Alaska Workers' Compensation Appeals Commission

Cache Camper Manufacturing and Republic Indemnity Company of America (RIG), Appellants, vs. John Thomas, Appellee.	Final Decision Decision No. 309 November 22, 2024 AWCAC Appeal No. 24-003 AWCB Decision No. 23-0078 AWCB Case No. 202301752

Final decision on appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 23-0078, issued at Anchorage, Alaska, on December 18, 2023, by southcentral panel members William Soule, Chair, and Randy Beltz, Member for Industry.

Appearances: Michelle M. Meshke, Meshke Paddock & Budzinski, P.C., for appellants, Cache Camper Manufacturing and Republic Indemnity Company of America (RIG); Robert J. Bredesen, Hillside Law Office, LLC, for appellee, John Thomas.

Commission proceedings: Appeal filed January 18, 2024; briefing completed August 19, 2024; oral argument was not requested.

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

By: Deirdre D. Ford, Chair.

1. Introduction.

Appellee, John Thomas, was injured on January 21, 2023, when the roof of a camper he was working on fell and hit him in the head while working for Cache Camper Manufacturing, insured by Republic Indemnity Company of America (RIG) (Cache Camper). Mr. Thomas filed workers' compensation claims on June 5, 2023, and August 11, 2023, requesting, in pertinent parts, reemployment stipend benefits, a penalty, interest, and a finding of frivolous or unfair controversion.

On December 18, 2023, the Alaska Workers' Compensation Board (Board) issued its decision awarding Mr. Thomas AS 23.30.041(k) stipend benefits (stipend benefits), a

penalty, interest, a finding of frivolous or unfair controversion, and a referral to the Division of Insurance.[1]

Cache Camper timely filed its appeal of this decision on January 18, 2024, on the issues of unfair and frivolous controversion and referral to the Division of Insurance.[2]

2. *Factual background and proceedings.*[3]

On April 4, 2023, adjuster Christina Miller notified the Division of Workers' Compensation (Division) that Mr. Thomas had been totally unable to return to his employment at the time of his injury for 45 consecutive days as a result of the injury. The notice stated the 45 consecutive days began on February 7, 2023.[4]

On May 17, 2023, 99 days after February 7, 2023, Dennis Chong, M.D., examined Mr. Thomas for an Employer's Medical Evaluation (EME). He diagnosed a work-related cranial contusion, and opined "disability" from this "should have ended within one week." Dr. Chong opined Mr. Thomas was medically stable, needed no further medical treatment, had "no ratable" permanent partial impairment (PPI), and "should be able to return to full duty work without restrictions." He concluded Mr. Thomas "is not disabled." When asked, "If Mr. Thomas is not able to return to work at this time, was his claim of workplace injury dated 01/21/2023 the substantial cause of his inability to work in his normal and customary occupation or is there an alternative explanation?" Dr. Chong said, "Not applicable." He did not say, "no" or state Mr. Thomas's "total inability to return to the

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[1] *Thomas v. Cache Camper Mfg.*, Alaska Workers' Comp. Bd. Dec. No. 23-0078 (Dec. 18, 2023) (*Thomas*).

[2] The Commission accepted Cache Camper's Notice of Appeal. However, *Thomas* is identified as an Interlocutory Decision and Order, which meant Cache Camper should have filed a Petition for Review. The Commission accepts the appeal as an appeal since the issues on appeal are discrete and final, and all remaining issues were resolved by a Compromise and Release Agreement.

[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. 0922.

employee's employment at the time of injury is not a result of the injury." He did say Mr. Thomas "should be able to return to full duty work without restrictions."[5]

By May 17, 2023, by Ms. Miller's own statement, Mr. Thomas had already been disabled from his work for 99 consecutive days.[6]

On May 19, 2023, Ms. Miller filed a form admitting Mr. Thomas had been totally unable to return to his employment for 90 consecutive days because of the work injury, and the 90 days began on January 27, 2023.[7] The Board found that Ms. Miller's May 19, 2023, Division-provided 90-day notice form was late.[8]

On May 22, 2023, Cache Camper paid Mr. Thomas temporary total disability (TTD) benefits for the last time. The Board found that it had not paid him any stipend benefits.[9]

On May 26, 2023, Cache Camper controverted "Reemployment Benefits" based on Dr. Chong's opinion, which said "the work injury would have resolved within 1 week post contusion." The Board found that Cache Camper added words not expressly written by Dr. Chong by stating, "the work injury was no longer the substantial cause of employee's disability or need for treatment." It echoed Dr. Chong's opinion that Mr. Thomas was no longer disabled and "should be able to return to work without restrictions." The denial notice did not differentiate between reemployment benefits payable to a reemployment specialist to conduct an eligibility evaluation, and stipend benefits payable to an injured worker under AS 23.30.041(k).[10] According to the Board, Cache Camper has paid all the bills submitted by the reemployment specialist.

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5 R. 0439-54.

6 *Thomas* at 3, No. 3.

7 R. 0926.

8 *Thomas* at 3, No. 5.

9 *Id.*, No. 6.

10 R. 0039-40; *Thomas* at 3, No. 7.

On May 29, 2023, the Division, based on payment information the insurer had provided, notified Mr. Thomas that Cache Camper had paid him TTD benefits for 91 days beginning January 24, 2023, through May 22, 2023. Cache Camper did not object.[11]

On June 1, 2023, the Division sent a letter advising it had received evidence that Mr. Thomas had "missed 90 consecutive days from work as a result" of his work injury. As "compensability" did "not appear to be in dispute," as required by law, the Reemployment Benefits Administrator (RBA) technician assigned Rehabilitation Specialist Daniel A. LaBrosse to complete an eligibility evaluation. Cache Camper did not object.[12] Also on June 1, 2023, the RBA technician emailed Ms. Miller that Mr. Thomas had been referred to Mr. LaBrosse for the evaluation. Again, Cache Camper did not object.[13] On June 5, 2023, in conformance with the RBA technician's letter, Ms. Miller sent Mr. LaBrosse the required documents to begin the eligibility evaluation.[14]

On June 5, 2023, Mr. Thomas, *pro se*, filed a June 2, 2023, claim for TTD benefits, temporary partial disability benefits, permanent total disability benefits, PPI benefits, and an unfair or frivolous controversion finding.[15]

On June 7, 2023, Ms. Miller emailed the RBA technician, without service on Mr. Thomas:

> There has been an error in assigning this claim for Voc Rehab: The employee has not been off work 90 consecutive days. He returned to work within the 90 days, and then was taken back off of work.
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> Please disregard with moving forward on this claim.
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> I apologize for the confusion.[16]

On June 7, 2023, the RBA technician emailed Mr. LaBrosse, Ms. Miller, and Mr. Thomas, stating:

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11 R. 0031-32.

12 R. 0927-29.

13 R. 0930-31.

14 R. 0935-1042.

15 R. 0048.

16 R. 1044.

> I have just been informed by Christina Miller, adjuster, that Mr. Thomas shouldn't have been referred out for an evaluation as he did not miss the required 90 days for an evaluation. Please stop work on this case.[17]

On June 14, 2023, Robert J. Bredesen entered his appearance for Mr. Thomas and wrote the RBA with Mr. Thomas's concerns about the RBA technician's June 7, 2023, email:

> He received an email from Ms. Charles that was sent to Specialist LaBrosse, instructing him to stop work on an eligibility evaluation. I write to follow-up on that. To begin with, I am not aware of any procedure to set aside an order under AS 23.30.041(c) other than an appeal to the Board, or a petition to modify.
>
> . . . .
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> Ms. Charles' email was in response to a communication with the adjuster, Christina Miller. Could I get a copy of that communication as well, and also be allowed an opportunity to respond? Ms. Miller apparently informed Ms. Charles that my client has not been unable to do the job at the time of injury for 90 consecutive days, which we disagree with. Thank you for your attention to this matter.[18]

On June 17, 2023, Ms. Miller sent a letter to Mr. LaBrosse with "copies of additional medical records for the reemployment eligibility evaluation in progress."[19]

On June 26, 2023, Cache Camper again controverted reemployment benefits in reliance on Dr. Chong's May 17, 2023, report. This time, the controversion included a contention that, "The employee's total inability to return to [the employee's] employment at the time of injury is not the result of the injury." The denial notice did not differentiate between reemployment benefits payable to the specialist performing the eligibility evaluation, and stipend benefits payable to Mr. Thomas.[20]

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17 R. 1043.

18 R. 0060, 1047.

19 R. 1048-53.

20 R. 0042-43 (*Martino v. Alaska Asphalt Servs., LLC*, Alaska Workers' Comp. App. Comm'n Dec. No. 304 (*Martino*) was issued on June 22, 2023).

On July 12, 2023, Michelle M. Meshke sent a transmittal letter to the RBA, which included the June 26, 2023, controversion.[21]

On July 25, 2023, Mr. Bredesen sent the RBA another letter:

> I recently obtained a copy of the Board file and, upon reviewing it, request that you please provide further instruction to the assigned reemployment specialist (Dan LaBrosse), to proceed with the already-ordered eligibility evaluation. I also anticipate that the employer will object, and would like to elaborate on my views regarding 90-day notices and their significance.
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> Within the Board file I found a written stipulation by the employer which admits that my client was entitled to an eligibility evaluation, pursuant to AS 23.30.041(c), as of late-April. Specifically, the insurer filed a 90-day notice. The standard 90-day form asks every employer: "Please advise if the employee has been off work for 90 consecutive days due to the date of injury. . . ." Here, the 90-day form, signed by the adjuster and filed with the Board on May 19, 2023, stipulated that "Yes, the employee has been off work since 01/27/23." The 90th day was April 27, 2023. Notably, the insurer has not petitioned the Board to set aside this written stipulation, under 8 AAC 45.050(f)(3). I further note that the employer paid TTD for more than 90-consecutive days, per the Compensation report dated May 2, 2029.
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> Next, based upon the employer's written stipulation, an order awarding reemployment benefits did in fact issue under AS 23.30.041(c), on June 1, 2023. Employer never appealed that order. Obviously, the employer could not have done so, because the only statutory requirement for entitlement to reemployment benefits under AS 23.30.041(c) is that an injured worker be "totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury," which the employer admitted. Under Regulation 8 AAC 45.522, certain types of controversions, if in place as of the 91st day, will prevent an award of benefits under AS 23.30.041(c). However, no such controversions were in place as of April 28, 2023.
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> Although the employer's *ex parte* communication succeeded in interrupting the eligibility evaluation, I note that the employer has continued to comply with the June 1st order. That order directed the adjuster to send medical records to the assigned reemployment specialist. On June 17th, 10 days after the email asking Specialist LaBrosse to pause his work in this case, the adjuster provided supplemental records to Specialist LaBrosse. This demonstrates that the employer understands that the reemployment process continues.

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[21] R. 1060-62.

> Finally, I noticed that the employer recently filed a controversion notice purporting to deny the benefits awarded on June 1st (again, the employer never appealed the June 1st order), and the employer also specifically served a copy of that controversion notice upon you. We regard that controversion as untimely for reemployment purposes, since Regulation 8 AAC 45.522 only applies when a determination gets made under AS 23.30.041(c), and that happened on June 1st.
>
> We therefore consider the recent controversion to be unlawful, pursuant to *Martino v. Alaska Asphalt Construction*, AWCAC Decision No. 304 (June 22, 2023). There, the employer filed a 90-day notice admitting liability for reemployment benefits, then an eligibility evaluation was ordered based upon that written admission. Just like the present case, the employer later controverted reemployment benefits based upon EME opinion that the employee could return to work. The Appeals Commission affirmed a Board award of a 25% penalty under those same circumstances, reasoning:
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> > Ms. Martino, by statute, was entitled to the eligibility evaluation because she had been off work for more than 90 days due to the work injury. Alaska Asphalt does not dispute this fact, nor could it, since it confirmed in March 2021 [via the 90-day notice] that she indeed had been off work for more than 90 days.
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> I further note that the Board has found similar post-referral controversions (i.e., based upon EME opinion) to be unfair and frivolous. See *Seamon v. Matanuska Susitna Borough School District*, AWCB Decision No. 02-0045 (March 8, 2002).
>
> Finally, in case you might be wondering, Mr. Thomas was briefly released to light duty by his doctor in April. The employer purported to offer a different employment to him within those restrictions (i.e., light duty), but when he arrived (on April 14, 2023) the work was not actually limited to light duty. Within a few hours he went to the hospital emergency room. He has been off work entirely since then. Thank you for your attention to this matter.[22]

On August 11, 2023, Mr. Bredesen amended Mr. Thomas's claim to include stipend benefits and other benefits.[23] On August 14, 2023, Ms. Miller sent Mr. LaBrosse another letter with additional medical records for the eligibility evaluation "in progress."[24] On

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[22] R. 1064-65.

[23] R. 0081.

[24] R. 1067-77.

August 25, 2023, Mr. Thomas requested an informal reemployment conference with the RBA to discuss his eligibility evaluation status.[25]

On August 28, 2023, the RBA wrote to the parties:

> On August 25, 2023 I received a request for an informal conference from employee attorney Robert Bredesen to discuss the status of John Thomas' eligibility evaluation. After review of the file I have determined that an informal conference will not be granted.
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> Our electronic file indicates that on May 19, 2023 the adjuster filed an Employer's Notice of 90 Consecutive Days of Time Loss for Injuries Occurring on or after November 7, 2005 form on this case. On May 26, 2023 a Controversion Notice was filed by adjuster Christina Miller. On June 1, 2023 the eligibility evaluation was referred to Rehabilitation Specialist Daniel LaBrosse. On June 7, 2023 Ms. Miller notified the parties that the 90 day notice was sent out in error and that Mr. Thomas had not missed 90 consecutive days of employment. Ms. Miller stated that Mr. Thomas had returned to work within the 90 days and was then taken back off work. An email was sent to Mr. LaBrosse to stop work on the case due to this information. The parties were copied on this email. On June 14, 2023 a phone message was left for Ms. Miller by Workers' Compensation Technician Darlene Charles requesting the exact consecutive days of time loss. A response was not received.
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> Records per regulation have been filed electronically by the adjuster on the following dates: 6/5/23, 6/19/23, 7/5/23, and 8/15/23 showing copy to Mr. LaBrosse, Mr. Thomas, and this office. Additionally, on July 25, 2023 employee attorney Robert Bredesen filed a letter stating that Mr. Thomas did not return to work in the job that he performed at the time of injury, stating it was a light duty job with restrictions.
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> After consideration of the above information I have determined that the eligibility evaluation shall move forward as it appears Mr. Thomas did miss 90 consecutive days of employment. Mr. LaBrosse is asked to continue work on the eligibility evaluation immediately.[26]

On August 31, 2023, Mr. LaBrosse issued a report concluding he could not make a recommendation until Mr. Thomas's attending physician responded to his inquiries.[27]

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[25] R. 1079.

[26] R. 1080-81.

[27] R. 1083-88.

On September 6, 2023, Cache Camper controverted all disability and PPI benefits, medical and related transportation costs, reemployment benefits including stipend benefits, an unfair or frivolous controversion finding, a penalty, interest, and attorney fees and costs. For the first time, Cache Camper included its contention that Mr. Thomas was not disabled for 90 consecutive days "regardless of causation."[28]

On September 7, 2023, Cache Camper wrote the RBA:

> You indicated that it appears that Mr. Thomas did miss 90 consecutive days of employment and requested Mr. LaBrosse proceed with the eligibility evaluation. I filed my entry of appearance on 6/14/23 and was unaware of the RBA-designee's voice mail to the adjuster requesting an itemization of time loss. I checked with Ms. Miller, and she does not have a record of receiving a voice mail and recalls that all of her communications were through email.
>
> I am attaching a list of payments issued to Mr. Thomas. The most consecutive days of time loss that he received was from 4/3/23 to 5/22/23, which is less than 60 days.
>
> I request reconsideration of whether the eligibility evaluation should move forward, with this information in mind.[29]

On September 18, 2023, the RBA responded to Cache Camper's September 7, 2023, letter:

> As the parties are aware employer attorney Michelle Meshke sent a letter on September 7, 2023 requesting reconsideration of whether the eligibility evaluation should move forward. I have reviewed the letter and the additional information provided by Ms. Meshke. As stated in my August 28, 2023 letter, the eligibility evaluation shall continue forward for the reasons I listed in my letter. Mr. LaBrosse is directed to continue his efforts to obtain the necessary information to bring this evaluation to a close.[30]

The Board found that to date, Cache Camper had not corrected any Electronic Data Interchange (EDI) filings to reflect alleged changes in benefits it paid to Mr. Thomas. It had not petitioned for any relief from the RBA's decision to proceed with the eligibility

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[28] R. 0045-46.

[29] R. 1090-91.

[30] R. 1094.

evaluation.[31] Further, the Board found that the agency's file contained no evidence that Cache Camper had denied payment to Mr. LaBrosse for his reemployment services rendered in this case.[32]

Mr. Thomas contended the RBA "awarded" him reemployment benefits in her June 1, 2023, letter, notwithstanding Cache Camper's late 90-day notice. He also contended that since Cache Camper did not appeal or petition for modification of this "award," he was entitled not only to the eligibility evaluation, but also to the associated stipend benefits because he had participated in the reemployment process vigorously. Mr. Thomas contended Cache Camper could not unilaterally controvert because he was entitled to stipend benefits as a matter of law. Consequently, he sought an award of stipend benefits from May 23, 2023, and continuing until the reemployment process was completed, a penalty, interest, and a finding that Cache Camper made a frivolous or unfair controversion. He also contended Ms. Miller's 90-day form and EDI data sent to the Division were binding "stipulations" that Mr. Thomas met the 90-day disability provisions in the Alaska Workers' Compensation Act (Act) and regulations. Mr. Thomas contended Cache Camper could not unilaterally avoid this stipulation. Mr. Thomas contended he was entitled to stipend benefits because he had been disabled under AS 23.30.041(c), was vigorously pursuing reemployment benefits, and was actively engaged in the reemployment process. As support for his position, he relied on *Martino*, *Carter*, and *Vandenberg*.[33]

Cache Camper, in opposition, contended the RBA's letter was not a "award" of compensation subject to appeal because there was nothing in the Act or regulations making it an "award," or providing for such an appeal from an eligibility evaluation referral. It contended there were numerous reasons why Cache Camper would move the

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[31] *Thomas* at 9, No. 32.

[32] *Id.*, No. 33.

[33] R. 0264-79; *Martino*, App. Comm'n Dec. No. 304; *Carter v. B & B Constr.*, Inc., 199 P.3d 1150 (Alaska 2008); *Vandenberg v. State*, Alaska Workers' Comp. App. Comm'n Dec. No. 240 (Sept. 14, 2017) (*Vandenberg*).

eligibility process forward and presumably finance it by paying Mr. LaBrosse's bills, but not have to pay stipend benefits to Mr. Thomas at the same time. For example, it contended the costs for the eligibility evaluation were far less than the costs for both the evaluation and stipend benefits. Cache Camper contended Dr. Chong's EME report and its May 26, 2023, controversion implicated an 8 AAC 45.510(b) exception, made applicable to 8 AAC 45.522(a) by reference. Specifically, while not initially using "magic words," which it contended are not required, Cache Camper contended Dr. Chong's report and its May 26, 2023, controversion effectively stated that Mr. Thomas's total inability to return to his employment at the time of injury was not a result of the work injury. Therefore, it contended the RBA should have referred the matter for a prehearing conference and a hearing. Notwithstanding the fact it voluntarily continued to presumably finance the eligibility evaluation, Cache Camper contended it had no legal obligation to pay Mr. Thomas stipend benefits. At hearing, it agreed no other 8 AAC 45.510(b) grounds apply, and it controverted Mr. Thomas's right to stipend benefits, in part, because in its view, Dr. Chong said Mr. Thomas's total inability to return to work was not the result of the injury. Cache Camper also contended Mr. Thomas was not disabled from his at-injury job for 90 consecutive days. Therefore, Cache Camper sought an order denying Mr. Thomas's claim for stipend benefits, a penalty, interest, and a frivolous or unfair controversion finding. It relied on 8 AAC 45.510(b), *Goodfellow*, *Lawhorne*, and *Martino*. However, Cache Camper's brief conceded that Mr. Thomas only returned to work for Cache Camper on light-duty accommodation, and did not return to his regular at-injury work.[34]

The Board awarded Mr. Thomas stipend benefits and found that Cache Camper had, in bad faith, filed an unfair and frivolous controversion, thus requiring the Board to refer it to the Division of Insurance.

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[34] R. 0190-203; *Goodfellow v. L. C. Wilson, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 09-0141(Aug. 14, 2009); *Lawhorne v. Alaska Garden & Pet Supply, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 06-0213 (July 28, 2006); *Martino*, App. Comm'n Dec. No. 304.

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.[35] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[36] "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."[37] 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.[38] The Board's conclusions with regard to credibility are binding on the Commission since the Board has the sole power to determine the credibility of witnesses.[39]

On questions of law and procedure, the Commission does not defer to the Board's conclusions but exercises its independent judgment.[40] Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.[41]

4. Discussion.

The Board awarded to Mr. Thomas, among other benefits, a penalty against Cache Camper for an unfair and frivolous controversion and, following statutory mandate, stated, "The Division's adjudications section will refer this decision to the Division Director

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35 AS 23.30.128(b).

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

37 *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).

38 AS 23.30.122.

39 AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013) (*Sosa de Rosario*).

40 AS 23.30.128(b).

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

for referral to the Division of Insurance pursuant to AS 23.30.155(o)." Cache Camper appealed these two orders to the Commission.

Although it did not appeal any of the other orders which were resolved by a Compromise and Release Agreement, Cache Camper asserts that underlying issues must be addressed before the Commission can find the controversion of reemployment benefits to be unfair and frivolous. Specifically, Cache Camper contends the issue to be resolved is exactly what language a controversion must contain in order to be in good faith and, in turn, what statements are required in the EME report in order for a controversion based on it to be fair and not frivolous. Cache Camper avers the Board erred in the finding that its two controversions based on Dr. Chong's report were unfair and frivolous and, thus, the Board's decision must be reversed. Cache Camper states the Board erred in finding the controversions unfair because the first controversion did not contain the precise language required by 8 AAC 45.510(b), and erred in finding that the second controversion was in bad faith because, while the controversion contained the required language from 8 AAC 45.510(b), the EME report upon which it was based did not contain explicit language from the regulation. That is, the EME report did not state that Mr. Thomas's total inability to return to his work at the time of injury was not a result of the work injury. Rather, that opinion may be surmised from a reading of the entire report. The Board found that the EME report needed to be more precise and that an employee should not have to guess whether the language was sufficient. Cache Camper seeks to reverse the finding of bad faith and subsequent referral to the Division of Insurance, contending the Board misread both the EME report and the *Martino* decision.[42]

Mr. Thomas, on the other hand, states that the only issue is whether the Board's finding that Cache Camper's controversions were unfair and frivolous, resulting in a referral to the Division of Insurance, was based on substantial evidence and the correct interpretation of the law. Mr. Thomas asserts the Board was correct in its decision, and the Board's order must be affirmed.

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[42] *Martino*, App. Comm'n Dec. No. 304.

Cache Camper admitted Mr. Thomas had been out of work for 90 days as a result of the work injury when it submitted the required form to the RBA, so asserting it is not in dispute. The form is not a stipulation because, although it is written, it is not signed by all parties. However, the form is an admission by the employer that the employee has been out of work for 90 days due to a work injury and is entitled to an eligibility evaluation. When the employer supplies the RBA with the prescribed form, it admits that the employee has been unable to return to the work at the time of injury for 90 days, and the RBA is required to start the evaluation process for reemployment benefits. The employee, if no other compensation is available, is entitled to stipend benefits during this process.[43]

The question of whether either or both of the two controversions were unfair and frivolous is a question of law since it involves the interpretation of the Act and the Board's regulations.[44]

a. Were Cache Camper's controversions unfair and frivolous?

The Board's regulation at 8 AAC 45.182(d)(1) provides that "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)[.]" 8 AAC 45.182(e) further states that "compensation due" includes medical and reemployment benefits.[45] AS 23.30.155(o) states, "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."[46]

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[43] *Vandenberg*, App. Comm'n Dec. No. 240; *Martino*, App. Comm'n Dec. No. 304.

[44] AS 23.30.128(b).

[45] 8 AAC 45.182(d) and (e).

[46] AS 23.30.155(o).

The regulation at 8 AAC 45.510(b) provides that the RBA shall consider a written request for an eligibility evaluation "unless the employer controverts on grounds the employee's injury did not arise out of and in the course of employment, on grounds the employee's total inability to return to the employee's employment at the time of injury is not a result of the injury. . . ."[47] The regulation at 8 AAC 45.522(a) states

> (a) For injuries occurring on or after November 7, 2005, if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation, unless the employer controverts on grounds identified under AS 23.30.022, 23.30.100, 23.30.105, and 23.30.250, or 8 AAC 45.510(b). If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference and hold a hearing in accordance with 8 AAC 45.510(b)."[48]

These two regulations must, in this circumstance, be read together.

Whether the precise language in 8 AAC 45.510(b) was required for a controversion to stop the evaluation process was discussed in *Martino*, which stated that the regulation is explicit as to the grounds for interrupting the evaluation process.[49] The regulation requires precise language for a controversion to be valid. Cache Camper understood *Martino* because it immediately filed a new controversion containing the exact language required by 8 AAC 45.510(b).

The first controversion, dated May 26, 2023, controverted "reemployment benefits" because the EME report stated Mr. Thomas's "work injury would have resolved within 1 week post contusion."[50] That controversion did not use the precise language of 8 AAC 45.510(b). Even though the second controversion contained the required language, the Board still found it to be an unfair and frivolous controversion because the EME report did not contain sufficient language for Mr. Thomas to reach the conclusion that Dr. Chong meant his total inability to return to work was not the result of the work

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47 8 AAC 45.510(b).

48 8 AAC 45.522(a).

49 *Martino*, App. Comm'n Dec. No. 304.

50 *Thomas* at 3, No. 7.

injury. Dr. Chong did not say what the controversion said he said. The Board found that for a controversion to be fair and not frivolous, the language in the controversion must be based on a medical report whose plain language and meaning comport with the language in 8 AAC 45.510(b). Cache Camper contends that if the entire report is read in total, one would understand that Mr. Thomas's total inability to return to work is not the result of the work injury.

The Alaska Supreme Court (Court), in *Harp v. ARCO Alaska, Inc.*, said, "[f]or 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 the claimant is not entitled to benefits."[51] Here, the Board found that the controversion, even though it quoted the regulation, was not supported by sufficient evidence because Dr. Chong did not actually say what the regulation says. Dr. Chong's report left Mr. Thomas speculating that his total inability to return to work was not caused by the work injury.

The Court, in *Vue v. Walmart Associates, Inc.*, defined a good faith controversion. A controversion must "fulfill the basic function of providing notice of what part of a claim is disputed" and must provide an explanation of coverage related to the facts that would enable an injured worker to discern what coverage exists.[52] The Board found that Dr. Chong's report did not come close enough to the language requirements of 8 AAC 45.510(b) to support the controversion. It was insufficient to stop the evaluation process and insufficient to inform the RBA to forward the matter for a prehearing conference and a hearing according to the regulations. The EME report was too imprecise.

The Court, in *Sosa de Rosario*, said a doctor's report did not have to use "magic words" "'in which the rights of injured workers should depend on whether a witness happens to choose a form of words prescribed by a court or legislature.' We have not required a physician's statement to include a specific term to prove an injured workers'

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51 *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

52 *Vue v. Walmart Assocs., Inc.*, 475 P.3d 270, 292 (Alaska 2020).

claim. . . .'"[53] Nonetheless, the employee should not be left guessing as to what the EME meant about the cause of his inability to return to work. Dr. Chung said Mr. Thomas was not disabled, but he did not reply to the question "If [employee] is not able to return to work at this time, was his claim of workplace injury . . . the substantial cause of his inability to work in his normal and customary occupation or is there an alternative explanation."[54] Rather Dr. Chong replied, "Not applicable." Had he answered the question, Mr. Thomas and the Board might have been able to reach a conclusion that this language was close enough. While it may not be necessary for an EME to state exactly the language in 8 AAC 45.510(b), the language must be close enough so that there can be no dispute that the EME meant that the employee's total inability to return to employee's work at the time of injury is not the result of the work injury.[55] Moreover, the employer asks the questions of the EME doctor, and the EME doctor should respond to the exact questions the employer asks. If the doctor does not, then the employer can always request that the doctor answer the question asked.

Cache Camper asserts the EME report did not need to use the specific language from the regulation as long as it is clear from the language that the employee's total inability to return to work is not the result of the work injury. This was a question for the Board to decide. The Board decided that what Dr. Chong said did not come close enough to support the controversion, which used the regulatory language even though Dr. Chong did not.

The question for the Commission is whether this is a correct interpretation of the existing law. The Board, in addressing this issue, came to the conclusion that Dr. Chung did not come close enough to "implicate" grounds in 8 AAC 45.510(b) because he did not state that Mr. Thomas's "total inability to return to the employment at the time of injury is not a result of the injury."[56] The Commission finds that substantial evidence in the

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53 *Sosa de Rosario*, 297 P.3d 139, 149.

54 *Thomas* at 22.

55 *Sosa de Rosario*, 297 P.3d 139, 150.

56 *Thomas* at 23.

record supports the Board's conclusion that the language of Dr. Chong's report was insufficient to support the controversion. While Dr. Chong said Mr. Thomas was not disabled, Dr. Chong did not address whether the work injury played any role in his inability to return to his work at the time of the injury. Therefore, the controversion was unfair and frivolous.

Moreover, the first controversion was unfair and frivolous because it did not reflect the language in the regulation. While denying Mr. Thomas the required stipend benefits, Cache Camper continued to pay the reemployment specialist, indicating it supported the eligibility evaluation process proceeding. As the Board found, and Cache Camper did not appeal, Mr. Thomas was entitled to stipend benefits while he was in the evaluation process. The second controversion contained the language from 8 AAC 45.510(b), but Dr. Chong did not say that the total inability to return to work was not the result of the work injury. Nowhere did he discuss if the work injury played any role in his overall condition or his inability to return to work. Here, the Board found the controversion was not adequate to stop the eligibility evaluation and, hence, inadequate to stop payment of stipend benefits. The Commission agrees.

Cache Camper also asserts it did not owe Mr. Thomas an eligibility evaluation because he had not missed 90 consecutive days of work due to the injury. This contention is based on Cache Camper's assertion he was paid TTD benefits for only 56 consecutive days.[57] Although Cache Camper made this allegation to the Board, the Board did not address this issue. Moreover, it is not a point on appeal. This issue is not addressed by this decision.

Both Cache Camper and Mr. Thomas had the right to request the RBA to refer any questions as to his eligibility for an eligibility evaluation to the Board to hold a hearing. Specifically, the RBA could have, if asked, referred the question to the Board as to whether Mr. Thomas had been off work for 90 consecutive days due to the work injury, and/or whether he was totally unable to return to his work at the time of injury, and

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[57] Cache Camper's Reply Brief at 5.

whether his total inability was the result of the work injury. Cache Camper did not make such a request.

While such a remedy is being pursued, stipend benefits must be paid, if neither TTD nor PPI benefits are available, until the eligibility evaluation issue is resolved or the evaluation is completed. The purpose of the evaluation is to determine if the injured worker should be eligible for reemployment benefits (retraining) and attempts to derail that process should be severely limited, especially where the injured worker has been out of work for 90-plus days due to the work injury. Hence, the requirement by regulation that the process may be stopped only in certain very specific circumstances.

Cache Camper admitted Mr. Thomas had been out of work for 90-plus days and, therefore, the evaluation process was required to go forward unless Cache Camper could controvert the process through evidence based on using the precise and specific language in the regulation. Moreover, at any time, Cache Camper could have asked the RBA to refer the matter to the Board for an immediate hearing. It did not do so. The Board found its attempt to controvert the eligibility evaluation to be unfair and frivolous. The Commission agrees this finding is supported by substantial evidence and the law.

b. Should Cache Camper's insurer be referred to the Division of Insurance?

The Board, having found that Cache Camper issued an unfair and frivolous controversion when it controverted stipend benefits to Mr. Thomas, was obligated under the Act to refer the matter to the Division Director for referral to the Division of Insurance. AS 23.30.155 states, "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."[58]

[58] AS 23.30.155(o).

Since the Commission has affirmed the Board's finding of unfair and frivolous controversion, the referral to the Division of Insurance is required by statute. The Board's order is affirmed.

5. Conclusion and order.

The Board's decision is AFFIRMED.

Date: ___*22 November 2024*___ 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 not later than 30 days after the date shown in the Commission's Certificate of Distribution 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 not later than 30 days after the date shown in the Commission's Certificate of Distribution below. If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted not later than 30 days after the reconsideration decision is distributed to the parties, or not 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. 309 issued in the matter of *Cache Camper Manufacturing and Republic Indemnity Company of America (RIG) v. John Thomas*, AWCAC Appeal No. 24-003, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on November 22, 2024.

Date: *November 25, 2024*

Signed

K. Morrison, Appeals Commission Clerk