

Alaska Workers' Compensation Appeals Commission

Derrick Gillion,
Appellant/Cross-Appellee,

vs.

The North West Company International
and Berkshire Hathaway Homestate
Insurance Company,
Appellees/Cross-Appellants.

Final Decision

Decision No. 253 August 28, 2018

AWCAC Appeal No. 17-014
AWCB Decision Nos. 17-0089 and
17-0120
AWCB Case No. 201415267

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 17-0089, issued at Anchorage, Alaska, on July 31, 2017, by southcentral panel members Henry Tashjian, Chair, and Stacey Allen, Member for Labor; and Final Decision and Order No. 17-0120, issued at Anchorage, Alaska, on October 16, 2017, by southcentral panel members Henry Tashjian, Chair, and Stacey Allen, Member for Labor.

Appearances: Keenan Powell, Attorney at Law, for appellant/cross-appellee, Derrick Gillion; Adam R. Sadoski, Holmes Weddle & Barcott, PC, for appellees/cross-appellants, The North West Company International and Berkshire Hathaway Homestate Insurance Company.

Commission proceedings: Appeal filed August 22, 2017, supplemental statement of points on appeal filed October 17, 2017; cross-appeal filed November 2, 2017, with motion for stay; hearing on motion for stay held November 27, 2017; order denying motion for stay issued December 4, 2017; briefing completed April 18, 2018; oral argument held on June 12, 2018.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Appellant, Derrick Gillion, sought benefits related to his injuries while employed by The North West Company International. The Alaska Workers' Compensation Board

(Board) heard the issues on May 25, 2017, and issued its final decision on July 31, 2017.¹ Mr. Gillion timely appealed this decision to the Alaska Workers' Compensation Appeals Commission (Commission) and also filed with the Board a petition for reconsideration.² The Board issued a final decision on reconsideration on October 16, 2017,³ and Mr. Gillion supplemented his appeal to include this new decision.

Appellees, The North West Company International and Berkshire Hathaway Homestate Insurance Company (NWC), cross-appealed the Board's Dec. No. 17-0120 and as part of its cross-appeal, NWC requested a stay of the Board's order for payment of three days of temporary total disability (TTD) incurred while Mr. Gillion attended a Second Independent Medical Evaluation (SIME). The Commission denied the request for stay on December 4, 2017. The Commission now affirms the Board in part and remands in part.

2. *Factual background and proceedings.*⁴

On August 7, 2014, Mr. Gillion injured his lower back while bending over to wrap a pallet at work.⁵ David W. Parliament, D.C., took Mr. Gillion off work from August 7 to August 18, 2014.⁶ At the time of injury, NWC paid Mr. Gillion at an hourly rate,⁷ and NWC initially calculated Mr. Gillion's weekly compensation rate to be \$251.00. NWC paid

¹ *Derrick Gillion v. The North West Co. Int'l*, Alaska Workers' Comp. Bd. Dec. No. 17-0089 (July 31, 2017) (*Gillion I*); *Derrick Gillion v. The North West Co. Int'l*, Alaska Workers' Comp. Bd. Dec. No. 16-0116 (Nov. 25, 2016) (*Gillion I*) is not part of this appeal.

² *Derrick Gillion v. The North West Co. Int'l*, Alaska Workers' Comp. Bd. Dec. No. 17-0100 (Aug. 24, 2017) (*Gillion II*).

³ *Derrick Gillion v. The North West Co. Int'l*, Alaska Workers' Comp. Bd. Dec. No. 17-0120 (Oct. 16, 2017) (*Gillion IV*).

⁴ 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.

⁵ *Gillion II* at 4, No. 1.

⁶ *Id.*, No. 2.

⁷ *Id.*, No. 1.

TTD of \$286.85 for August 10, 2014, through August 17, 2014. NWC suspended all benefits after August 17, 2014.⁸

On November 21, 2014, Mr. Gillion's treating physician, Michel L. Gevaert, M.D., noted:

MRI of the lumbar spine was carried out on 11/10/14. This shows a disc protrusion and anular [sic] tear at L5-S1 and severe foraminal stenosis of the right L5-S1. He appears to have short pedicle syndrome.

Dr. Gevaert further noted:

[Mr. Gillion] presents with a five month history of low back pain which initially started following an 8/13/14 work-related injury. He has responded well with relative rest and chiropractic treatment. The primary reason of this visit is the fact that he remains with persistent pain. The pain is usually triggered when he works overtime⁹

On February 20, 2015, Dr. Gevaert performed a lumbar interlaminar epidural injection, and Mr. Gillion remained off work from February 20, 2015, through February 27, 2015, during which time his pain symptoms improved. However, his symptoms recurred when he returned to work. NWC paid TTD of \$286.86 for this period of disability. Mr. Gillion did not miss work due to back pain again until May 8, 2015.¹⁰ On May 8, 2015, Dr. Gevaert performed a facet block of right L3-4, left L3-4, right L4-5, and left L4-5, and restricted Mr. Gillion from working. He returned to full-duty work on May 29, 2015.¹¹

On December 10, 2015, Mr. Gillion again injured his lower back while wrapping and lifting pallets at work. He saw Eric S. Suoja, P.A., on the same day, who prescribed a painkiller and restricted Mr. Gillion from work until he could see Dr. Gevaert.¹² On December 18, 2015, P.A. Suoja indicated Mr. Gillion was "experiencing a temporary setback," and "[t]he clinical presentation does not appear to be as severe as earlier this

⁸ *Gillion II* at 4, No. 3.

⁹ *Gillion I* at 2, No. 2.

¹⁰ *Gillion II* at 5, No. 6.

¹¹ *Id.*, No. 7.

¹² *Id.*, No. 8.

year.” P.A. Suoja continued to restrict Mr. Gillion from full work.¹³ Dr. Gevaert found Mr. Gillion totally disabled from December 10, 2015, through January 31, 2016, and released him to light duty as of February 1, 2016. During this period of disability, Dr. Gevaert gave Mr. Gillion a lumbar transforaminal epidural injection and he attended physical therapy (PT).¹⁴

On February 18, 2016, Mr. Gillion attended an employer’s medical examination (EME) with R. David Bauer, M.D., who diagnosed a strain of the lumbar spine and “degenerative disease of the lumbar spine, neither aggravated by, nor accelerated by, the incident in question.” Dr. Bauer indicated Mr. Gillion’s lumbar strain caused the short-term pain from December 10, 2015, to February 2016, but the work injury was not the substantial cause of any ongoing disability or need for treatment except the twelve sessions of PT. Dr. Bauer also opined Mr. Gillion would be medically stable with no ratable permanent impairment after the twelve sessions of PT, and would be able to perform heavy work with no physical restrictions.¹⁵

Mr. Gillion had the following periods of past disability related to his injuries:¹⁶

| Disability Period | Length of Disability | Reason |
|-------------------|-----------------------------------|--------------------|
| 8/8/14 – 8/17/14 | 1 week, 3 days (see AS 23.30.150) | 8/7/15 Injury |
| 2/20/15 – 2/27/15 | 1 week, 1 day | 2/20/15 Epidural |
| 5/8/15 – 5/29/15 | 3 weeks | 5/8/15 Facet Block |
| 12/11/15 – 2/1/16 | 7 weeks, 4 days | 12/10/15 injury |

Following the February 18, 2016, EME, but prior to Mr. Gillion’s March 8, 2016, examination with Dr. Gevaert, an adjuster for NWC telephoned Mr. Gillion to tell him his workers’ compensation benefits had been or would be cut off.¹⁷ This constituted a

¹³ *Gillion II* at 5, No. 9.

¹⁴ *Id.* at 5-6, No. 10.

¹⁵ *Id.* at 6, No. 11.

¹⁶ *Id.*, No. 12.

¹⁷ *Gillion IV* at 2, No. 2.

controversion-in-fact, although based on the EME, because NWC did not file a formal controversion notice.¹⁸

On March 31, 2016, Mr. Gillion filed a workers' compensation claim (WCC) for TTD, medical and transportation costs, review of a reemployment benefit decision on eligibility, penalty, interest, and attorney fees and costs. He later amended this WCC to include a compensation rate adjustment, unfair or frivolous controversion, and TTD for the days during which Mr. Gillion attended an SIME.¹⁹ Both parties filed compensation reports as evidence; however, the Board noted the reports did not clearly indicate what payments were made and when, and the parties filed no other evidence of payment.²⁰

Also, on March 31, 2016, Mr. Gillion filed a Petition for SIME, attaching an SIME form that listed a number of medical disputes. Included in the boxes for attending physician medical opinions regarding causation and compensability were "disc protrusion L5-S1 and annular tear", from Dr. Gevaert's November 21, 2014, medical report. This form was not signed by NWC.²¹ On May 12, 2016, the parties stipulated to an SIME, and agreed to filing deadlines. The parties agreed to complete and sign the SIME form by August 5, 2016.²² On August 5, 2016, NWC signed and returned an altered SIME form to Mr. Gillion for signature. NWC altered the form to remove the reference to Dr. Gevaert's November 21, 2014, medical report.²³ Mr. Gillion did not sign the altered form and a form signed by both parties was never submitted.²⁴

On August 24, 2016, the Board designee confirmed that SIME medical binders and SIME questions had been received from both parties. The parties noted a dispute over inclusion of Dr. Gevaert's November 21, 2014, medical report. The dueling SIME forms

¹⁸ *Gillion IV* at 9.

¹⁹ *Gillion II* at 6, No. 13.

²⁰ *Id.* at 7, No. 14.

²¹ *Gillion I* at 2-3, No. 3.

²² *Id.* at 3, No. 4.

²³ *Id.*, No. 5.

²⁴ *Id.* at 6.

offered by the parties indicated there were medical disputes on the same issues: causation, compensability, treatment, degree of impairment, functional capacity, and medical stability. The parties agreed that an SIME should be conducted.

The parties agreed to a hearing on October 25, 2016, on this issue.²⁵ The Board found that inclusion or exclusion of the reference to Dr. Gevaert's November 21, 2014, medical report would not change the areas of medical dispute.²⁶ The Board found that since SIME forms are created by the Division of Workers' Compensation and are not transmitted to the SIME physician, the parties' precise language did not need to be included.²⁷ The two forms were accepted by the Board as a joint stipulation.

On April 25, 2016, NWC filed and served its first formal controversion notice in this case, denying all further benefits except for the twelve sessions of physical therapy, per Dr. Bauer's EME.²⁸

On January 24, 2017, Paul M. Puziss, M.D., conducted the SIME and supplemented his report with deposition testimony. Dr. Puziss opined the work injury was the substantial cause of Mr. Gillion's past and continuing disability and need for medical treatment, and no other cause existed. Dr. Puziss found Mr. Gillion was not yet medically stable and recommended further medical treatment. Dr. Puziss also recommended physical therapy and manual therapy for initial treatment, followed by the other treatments as needed to improve Mr. Gillion's symptoms. Dr. Puziss opined Mr. Gillion could perform light duty work, but noted that Mr. Gillion's description of his actual duties was not light duty.²⁹ The Board concluded that Dr. Puziss conducted a thorough and professional examination. The Board also found he provided a detailed and well-supported medical opinion, and his medical opinions and testimony were credible.³⁰

²⁵ *Gillion I* at 3, No. 6.

²⁶ *Id.*, No. 7.

²⁷ *Id.*, No. 8.

²⁸ R. 35-36.

²⁹ *Gillion II* at 7, No. 16.

³⁰ *Id.*, No. 17.

NWC did not provide the check for Mr. Gillion's transportation, room, and board costs until the date of the SIME, and Mr. Gillion did not receive it until his return from attending the SIME. Mr. Gillion missed three days of work for the travel to Oregon for the SIME.³¹

On May 23, 2017, two days prior to hearing, NWC filed a petition requesting an order for the parties to attend mediation.³²

At the May 25, 2017, hearing, NWC withdrew its opposition to a number of Mr. Gillion's claimed benefits. NWC:

- a) withdrew opposition to a finding [of] compensability. [NWC] agreed that [Mr. Gillion] had sustained a compensable injury;
- b) withdrew controversion of future disability, medical, and transportation benefits. [NWC] argued treatment other than physical therapy is not currently reasonable and necessary since physical therapy had shown success and Dr. Puziss's recommended continuing physical therapy until it ceases to provide effective treatment;
- c) agreed [Mr. Gillion's] compensation rate had been incorrectly calculated, though [NWC] disputes [Mr. Gillion's] argument on the compensation rate issue. [NWC] argues [Mr. Gillion's] compensation rate from the date of the August 7, 2014 injury and ongoing should be \$450.03. [NWC] states the amount of underpayment of TTD is \$1416.58.
- d) agreed [Mr. Gillion] is entitled to a [permanent partial impairment] PPI rating once medically stable.³³

On June 20, 2017, the Board issued a letter to the parties reopening the record and providing calculations based on Mr. Gillion's reported W-2 wages. Mr. Gillion received W-2 tax forms from NWC for the years 2012 through 2014, showing Social Security wages of \$32,748.57 in 2012, \$35,841.76 in 2013, and \$38,777.62 in 2014.³⁴ The Board's calculations resulted in a weekly compensation rate of \$464.86 per week for the 2014

³¹ *Gillion II* at 8, No. 18.

³² *Id.*, No. 19.

³³ *Id.*, No. 20; this acceptance of benefits by NWC was accepted by the Board and, thus, is part of the Board's decision.

³⁴ *Id.*, No. 21.

work injury and a weekly compensation rate of \$501.53 for the 2015 injury. Mr. Gillion agreed with the Board's calculations. NWC did not file a response.³⁵

NWC had initially paid TTD based on a weekly compensation rate of \$251.00. On or about June 16, 2015, NWC raised the weekly compensation rate to \$434.02, and paid the difference between the previously paid benefits and the new rate. Following the December 10, 2015, injury, NWC paid TTD at a weekly compensation rate of \$344.07.³⁶

To this point, Mr. Gillion had incurred attorney fees of \$29,696.00, including paralegal costs, and additional costs of \$1,916.14, for a total of \$31,612.14. The Board reduced the requested fees by \$3,032.52 relating to Mr. Gillion's petition for SIME language and \$107.50 due to incorrect billing at the attorney rate when the paralegal rate was appropriate. The Board further reduced the requested fee by \$360.00 for charges relating to Mr. Gillion's claim for unfair and frivolous controversion.³⁷ The Board reduced the remaining requested attorney fees by 20 percent based on the issues upon which Mr. Gillion prevailed at hearing.

On July 31, 2017, the Board, in *Gillion II*, found Mr. Gillion was entitled to workers' compensation benefits, including a higher compensation rate, progressive medical treatments, penalty, interest, and attorney fees. The Board also found Mr. Gillion was not entitled to an eligibility evaluation nor TTD during the time he attended the SIME. The Board concluded that NWC's controversion had not been unfair or frivolous.³⁸

The Board found the initial weekly compensation rate resulted from a typographical error or miscalculation. NWC corrected this error in June 2015, when the compensation reports listed \$434.02 as Mr. Gillion's compensation rate, from a weekly wage of \$667.47.³⁹ The Board found that initial compensation rate was the probable result of a typo or miscalculation. The rate of \$251.00 per week was the equivalent of

³⁵ *Gillion II* at 8, No. 22.

³⁶ *Id.* at 9, No. 24.

³⁷ *Id.*, No. 25.

³⁸ *Id.* at 23-24.

³⁹ R. 8-10, 20-22, 26-31, 849, 852.

the gross weekly wage of \$667.47 (box 1 of Mr. Gillion's 2013 W-2 divided by 52), which resulted in a compensation rate of \$434.02 when put into the Division's 2014 rate tables. This, in turn, multiplied by 80 percent and re-entered into the 2014 rate tables, resulted in a rate of \$251.00. Early compensation reports listed \$434.02 as Mr. Gillion's weekly wage, rather than his weekly compensation rate. This error was corrected in June 2015, when compensation reports listed \$434.02 as Mr. Gillion's weekly compensation rate, based on a weekly wage of \$667.47.⁴⁰

The parties do not dispute that Mr. Gillion was not medically stable at the time of hearing nor that he is entitled to a PPI rating when he reaches medical stability.⁴¹

On August 9, 2017, Mr. Gillion timely filed a petition for reconsideration of *Gillion II*, alleging errors of law and fact. Mr. Gillion argued the Board, in *Gillion II*, erred by:

- a. Denying TTD during Employee's SIME;
- b. Failing to order transportation costs and PPI;
- c. Finding Employer did not unfairly and frivolously controvert Employee's benefits;
- d. Finding the exam conducted by Dr. Bauer constituted substantial evidence;
- e. Finding Employee was not successful in the SIME dispute addressed by *Gillion I*; and
- f. Miscalculating Employee's reasonable attorney fees.⁴²

Mr. Gillion claimed transportation costs of \$173.76 and a prospective order for a PPI rating upon medical stability.⁴³ The Board found a discrepancy between Mr. Gillion's claimed attorney fees of \$29,696.00 and the discussion portion of the decision which showed a total of \$28,656.00 in fees claimed. The \$1,040.00 difference between these two numbers was unexplained.⁴⁴

⁴⁰ Compensation Reports, April 1, 2015, June 2, 2015, June 3, 2015, June 25, 2015; Gillion W-2, 2013; Division 2014 Rate Table; Judgment; Observation.

⁴¹ *Gillion II* at 8, No. 20.

⁴² Petition for Reconsideration, August 9, 2017.

⁴³ *Gillion III* at 3, No. 7.

⁴⁴ *Id.* at No. 8.

The Board noted that NWC had withdrawn controversion of future transportation benefits, but the Board had not addressed past transportation benefits. The Board calculated attorney fees by deducting the SIME dispute fees, the mischarged fees, and the unfair and frivolous controversion fees from the total billed. The Board then reduced the requested attorney fees by 20 percent to reflect Mr. Gillion's rate of success in pursuing the remaining parts of his claims, i.e. reemployment benefits, PPI, validity of EME report, and right to a finding of frivolous and unfair controversions. The Board found the resulting amount of \$21,657.70 was a reasonable award in light of Attorney Powell's experience, the nature and complexity of the case, the work performed, and the benefits accrued to Mr. Gillion.⁴⁵

The Board reconsidered its decision in *Gillion II* and issued *Gillion IV*. The Board ordered payment of past transportation costs of \$173.76 and payment of TTD for the three days of work missed when Mr. Gillion attended the SIME.⁴⁶ The Board affirmed its other findings and orders from *Gillion II*.

Mr. Gillion appealed several issues and NWC cross-appealed the issue of payment of three days of TTD for attendance at the SIME.

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.⁴⁷ The Board's credibility findings are binding on the Commission.⁴⁸ "The board has the sole power to determine the credibility of a witness."⁴⁹ A determination on credibility of testimony or evidence is conclusive.⁵⁰ On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its

⁴⁵ *Gillion II*.

⁴⁶ *Gillion IV* at 17.

⁴⁷ AS 23.30.128(b).

⁴⁸ *Id.*

⁴⁹ AS 23.30.122.

⁵⁰ *Id.*

independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."⁵¹ The Commission, when interpreting a statute, adopts "the rule of law that is most persuasive in light of precedent, reason, and policy."⁵² An award of attorney fees should be upheld upon review unless it is manifestly unreasonable.⁵³

4. Discussion.

a. *Did the Board err in not finding the several delays in payment to Mr. Gillion to be unfair and frivolous controversies?*

Mr. Gillion requested a finding NWC had unfairly and frivolously controverted his benefits on several occasions when it failed to correct his compensation rate, when it failed to file a controversion after orally telling him his benefits were terminated, and when it failed to send the money for his travel to the SIME timely. The Board found that, while unfortunate, these failures were neither malicious nor undertaken with a bad intent and, therefore, the statutory penalties and interest on these actions were sufficient sanctions and provided proper compensation to Mr. Gillion for his inconvenience.

The Alaska Workers' Compensation Act (Act) provides that "compensation . . . shall be paid periodically, promptly, and directly . . . except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer **must** file a notice, on a form prescribed by the director, stating . . . the type of compensation and all grounds upon which the right to compensation is controverted."⁵⁴ The Act further provides that if compensation is not timely paid "there shall be added to the unpaid installment an amount equal to 25 percent of the installment."⁵⁵ The penalty amount is payable without

⁵¹ AS 23.30.128(b).

⁵² *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

⁵³ *Bailey v. Litwin Corp.*, 780 P.2d 1007, 1011 (Alaska 1989).

⁵⁴ AS 23.30.155(a)(emphasis added).

⁵⁵ AS 23.30.155(e).

an order and payment is made directly to the recipient of the unpaid installment.⁵⁶ The Act also requires the payment of interest on each late paid installment of benefits.⁵⁷

The Board, in *Gillion II*, determined, based on Mr. Gillion's W-2s, his compensation rate for his 2014 injury was \$464.86 and for the 2015 injury the rate was \$501.53.⁵⁸ Although both parties had initially agreed to a compensation rate of \$450.03 for the 2014 injury, the Board found, based on its solicited information from Mr. Gillion, the correct rates were \$464.86 and \$501.03 respectively. In *Gillion IV*, the Board reviewed the compensation reports to determine how and why NWC had incorrectly calculated Mr. Gillion's compensation rate. The Board found that NWC inadvertently reentered Mr. Gillion's spendable weekly wage into the 2014 rate tables twice, and listed his compensation rate as his spendable weekly wage on the compensation reports. To an impartial observer, this appears to have been an all too human mistake and not the result of any bad faith. NWC had Mr. Gillion's W-2s at the time of the payments of the incorrect compensation rate and, more probably than not, would have paid him the correct compensation but for the mistakes on the compensation report. No evidence was presented to support another finding.

The Board awarded the statutory penalty in AS 23.30.155(e) for the incorrectly calculated and late paid TTD, holding that the statutory penalty and interest was the appropriate remedy for the injustice to Mr. Gillion for the incorrect compensation rate.⁵⁹ The Board observed the original compensation reports had inadvertently recorded his spendable weekly wage in two different places, effectively cutting his compensation rate in half. NWC attempted to correct its mistake and the Board found the mistakes did not rise to the level of unfair and frivolous.

⁵⁶ AS 23.30.155(e).

⁵⁷ AS 23.30.155(p); 8 AAC 45.142(a).

⁵⁸ *Gillion II* at 17-18.

⁵⁹ *Id.* at 18.

Mr. Gillion mistakenly relies on *Morales de Lopez v. Unisea, Inc.*⁶⁰ in support of his contention that the miscalculated weekly compensation rate and, thus, untimely payment of his full TTD is sufficient to support a finding of unfair and frivolous controversion. The Commission, in *Morales de Lopez*, found it was the lack of controversions and the failure of the employer to pay any portion of benefits when the benefits were due, to be the kind of behavior rising to the level to merit a finding of unfair and frivolous controversion. However, in Mr. Gillion's case, the Board found that the underpayment of TTD was due to a mistake made on the compensation reports. This mistake did not arise to the level of bad faith, in part because it was the result of human error. Moreover, NWC eventually discovered its own error and corrected it, albeit with an incorrect rate close to Mr. Gillion's proper compensation rate. Moreover, penalties were ordered to be paid on the late paid amounts, thus providing Mr. Gillion with recompense for NWC's mistake. The record supports the Board's findings.

In *Harp v. ARCO Alaska, Inc.*, the Alaska Supreme Court (Court) cited its findings in *Stafford v. Westchester Fire Ins. Co. of New York, Inc.*,⁶¹ stating that bad faith may be found where nonpayment is made due to mistake of law or misplaced reliance on advice of counsel. This would indicate that something more than mere human error is needed for a bad faith controversion. The Court also relied in part on a California decision stating that "[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 that the claimant is not entitled to benefits."⁶² The underpaid TTD in Mr. Gillion's case was due principally to a human error in filling out the compensation report, an error which upon review of the compensation report was noticed both by NWC and the Board.

⁶⁰ *Morales de Lopez v. Unisea, Alaska Workers' Comp. App. Comm'n Dec. No. 236* (July 7, 2017).

⁶¹ *Stafford v. Westchester Fire Ins. Co. of New York, Inc.*, 526 P.2d 37, 42 (Alaska 1974).

⁶² *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992)(citation omitted).

Therefore, the Board's findings that NWC did not frivolously or unfairly controvert the compensation rate are supported by the evidence in the record. The Board properly found the statutory penalties and interest on each incorrectly calculated weekly compensation payment were sufficient recompense for Mr. Gillion's delay in receiving the proper benefits.

However, the failure of NWC to mail timely the mandatory expense payment for his SIME is more difficult to explain and more troubling, especially as NWC proffered no explanation. An experienced adjuster should have a calendaring procedure in place by which to ensure the timeliness of SIME payments. An injured worker should not have to pay his or her own expenses in order to comply with a Board order to attend an SIME. There are undoubtedly injured workers who would have to go without food in order to attend an SIME when the employer fails to timely send the expense check.

No evidence was offered to support a finding of unfair and frivolous controversion for the late paid SIME expenses. Rather, as the Board seems to believe, the untimeliness appears to have been the result of human error, whether in the calendaring system or mailing procedure, that resulted in the check not being sent until the day of the SIME itself. While this is an example of adjusting gone awry, it does not appear to have been based on a pattern of inept adjusting or out of a pattern of treating injured workers with contempt or lack of concern.⁶³

b. Should Mr. Gillion be awarded additional attorney fees?

If there is a medical dispute, the Board may order an SIME. The Act provides, at AS 23.30.095:

(k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and

⁶³ The adjuster did not testify at hearing or by deposition, so no evidence was submitted as to the reason for the late payment.

medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. A person may not seek damages from an independent medical examiner caused by the rendering of an opinion or providing testimony under this subsection, except in the event of fraud or gross incompetence.

The Board's regulation outlines the procedure for the parties to follow if one or both believe an SIME is necessary:

(g) If there exists a medical dispute under in AS 23.30.095(k),

(1) the parties may file a

(A) completed second independent medical form, available from the division, listing the dispute together with copies of the medical records reflecting the dispute, **and**

(B) stipulation signed by all parties agreeing

(i) upon the type of specialty to perform the evaluation or the physician to perform the evaluation; and

(ii) that either the board or the board's designee determine whether a dispute under AS 23.30.095(k) exists, and requesting the board or the board's designee to exercise discretion under AS 23.30.095(k) and require an evaluation;

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

(A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and

(B) copies of the medical records reflecting the dispute; or

(3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if

(A) the parties stipulate, in accordance with (1) of this subsection, to the contrary and the board determines the evaluation is necessary; or (B) the board on its own motion determines an evaluation is necessary⁶⁴

⁶⁴ 8 AAC 45.092 (emphasis added).

The regulation above states the Board may order an SIME when the parties present a joint stipulation “signed by all parties.” While the parties here agreed an SIME was necessary and agreed both on the issues for the SIME physician to address and the medical specialty of the SIME physician, no completed form or stipulation signed by all parties was presented. Rather, the parties were in strong disagreement over specific language and medical reports to be included on the SIME form. Neither party was willing to stipulate to the language on the form submitted by the other party. Neither party signed the other party’s form. According to its regulation, the Board designee was not in a position to order an SIME because there was no jointly signed stipulation. The issue of necessity went to hearing.

The Board issued *Gillion I* deciding the SIME form was for the Board’s use in determining whether to order an SIME. The Board found that the SIME form was not submitted to the SIME physician. Since neither form would be submitted to the SIME physician, the dispute over language on the form would not affect the manner in which the SIME is conducted nor have an influence over the conclusions reached by the SIME physician. Therefore, the Board, in finding “[t]he SIME form should not be required to include [Mr. Gillion’s] requested language,” seems to have concluded that the two submitted and separately signed forms are the equivalent of one stipulation signed by all parties. Thus the two forms together meet the regulatory requirements for requesting an SIME, according to the Board.⁶⁵ Therefore, since the parties were allowed to file any additional medical records and submit questions, the SIME process could begin.⁶⁶ However, until the Board ruled on the disputed separate SIME forms there was no jointly signed stipulation as required by the statute and, therefore, the SIME process could not have moved forward.

The Board has authority to interpret its own regulations and its interpretation should be given deference if it is consistent with the statute from which it derives its

⁶⁵ *Gillion I* at 6.

⁶⁶ *Id.*

authority and the interpretation is reasonable.⁶⁷ The Board's interpretation of its regulation seems to comport with the statute and, in this instance, is a reasonable interpretation.

The Board needed to interpret its regulation in order to resolve the dispute over the SIME forms. This resolution was required before the SIME could go forward. Having determined the two separate forms were equivalent to the required single form, the Board incorrectly decided Mr. Gillion was not entitled to attorney fees since he had not prevailed on having his requested language included on the form. Nonetheless, he did prevail on getting the Board to order the SIME process to move forward. Without his seeking a Board decision on the need for one jointly signed stipulation, the SIME process could not have taken place because there was no jointly signed stipulation. Therefore, Mr. Gillion should be held to be the prevailing party on the issue of the SIME. He should be awarded attorney fees for the work in obtaining the ordered SIME.

As to the other reduction in attorney fees, the Commission should uphold an award unless the award is manifestly unreasonable.⁶⁸ Here the Board carefully analyzed the issues upon which Mr. Gillion prevailed and those upon which he did not. The record supports the Board's reasoning for the other reductions. Nonetheless, since the issue on attorney fees must be remanded to the Board for reconsideration, the Board may want to revisit whether any mathematical errors occurred in its original calculations. Furthermore, the Board did not seem to address whether Mr. Gillion is entitled to attorney fees for his successful motion on reconsideration. This issue should also be addressed on remand.

c. Was Mr. Gillion entitled to TTD for days missed from work for the SIME?

Mr. Gillion sought three days of TTD to compensate him for time loss when he missed work to attend the Board-ordered SIME. NWC cross-appealed the Board's award

⁶⁷ See, e.g., *Davis Wright Tremaine LLP v State, Dep't of Admin.*, 324 P.3d 293, 301 (Alaska 2014).

⁶⁸ *Bailey v. Litwin Corp.*, 780 P.2d 1007, 1011 (Alaska 1989).

of TTD for these three days asserting that Mr. Gillion was medically stable at the time of the SIME and actively working at his regular wages. NWC contends that attendance at the SIME did not arise out of the work injury, it was not his work injury that caused him to miss work, and Mr. Gillion was not disabled at the time of the SIME. NWC asserts the Board erred in awarding Mr. Gillion three days of TTD for attendance at the SIME.

TTD is payable "in case of disability total in character but temporary in quality" ⁶⁹ Disability is defined by the Act as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury" ⁷⁰ Injury is defined as "accidental injury . . . arising out of and in the course of employment" ⁷¹

The reason for an employee to attend either an EME or an SIME is because the employee has been injured on the job or there is a dispute over the nature of the work injury. Here Mr. Gillion sustained two injuries on the job and there was a dispute over his medical treatment. The only reason Mr. Gillion attended the Board-ordered SIME was because he was injured on the job. He was unable to work for those three days as a result of the work injury. The evidence is that he was unable to earn the wages he was receiving at the time of injury when he missed work to attend the SIME. Although NWC contends he was receiving his regular wages when he attended the SIME, NWC presented no evidence Mr. Gillion was paid for those three days by his employer. Moreover, NWC conceded at hearing that Mr. Gillion was not medically stable at the time of the hearing. ⁷² Therefore, Mr. Gillion was not medically stable at the time of the SIME. ⁷³ He was entitled to TTD for the loss time (and pay) from work for attending the SIME because his attendance arose out of his work injury.

⁶⁹ AS 23.30.185.

⁷⁰ AS 23.30.395(16).

⁷¹ AS 23.30.395(24).

⁷² *Gillion IV* at 5, No. 15; *Id.* at 14.

⁷³ *Id.*

The Commission affirms the Board finding that Mr. Gillion was unable to work while attending the SIME and is entitled to receive TTD for his time loss. The Board's order is affirmed.

d. Did the Board err in finding the EME was substantial evidence to support both the controversion in fact and a formal controversion?

Mr. Gillion asserts the EME by Dr. Bauer was not substantial evidence needed to rebut the presumption of compensability, and, therefore, it could not be a proper basis for controverting any benefits that might be owed to Mr. Gillion. The Board found the EME sufficient to support both controversions.

Dr. Bauer's report in February 2016 was sufficient to rebut the presumption of compensability at the time of the report and, thus, it was sufficient support for the controversions. The Court issued *Huit v. Ashwater Burns, Inc.* in June 2016, finding that an EME, in order to be substantial evidence sufficient to rebut the presumption of compensability, had to provide an alternative explanation for an injured worker's need for medical treatment.⁷⁴ It was no longer sufficient to state merely that work is not the substantial cause for the need for medical treatment.⁷⁵ However, in February and March 2016 when the EME was issued and NWC controverted Mr. Gillion's benefits, the Commission's decision in *Huit* was still precedential law.⁷⁶ That decision has held, until reversed by the Court, that a medical expert needed only to rule out work as the substantial cause of the need for medical treatment. Thus, when NWC controverted Mr. Gillion's benefits based on Dr. Bauer's report, NWC was within its rights to do so.

Dr. Bauer agreed Mr. Gillion was not medically stable and would not be until he completed 12 weeks of PT. Dr. Bauer related the need for PT to the work injuries. NWC paid for the PT. Mr. Gillion did not treat with Dr. Gevaert or anyone else for another ten months, according the SIME report. Therefore, no medicals were due and owing. Furthermore, Mr. Gillion, at the time of the EME, had returned to work so no TTD was

⁷⁴ *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 919 (Alaska 2016).

⁷⁵ *Id.*

⁷⁶ *Ashwater-Burns, Inc. v. Huit*, AWCAC Dec. No. 191 (Mar, 18, 2014).

due and owing to him. There were no benefits owed upon which a penalty could have been based.

Although Dr. Bauer was unable to point to an alternative explanation for Mr. Gillion's future medical needs, he opined the work injuries were not the substantial cause of any need in the future he might have for medical treatment for his back condition. After June 2016, this report would not have been sufficient evidence but at the time of the controversies it was sufficient. Therefore, the Board's finding that the report supported the controversies and precluded a finding of frivolous and unfair controversy is affirmed.

e. Is Mr. Gillion entitled to a specific order for a PPI evaluation when he reaches medical stability?

Mr. Gillion sought a specific order that he is entitled to a PPI evaluation when he reaches medical stability. When the hearing in *Gillion II* began, NWC withdrew its opposition to several issues in contention. Among those issues, NWC specifically agreed Mr. Gillion was entitled to a PPI rating when he reached medical stability. The Board incorporated NWC's withdrawal of opposition to and acceptance of several aspects of Mr. Gillion's claim in a specific finding of fact, including his entitlement to a PPI rating.⁷⁷ In *Gillion IV*, the Board reiterated NWC's agreement to an evaluation for PPI when Mr. Gillion reached medical stability. Thus, the Board did not have an obligation to make a separate order for a PPI evaluation because the decision already included NWC's agreement. The Board is affirmed on its not including a separate order.

5. Conclusion.

The Commission AFFIRMS the Board's findings that NWC's controversies, both formal and in-fact, were not unfair or frivolous. The Commission AFFIRMS the Board's finding that TTD is owed for attendance at an SIME. The Commission AFFIRMS in part and REMANDS in part the Board's order on attorney fees, specifically finding fees are owed on the SIME question. The Commission AFFIRMS the holding that no specific order

⁷⁷ *Gillion II* at 8, No. 20.

for a PPI evaluation is needed since the decision includes NWC's specific agreement to Mr. Gillion's right to a PPI evaluation.

Date: 28 August 2018 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Michael J. Notar, Appeals Commissioner

Signed

S. T. Hagedorn, 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 no later than 30 days after the date shown in the Commission's notice of distribution (the box 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 no later than 30 days after the date shown in the Commission's notice of distribution (the box below). 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, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of Final Decision No. 253, issued in the matter of *Derrick Gillion vs. The North West Company International and Berkshire Hathaway Homestate Insurance Company*, AWCAC Appeal No. 17-014, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 28, 2018.

Date: August 29, 2018



Signed

K. Morrison, Appeals Commission Clerk