Case: *Municipality of Anchorage vs. Mark Monfore*, Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008)

Facts: Monfore, a paramedic, hurt his neck July 31, 2005, while catching a patient who fell. His injury resulted in surgery in October 2005 to remove two disks and fuse vertebrae in his neck. Monfore returned to full work in August 2006. The parties appealed and cross-appealed various issues described below.

Dr. Mulholland awarded a permanent partial impairment (PPI) rating of 32 percent, which was the higher of a diagnosed-related Estimate (DRE)-based rating (28 percent) and a "range of motion" rating. He failed to include his range-of-motion measurements. Monfore received his copy of this report on September 8, 2006, and he testified that he gave it to the adjuster; he filed a claim for PPI on September 11, 2006. The employer controverted the percentage on October 2, 2006, based on a preliminary opinion from Dr. Dietrich who stated that:

> As I understand Dr. Mulholland's rating calculations, he is calculating the range of motion model and adding the neurological impairments. The sensory impairments are doubled on the basis of bilateral involvement. There is no mention of bilateral involvement in any of the post operative notes. . . . I think this impairment would be best described using the DRE method, and he likely would be in the lower range of a Category IV. However, I do not feel comfortable doing a formal rating without actually evaluating Mr. Monfore.

The employer paid PPI biweekly pending the outcome of an evaluation of Monfore by Dr. Dietrich. Dr. Dietrich evaluated Monfore a month later. Using a DRE method, he put Monfore's impairment at the upper range of the 25-28 percent category. Because his measurements of range of motion totaled 29 percent impairment, which was slightly higher than the DRE-based rating, he would award a 29 percent rating. He included his measurements with the report. Dr. Dietrich noted he did not have Dr. Mulholland's range of motion calculations to compare to his own, "but it is possible that Mr. Monfore's range of motion has improved somewhat since the evaluation in August." The employer paid PPI based on the 29 percent rating on November 1 and controverted on November 3 the additional 3 percent.

After a hearing, the board concluded that Dr. Mulholland's report was "more accurate" for unspecified reasons and discredited Dr. Dietrich's report because Dr. Dietrich did not have Dr. Mulholland's measurements to compare to his measurements. The board awarded the additional 3 percent in PPI. The board awarded a late-payment penalty on the PPI based on a 29 percent rating because it was due 21 days after the employer had notice of the rating, or September 29, 2006. Additionally, the board awarded a penalty on the three-percent difference because the first controversion was not in good faith since Dr. Dietrich had not yet performed his rating evaluation of Monfore. The board concluded that Monfore should have been seen for the employer's rating before the 21 days for payment expired in order for the employer to file a valid controversion.

Monfore also sought a late-payment penalty for the surgical treatment provided at Providence hospital. The parties disputed when the adjuster received the required documentation, which would trigger the period during which the bill must be paid. The board awarded payment of a penalty to Providence. "[T]he board found 'the bill from the hospital and medical records were served on the employer through Ward North on May 22, 2006[,]'" but that "due to errors on the part of Ward North aka NovaPro in not securing needed documentation to complete the billing process, the employee's [Providence Hospital] bill was . . . not paid until February 13, 2007." Dec. No. 081 at 10. The employer appealed, arguing the board erred in penalizing the employer and the adjuster for failing to secure bills and statements from a provider, and that the board failed to consider, before awarding a penalty, that the provider's claim was not "valid and enforceable" under AS 23.30.095(c) until the board excused the failure to give notice of treatment to the board. Monfore cross-appealed, arguing the board correctly determined that a penalty is owed but that it should have been paid to him, not Providence.

Applicable law: 8 AAC 45.120(k)(9) requires the board, in evaluating the relative merits of reports, to give less weight to impairment rating reports that do not include "the extent of impairment, and detailed factors upon which the rating is based."

Per AS 23.30.122, a board finding as to the weight to be assigned medical testimony and reports is conclusive, even if the evidence is susceptible to contrary conclusions.

AS 23.30.190(a) requires that compensation for PPI be paid "in a single lump sum, except as otherwise provided in AS 23.30.041," without discount for present value considerations.

In *Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 631 (Alaska 1995) the Alaska Supreme Court held that lump sum payments of PPI ratings under AS 23.30.190 are due 21 days after notice of the rating.

In *Hammer v. City of Fairbanks*, 953 P.2d 500, 505 (Alaska 1998), the Alaska Supreme Court confirmed that knowledge, for purposes of determining when compensation is due, occurs "not later than receipt of the PPI rating." The Court agreed that the employer should have "paid the amount of PPI benefits clearly due, and controverted the remainder while it sought clarification."

AS 23.30.155(e) imposes a penalty of "an amount equal to 25 percent" of what is due, 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."

AS 23.30.155(d) provides that "[i]f the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due."

Harp v. ARCO Alaska, Inc. 831 P.2d 352 (Alaska 1992), held that the employer must provide "sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board *would* find that the claimant is not entitled to benefits."

AS 23.30.095(c) provides in pertinent part:

> A claim for medical or surgical treatment . . . is not valid and enforceable against the employer unless, within 14 days following treatment, the physician or health care provider giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee. . . .

When Monfore was injured, AS 23.30.095(l) provided:

> An employer shall pay an employee's bills for medical treatment under this chapter . . . within 30 days after the date that the employer receives the health care provider's bill or a completed report, whichever is later.

8 AAC 45.082(d) provided:

> Medical bills for an employee's treatment are due and payable within 30 days after the date the employer received the medical provider's bill and a completed report on form 07-6102. . . . If the employer controverts
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> (1) a medical bill or if the medical bill is not paid in full as billed, the employer shall notify the employee and medical provider in writing the reasons for not paying all or a part of the bill or the reason for delay in payment within 30 days after receipt of the bill and completed report on form 07-6102;

8 AAC 45.086 provided:

> (a) A provider who renders medical or dental services under the Act shall file with the board and the employer a substantially complete form 07-6102 within 14 days after each treatment or service.
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> (b) The board will, in its discretion, deny a provider's claim of payment for medical or dental services if the provider fails to comply with this section.

A "person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party." 8 AAC 45.040(c), *Sherrod v. Municipality of Anchorage,* 803 P.2d 874 (Alaska 1990). . . .

Issues: Did the board have substantial evidence to find that Monfore's PPI rating was 32 percent? Did the board correctly apply *Harp* in awarding a penalty against the employer for a controversion not in good faith? When is a medical bill due under

AS 23.30.095(c), AS 23.30.097(d) and AS 23.30.155(e), such that a late payment penalty is owed? Is a late-payment penalty on a medical bill owed to the medical provider or the employee?

Holdings/analysis: Even though the commission could not disturb the board's weighing of the medical reports, the commission concluded the board's decision on which rating was more accurate was not based on substantial evidence, or evidence on which a reasonable mind could rely. The regulation required the board to give more weight to reports that "detailed factors upon which the rating was based," in this case, by providing the range-of-motion measurements.

> Without both sets of measurements, no comparison could be drawn as to the accuracy of their respective measurements and calculations. The board's decision to reject the report *with* measurements (because its author could not compare his measurements to the report without measurements) and to find the report *without* measurements is more accurate is not logical. Dec. No. 080 at 14-15.

The commission remanded for additional fact-finding by the board.

The commission agreed a late-payment penalty was owed for the PPI benefits. The employer was required to pay what was clearly due in a lump sum within 21 days. Dr. Dietrich's first opinion did not contradict the entitlement to at least some PPI. However, the commission remanded to the board to recalculate the penalty as it should not be based on the entire 29 percent because the employer did not have that rating when it first controverted. Instead, the board should calculate the undisputed PPI amount that was owed based on Dr. Dietrich's opinion before he evaluated Monfore, and the board should subtract any portion of the lump sum that was timely paid.

Because the employer had a valid basis for controverting part of Dr. Mulholland's rating, the board's assessment of a penalty on *all* of the PPI compensation based on *Harp* was error. To controvert a medical issue, an employer must have responsible medical opinion or contradictory medical testimony. The evidence, viewed in isolation and without considering credibility, must be sufficient to rebut the presumption of compensability. "Responsible medical opinion may be based on scientific principles widely accepted in the medical community, review of the employee's medical records, and the specialized knowledge and training of the physician." Dec. No. 081 at 19-20. Examinations of the employee to form an opinion are not always necessary. In Monfore's case, Dr. Dietrich wrote that because there were no reports of post-surgical bilateral sensory loss, bilateral, rather than unilateral sensory loss and impairment was unlikely. "The physician who limits an opinion to that for which he or she has a valid medical basis is acting responsibly." *Id.* at 21.

In terms of the employer's arguments that a claim is not "valid and enforceable" under AS 23.30.095(c) until notice was provided to the board, the commission found that the board failed to make findings that (1) the provider (Providence) or the employee gave, or did not give, notice to the Municipality *and* the board of the surgical treatment; (2) that, if given, the notice was given within 14 days following treatment; or, (3) if

notice was not given, it was in the interest of justice to excuse the failure to furnish notice. The commission discussed the rationale for providing notice to the board and concluded that the notice must alert the board and employer to "the general scope of treatment provided":

> Notice to the board provides a means of verifying the address used to provide notice to the employer, it verifies when notice was given, it encourages timely payment, it provides a means of assuring that employer or insurer payment reserves are current and adequate, it ensures the board has a record of the providers of treatment to the employee in the event of subsequent disputes, and it ensures that the board is able to quickly resolve disputes.
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> . . . The purpose of notice is . . . to avoid stale claims for payment of lost, forgotten, or delayed medical bills by requiring those who have the best access to the information about the treatment to give prompt notice to those who must pay for it. *Id.* at 25-6.

Moreover, the statute and regulations require payment within 30 days after the date that the employer *receives* the completed form 07-6102 (medical report) and the bill in a form that permits review of the charges under 8 AAC 45.082(i) or a late payment penalty is owed under AS 23.30.155(e). Testimony that a copy of the report and bill were served on the adjuster is not enough to prove receipt. The commission remanded because:

> The board had some evidence to support a finding that the reports were mailed to Ward North; but it did not follow it with a finding that the records were mailed to the correct address, received (by mail or fax), and then misplaced or ignored by Ward North or NovaPro. Thus, the board failed to make a necessary finding for the imposition of a late payment penalty. *Id.* at 29.

The commission found the board also erred in imposing the late-payment penalty due to a failure on the employer's part to "secure" the necessary reports from the provider. Instead, the statutes place the burden of reporting on the treatment provider.

The commission also agreed with the board and rejected Monfore's arguments to the contrary that because a penalty under AS 23.30.155(e) is owed to the "recipient of the installment," Providence was entitled to the penalty, if owed. "In this case, the 'installment' is the payment for medical treatment. The 'recipient' is not the employee, but Providence." *Id.* at 29.

Finally, the commission concluded that the board must give Providence an opportunity to appear as an interested party.

> There was no evidence in the record that Providence was informed of the request for penalty and authorized Monfore to act on its behalf. When, as here, a penalty is contested based on a claim bar raised by the provider's failure to give timely notice under AS 23.30.095(c), the provider entitled

to the penalty being adjudicated should be informed of the matter prior to the board's adjudication, and given an opportunity to appear, or to authorize another to proceed on its behalf. *Id.* at 29-30 (footnotes omitted).