

**Case:** *Robert L. Griffiths vs. Andy's Body & Frame, Inc. and Alaska National Insurance Company*, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (October 27, 2009)

**Facts:** Robert Griffiths (Griffiths) reported bilateral hand and wrist pain in 2001, which he attributed to working with pneumatic tools at Andy's Body & Frame, Inc. Griffiths had bilateral wrist surgeries. Two doctors reported he was medically stable, but opined that he probably should not return to auto repair work. Griffiths sought reemployment benefits on January 7, 2002. He was eventually found eligible and his specialist filed a closing report in February 2003 that she had been unable to complete a plan in 90 days and that Griffiths was living in a motor home, primarily in Oregon and California. The administrator extended the planning period by 30 days so that Griffiths could meet with a California specialist. Meanwhile, the board found Griffiths ineligible in June 2003 because he had received a 0 percent permanent impairment rating, notwithstanding earlier predictions that he would suffer a ratable impairment. The board, however, stated that Griffiths could seek modification under AS 23.30.130 if he received a rating from his doctors.

Griffiths, who was self-represented, filed a petition for modification in March 2004 and received a permanent impairment rating in May 2004. On April 28, 2005, the board denied his petition as untimely but stated that it would have denied his petition anyway because he did not show that he could not have gotten the rating with due diligence prior to its June 2003 decision. Griffiths ultimately appealed to the Alaska Supreme Court. The court reversed the board's 2005 order denying Griffiths' petition for modification, concluding, "We think that a reasonable worker in Griffiths's position would understand the 2003 decision and order as allowing Griffiths to submit a petition for modification within one year based on a new PPI rating, without the need to explain why greater diligence might not have produced an earlier rating." *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619 at 624 (Alaska 2007).

On May 27, 2008, the board decided that Griffiths was eligible for benefits after rehearing his petition for modification because, per Dr. Levine's reports and deposition testimony, Griffiths had at least a 1% permanent partial impairment (PPI) rating. The employer began paying a stipend a day later and paid him a lump sum of \$39,648 in July 2008, asserting that this sum satisfied its obligation to pay stipend as Griffiths was entitled to no more than two years of section .041(k) stipend. Griffiths contended he was entitled to five years of stipend because he was actively pursuing reemployment benefits. The board denied this claim, concluding that the Alaska Supreme Court in *Carter v. B & B Construction, Inc.*, 199 P.3d 1150, 1159 (Alaska 2008) capped the maximum amount of section .041(k) stipend at two years. Griffiths appeals.

**Applicable law:** At the time Griffiths was injured, AS 23.30.041(k) provided:

Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease and permanent impairment benefits shall then be paid at the

employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the plan, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the plan to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.

Section .041(k) "contains a two-year cap on benefits after a reemployment plan is accepted or approved." *Carter*, 199 P.3d at 1159. An employee may receive stipend benefits before a reemployment plan is accepted or approved as long as the employee "has begun the reemployment process." *Id.* Participating in the reemployment process begins when "the employee begins his active pursuit of reemployment benefits," such as by requesting an eligibility evaluation. *Id.* at 1160. The court construed the statute in this way to prevent a gap "between the expiration of PPI benefits and the commencement of reemployment benefits for employees who are vigorously pursuing eligibility evaluations before their PPI benefits expire." *Id.*

**Issues:** Is the period of stipend payable under AS 23.30.041(k) limited? When was Griffiths entitled to stipend? Does his appeal constitute the "active pursuit of reemployment benefits," such that he continues to be eligible for the stipend?

**Holding/analysis:** The commission concludes that the two-year limit on payment of stipend (supplementary reemployment compensation under AS 23.30.041(k)) applies only to the period "from the date of plan approval or acceptance, whichever date occurs first." Dec. No. 119 at 4. But the commission concluded that an employee is not entitled to an indefinite period of stipend:

A reasonable limit based on the statutory time periods set forth in AS 23.30.041(k) avoids the absurd result that an employee receives more in pre-plan stipend than he or she may be entitled to receive during an approved plan. . . . [T]he commission holds that the outside limit of a

reasonable stipend award for the gap period before a plan is accepted or approved is 247 days. The commission cautions that employees are not *entitled* to 247 days of pre-plan stipend. Rather, the commission concludes that, as a matter of law, a board award of pre-plan gap stipend not exceeding 247 days would be considered reasonable if the employee was not eligible for temporary compensation benefits; the employee had exhausted permanent partial impairment benefits prior to the request for benefits (or no impairment rating was yet provided); the employee was vigorously pursuing reemployment benefits as required by AS 23.30.041 during the entire 247 days; and, the employer did not unreasonably impede the progress of the evaluation or plan. The commission applies this rule prospectively only. *Id.* at 20-21.

However, in the conclusion of its decision, the commission referred to this period lasting 242 days, rather than 247 days. *Id.* at 28.

The commission concluded that Griffiths was entitled to stipend from April 28, 2005. “[B]ecause the Supreme Court returned the case to its posture the day of the hearing in 2005, the effective date of the order reinstating eligibility is April 28, 2005.” *Id.* at 25.

However, the commission noted that, “[r]eceipt of stipend after exhaustion of temporary compensation and permanent partial impairment compensation is contingent upon the active pursuit of reemployment benefits – not the active pursuit of stipend.” *Id.* at 26. Thus, appealing an order denying retroactive stipend is not the active pursuit of reemployment benefits. Griffiths needed to timely contact the rehabilitation benefits administrator about developing his plan when his eligibility was reinstated. Because he did not do so, he ceased to be entitled to “gap” period stipend. “Eligibility for stipend during the gap will resume when active pursuit of reemployment resumes, provided that permanent partial impairment compensation is exhausted.” *Id.* at 27.

The commission remanded the case to the board for further proceedings.

**Note:** This case was appealed to the Alaska Supreme Court but the appeal was dismissed.