[63]

On April 6, 2021, the Board designee set an oral hearing on May 18, 2021, "to address both of [Mr. Quimiging's] petitions to enforce the parties' [January 8, 2019] stipulation." Under "Issues for Hearing," it listed Mr. Quimiging's petitions and included, "Penalty, Back TTD, Order requiring Mr. Quimiging be brought to Anchorage for [p]ain management, Transportation Costs, Medical Costs, Nurse case manager to locate providers and help coordinate medical care using an employer-provided interpreter."[64]

On April 7, 2021, Ms. Cortis issued an employment plan status report and said the Stockton School for Adults was anticipating accepting new students back in the classroom by summer. She also noted Dr. Gray recommended Mr. Quimiging participate in a work-hardening program after evaluation by Dr. Olson. Ms. Cortis anticipated a reemployment plan might be developed after Mr. Quimiging completed a work-hardening program and the school reopened.[65]

On May 7, 2021, Ocean Beauty faxed a letter to the medical office of Madelaine Aquino, M.D., in California, asking if she would evaluate Mr. Quimiging for pain management and if she would bill Liberty Mutual.[66] On May 10, 2021, her office confirmed Dr. Aquino's ability to evaluate Mr. Quimiging for pain management and to bill Liberty Mutual.[67]

At hearing on May 18, 2021, Mr. Quimiging's attorney mentioned that Mr. Quimiging did not speak English, but spoke Tagalog.[68] His daughter helped with

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62 R. 1307-1309.

63 R. 1310-1311.

64 R. 2180-2184.

65 R. 1305.

66 R. 1964.

67 R. 1964.

68 May 18, 2021, Hr'g Tr. at 5:19 – 6:2, 37:3-7.

going to doctors, making appointments, and managing his bank account. None of the California doctors he and his daughter spoke with would agree to treat his work injury, and his personal physician would not provide a referral.[69] He, through his attorney, contended it was unknown if Dr. Aquino reviewed Mr. Quimiging's records before agreeing to see him, was familiar with CRPS, or performed impairment ratings under the correct American Medical Association's Guide to Impairment Ratings.[70]

On June 25, 2021, *Quimiging I* granted Mr. Quimiging's petitions and ordered Ocean Beauty to pay TTD benefits from February 24, 2021, and continuing, interest on past due TTD benefits from February 24, 2021, until paid and current, penalties on TTD benefits, reasonable and necessary medical and transportation benefits, including NCM services, a second evaluation by an orthopedic surgeon, pain management evaluation and treatment, a work-hardening program, a PPI rating by a hand surgeon at medical stability, transportation costs, and to provide treatment and related transportation costs in Alaska. It also granted Mr. Quimiging's request for a finding of frivolous or unfair controversion and referral under AS 23.30.155(o) to the Division of Insurance.[71]

On July 9, 2021, Ocean Beauty timely requested reconsideration and modification and contended *Quimiging I* decided issues not set for hearing, considered evidence not in the record, ignored relevant evidence, and incorrectly analyzed the stipulation language and medical stability. It submitted new evidence it contended should be considered and requested an oral hearing on its requests. The new evidence included emails between Ocean Beauty's attorney and Ms. Hanson. Ocean Beauty also included a copy of the timeline it read into the record at the May 18, 2021, hearing.[72]

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[69] May 18, 2021, Hr'g Tr. at 24:5 – 25:4, 38:20-24, 47:18-24, 49:21-24, 52:5-12, 55:24 – 56:4, 56:12-21.

[70] May 18, 2021, Hr'g Tr. at 60:10-15; Sept. 7, 2021, Hr'g Tr. at 68:14 – 69:12.

[71] *Quimiging I* at 27-28, Nos. 2-7.

[72] R. 1802-2090.

On July 23, 2021, *Quimiging II* granted Ocean Beauty's petition for reconsideration and modification to toll the appeal time and for additional oral argument and briefing.[73]

On July 29, 2021, Mr. Quimiging's counsel filed and served an affidavit stating:

> October 26, 2020 conversation with [Employer's attorney]. We kicked around various ideas related to this case. I pointed out that they had not continued paying for a nurse case manager notwithstanding my requests. I pointed out that I had been unable to find a pain doctor in California who would treat him and I had not been able to even find an industrial position/clinic who would provide treatment. She wondered if Dr. Gray would be willing to make a referral to a local pain doctor for treatment of his pain. I suggested that would be a good idea and that I will give him a call and see if I can find out if that is reasonable suggestion. . . .[74]

On August 31, 2021, Ocean Beauty contended Mr. Quimiging's evidence supported its position that he did not request or approve further NCM services and instead took it upon himself to find treatment for seven months. Ocean Beauty contended that due to limitations on ex parte communications in litigated cases, any authorization for an NCM had to be in writing. It requested an order allowing an NCM ex parte communication with Mr. Quimiging's treating physicians for the life of the claim and all future medical care. Ocean Beauty's exhibit contained a fee entry for Ocean Beauty's attorney on October 26, 2020, for a telephone call with Mr. Quimiging's attorney regarding the "status of claim, medical care delay and resolution of issues."[75]

Also, on August 31, 2021, Mr. Quimiging agreed language regarding a "second evaluation by an orthopedic surgeon" should be removed from *Quimiging I* because he did not request it. He also proposed modifying *Quimiging I* to allow for medical treatment in California if available. In all other regards, he opposed Ocean Beauty's request for modification and reconsideration.[76] On September 1, 2021, Ocean Beauty requested Mr. Quimiging's counsel's July 28, 2021, affidavit and exhibit be stricken because the

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[73] *Quimiging II* at 5-6.

[74] R. 2113-2115.

[75] R. 2189-2194.

[76] R. 2117-2184.

hearing record had closed, and he provided no reason why it was not produced at the time of hearing.[77]

At the September 7, 2021, hearing, Mr. Quimiging agreed to find Dr. Aquino qualified to provide the services he needs for pain management. He accepted Dr. Aquino as his pain management physician in California and authorized her to evaluate and treat his work injury.[78]

The Board issued *Quimiging III* on September 30, 2021, and modified *Quimiging I*, but the Board declined to reconsider its findings regarding medical stability, penalties under AS 23.30.155(e), and referral to the Division of Insurance under AS 23.30.155(o). The Board did reconsider interest and held that Ocean Beauty was not ordered to pay interest on past TTD until paid and current. The Board acknowledged that Ocean Beauty had paid .041(k) benefits from February 24, 2021, and, therefore, ordered Ocean Beauty to pay Mr. Quimiging the difference between the .041(k) benefits and the owed TTD benefits. The Board modified its order on medical benefits to require Ocean Beauty to pay "for reasonable and necessary medical and transportation benefits, including NCM services to provide [Mr. Quimiging] with rehabilitative treatment, pain management evaluation and treatment with Dr. Aquino, and a PPI evaluation at medical stability and work-hardening by Dr. Aquino . . . in California, or if a qualified provider is unavailable in California, by a qualified provider in Alaska."[79] The Board also stated that pain is subjective in that it is individually experienced and is self-reported by an injured worker. A reduction or increase in subjective pain levels may be quantitatively measured by measuring reductions or increases in functionality.[80]

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77 R. 2196.

78 Sept. 7, 2021, Hr'g Tr. at 68:14 – 69:18.

79 *Quimiging III* at 32, Nos. 2-6.

80 *Id.* at 15, No. 62.

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.[81] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[82] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[83]

The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.[84] The Board's conclusions with regard to credibility are binding on the Commission since the Board has the sole power to determine credibility of witnesses.[85]

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but exercises its independent judgment.[86] Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.[87]

4. Discussion.

The Board, in *Quimiging I*, found that Mr. Quimiging was not medically stable as his treating doctor had recommended pain management which might improve Mr. Quimiging's function in his left hand. Based on this finding, the Board also awarded

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81 AS 23.30.128(b).

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

83 *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984).

84 AS 23.30.122.

85 AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013); *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

86 AS 23.30.128(b).

87 *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

TTD from February 24, 2021, and ongoing until Mr. Quimiging did reach medical stability. In *Quimiging III*, the Board recognized that Ocean Beauty had been paying .041(k) stipend benefits during this time, and so revised its order to require Ocean Beauty to pay the difference between TTD and .041(k) stipend benefits. The Board, in *Quimiging I*, also found that Ocean Beauty had improperly relied on Dr. Gray's statements concerning medical stability because he also stated Mr. Quimiging's condition might improve with pain management treatment, thereby rendering his opinions confusing and unreliable. Thus, the Board found that Ocean Beauty's controversion was unfair and frivolous and referred Ocean Beauty's insurer to the Division of Insurance.

In *Quimiging III*, the Board reversed its award of interest on the unpaid difference between TTD and .041(k) benefits until the benefits are due and payable because interest was not listed as an issue in the prehearing conference summary (PHCS). *Quimiging III* affirmed the order for Ocean Beauty to provide ongoing NCM services because Mr. Quimiging's language skills were impeding his ability to find medical care in California. However, in *Quimiging III*, the Board accepted the parties' agreement that Dr. Aquino, a pain management specialist who speaks Tagalog, would treat Mr. Quimiging in California where he lives with his family. This finding obviated the need to bring Mr. Quimiging to Alaska for ongoing treatment.

Ocean Beauty appealed *Quimiging III*, the decision on reconsideration of *Quimiging I*. In order to review properly *Quimiging III*, the Commission also reviewed *Quimiging I* in order to understand the issues on appeal.

a. Nurse case manager.

The Board, in *Quimiging I*, ordered Ocean Beauty to provide what both parties called a nurse case manager to assist Mr. Quimiging in finding a pain management specialist in California who would provide him with the care he needed.[88] Ocean Beauty asserts this amounted to the Board ordering it to direct the pain management specialist

[88] The Commission notes that Liberty Insurance Corporation is a national insurance company with resources across the country. As such, it is in a better position than Mr. Quimiging for locating treating physicians in California who would accept Alaska Workers' Compensation benefits for providing medical care to Mr. Quimiging.

in how to treat Mr. Quimiging. Ocean Beauty further contends it is always in an employer's discretion when and how to employ an NCM and, therefore, the Board erred in ordering it to employ an NCM for the benefit of Mr. Quimiging. Ocean Beauty asserts use of NCMs is an employer's choice, is a cost of administering a claim, and is not a medical benefit to an employee.

Ocean Beauty relies on several decisions, both Board decisions and decisions from other jurisdictions, which denied an employer the right to recover expenses for NCMs from a third party. These cases held that these expenses were administrative costs, not medical services. None of these cases are binding on the Commission and, more importantly, are not pertinent to the issue here. The cases cited all involved situations where an employer hired an NCM to report to the employer how the employee was progressing in the course of the employee's recovery from a work injury. All the NCMs hired were to benefit the employer and were not retained to assist the employee in finding and receiving medical care. Therefore, the costs for these NCMs were not medical expenses for which an employee should have to reimburse the employer out of a third-party recovery.

Mr. Quimiging, on the other hand, asserts that provision of an NCM was agreed to in a stipulation and partial C&R. He contends Ocean Beauty agreed that Mr. Quimiging, due to his language skills and level of education, and location in California, was having difficulty finding appropriate medical treatment, and Ocean Beauty agreed it could supply some expertise. Mr. Quimiging points to the assistance provided by an NCM which resulted in his obtaining treatment at St. Joseph's Medical Center from April to August 2019.[89]

Ocean Beauty asserts that it provided the NCM as required by the stipulation and only discontinued the services once Mr. Quimiging had located a hand surgeon and the occupational therapy he needed. Ocean Beauty further contends that stipulation limited the services of the NCM to finding a hand surgeon and occupational therapist. These services, according to Ocean Beauty did not include finding a pain management specialist,

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[89] *See, Quimiging I* at 6, No. 13.

arranging for a PPI rating, or locating a work-hardening program. Ocean Beauty asserts the Board erred in ordering additional NCM services because these services are not medical benefits provided for in the Act.

The Board relied on the language in the stipulation which stated:

> Going forward, the employer agrees to pay reasonable and necessary future medical and transportation benefits to include the employment of a nurse case manager who will work with the employee and his attorney in an effort to locate a hand surgeon and occupational therapist for the purpose of providing the employee with rehabilitative treatment for the employee's injured left hand.

The Act provides for medical services in two different statutes. At AS 23.30.095(a), the Act states:

> The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.[90]

The Act continues:

> If the employee is unable to designate a physician and the emergency nature of the injury requires immediate medical care, or if the employee does not desire to designate a physician and so advises the employer, the employer shall designate the physician. Designation under this subsection, however, does not prevent the employee from subsequently designating a physician for continuance of required medical care.[91]

The Act also defines medical care at AS 23.30.395 as follows:

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[90] AS 23.30.095(a).

[91] AS 23.30.095(b).

> "medical and related benefits" *includes but is not limited* to physicians' fees, nurses' charges, hospital services, hospital supplies, medicine and prosthetic devices, physical rehabilitation, and treatment for the fitting and training for use of such devices as may reasonably be required which arises out of or is necessitated by an injury, and transportation charges to the nearest point where adequate medical facilities are available[.][92]

AS 23.30.095(a) provides that an "employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service . . . for the period which the nature of the injury or the process of recovery requires. . . ."[93] This list is neither exhaustive nor exclusive in the kind of treatment and care an employer may be required to furnish an injured worker.

According to *Larson's*, the question is whether the services sought are medically necessary and causally connected to the injury, i.e., "reasonable and necessary to treat the work injury."[94] Incidentals such as nursing care, medicines, and others have been ordered when the need is causally connected to the injury.[95] For example, the Alaska Supreme Court (Court) has approved payment for a hot tub and a queen-sized therapeutic bed because the employee's doctors testified that the cost, to a point, was necessary for treatment of the low back.[96] In another jurisdiction, attendant care was approved.[97] What constitutes medical benefits can cover a wide range of services and apparatus necessary for recovery.

The language in AS 23.30.095 does not limit the kind of services an employer must provide to an injured worker. The statute requires an employer to "provide medical . . . and other attendance" as the injury requires. The enumerated list is not intended to be

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92 AS 23.30.395(26) (emphasis added).

93 AS 23.30.095(a).

94 8 *Larson's Workers' Compensation Law*, § 94.03 (2020).

95 8 *Larson's Workers' Compensation Law*, § 94.03 at 94-37 (2020).

96 *See, Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 963 (Alaska 1998).

97 *See, Wee Wisdom Montessori Sch. v. Vickers*, 584 So.2d 132 (Fla. Dist. Ct. App. 1991).

exclusive. In this case, the NCM was being hired to benefit Mr. Quimiging due to his limited English language skills in getting the necessary medical treatment.

Moreover, in the stipulation (and the partial C&R) Ocean Beauty agreed to the inclusion of an NCM by agreeing to language stating "reasonable and necessary future medical and transportation benefits to include the employment of a nurse case manager who will work with the employee and his attorney in an effort to locate a hand surgeon and occupational therapist for the purpose of providing the employee with rehabilitative treatment for the employee's injured left hand."[98] Ocean Beauty's argument now that an NCM in this situation is not a medical benefit does not stand. Ocean Beauty already agreed to the inclusion of an NCM as a part of medical benefits it would pay for or on behalf of Mr. Quimiging. The Commission is aware that ordinarily when an employer hires an NCM it is for the employer's benefit. However, here, Ocean Beauty has agreed that in this situation an NCM was a medical benefit.

The additional question at hearing was whether having agreed once to employ an NCM, Ocean Beauty could end those services without requesting Board approval. The Board answered by saying Ocean Beauty could not. The Board also then ordered ongoing NCM services to ensure that Mr. Quimiging received the medical attention recommended by Dr. Gray. Ocean Beauty did not dispute the recommended treatment, only the use of the NCM to help Mr. Quimiging obtain it. Ocean Beauty also asserts that in ordering the ongoing use of the NCM the Board ordered it to direct Mr. Quimiging's medical care contrary to Commission and Court decisions.

In *Millar v. Young Life*, the Commission held that any controversion placed a matter in litigation and, thus, an employer's ex parte contact with a treating physician could only be with the employee's permission.[99] This decision was in follow-up to the Commission's

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[98] *Quimiging I* at 5, No. 10.

[99] *Millar v. Young Life*, Alaska Workers' Comp. App. Comm'n Dec. No. 281 (June 3, 2020).

decision in *The Home Depot, Inc. v. Holt* where the Commission stated ex parte contact with a treating doctor is prohibited once a claim is in litigation.[100]

The Board's order to fund an NCM did not require Ocean Beauty to direct Mr. Quimiging's treatment. It required Ocean Beauty to pay for the services of an NCM to assist Mr. Quimiging in finding a doctor in California who could provide, if necessary, the medical treatment recommended by Dr. Gray, his treating doctor in Alaska. This order is supported by the evidence in the record that Ocean Beauty had agreed in the stipulation to such a provision, that the services of the NCM had been useful in finding occupational or physical therapy for Mr. Quimiging in the past, and that neither Mr. Quimiging nor his attorney had been successful in locating a pain management doctor in California near his residence. This is substantial evidence in the record as a whole that the use of an NCM was a necessary part of the medical benefits needed by Mr. Quimiging. The use of the NCM in this case is unique in that the NCM services were not retained by Ocean Beauty for its own benefit, but rather the NCM was retained specifically and solely for the benefit of Mr. Quimiging. The use of the NCM here did not give Ocean Beauty either the obligation to direct medical care or the right to ex parte contact with his treating physicians. Further, the use of the NCM here is based on the agreement of Ocean Beauty in the stipulation and partial C&R. In this case, use of an NCM is a medical benefit inuring to the benefit of Mr. Quimiging. The Board's order is affirmed.

b. Was Mr. Quimiging medically stable?

Ocean Beauty claims Mr. Quimiging was medically stable when Dr. Gray stated he was. Furthermore, the stipulation was self-executing because it provided for payment of TTD only to the point of medical stability.

Mr. Quimiging claims he was not medically stable because Dr. Gray recommended additional pain management to improve his function. "I think what he needs is multi-modal treatment, which involves pain management, to help him accelerate and improve

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[100] *The Home Depot, Inc. v. Holt*, Alaska Workers' Comp. App. Comm'n Dec. No. 261 (May 28, 2019).

his progress with therapy."[101] However, Dr. Gray also stated that he had not seen any change in his condition over six months. He then stated that Mr. Quimiging was medically stable.[102] He did modify this stability by stating "So it's tough to say that he was medically stable from the fact that there are some other treatment options, but medically stable as in nothing changed after some therapy. . . ."[103] Dr. Gray later stated "I think if we can get rid of the pain, then we can get rid of some of the avoidance of use of the extremity, thereby increasing the functional capacity of said extremity."[104] He added, "At this point, I don't see any improvement, and I would say until a pain management specialist actually sees him and actually tries stuff, I don't know – I don't think we are going to see improvement."[105]

The Board held that while Dr. Gray did say Mr. Quimiging was medically stable as of January 14, 2020, he added that it did not make sense to say that because Mr. Quimiging needed additional medical treatment after which he anticipated that Mr. Quimiging's function would improve with pain reduction. The Board held that Ocean Beauty should not have relied on part of Dr. Gray's statement as substantial evidence of medical stability because the rest of Dr. Gray's statement demonstrated that his opinion was not substantial evidence of medical stability.[106]

The Act provides a very specific definition of medical stability. AS 23.30.395 states:

> "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability *shall be presumed in the absence of objectively*

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101 Gray Dep. at 13:23-25.

102 *Id.* at 26:4-10.

103 *Id.* at 26:22-25.

104 *Id.* at 35:7-10.

105 *Id.* at 45:5-9.

106 *Quimiging I* at 24.

> *measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence*[.][107]

The Act further provides that TTD may not be paid after the date of medical stability:

> In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. *Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.*[108]

The Court has addressed medical stability on several occasions. In *Thoeni v. Consumer Electronic Services*, the Court ruled that Ms. Thoeni was not medically stable because surgery was recommended and she improved after the recommended surgery was performed.[109] The Court held that predictions of medical stability were not substantial evidence upon which the Board could reasonably rely.

The Court, in *Alyeska Pipeline Service Company v. DeShong*, discussed whether the employee had produced clear and convincing evidence that she was not medically stable during the time in dispute.[110] The Court discussed that medical stability is the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment.[111] In *DeShong*, the treating doctor had consistently recommended evaluation by a specialist along with surgery. The Board concluded, and the Court agreed, that the recommendations for surgery along with the recommendation for a second opinion were clear and convincing evidence that Ms. DeShong was not medically stable.[112]

In *Grove v. Alaska Construction and Erectors*, the Court stated that, "A claimant's own doctor's conclusion that he is medically able to work is 'such relevant evidence as a

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107 AS 23.30.395(28) (emphasis added).

108 AS 23.30.185 (emphasis added).

109 *Thoeni v. Consumer Elec. Servs.*, 151 P.3d 1249, 1256 (Alaska 2007).

110 *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003) (*DeShong*).

111 *Id.*

112 *Id.*

reasonable mind might accept as adequate to support a conclusion.'"[113] Here Dr. Gray stated more than once, relying on the statutory definition of presumption of medical stability after forty-five days of no change or improvement, that Mr. Quimiging was medically stable. As quoted above, Dr. Gray was not entirely convinced Mr. Quimiging was indeed medically stable because he needed additional treatment. Dr. Gray qualified his opinion that a finding of medical stability was not proper to Mr. Quimiging because he thought Mr. Quimiging would benefit from pain management therapy which might improve his function, and that pain reduction would certainly improve his ability to use his left hand. Dr. Gray's opinion was at best confusing on the issue of medical stability and the Board's opinion that Ocean Beauty should not have relied on it is supported by the evidence in the record. Based on *DeShong*, Mr. Quimiging could not be considered to be medical stable until he received the medical treatment recommended by Dr. Gray.

Moreover, Ocean Beauty was aware of Dr. Gray's recommendations and of the problems Mr. Quimiging was encountering in trying to find a treating doctor in California. Mr. Quimiging's attorney wrote to both the adjuster and Ocean Beauty's attorney seeking assistance in finding a treating doctor in California.[114] To no avail. In *DeShong*, the Court found the employee was not medical stable from the delay in getting surgery and in getting a second opinion. The Board had noted in *DeShong* that "the combination of the employer's delay in providing an evaluation for the surgery and the final outcome of the surgery produced clear and convincing evidence of no medical stability."[115] The situation for Mr. Quimiging is similar to the situation in *DeShong.*

Ocean Beauty contends that Mr. Quimiging did not overcome the statutory presumption of medical stability with clear and convincing evidence because Dr. Gray recommended the pain management treatment to improve functionality. Ocean Beauty claims that improvement of functionality does not change the underlying condition and, therefore, does not support a finding that Mr. Quimiging was not medically stable until

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113 *Grove v. Alaska Constr. and Erectors*, 948 P.2d 454, 458 (Alaska 1997).

114 *Quimiging I* at 7, Nos. 17-20.

115 *DeShong*, 77 P.3d at 1233.

he got the recommended treatment. Ocean Beauty contends that improvement in functionality is not an improvement in the underlying condition and, thus, should not be considered when determining if Mr. Quimiging is medically stable.

However, it is the lack of functionality that impedes Mr. Quimiging's recovery from the work injury and prevents him from working or participating in the reemployment process. Improvement in his functionality is part of his recovery from the work injury. As in *Tobar v. Remington Holdings LP*, Mr. Quimiging was willing to participate in the recommended medical treatment and Ocean Beauty was aware of his difficulty in finding a doctor in California to take Alaska workers' compensation benefits.[116]

The Board's award of ongoing TTD benefits until Mr. Quimiging is able to be treated by a pain management specialist and has an opportunity to improve his functionality and reduce his pain is supported by substantial evidence in the record. The Board's decision on TTD (reduced by the payments already made to Mr. Quimiging under .041(k)) is affirmed.

c. Was a Board order required before termination of TTD benefits?

Does the language in the stipulation and partial C&R require a Board order prior to cessation of payment of TTD when the stipulation and the partial C&R both state TTD benefits will cease upon medical stability? The Board found that Ocean Beauty had frivolously and unfairly controverted payment of TTD to Mr. Quimiging when it converted payment of TTD to .041(k) benefits when Dr. Gray, in deposition, indicated Mr. Quimiging was medically stable if he did not receive additional pain management treatment and/or did not improve his functionality following such treatment. As noted above, the Act mandates that TTD "may not be paid for any period of disability occurring after the date of medical stability."[117]

The stipulation stated, "The employer further agrees to payment of ongoing TTD benefits at the weekly rate of $285.58 until the employee is medically stable."[118] The

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116 *Tobar v. Remington Holdings LP*, 447 P.3d 747, 756 (Alaska 2019).

117 AS 23.30.185.

118 R. 738-740.

partial C&R also stated, "[t]he employer will continue TTD benefits at the weekly rate of $285.58 until the employee's condition reaches medical stability."[119] Ocean Beauty contends this language is self-executing and it properly terminated TTD benefits based on Dr. Gray's statement that Mr. Quimiging was medically stable as of January 14, 2020. Unfortunately, neither document addresses how it would be determined that Mr. Quimiging had reached medical stability.

In *Harris v. M-K Rivers*, the Court stated, "[w]e have held that 'the employer or insurer must petition the Board for rehearing or modification of its order on the basis of "a change in conditions"' if payments are being made pursuant to a Board order."[120] Here, the parties entered into a stipulation which was further documented by a partial C&R, both of which were approved by the Board.[121] Approval by the Board amounts to a Board order regarding the contents of both the stipulation and the partial C&R. Under *Harris*, this means that a hearing before termination of at least TTD benefits is required.

Ocean Beauty contends that the language "until the employee's condition reaches medical stability" makes the documents self-executing and, thus, exempt from the need for a further Board hearing and order. Mr. Quimiging asserts that to terminate benefits without a Board order is a bad faith controversion because a claimant is entitled to be heard as to why the benefits should not be terminated. A claimant has a due process right to be heard in a meaningful manner and have an opportunity to explain why he is not medically stable.[122]

It might appear that the language in the stipulation and partial C&R regarding cessation of TTD benefits is self-executing given the statutory language that TTD may not be paid "for any period of disability occurring after the date of medical stability."[123]

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119 R. 745-756.

120 *Harris v. M-K Rivers*, 325 P.3d 510, 522 (Alaska 2014) citing *Underwater Constr., Inc. v. Shirley*, 884 P.2d 156, 1611 (Alaska 1994) (*Harris*).

121 R. 738-740, 745-756.

122 *Rusch v. Southeast Alaska Reg'l Health Consortium*, 453 P.3d 784, 800 (Alaska 2019).

123 AS 23.30.185.

However, neither the statute nor the stipulation or partial C&R provide clarification as to what basis will be used to determine medical stability: statement of treating doctor? statement of EME doctor? forty-five days without objective measurable improvement even if additional medical care is recommended? This lack of clarity makes the finding of medical stability ambiguous and subject to contention and disagreement.

As the case here demonstrates, the evidence of medical stability was not clear when Ocean Beauty terminated TTD benefits. This is demonstrated by Dr. Gray's testimony that Mr. Quimiging was medically stable only because there had been no change in his condition, due in part to the fact that he had not received the recommended medical treatment. Dr. Gray was also confident Mr. Quimiging's condition would change if he had access to the recommended pain management treatment. The statute provides that medical stability is presumed when "objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care. . . ."[124] Dr. Gray prescribed additional medical care to see if the pain in Mr. Quimiging's hand and his lack of function could be improved. Improvement in function would seem, contrary to the assertions of Ocean Beauty, to be an important component of the process of recovery. Although Ocean Beauty relied on Dr. Gray's statement of medical stability, it ignored his other statements about the need for pain management treatment which might make Mr. Quimiging's hand useable and enable him to return to work. Dr. Gray's statement about medical stability was far from being unequivocal.

Unless the Board order is specific as to how the determination of medical stability is to be made, the logical and sensible procedure, which best protects the injured worker's rights, is to require the employer to seek Board approval prior to terminating TTD benefits. The Board's finding that a hearing was required before terminating benefits ordered by approval of the stipulation and the partial C&R is affirmed.

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[124] AS 23.30.395(28).

d. Penalties.

Ocean Beauty asserts the Board erroneously assessed two separate penalties because the issues of both an unfair controversion and penalty on late-paid benefits were not listed in the PHCS which controls the issues for hearing.[125] However, the PHCS did list "Penalty" as an issue for hearing.[126] Ocean Beauty was on notice that Mr. Quimiging would be pursuing the issue of a penalty and, therefore, was on notice to be prepared to address why a penalty was not due and owing. Ocean Beauty also asserts that it should not be penalized because it did not deny medical treatment nor the use of an NCM.

AS 23.30.155 provides that a penalty for a late payment is automatic.

> 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.[127]

The Board found that TTD should have continued to be paid to Mr. Quimiging because he was not medically stable in January 2021 as Ocean Beauty contended in its controversion. The Board found ongoing TTD was due and owing. Since Ocean Beauty only paid .041(k) benefits, the automatic penalty on the unpaid portion of the benefits is due.

The Act further provides that if the Board finds that an employer's insurer unfairly or frivolously controverted a claim, it must report the insurer to the Division of Insurance for a determination if the insurer violated an unfair claim settlement practice.

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[125] *See, Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981); *Schouten v. Alaska Indus. Hardware*, Alaska Workers' Comp. App. Comm'n Dec. No. 094 at 4-5 (Dec. 5, 2008).

[126] R. 2803-2807; Ocean Beauty's Opening Brief at 29.

[127] AS 23.30.155(e) (emphasis added).

> The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.[128]

In *Harp v. ARCO Alaska, Inc.*, the Court held that controversions were in bad faith when an adjuster did not have adequate information at the time of the controversion to support the controversion.[129] "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence . . . 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."[130]

The testimony by Dr. Gray was equivocal at best. He said Mr. Quimiging was medically stable, but then asserted he was not if he got the recommended medical treatment. The test in *Harp* is that the evidence behind a controversion is such that the Board could base a finding that an injured worker was not entitled to benefits if no other evidence was introduced. This statement could not be made of the evidence of medical stability because this evidence was equivocal at best. Dr. Gray did say Mr. Quimiging was medical stable because there had been no improvement, but he then added this was due to the fact that Mr. Quimiging had not been able to get the recommended medical treatment. If he received the recommended medical treatment his condition might very well change and his functionality improve. This is not the kind of evidence which standing alone would entitle an employer to a finding that no additional benefits are due to an employee. The Board was correct in finding the termination of TTD benefits was a bad faith controversion.

e. Quimiging III.

The Board, in *Quimiging III*, rendered moot Ocean Beauty's disputes about the award of interest and the need for a second opinion. That is, in *Quimiging III*, the Board

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128 AS 23.30.155(o).

129 *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 355 (Alaska 1992) (*Harp*).

130 *Id.* at 358.

agreed that Ocean Beauty did not owe interest on past due TTD until those benefits were paid and current.[131] The Board also recognized that Ocean Beauty had been paying .041(k) benefits and revised its order from *Quimiging I* to require Ocean Beauty to pay to Mr. Quimiging the difference between the .041(k) benefits and the TTD benefits it had ordered.[132] The Board further modified its order on medical benefits and awarded "reasonable and necessary medical and transportation benefits" including rehabilitative treatment, pain management with Dr. Aquino, a PPI evaluation at medical stability, and work-hardening.[133] These points on appeal by Ocean Beauty that raised questions about the benefits awarded in *Quimiging I*, but were reconsidered by *Quimiging III*, are no longer in dispute and are, therefore, not addressed by this decision.

f. Medical benefits awarded.

Ocean Beauty contends the Board improperly ordered a work-hardening program and a PPI evaluation when Mr. Quimiging is medically stable because these were not specifically identified on the PHCS which controls issues for hearing. It further asserts it had not controverted any medical benefits.

According to Ocean Beauty's opening brief, the PHCS listed medical costs as an issue. Work-hardening was recommended by Dr. Gray as important before Mr. Quimiging participated in any rehabilitation plan.[134] It was discussed in his deposition. Work-hardening programs are medical costs. A PPI rating is required if an injured worker is to be eligible for retraining.[135] Mr. Quimiging was in the eligibility for reemployment process and Ocean Beauty had contended he was medically stable. Thus, a PPI evaluation was a necessity at some point.

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131 *Quimiging III* at 32, No. 4.

132 *Id.*, No. 5.

133 *Id.*, No. 6.

134 Gray Dep. at 17:16-20, 46:12-19.

135 AS 23.30.041(e).

Both the need for work-hardening and for a PPI evaluation were not a surprise to Ocean Beauty and are a part of medical costs. The Board did not err in awarding these medical costs.

g. Issues waived or evidence not in record before the Board.

Ocean Beauty, in its opening brief, referenced treatment by Dr. Aquino beginning August 9, 2021. *Quimiging I* was issued June 25, 2021, and *Quimiging III* was issued September 30, 2021. At neither hearing were the medical records of Dr. Aquino before the Board. The Commission does not consider these records in reaching this decision.

"The matter on appeal shall be decided on the record made before the board . . . and written briefs allowed by the commission. Except as provided in (c) of this section [dealing with stays, attorney fees, fee waivers, or dismissal of appeals], new or additional evidence may not be received with respect to the appeal."[136] Therefore, the Commission has not considered the information about treatment by Dr. Aquino.

Mr. Quimiging contends that the eleven points on appeal mentioned in Ocean Beauty's opening brief on pages 32-33 were not fully briefed and therefore, these contentions by Ocean Beauty must be deemed waived. Mr. Quimiging is correct that these items were not fully briefed and, pursuant to Court decisions, must be considered waived.[137] To the extent these points were included in the fully briefed arguments, however, they were considered by the Commission.

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[136] AS 23.30.128(a).

[137] *See, e.g., Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 fn. 3 (Alaska 1991); *Wright v. Anding*, 390 P.3d 1162, 1168 (Alaska 2017).

5. Conclusion.

The Board's decision is AFFIRMED.

Date: *4 October 2022* Alaska Workers' Compensation Appeals Commission

Signed
James N. Rhodes, Appeals Commissioner

Signed
Amy M. Steele, 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. 296 issued in the matter of *Ocean Beauty Seafoods, Inc. and Liberty Insurance Corporation v. Elizar Quimiging*, AWCAC Appeal No. 21-013, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 4, 2022.

Date: *October 6, 2022*

Signed
K. Morrison, Appeals Commission Clerk