

Alaska Workers' Compensation Appeals Commission

First Student Services and Sedgwick
CMS, Inc.,
Appellants,

vs.

Jonathan Bockus,
Appellee.

Final Decision

Decision No. 205 December 3, 2014

AWCAC Appeal No. 14-008
AWCB Decision No. 14-0040
AWCB Case No. 201302957

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 14-0040, issued at Fairbanks, Alaska, on March 24, 2014, by northern panel members Robert Vollmer, Chair, Zeb Woodman, Member for Labor, and Sarah LeFebvre, Member for Industry.

Appearances: Krista M. Schwarting, Griffin & Smith, for appellants, First Student Services and Sedgwick CMS, Inc.; J. John Franich, Jr., Franich Law Office, LLC, for appellee, Jonathan Bockus.

Commission proceedings: Appeal filed April 4, 2014, with motion for stay; order granting motion for stay issued May 2, 2014; briefing completed September 10, 2014; oral argument held on November 19, 2014.

Commissioners: David W. Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellee, Jonathan Bockus (Bockus), was working for appellant, First Student Services (FSS), when, on March 6, 2013, he injured his back.¹ Thoracic surgery in the form of a right T10-11 laminectomy was performed by Kim B. Wright, M.D., on March 8,

¹ See *Jonathan Bockus v. First Student Services, et al.*, Alaska Workers' Comp. Bd. Dec. No. 14-0040 at 3 (Mar. 24, 2014).

2013. A right T10-11 hemi-laminotomy was performed the following day, March 9, 2013, because the results of the first procedure were inconclusive.²

FSS began paying disability benefits on March 10, 2013. Paul Williams, M.D., performed an employer's medical evaluation (EME³) on April 17, 2013. He concluded that the work incident was the substantial cause of Bockus's thoracic condition and that the two surgeries were medically reasonable and necessary.⁴

As of June 2013, Dr. Wright expressed the view that Bockus might need more back surgery. FSS scheduled another EME with Dr. Williams for July 27, 2013, however, it was rescheduled so that Bockus could attend a family reunion.⁵ Bockus returned to Dr. Wright's office on August 7, 2013, reported that he had continuing and worsening back pain, advised that he had an EME rescheduled for September 27, 2013, and stated he wanted to proceed with surgery, however, his employer would not approve the surgery pending completion of the EME.⁶

On September 20, 2013, Bockus filed a workers' compensation claim for medical and transportation costs and attorney fees and costs.⁷ The basis for the claim was: "Controversion in fact. ER [employer] has resisted payment of medical benefits by not approving surgery that has been recommended by treating physician until after an [EME]."⁸ The matter went to hearing before the board on January 2, 2014. For context, we will quote the board's description of the background of the parties' dispute.

[Bockus] presents a rather complex and intriguing case theory [that FSS] controverted-in-fact his third surgery. He contends [FSS's] adjuster denied or delayed his surgery until such time as its own physician would

² See *Bockus*, Bd. Dec. No. 14-0040 at 4.

³ The parties, attorneys, witnesses, and the Alaska Workers' Compensation Board (board) have used different acronyms for employer medical evaluations, EME, IME, and EIME, interchangeably.

⁴ See *Bockus*, Bd. Dec. No. 14-0040 at 4-5.

⁵ See *id.* at 5.

⁶ See *id.*

⁷ See *id.* at 6.

⁸ *Id.*

approve it. [Bockus] specifically contends [FSS's] adjuster effectuated this delay or denial by not only refusing to preauthorize the surgery when it was contacted by his provider, but also by deliberately informing his provider of a pending employer's medical evaluation (EME), which then caused his provider to delay scheduling his surgery. Eventually, after [FSS's] physician approved his surgery, and when his provider next contacted [FSS's] adjuster to inquire about the status of its preauthorization, he contends, only at that point, did [FSS's] adjuster again signal his provider to proceed with scheduling his surgery.⁹

The board issued a decision, concluding that FSS was obligated to preauthorize the third surgery, and as a result of the delay in scheduling that surgery, FSS otherwise resisted providing medical treatment. Accordingly, it awarded Bockus's counsel \$3,517.25 in attorney fees and costs, pursuant to AS 23.30.145(b).¹⁰

FSS appealed the board's decision to the Workers' Compensation Appeals Commission (commission). In connection with that appeal, FSS filed a motion for stay of the attorney fees and costs award, which motion the commission granted. On the merits of the appeal, we REVERSE the board's holding that FSS was obligated to preauthorize the third surgery, with or without the benefit of the second EME.

2. Factual background.

The day he was injured, March 6, 2013, Bockus presented himself at Fairbanks Memorial Hospital Emergency Department complaining of severe pain in his back which radiated into his legs. A thoracic magnetic resonance imaging (MRI) study showed a central disc herniation at T10-11 impinging on his spinal cord. Because of the likelihood that Bockus needed surgery and a neurosurgeon was unavailable, it was decided to transport him to Providence Hospital in Anchorage.¹¹

On March 7, 2013, Bockus had another thoracic MRI at Providence Hospital, which showed a large right paracentral disc extrusion at T10-11 causing significant canal stenosis and associated thoracic cord edema.¹² On March 8, 2013, Dr. Wright,

⁹ *Bockus*, Bd. Dec. No. 14-0040 at 2.

¹⁰ *See id.* at 28.

¹¹ R. 0226-27.

¹² R. 0219.

attempted to perform a right T10-11 laminectomy. A calcified ligament and synovial cyst were removed, however, the disc herniation could not be located. Dr. Wright decided to close and perform a repeat MRI rather than search for the herniation by performing additional laminectomies.¹³ The following day, March 9, 2013, a repeat MRI showed a right paracentral disc protrusion at T10-11 with associated cord distortion, as well as surgical changes at T11-12.¹⁴ Based on the results of the most recent MRI, Dr. Wright proceeded with another surgery one level higher than the first surgery. He performed a right T10-11 hemi-laminotomy and removed a calcified ligament, decompressed the spinal cord, and removed a free disc fragment.¹⁵

On March 10, 2013, Dr. Wright reported that Bockus's pain had diminished and postsurgical imaging studies showed marked improvement in his cord compression, nevertheless, some residual osteophyte remained. Dr. Wright determined osteophyte removal would require rib removal and fusion to improve Bockus's condition further. As an alternative, he recommended conservative management.¹⁶ That same day, FSS began paying Bockus disability benefits.¹⁷

Dr. Williams performed an EME on April 17, 2013. Based on that evaluation, he concluded that the work injury was the substantial cause of Bockus's thoracic spine condition. It was also his opinion that the medical treatment Bockus had received, including the two surgeries, was medically reasonable and necessary.¹⁸

Subsequently, Dr. Wright noted that Bockus did not appear to be responding to conservative treatment and discussed possible additional surgery with him, including a repeat microdiscectomy or a discectomy with fusion. Bockus did not feel he was improving and was anxious to seek more timely relief. He made it clear to Dr. Wright

¹³ R. 0202-03.

¹⁴ R. 0159.

¹⁵ R. 0160-63.

¹⁶ R. 0156.

¹⁷ R. 0002-03.

¹⁸ R. 0138-45.

that he did not want to suffer another disc herniation and wanted to proceed with further surgery.¹⁹

An MRI performed on June 4, 2013, showed post-surgical changes and a residual disc fragment within the right paracentral/foraminal region at T10-11.²⁰ Bockus saw Dr. Wright again on June 21, 2013, for an MRI review. He reported disabling, recurring back pain that radiated around his chest wall, accompanied by a “good deal” of numbness. Dr. Wright explained his symptoms may improve with convalescence and time, however, if they did not, he suggested a repeat discectomy and possible fusion might be appropriate.²¹

On July 16, 2013, FSS scheduled Bockus for another EME with Dr. Williams on July 27, 2013. The appointment confirmation notice for this EME bears a July 16, 2013, “referral date.” This EME was later rescheduled due to Bockus’s prior plans to attend a family reunion.²²

Bockus returned to see Dr. Wright on July 19, 2013, reporting significant, reoccurring, back pain. He did not feel he was improving and was anxious to seek more timely relief. Dr. Wright reported, “[c]learly, the patient does not appear to be responding to further conservative treatment including convalescence and the tincture of time.” Dr. Wright discussed with Bockus performing a repeat microdiscectomy or discectomy with fusion, and specifically recommended a modified transpedicular approach to the canal, and posterior lateral fusion. Bockus wanted to proceed with that surgery.²³

On August 7, 2013, Bockus returned to Dr. Wright’s office and saw Jan DeNapoli, PA-C. He reported continued and worsening back pain and advised PA-C DeNapoli he had a scheduled EME that was postponed until September 27, 2013. Bockus indicated

¹⁹ R. 0133.

²⁰ R. 0126-27.

²¹ R. 0122-24.

²² R. 0051; Hr’g Tr. 14:9–15:15, 20:15–22:5, Jan. 2, 2014.

²³ R. 0102-05.

he was ready to proceed with surgery but his employer would not approve the surgery until the EME was completed. PA-C DeNapoli's report bears a notation for follow-up that states, "[p]atient will followup [sic] with Dr. Wright Oct [sic] 4 or later, once we have his new IME report and approval for surgery." It also concludes: "The patient . . . wishes to proceed with surgery. We are simply awaiting his new IME and approval for surgery. In the meantime, patient would like to see Dr. Zipperer for pain management to be able to get through to the Sept [sic] 27 IME and followup [sic] before hopeful surgery. We will facilitate this visit."²⁴

Bockus filed a claim on September 20, 2013, seeking medical and transportation costs and attorney fees and costs. His reason for filing the claim was: "Controversion in fact. ER has resisted payment of medical benefits by not approving surgery that has been recommended by treating physician until after an EIME. See Summers v. Korobkin Const., 814 P.2d 1369, at 1371-72 (Alaska 1991)."²⁵ The claim was served on FSS on September 23, 2013.²⁶

Dr. Williams performed another EME on September 27, 2013. In his opinion, a repeat discectomy was appropriate medical treatment.²⁷

On October 17, 2013, FSS filed its answer to the September 20, 2013, claim. Regarding the claim for medical benefits, it asserted "no controversions have been filed in this claim, nor have any medical benefits been denied." Regarding the claim for attorney fees, FSS stated there "has not been resistance to paying medical benefits," and Bockus's attorney "has not obtained any benefits of value to him; therefore, no attorney fees are due."²⁸

On October 22, 2013, Nancy Nashlund (Nashlund), Surgery Coordinator for Dr. Wright's office, wrote a letter at FSS's request to explain the process of scheduling

²⁴ R. 0099-0101.

²⁵ R. 0013-14.

²⁶ Alaska Workers' Compensation Division's electronic database, September 23, 2013.

²⁷ R. 0071-78.

²⁸ R. 0017-18.

surgeries for workers' compensation patients. In her letter, she explained after she received an order from Dr. Wright to schedule Bockus for surgery, she called FSS's adjuster and talked to "Adela," who told her Bockus had an "open and billable claim." Adela also mentioned Bockus had an EME scheduled for July 27, 2013, and Dr. Wright's office "usually" waits for the outcome of an EME before scheduling surgery. Bockus had called to schedule surgery but she informed him he would have to wait for the outcome of the EME before she could schedule the surgery. Bockus's attorney also called her to ask if the adjuster had instructed her to delay scheduling the surgery. Nashlund explained to Bockus's attorney what their "usual" process was, and she was told by FSS's adjuster that Bockus had an "open and billable" claim. She told him there was an EME scheduled and Dr. Wright's office waits for the outcome of an EME so the "patient doesn't get stuck with a big bill."²⁹

The third surgery was performed on November 2, 2013.³⁰

At a prehearing conference on November 18, 2013, the parties agreed to a hearing before the board on January 2, 2014. The summary states: "EE's atty stated that he wants to go to hearing on the issue of ER not preauthorizing surgery until after the EIME."³¹

On December 20, 2013, the parties took Nashlund's deposition, who testified as follows: She is a nationally certified medical assistant. For the past four years, she has been the surgery coordinator for Dr. Wright's office. After Dr. Wright recommended surgery for Bockus, she called FSS's adjuster, Adela, who told her Bockus had an "open and billable" claim, however, he also had an "IME" scheduled. Adela did not tell her surgery was denied or ask her to postpone scheduling until after the EME was completed. If an adjuster tells her there is an IME scheduled, Dr. Wright asks her to postpone the scheduling of surgeries until after the IME is completed. Nashlund received a call from Bockus, who stated he was ready to schedule his surgery. She told

²⁹ R. 0037.

³⁰ Hr'g Tr. 13:24-14:1, 25:4-6.

³¹ R. 0476-77.

Bockus she had not yet heard back from the insurance company regarding the IME. Nashlund testified that she received a call from Bockus's attorney, who asked her whether the third surgery was denied. She stated it had not been scheduled, explained to Bockus's attorney that Bockus had an "open and billable" claim, and she could not schedule the surgery until Bockus completed the IME. When asked if she received a copy of the EME report in Bockus's case, she replied, "I don't know if we ever got that or not. I think we – they don't have to give it to us, but sometimes we get it." She could not recall if she received a copy of the IME report. FSS's adjuster, Kimberly LaRose (LaRose), advised her that Bockus's surgery was authorized on October 17, 2013, and Bockus had the surgery on November 2, 2013. Nashlund denied FSS's adjuster asked her to delay surgery or told her surgery was denied. On cross-examination, Nashlund testified that after Dr. Wright recommended the third surgery, she first called FSS's adjuster on July 22, 2013, and asked if Bockus had an "open and billable" claim. If the adjuster had told her it was okay to go ahead with surgery, she stated: "Usually we can get the surgery scheduled within a couple weeks." The surgery could have conceivably been scheduled by the end of August. She does not schedule surgery when there is a pending IME because "we don't want to stick the patient with a huge bill that they can't pay. . . ." On re-direct, Nashlund testified she asked FSS's adjuster if there was an "open and billable" claim rather than asking the adjuster to authorize surgery. She denied asking FSS's adjuster to authorize the surgery and stated: "My understanding is that workers' comp companies don't authorize surgeries, per se, but they will tell us that there is an open and billable claim." When she calls adjusters, they will also tell her if a claim had been denied or controverted, but in Bockus's case, the adjuster did not.³²

The following exchange occurred on FSS's direct examination of Nashlund at her deposition:

Q. Did there come a point where you were informed that the surgery was being authorized?

³² Nashlund Dep., 5:15-20, 6:22-7:19, 7:23-8:4, 8:8-13, 9:4-11:6, 12:12-17, 15:1-16:5, 16:15-19, 20:5-19, Dec. 20, 2013.

A. Yes.

.....

Q. Do you have any record as to when it was scheduled or when it – when the scheduling happened?

.....

A. Let's see. I talked to Kimberly on October 17th.

.....

Q. So the surgery was authorized on October 17th?

A. Yes.³³

On Bockus's re-cross of Ms. Nashlund, the following exchange took place:

Q. When you called [FSS's adjuster] on July 22nd, 2013, if the adjuster had told you that it was okay to go ahead with the surgery, how soon could that surgery have been scheduled?

[FSS attorney]: Objection, calls for speculation. Go ahead and answer – if you can answer it, go ahead.

A. I don't know. Usually we can get surgery scheduled within a couple weeks.

Q. Okay. So could it have been scheduled by the end of August?

[FSS attorney]: Objection, calls for speculation. Answer if you can.

A. Yes. Conceivably, yes.

Nashlund went on to testify the only reason surgery could not have been scheduled within 30 days of July 22, 2013, was if the doctor was out of town. She thought the doctor was out of town for one week at the beginning of August.³⁴

On FSS's re-direct examination of Nashlund, the following exchange took place:

Q. The policy regarding IME's, that's an office policy, not something that's specific to [Bockus's] case, correct?

A. Oh, correct, yeah.³⁵

On subsequent re-cross-examination by Bockus, the following exchange took place:

³³ Nashlund Dep., 10:11–11:12.

³⁴ Nashlund Dep., 15:16 – 16:14.

³⁵ Nashlund Dep., 18:19-22.

Q . . . if the person from [FSS's adjuster] when they called you back on . . . July 22nd had said yes, we are authorizing this surgery, you would not have waited for the IME. You would have gone ahead and scheduled surgery, correct?

A. Correct. If they authorized it, yes.

Q. And you had called them to authorize it?

A. Correct.

Q. They did not, in fact, authorize it when you called on July 22nd?

A. Correct.

Q. If they had authorized it, you would have scheduled it at that time?

A. Yes.³⁶

Nashlund fills out what she calls an "insurance sheet" on every surgery she schedules. The parties questioned her on Bockus's insurance sheet at her deposition. His insurance sheet shows the following entries: "7/22/13 LMTRC for adjuster;" "7/22/13 Adela open & billable claim – IME;" and "10/17/13 S/W Kimberly & we are ok to go forward w/surg."³⁷

On December 30, 2013, Bockus filed an affidavit of attorney fees and costs, which listed 9.9 hours of attorney time and \$52.25 in costs. The affidavit does not set forth an hourly rate for attorney time.³⁸

At the hearing on January 2, 2014, Bockus testified as follows: Dr. Wright recommended surgery in July and he called Ms. Nashlund to schedule the surgery. He was in pain and the delay in getting his surgery was the IME. He called Dr. Wright's office numerous times then went to see his attorney and they filed his claim. Dr. Williams performed the IME on September 27, 2013, and he had the third surgery on November 2, 2013.

On cross-examination, Bockus testified LaRose initially called him and said the IME was scheduled for September 27, 2013, although a week later she called back and said she had made a mistake and the IME was on July 27, 2013. He called LaRose

³⁶ Nashlund Dep., 19:11–20:1.

³⁷ Nashlund Dep., 11:1–14:11, Ex. 2.

³⁸ R. 0065-67.

after receiving the letter for the July 27, 2013, IME and told her he already had plans involving a family reunion on that date. Bockus acknowledged LaRose never told him his surgery was denied and she rescheduled the IME as he requested. He called LaRose about three times to schedule the surgery, and she told him his claim was "open." He called Nashlund three or four times to schedule the surgery and Nashlund told him she was calling FSS to "get the surgery going." On one occasion, Nashlund stated she was calling for preauthorization. Bockus acknowledged that Nashlund never told him surgery was denied.³⁹

At the hearing, LaRose testified she was the adjuster on Bockus's claim and had accepted all benefits. He had been paid benefits since March of 2013, and his benefits had never been controverted. When she called him on July 16, 2013, Bockus first told her he "might" need another surgery. During this conversation, LaRose told him the IME had been scheduled for July 27, 2013. The IME was already "in the works" before she became aware of Bockus's need for his third surgery. LaRose had initiated scheduling of the IME with an email on July 9, 2013.⁴⁰

LaRose had another conversation with Bockus on July 22, 2013. Bockus thought the IME was on August 27, 2013, not September 27, 2013. She sent him a letter informing him of the IME on July 27, 2013. During the July 22, 2013, conversation, Bockus told her he was going to a family reunion in Kenai and had spent \$1,500.00 for the trip and he could not get his money back. LaRose asked Dr. Williams to do a records review to "move things along" for Bockus, however, the doctor wanted to do a physical examination. September was the next available date with Dr. Williams. Bockus asked her if his surgery would be paid for before the IME and she told him the doctors usually call before scheduling and she would be "obligated" to inform the doctor of a pending IME. LaRose told Bockus some doctors proceed with surgery with a pending IME and some do not. She denied instructing Bockus not to have the surgery.

³⁹ Hr'g Tr. 9:24-10:9, 12:13-18, 12:22-13:11, 13:24-14:1, 14:9-16:2, 16:16-22, 17:6-25, 19:10-24, 20:9-24.

⁴⁰ This email from LaRose does not appear in the record.

LaRose also denied telling him his surgery would be denied if he went forward with it before the IME. She acknowledged receiving a letter from Bockus's attorney contending she was denying surgery unless it was approved by her own physician. LaRose denied she was asked by Nashlund to preauthorize the surgery. On October 16, 2013, LaRose spoke with "Trina" from Dr. Wright's office, who informed her Dr. Wright's office had not received a reply to its request for preauthorization. LaRose told Trina a formal request was not necessary. All bills have been paid from the November 2, 2013, surgery.

On cross-examination, LaRose testified no one contacted her before Bockus's first or second surgeries and she had already received and paid bills from Dr. Wright's office by July 16, 2013. She frequently gets calls from providers when "something significant" is going to happen with medical treatment and the providers want to know if anything is pending, such as IME's. Generally, providers will call her and ask if there is an open and billable claim, as well as other issues, like IME's. LaRose's "standard answer" to providers is to tell them there are "no issues" with the claim. She does not preauthorize surgery because she "can't direct medical treatment." Regarding the October 16, 2013, conversation with "Trina" from Dr. Wright's office, LaRose testified she had not received a written request for preauthorization and told Trina there were "no issues" with the claim and she did not need to send a written request.⁴¹

FSS has never filed a controversion for this injury.⁴²

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.⁴³ The board's findings regarding the

⁴¹ Hr'g Tr. 21:4-24:4, 24:10-25:6, 25:24-26:25, 27:13-17, 28:23-29:8, 30:2-12, 30:23-24.

⁴² Record.

⁴³ Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

credibility of the testimony of a witness are binding on the commission.⁴⁴ We exercise our independent judgment when reviewing questions of law and procedure.⁴⁵

4. Applicable law.

AS 23.30.001. Intent of the legislature and construction of chapter.

It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter[.]

. . .

AS 23.30.045. Employer's liability for compensation.

(a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 – 23.30.215. . . .

. . .

AS 23.30.095. Medical treatments, services, and examinations.

(a) 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[. . .]

. . .

(e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. . . . An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . .

. . .

⁴⁴ See AS 23.30.122 and .128(b).

⁴⁵ See AS 23.30.128(b).

AS 23.30.097. Fees for medical treatment and services.

...

(d) 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 provider's bill[. . .]

...

(f) An employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter.

...

8 AAC 45.082. Medical Treatment.

...

(d) Medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill . . . and a completed report in accordance with 8 AAC 45.086(a)[. . .]

...

AS 23.30.145. Attorney fees.

...

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

...

AS 23.30.155. Payment of compensation.

(a) Compensation . . . shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer[. . .]

...

(d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. 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. . . .

(e) 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[. . . .]

. . .

5. Discussion.

a. FSS was not required to preauthorize the third surgery.⁴⁶

The issue before us is whether FSS was required to preauthorize Bockus's third surgery so that it would not be delayed by the second EME. In this context, preauthorization would entail a commitment on the part of FSS to pay for the surgery before it was performed and FSS is billed for it, or receives a report. In order to decide the issue, it is necessary for the commission to engage in statutory construction. "The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."⁴⁷ Statutes are interpreted according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose. Words in statutes are construed using their common meanings unless they have acquired a peculiar meaning, by virtue of statutory definition or judicial construction.⁴⁸

According to the board, the issue implicates AS 23.30.001(1), AS 23.30.045(a), AS 23.30.095(a), AS 23.30.097(f), and AS 23.30.155(a). The board reasoned that, applying these statutory subsections, FSS had failed to provide Bockus with medical

⁴⁶ The ensuing discussion incorporates in part the commission's decision on the motion for stay in this matter. However, references in that decision to the commission's Memorandum Decision and Order in *United Technologies v. King*, Alaska Workers' Comp. App. Comm'n Dec. No. 193 (Oct. 29, 2013)(hereafter *King*), have been deleted.

⁴⁷ *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).

⁴⁸ *King*, App. Comm'n Dec. No. 193 at 11 citing *Municipality of Anchorage v. Adamson*, 301 P.3d 569, 577-78 (Alaska 2013).

treatment, namely the third surgery, when he wanted and needed it. However, initially, we note that none of the statutory subsections cited by the board expressly provides that an employer must preauthorize medical treatment, nor do they imply any such requirement.

Moreover, because the board's analysis involved the application of several statutory subsections, principles of statutory construction that pertain to the interpretation of multiple statutes or statutory subsections come into play. "[A]ll sections of an act are to be construed together so that all have meaning and no section conflicts with another."⁴⁹ If one statutory "section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict, the specific section will control over the general."⁵⁰

Notably absent from the board's analysis is any consideration of AS 23.30.097(d), which states that an employer must pay an employee's medical bills within 30 days of receipt of the provider's bill or a completed report.⁵¹ We believe the board erred in failing to consider §.097(d), which addresses paying for medical treatment in a more detailed way than AS 23.30.001(1), AS 23.30.045(a),

⁴⁹ *In re Hutchinson's Estate*, 577 P.2d 1074, 1075 (Alaska 1978).

⁵⁰ *Id.*

⁵¹ A subsection of a board regulation, 8 AAC 45.082(d), is worded almost identically to AS 23.30.097(d). Therefore, we consider this discussion to pertain to the construction of that regulatory subsection as well. In contrast, the board downplayed the regulation as having any significance to its analysis, holding that it "merely sets forth the procedural requirement for when bills must be paid following receipt. It does not form the basis for a sweeping legal doctrine stating [FSS] did not have to preauthorize medical care in Alaska." *Bockus*, Bd. Dec. No. 14-0040 at 24-25.

AS 23.30.095(a), AS 23.30.097(f), and AS 23.30.155(a).⁵² Imposing a preauthorization requirement whereby an employer must commit to paying for medical treatment before it is performed and billed to the employer, as the board did here, is to ignore the plainly-worded, specific, 30-day deadline for payment of medical bills. Consequently, as a matter of statutory interpretation, the board's construction and application of the statutory scheme governing payment for medical treatment is contrary to law.

b. Case law does not support requiring preauthorization of medical treatment in the circumstances of this case.

Years ago, in *Richard v. Fireman's Fund Ins. Co.*,⁵³ the Alaska Supreme Court (supreme court) stated that "the only affirmative duty of the employer or the insurance carrier in a case such as the [one at issue] is that of paying for all necessary medical expenses."⁵⁴ Given this limited duty, if a claimant wishes to know in advance whether his or her employer must pay for certain medical treatment, that is, wishes to obtain a prospective determination of the compensability of particular treatment, there is one and only one means of obtaining that determination. The board makes the decision.⁵⁵

In this case, a prospective determination of the compensability of the third surgery was not forthcoming until the board issued its decision on March 24, 2014. Thereafter, pursuant to AS 23.30.097(d), FSS had 30 days to pay for that surgery,

⁵² §.001(1) provides for "the quick, efficient, fair, and predictable delivery of . . . medical benefits[.]"; §.045(a) states that "[a]n employer is liable for and shall secure the payment to employees of . . . compensation[,]" including payment for medical treatment pursuant to §.095(a); §.095(a) requires the employer to "furnish" medical treatment; §.097(f) states that "[a]n employee may not be required to pay a fee or charge for medical treatment . . ."; and §.155(a) provides that "[c]ompensation . . . shall be paid periodically, promptly, and directly to the person entitled to it, without an award"

⁵³ 384 P.2d 445 (Alaska 1963).

⁵⁴ *Richard*, 384 P.2d at 450. While we concede that this is a rather broad statement and one should not read too much into it, the statement has not been disavowed or qualified in any subsequent supreme court decision of which the commission is aware.

⁵⁵ *See Summers v. Korobkin Constr.*, 814 P.2d 1369 at 1372-73 (Alaska 1991).

barring a stay on appeal to this commission pursuant to AS 23.30.125(c).⁵⁶ FSS promptly filed this appeal and moved for a stay of the obligation the board imposed on it to pay for the third surgery. The stay was granted by the commission, thus relieving FSS, at least temporarily, of that obligation.

The board took a different approach to the issue. First, citing AS 23.30.095(a), which states that an employer “shall furnish” medical treatment, it interpreted that statutory subsection as requiring *authorization* of medical treatment “when requested unless there is a valid legal or [r] factual reason to deny it.”⁵⁷ We think the board’s interpretation stretches the “shall furnish” language in the subsection beyond its plain meaning. As distinguished from the board’s assertion that this language imposes a requirement that the employer pay for medical treatment unless there is a valid legal or factual reason to deny it, the commission interprets it to mean that an employer “shall furnish” medical treatment that is *compensable*. Here, the compensability of Bockus’s third surgery was not determined until the board issued its decision to that effect.

Second, the board went on to cite a recent supreme court decision, *Harris v. M-K Rivers*,⁵⁸ as further support for the proposition that preauthorization of medical treatment is required.⁵⁹ The board noted that *Harris* held that “payments ‘due’ under the act are more appropriately characterized as ‘[p]ayable immediately or on demand,’ not ‘[o]wed as a debt.’”⁶⁰ From this language, the board concluded that FSS had to commit to pay for the third surgery immediately, when Bockus demanded it.⁶¹

As distinguished from the board, we think the *Harris* decision stands for a different proposition. First, as we have previously noted, AS 23.30.097(d) provides that

⁵⁶ This statutory subsection provides the authority for the commission to issue a stay on appeal.

⁵⁷ *Bockus*, Bd. Dec. No. 14-0040 at 25.

⁵⁸ 325 P.3d 510 (Alaska 2014).

⁵⁹ *See Bockus*, Bd. Dec. No. 14-0040 at 25.

⁶⁰ *Harris*, 325 P.3d at 518, 519 quoting Webster’s II New College Dictionary 356 (3d ed. 2005).

⁶¹ *See Bockus*, Bd. Dec. No. 14-0040 at 25.

medical bills are to be paid within 30 days of the employer's receipt of the provider's bill or a completed report. Therefore, the commission concludes that, within the meaning of the *Harris* holding, "payments due under the act" for medical treatment are to be paid by the employer within 30 days of receipt of the provider's bill or a completed report. Second, *Harris* makes no mention of a requirement that medical treatment must be preauthorized in any given context. On the contrary, in the context of the supreme court's holding, that payments for benefits under the act are to be made "immediately or on demand," in the case of payments for medical treatment, immediate or on-demand payment is timely payment within the statute's 30-day deadline.

Furthermore, we observe that the supreme court construed the penalty provision in AS 23.30.155(e) as including medical benefits because a penalty would give the employer incentive to pay medical bills "promptly."⁶² The *Harris* decision does not stand for the proposition the board attributes to it, namely that the late-payment penalty provision in AS 23.30.155(e), which extends to late payment for medical treatment, serves as an underpinning for its holding that FSS had to preauthorize the third surgery.⁶³ According to the supreme court, "[w]ithout the possibility of a penalty, the insurer would be able to controvert expensive medical care for no reason and escape without sanction, even when the care is critical to an employee's health."⁶⁴ Thus, the purpose of the penalty for late payment of medical bills is to punish employers for not providing medical treatment when they should; it does not give rise to an alternative remedy, that employers are required to preauthorize medical treatment.

Here, in the language of the *Summers* holding, Bockus had been receiving medical treatment and was entitled to a prospective determination of the compensability of the third surgery by the board. Ironically, the second EME, had it not been delayed by Bockus's reunion trip, would have provided FSS with the information it

⁶² *Harris*, 325 P.3d at 519.

⁶³ *See Bockus*, Bd. Dec. No. 14-0040 at 25.

⁶⁴ *Harris*, 325 P.3d at 519.

needed to agree to the compensability of that surgery, thus, in all likelihood, eliminating the need for a hearing in which the board could make a prospective compensability determination. There is nothing in *Summers* from which it could be inferred that FSS had to preauthorize the third surgery, with or without the benefit of the second EME, the right to which is statutorily mandated.⁶⁵

Lastly, the board reasoned that “[e]ven if the [a]ct does not require [FSS] to preauthorize treatment, *Summers* provides [Bockus] with a remedy.”⁶⁶ First, the commission views the board’s concession that the act may not require preauthorization of medical treatment as significant. It is some recognition that, as we have maintained in this decision, there is no statutory authority for the board’s holding that preauthorization of medical treatment is required. Second, we question whether the *Summers* decision can be understood as providing Bockus with a remedy, specifically that FSS was required to preauthorize the third surgery under the facts of this case.

In *Summers*, the employee, Henry Summers (Summers) suffered a neck injury. His employer, Korobkin Construction (Korobkin), paid all of his medical expenses, however, it would not acknowledge that Summers had a compensable claim and reserved its right to assert affirmative defenses against future claims by Summers. At hearing before the board, Summers sought a determination whether his injury was compensable.⁶⁷ The board would not make a compensability determination because it reasoned that there was no outstanding claim.⁶⁸ The supreme court reversed, holding that, at the time of the board hearing, Summers had a claim and the board should have ruled on its compensability.⁶⁹

⁶⁵ See AS 23.30.095(e).

⁶⁶ *Bockus*, Bd. Dec. No. 14-0040 at 26.

⁶⁷ Prior to hearing, Korobkin paid all of Summers’ medical bills, agreed to pay his attorney fees, and withdrew its reservation of rights with respect to the medical bills it had paid, thereby waiving any right to seek reimbursement for them in the future. See *Summers*, 814 P.2d at 1370.

⁶⁸ See *Summers*, 814 P.2d at 1369.

⁶⁹ See *id.* at 1372.

Here, the board characterized FSS's insistence on an EME before authorizing the third surgery as an informal reservation of rights.⁷⁰ While it may have had that practical effect, we do not understand the significance of, or analytical nexus between, any reservation of rights on the one hand, and on the other, the purported creation of a remedy, namely, an obligation on the part of employers to preauthorize medical treatment. On the contrary, the supreme court held that "a worker in Summers' position, who has been receiving treatment for an injury which he or she claims occurred in the course of employment, is entitled to a hearing and prospective determination on whether his or her injury is compensable."⁷¹ In the commission's view, the foregoing statement cannot be understood as a pronouncement of a remedy consisting of preauthorization of medical treatment.

c. Bockus is not entitled to an award of attorney fees and costs.

The remaining issue for the commission to decide is whether the board's award of attorney fees and costs to Bockus was appropriate, given our disposition of this appeal. The board held that FSS "resisted promptly providing [Bockus's third] surgery by delaying its preauthorization."⁷² Under AS 23.30.145(b), if the employer resists payment of medical benefits and the claimant employs an attorney in the *successful* prosecution of his claim, the board is to award costs, including reasonable attorney fees.⁷³

We have decided the board legally erred in insisting that FSS preauthorize the third surgery and have rejected the claim in that respect. Thus, at this juncture, Bockus has not employed an attorney in the *successful* prosecution of his claim and is therefore not entitled to an award of any attorney fees or costs.

⁷⁰ See *Bockus*, Bd. Dec. No. 14-0040 at 26.

⁷¹ See *Summers*, 814 P.2d at 1372-1373 (footnote omitted).

⁷² *Bockus*, Bd. Dec. No. 14-0040 at 27.

⁷³ See AS 23.30.145(b).

6. *Conclusion.*

We REVERSE the board's holdings that FSS had to preauthorize Bockus's third surgery and that Bockus was entitled to an award of attorney fees and costs.

Date: 3 December 2014 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission reverses the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).⁷⁴ For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed⁷⁵ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

⁷⁴ A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

⁷⁵ *See id.*

You may wish to consider consulting with legal counsel before filing an appeal. 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

More information is available on the Alaska Court System's website:
<http://www.courts.alaska.gov/>

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. 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 this is a full and correct copy of Final Decision No. 205, issued in the matter of *First Student Services and Sedgwick CMS, Inc. v. Jonathan Bockus*, AWCAC Appeal No. 14-008, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 3, 2014.

Date: December 4, 2014



Signed

K. Morrison, Appeals Commission Clerk