Case: *Kinley's Restaurant & Bar, Republic Indemnity Company, and Northern Adjusters, Inc. vs. Michael S. Gurnett,* Alaska Workers' Comp. App. Comm'n Dec. No. 121 (November 24, 2009)

Facts: Michael Gurnett (Gurnett) was struck in the forehead with a freezer door while working as a server for Kinley's Restaurant & Bar (Kinley's) in September 2007. Dr. Tolbert, a neurosurgeon, diagnosed a traumatic dissection of the left distal cervical internal carotid artery, resulting in Horner's syndrome. The employer's doctor agreed the work injury was a substantial cause of the Horner's syndrome and stenosis of the carotid artery. The artery healed without surgery. The adjuster wrote to Dr. Tolbert on January 10, 2008, asking whether Gurnett was medically stable and able to return to work. On February 13, 2008, Dr. Tolbert indicated Gurnett was able to return to work with some restrictions. The adjuster controverted temporary total disability (TTD) compensation based on this opinion. However, the employer apparently refused to employ Gurnett due to his injury. In February 2008, Solomon Loosli (Loosli) sent a letter to Dr. Tolbert, stating that "the diminished: depth perception, balance, and peripheral vision leave Michael, guests, and his coworkers at risk for further accidents" and that Kinley's had no work available for Gurnett. Also, Dr. Tolbert's office told the adjuster in March 2008 that she should also check with Dr. Rosen as Dr. Tolbert was not the only doctor treating Gurnett. Dr. Rosen had earlier evaluated Gurnett and referred him to Dr. Tolbert. On April 14, 2008, Gurnett obtained a form letter from Dr. Tolbert, stating he was disabled from work from February 14, until a physical capacity evaluation (PCE) was completed. Meanwhile, a second employer's medical evaluation performed by Dr. Williams in late April 2008 concluded that Gurnett could return to work, if he was not required to lift more than 50 pounds occasionally.

Gurnett sought a penalty and the board concluded that:

> the controversion was not valid from the time the employer became aware it should contact Dr. Rosen concerning the claimant's disability and ability to return to his job at the time of injury, which is March 24, 2008. At the latest, the controversion was not valid as of April 14, 2008, when Dr. Tolbert stated unequivocally the claimant was totally disabled from February 14, 2008 until a PCE was completed. We conclude the employee is due a 25 percent penalty on all the TTD benefits not timely paid following the controversion, under AS 23.30.155(e) by operation of law. *Michael S. Gurnett v. Kinley's Restaurant & Bar,* Alaska Workers' Comp. Bd. Dec. No. 08-0263 at 41-42.

Kinley's sought reconsideration. The board decided that the controversion based on Dr. Tolbert's February 2008 opinion was not in good faith because the employer provided Dr. Tolbert with an inaccurate job description. Also, the employer's controversion was no longer in good faith as of April 1, 2008, when Dr. Rosen determined that Gurnett could not return to work. The board decided that Dr. Williams' April 2008 opinion would support the controversion and ordered payment of the penalty for the compensation owed between February and April 2008. Kinley's appealed.

Applicable law: AS 23.30.155(d) provides in part, "If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due."

AS 23.30.155(e) provides in part, "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."

AS 23.30.155(o) provides in relevant part, "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."

The Alaska Supreme Court has repeated that good faith controversion will protect the employer from a penalty for nonpayment of benefits when due under AS 23.30.155(e). *E.g., Irby v. Fairbanks Gold Mining, Inc*., 203 P.3d 1138, 1147 (Alaska 2009). However, an invalid, or ultimately unsuccessful controversion, does not mean that an adjuster must be subject to the penalties of AS 23.30.155(o).

Issues: When is a controversion of temporary disability compensation based on a physician's statement that an injured worker is able to return to work made invalid? Is the employer's insurer bound by the position adopted by the employer regarding the employee's ability to return to work? What were the adjuster's duties in terms of contacting doctors before the controversion?

Holding / analysis: The board improperly weighed the evidence and determined credibility to decide that the controversion was not valid. *Municipality of Anchorage v. Monfore*, Alaska Workers' Comp. App. Comm'n Dec. No. 081, 19 (June 18, 2008) (holding that the board must examine the evidence in support of a controversion in isolation and without consideration of credibility, to determine if the evidence is sufficient to rebut a presumption of compensability of the compensation controverted). A controversion's validity is assessed "based on the evidence in the issuing adjuster's possession *at the time the controversion was mailed*." Dec. No. 121 at 5. Effectively, the board decision punished the employer for not predicting that the doctor would change his opinion two months later, and assumed the later opinion was entitled to greater weight. The commission rejected imposing a penalty.

Referral under AS 23.30.155(o) may be made only after a separate finding that the controversion was frivolous or it was otherwise unfair. In other words, an employer may be subjected to a penalty under .155(e) but not subject to referral under .155(o). Because the board did not conduct an inquiry into whether the controversion was frivolous or unfair, the commission viewed the board's comment that "had the claimant requested a finding of frivolous and unfair controversion, we would have . . . seriously considered making such a finding" as "a premature and needless disapproval." *Id.* at 16.

The commission required the employee to select one attending doctor for an injury per AS 23.30.095(a). "The employee's direction to his employer to contact a physician regarding an ability to return to work is a selection of the attending physician. In this case, the adjuster was not required to inquire of all consulting physicians before controverting compensation. But, if a physician specifically qualifies an opinion on return to work by deferring to the attending physician, or the selected physician declines to serve as the attending physician, then the insurer must inquire of the default attending physician." *Id.* at 5. Here, the commission concluded Dr. Tolbert was the attending doctor because Gurnett directed Loosli to write his letter to that doctor. Until the adjuster was given notice that Dr. Tolbert was not the attending doctor, the adjuster was not obligated to contact any other doctors. Because the record and board's findings were unclear as to whether Dr. Tolbert refused to serve as the attending doctor or if Gurnett changed his attending doctor, the commission remanded.

On Loosli's letter refusing Gurnett as an employee, the commission held:

> that (1) if the employment has not been terminated and an employee's position is still available, (2) if the employer refuses in writing to accept the employee's physician's release to return to work in the employee's position, and (3), if the employer's refusal is based on a belief the employee cannot, because of the work injury, perform the essential functions of the position, then the employer's refusal to accept its employee's attending physician's release to return to work is an acceptance of liability for disability compensation that is binding on the insurer. If the insurer has, or when the insurer obtains, other substantial evidence that the employee can return to the same or other employment at similar wages or other evidence that the employee is not disabled, the insurer may assert a defense to liability based on that evidence. This holding does not apply when the employer offers temporary limited duty, alternate positions, or limitations on hours or duties consistent with medical advice or safety rules, even if it results in reduction in pay. Id. at 5.
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> Assuming that Gurnett's employment relationship with Kinley's had not been severed, that Solomon Loosli's letter was within the scope of his authority to act for Kinley's and that Loosli wrote the letter for the reasons testified to by Gurnett, by representing to Gurnett and to the physician that released him to work that Gurnett was unable, because of his work injury, to return to his employment at the time of injury, Kinley's adopted the position that Gurnett was incapable of earning the wages earned at the time of injury in the *same* employment. This is an "acceptance of liability by the insured employer" for disability compensation. *Id.* at 24-26.

The commission remanded to the board to make findings on the above "assumptions" and to permit the parties to make arguments to determine whether the employer accepted liability.