

Alaska Workers' Compensation Appeals Commission

Kiel L. Cavitt,
Appellant,

vs.

D & D Services, LLC d/b/a Novus Auto
Glass and Ohio Casualty Insurance
Company,
Appellees.

Final Decision

Decision No. 259 March 29, 2019

AWCAC Appeal No. 18-012
AWCB Decision No. 18-0060
AWCB Case No. 201513001

Final decision on appeal from Alaska Workers' Compensation Board Decision and Order No. 18-0060, issued at Anchorage, Alaska, on June 25, 2018, by southcentral panel members Ronald P. Ringel, Chair, Nancy Shaw, Member for Labor, and Linda Murphy, Member for Industry.

Appearances: Keenan Powell, Attorney at Law, for appellant, Kiel L. Cavitt; Martha T. Tansik, Barlow Anderson, LLC, for appellees, D & D Services, LLC d/b/a Novus Auto Glass and Ohio Casualty Insurance Company.

Commission proceedings: Appeal filed July 20, 2018; briefing completed December 6, 2018; oral argument was not requested by either party.

Commissioners: James N. Rhodes, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Kiel L. Cavitt (Mr. Cavitt) worked as a glazier for D & D Services LLC, d/b/a Novus Auto Glass, insured by Ohio Casualty Insurance Company (D & D). He injured his right elbow when he fell while stepping off of scaffolding. On July 20, 2016, the Alaska Workers' Compensation Board (Board) held a hearing on Mr. Cavitt's May 11, 2016, claim. At that hearing, the parties stipulated that Mr. Cavitt had been injured in the course and scope of his employment with D & D, that the permanent partial impairment (PPI) benefits

had been paid late and Mr. Cavitt was entitled to a penalty, and that D & D would pay Mr. Cavitt's attorney \$4,800.00 in fees and costs.¹

The Board next heard Mr. Cavitt's claim on August 2, 2017, and issued a Decision & Order awarding him some benefits and denying others.² This decision was timely appealed to the Alaska Workers' Compensation Appeals Commission (Commission) which remanded the matter to the Board for reconsideration of attorney fees.³

The Board heard additional matters relevant to Mr. Cavitt's claim on May 15, 2018, and issued an Interlocutory Decision and Order.⁴ The Board awarded Mr. Cavitt some benefits, including additional attorney fees on remand from the Commission, and denied other benefits. Mr. Cavitt filed a Notice of Appeal on July 20, 2018.⁵ Neither party requested oral argument so this matter is now decided on the basis of the parties' briefs. The Commission affirms the Board's decision as supported by substantial evidence in the record as a whole.

¹ *Cavitt v. D & D Services, LLC dba Novus Auto*, Alaska Workers' Comp. Bd. Dec. No. 18-0060 at 5, No. 12 (June 25, 2018)(*Cavitt III*) (the July 20, 2016, hearing apparently did not result in a published decision and is not before the Commission).

² *Cavitt v. D & D Services LLC, d/b/a Novus Auto Glass*, Alaska Workers' Comp. Bd. Dec. No. 17-0109 (Sept. 13, 2017)(*Cavitt I*).

³ *Cavitt v. D & D Services, LLC d/b/a Novus Auto Glass*, Alaska Workers' Comp. App. Comm'n Dec. No. 248 (May 4, 2018)(*Cavitt II*).

⁴ *Cavitt III*.

⁵ This should have been a Petition for Review since the decision is denoted as an Interlocutory Decision and Order. However, D & D did not oppose the Notice of Appeal and the Commission accepted the matter as an appeal since the issues decided were final dispositions of those issues.

2. *Factual background.*⁶

Mr. Cavitt worked for D & D as a glazier. On August 14, 2015, he was working on scaffolding replacing the windshield in a motorhome and injured his right elbow when he fell off the scaffolding.⁷

On August 15, 2015, Kenneth C. Thomas, M.D., performed open reduction and internal fixation surgery, with a radial head arthroplasty and ligament repair.⁸ Mr. Cavitt was unable to return to his job at the time of injury for more than 90 days, and an eligibility evaluation for reemployment benefits was begun on December 21, 2015.⁹ Dr. Thomas found Mr. Cavitt medically stable on December 29, 2015, and released him to light-duty work.¹⁰ Mr. Cavitt was unable to return to work with D & D in a light-duty capacity, so on January 5, 2016, he began working as a pizza delivery driver.¹¹

Because Mr. Cavitt was medically stable, but in the reemployment process, D & D discontinued temporary total disability (TTD) benefits and began paying PPI benefits on January 29, 2016, on a biweekly basis.¹² On February 1, 2016, Mr. Cavitt received a seven percent PPI rating based on the injury.¹³ On March 8, 2016, Mr. Cavitt was found not eligible for reemployment benefits because Dr. Thomas stated he had the physical capacities to return to work as a kitchen helper and delivery driver, two jobs he had held in the past 10 years.¹⁴

⁶ 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.

⁷ *Cavitt I* at 2, No. 1.

⁸ *Id.* at 3, No. 3.

⁹ *Id.*, No. 4.

¹⁰ *Id.*, No. 5.

¹¹ *Id.*, No. 6.

¹² *Id.*, No. 7.

¹³ *Id.*, No. 8.

¹⁴ *Id.*, No. 9; R. 001567.

On August 16, 2016, Dr. Thomas was concerned about possible nerve entrapment and referred Mr. Cavitt to Jared Kirkham, M.D., for nerve conduction studies.¹⁵ Dr. Kirkham, on August 17, 2016, performed the nerve conduction studies, which were within normal limits. Dr. Kirkham explained it was not unusual for patients to have persistent neuropathic pain of unclear origin after traumatic injuries.¹⁶

Mr. Cavitt saw, on December 5, 2016, PA-C Kristin Fredley who noted a fresh abrasion on Mr. Cavitt's right elbow. He reported he had fallen after being hit by a car.¹⁷ In mid-February 2017, Mr. Cavitt fell on an icy sidewalk while delivering pizza.¹⁸ Mr. Cavitt reported, on March 1, 2017, worsening pain after a fall about two weeks before, and Dr. Kirkham ordered a CT scan of Mr. Cavitt's right elbow.¹⁹

On March 8, 2017, PA-C Fredley reviewed the CT scan and determined there had been either chronic or posttraumatic loosening of the prosthesis with "likely posttraumatic changes."²⁰ Dr. Kirkham, on March 10, 2017, took Mr. Cavitt off work until March 14, 2017, and on March 15, 2017, he extended that restriction until April 15, 2017.²¹ On March 15, 2017, Dr. Kirkham also noted that the CT scan showed loosening of the prosthesis that was due to:

Acute-on-chronic right elbow pain status post right elbow fracture and dislocation from work injury on August 14, 2015, and right coronoid ORIF and radial head arthroplasty on August 15, 2016 [sic 2015]. This is likely related to posttraumatic loosening of the radial head prosthesis on top of his underlying right neuropathic right elbow pain of unclear etiology.²²

R. David Bauer, M.D., on April 26, 2017, examined Mr. Cavitt for an employer's medical evaluation (EME), and concluded the most significant factor in bringing about

¹⁵ *Cavitt I* at 4, No. 13.

¹⁶ *Id.*, No. 14.

¹⁷ *Id.*, No. 15.

¹⁸ *Id.*, No. 16.

¹⁹ *Id.*, No. 17.

²⁰ *Id.*, No. 18.

²¹ *Id.*, No. 19.

²² *Id.*, No. 20.

Mr. Cavitt's current need for medical treatment was the 2015 work incident. Neither the motor vehicle accident nor the February fall were substantial factors in his need for ongoing medical treatment. Dr. Bauer stated Mr. Cavitt required revision surgery for the prosthesis and was not medically stable. He predicted Mr. Cavitt would be medically stable within nine months of the surgery and Mr. Cavitt would be restricted to light-duty work until he became medically stable.²³

Dr. Bauer, in response to questions from D & D's attorney, opined Mr. Cavitt was medically stable until such time as he pursued the revision surgery. Dr. Bauer also stated Mr. Cavitt would become medically stable either 90 or 180 days after the surgery, depending on what procedure was done. He also stated Mr. Cavitt was capable of medium-duty work.²⁴ Mr. Cavitt underwent surgery on July 11, 2017, to revise the prosthesis and remove plates.²⁵ D & D restarted TTD benefits.

On November 8, 2017, Mr. Cavitt filed a medical summary including chart notes for treatment by infectious disease specialist Benjamin P. Westley, M.D. The chart notes were for services related to Mr. Cavitt's work injury, for dates of service of September 1, 2017, September 19, 2017, and October 3, 2017.²⁶

On December 5, 2017, D & D filed a medical summary that included an October 2, 2017, chart note documenting post-surgery follow-up by PA-C Kristin McGlohn at Alaska Fracture and Orthopedic Clinic (AFOC). The treatment was related to Mr. Cavitt's work injury.²⁷

On December 29, 2017, Dr. Thomas reviewed job descriptions for jobs Mr. Cavitt had held in his ten-year work history. All of the jobs required medium strength, and

²³ *Cavitt I* at 5, No. 24.

²⁴ *Id.*, No. 28.

²⁵ *Id.* at 6, No. 30.

²⁶ *Cavitt III* at 10, No. 48.

²⁷ *Id.* at 11, No. 51.

Dr. Thomas indicated Mr. Cavitt had the permanent physical capacities to perform all of the jobs.²⁸

On January 18, 2018, Dr. Thomas reviewed the same job descriptions he had reviewed on December 29, 2017, but he now opined Mr. Cavitt did not have the permanent physical capacities to perform the jobs.²⁹

On January 25, 2018, Mr. Cavitt was seen by Dr. Bauer for a second EME. In addition to examining him, Dr. Bauer reviewed medical records dated after his April 26, 2017, EME. Dr. Bauer's diagnosis was unchanged since his April 2017, EME report, and he continued to find the work injury was the substantial cause of Mr. Cavitt's disability and need for medical treatment. He also found the treatment to date was reasonable and necessary. However, Dr. Bauer found Mr. Cavitt reached medical stability as of the date of his examination and the only further treatment needed was a home exercise program and continued use of his elbow brace, although a functional capacity evaluation would aid in determining appropriate restrictions for future employment. Dr. Bauer rated Mr. Cavitt with an eight percent permanent partial impairment.³⁰

On February 22, 2018, Dr. Thomas reviewed Dr. Bauer's January 25, 2018, report and responded to several questions. He agreed with Dr. Bauer that Mr. Cavitt was medically stable and the only further treatment was a home exercise program, and he agreed with Dr. Bauer's recommendation for a functional capacity evaluation. Dr. Thomas noted "Excellent IME by Dr. Bauer."³¹

On February 28, 2018, Mr. Cavitt saw PA-C Kaleigh Bishop, who works with Dr. Thomas. Mr. Cavitt reported increased pain in his elbow. Concerned about infection, Ms. Bishop ordered an aspiration and cultures.³² On March 5, 2018, Mr. Cavitt saw

²⁸ *Cavitt III* at 11, No. 56.

²⁹ *Id.* at 12, No. 61.

³⁰ *Id.* at 12-13, No. 62.

³¹ *Id.* at 13, No. 68.

³² *Id.* at 14, No. 71.

Dr. Westley who stated Mr. Cavitt's pain could be due to an infection, and, if so, the prosthesis would have to be removed from his elbow.³³

On March 14, 2018, Mr. Cavitt filed a medical summary that included therapy notes for his January 29, 2018, and February 5, 2018, physical therapy treatments at AFOC. The chart note for a February 29, 2018, examination of Mr. Cavitt's right elbow by PA-C Bishop at AFOC was included.³⁴ On March 19, 2018, Mr. Cavitt filed a medical summary which included the March 2, 2018, chart note from Imaging Associates for an attempted aspiration on Mr. Cavitt's right elbow. Also included was a March 5, 2018, physical therapy note from AFOC.³⁵

On May 7, 2018, Dr. Thomas was deposed and explained that the recent cultures did not show an infection in Mr. Cavitt's elbow and there was no need for surgery at that time, although Mr. Cavitt required additional physical therapy and other conservative treatment. He stated physical therapy would be needed until Mr. Cavitt "plateaued," but he did not identify what other conservative treatment may be necessary. Dr. Thomas stated Mr. Cavitt would need check-ups whenever he experienced pain or other problems, but at least annually until "further notice." He explained that the estimated life of Mr. Cavitt's current prosthesis is 10 years, and at that point the risk of needing replacement increased, although he could not say whether the surgery would consist of the replacement of Mr. Cavitt's existing prosthesis or a total elbow replacement. Additionally, surgery to increase Mr. Cavitt's range of motion might be needed. Dr. Thomas said his December 29, 2017, opinion that Mr. Cavitt could work at medium strength jobs was mistaken; Mr. Cavitt is limited to sedentary work.³⁶

D & D did not file a witness list for the May 15, 2018, hearing, and Dr. Bauer did not testify. D & D represented it had timely paid all medical costs for which it had received

³³ *Cavitt III* at 14, No. 75.

³⁴ *Id.*, No. 76.

³⁵ *Id.* at 15, No. 79.

³⁶ *Id.* at 16, No. 85; Dr. Kenneth Thomas Dep., May 7, 2018, at 26:4-5; 27:1-5, 11-14; 36:2-4; 25:1-8; 6:23 – 7:12; 33:1-8; 22:12 – 23:9.

both a bill and the corresponding chart notes, except for one bill which was still undergoing review. D & D also represented it had paid all past TTD, except for the period from February 13, 2018, through April 12, 2018, which it had controverted based on facts developed from Dr. Bauer's January 25, 2018, EME Report.³⁷

At the May 15, 2018, hearing, the parties agreed Mr. Cavitt's February 26, 2018, petition for a Second Independent Medical Evaluation (SIME) was moot given their April 2, 2018, stipulation. D & D stated the relationship between the parties' counsel had become contentious and mediation with a neutral mediator might help with resolution. D & D also contended the hearing should be continued to allow the mediation, and because there were no current disputes before the Board after D & D withdrew its controversions and reinstated benefits after Dr. Thomas's May 7, 2018, deposition. Mr. Cavitt was opposed to mediation stating he should not be forced to give up one benefit to which he is entitled to obtain another. As an example of such coercion, Mr. Cavitt cited the parties' April 2, 2018, stipulation, claiming he was forced to give up his right to an SIME in order to obtain D & D's consent to treatment.³⁸

At hearing, Mr. Cavitt conceded the Reemployment Benefits Administrator (RBA) had not abused her discretion in determining he was ineligible for reemployment benefits in March, 2016.³⁹ The Board remanded the reemployment issue to the RBA for reconsideration based on Dr. Thomas' new restrictions on working.

The Board found the relationship between counsel in this case has been contentious. The Board noted several pleadings in the case demonstrated that both parties were ready to jump to the conclusion that any action by the other party was motivated by spite or ill will.⁴⁰

³⁷ *Cavitt III* at 17, No. 89.

³⁸ *Id.* at 17-18, No. 90.

³⁹ *Id.* at 19, No. 94.

⁴⁰ *Id.*, No. 98.

3. Proceedings.

On July 20, 2016, the Board held a hearing on Mr. Cavitt's May 11, 2016, claim at which time the parties stipulated that, among other things, Mr. Cavitt was injured in the course and scope of his employment with D & D. The Board next heard his claim on August 2, 2017, and issued a Decision and Order, awarding him some benefits and denying others.⁴¹ This decision was timely appealed to the Commission which then remanded the matter to the Board for reconsideration of attorney fees.⁴²

The record shows a history of lengthy and contentious issues between the parties. Relative to the hearing on May 15, 2018, there were numerous claims and answers. On November 20, 2017, D & D answered Mr. Cavitt's October 27, 2017, claim and filed a controversion and a petition to dismiss the claim. D & D stated the compensation rate issue had been decided in *Cavitt I* and all of D & D's controversions were based on fact or law. D & D denied Mr. Cavitt was entitled to attorney fees because he should not receive any benefits as a result of the claim.⁴³ Mr. Cavitt's December 1, 2017, amended claim sought medical costs, a finding of unfair or frivolous controversion, and attorney fees and costs.⁴⁴ On December 26, 2017, D & D answered his December 1, 2017, claim, and admitted Mr. Cavitt was entitled to medical costs related to the work injury. It denied its controversions were unfair or frivolous, or that Mr. Cavitt was entitled to attorney fees and costs.⁴⁵

On January 4, 2018, D & D answered Mr. Cavitt's December 12, 2017, claim, and admitted Mr. Cavitt was entitled to TTD and medical and transportation costs, except during the period from November 27, 2017, through December 11, 2017. It denied any controversions had been unfair or frivolous and denied penalties, interest, and attorney fees and costs. The answer noted that benefits had been reinstated when D & D received

⁴¹ *Cavitt I*.

⁴² *Cavitt II*.

⁴³ *Cavitt III* at 10, No. 49.

⁴⁴ *Id.* at 11, No. 50.

⁴⁵ *Id.*, No. 55.

the signed medical release.⁴⁶ On January 4, 2018, D & D also filed a controversion denying Mr. Cavitt was entitled to TTD, or medical and transportation costs between November 27, 2017, and December 11, 2017.⁴⁷

Subsequent Reports of Injury filed on December 14, 2017, and January 11, 2018, indicated Mr. Cavitt was paid TTD for the period between the December 6, 2017, controversion and the December 12, 2017, withdrawal. It is unclear from the reports whether TTD was timely paid.⁴⁸

On January 16, 2018, the parties filed a stipulation in which Mr. Cavitt agreed to dismiss his July 11, 2017, December 1, 2017, and December 11, 2017, claims and D & D agreed to pay employee past due TTD together with a penalty. The stipulation did not identify the time period for which the TTD was being paid or the amount of either TTD or the penalty. The stipulation also stated that D & D would pay Mr. Cavitt's attorney fees and costs of \$4,825.76, but, again, it did not indicate the time period for which fees were being paid.⁴⁹

On January 25, 2018, Mr. Cavitt filed a new claim seeking TTD, modification of the RBA's determination that he was ineligible for reemployment benefits, reemployment stipend benefits under AS 23.30.041(k), and attorney fees and costs.⁵⁰

On February 12, 2018, D & D controverted TTD and medical costs other than a functional capacities evaluation after January 25, 2018, based on Dr. Bauer's January 25, 2018, EME report that Mr. Cavitt was medically stable and needed no further medical treatment.⁵¹ On February 16, 2018, D & D filed an answer to Mr. Cavitt's January 25, 2018, claim and a controversion. D & D denied TTD and medical costs other than a functional capacities evaluation after January 25, 2018, and modification of the

⁴⁶ *Cavitt III* at 12, No. 57.

⁴⁷ *Id.*, No. 58.

⁴⁸ *Id.*, No. 59.

⁴⁹ *Id.*, No. 60.

⁵⁰ *Id.* at 13, No. 63.

⁵¹ *Id.*, No. 64.

reemployment benefits eligibility determination, reemployment stipend benefits, and attorney fees and costs.⁵² On February 21, 2018, Mr. Cavitt filed a request to cross-examine Dr. Bauer regarding his January 25, 2018, EME report.⁵³

On February 26, 2018, Mr. Cavitt filed a new claim seeking TTD, medical and transportation costs, modification of the reemployment eligibility decision, reemployment stipend, penalty, interest, a finding of unfair or frivolous controversion, and attorney fees and costs.⁵⁴ Also on February 26, 2018, Mr. Cavitt filed a petition for an SIME solely on the issue of treatment.⁵⁵ D & D filed a petition for Board-ordered mediation on March 2, 2018.⁵⁶ On March 5, 2018, Mr. Cavitt answered the petition for mediation, stating he did not agree to mediation and contending the Board did not have authority to order a party to participate in mediation.⁵⁷

On March 16, 2018, D & D filed both an answer and a controversion denying TTD, medical and transportation costs after January 25, 2018, as well as penalty, interest, modification of the reemployment eligibility decision, reemployment stipend, and attorney fees and costs.⁵⁸ On March 19, 2018, D & D filed its answer to Mr. Cavitt's February 26, 2018, petition for an SIME, stating there was no medical dispute regarding treatment as Mr. Cavitt's doctor, Dr. Thomas, agreed with Dr. Bauer.⁵⁹

At the March 20, 2018, prehearing conference, Mr. Cavitt's attorney orally amended Mr. Cavitt's claims to include a request for permanent total disability (PTD) from January 26, 2018, into the future and specified the claim for TTD was also from January 26, 2018, into the future. The parties stipulated to a May 15, 2018, hearing on

⁵² *Cavitt III* at 13, No. 65.

⁵³ *Id.*, No. 67.

⁵⁴ *Id.* at 14, No. 69.

⁵⁵ *Id.*, No. 70.

⁵⁶ *Id.*, No. 73.

⁵⁷ *Id.*, No. 74.

⁵⁸ *Id.*, No. 77.

⁵⁹ *Id.* at 15, No. 78.

Mr. Cavitt's claims for TTD or PTD from January 26, 2018, into the future, medical and transportation costs, penalty, interest, modification of the reemployment benefits eligibility decision, reemployment stipend, and attorney fees and costs. Also set for hearing were Mr. Cavitt's petition to strike Dr. Bauer's January 25, 2018, EME report, Mr. Cavitt's petition for an SIME, and D & D's petition for Board-ordered mediation.⁶⁰

Dr. Bauer, on March 21, 2018, reviewed additional records since his January 25, 2018, report and issued a supplemental EME report.⁶¹ The Board found that because Mr. Cavitt subsequently requested cross-examination of Dr. Bauer, and because Dr. Bauer did not testify at hearing and was not produced for cross-examination, this report cannot be considered by the Board under 8 AAC 45.120(f).⁶²

On April 2, 2018, the parties filed a stipulation in which they agreed Mr. Cavitt was injured in the course and scope of his employment with D & D. Mr. Cavitt filed a petition for an SIME regarding the need for surgery to remove the hardware from his elbow. Since D & D agreed Mr. Cavitt should schedule the surgery without delay, and it would pay for the surgery and related care as well as TTD for time loss related to the surgery, Mr. Cavitt agreed to withdraw his petition for an SIME.⁶³

D & D, on April 9, 2018, filed its answer and a controversion to Mr. Cavitt's February 26, 2018, claim, as amended at the March 20, 2018, prehearing conference. The answer was the same as D & D's March 16, 2018, answer except it also denied Mr. Cavitt's claim for PTD.⁶⁴

On May 4, 2018, the Commission issued Dec. No. 248, which affirmed *Cavitt I's* denial of the compensation rate adjustment, the denial of a penalty, and the denial of a finding of an unfair or frivolous controversion. However, the Commission determined D & D had resisted Mr. Cavitt's claim for ongoing TTD, and held that the \$500.00 in fees

⁶⁰ *Cavitt III* at 15, No. 80.

⁶¹ *Id.*, No. 81.

⁶² *Id.*

⁶³ *Id.*, No. 82.

⁶⁴ *Id.* at 15-16, No. 83.

awarded in *Cavitt I* for obtaining that order did not properly reflect the value of the benefit. The Commission noted that under *Shirley*⁶⁵ an order for ongoing benefits makes it more difficult for D & D to change his status at a later time. Consequently, the Commission remanded the attorney fee issue for “a determination, among other things, of the time involved for Mr. Cavitt’s request” for ongoing TTD.⁶⁶

On May 10, 2018, D & D withdrew its February 12, 2018, February 16, 2018, March 16, 2018, and April 9, 2018, controversions based on Dr. Thomas’s deposition statement that Mr. Cavitt needed further physical therapy and other conservative treatment and was, therefore, not medically stable.⁶⁷

The Board heard additional matters relevant to Mr. Cavitt’s claim on May 15, 2018, and issued an Interlocutory Decision and Order.⁶⁸ The Board denied D & D’s petition for mediation and denied Mr. Cavitt’s petition to strike the EME report of Dr. Bauer. The Board agreed that since D & D did not take Dr. Bauer’s deposition nor arrange for him to testify at hearing, the Board would not consider his report in reaching its decision. Since Mr. Cavitt was unable to prove if and when his past medical bills were paid, the Board denied his claim for payment. The Board did order D & D to pay any past medical bills pursuant to the Act and ordered it to pay future medical costs in accordance with the Act. Both *Cavitt I* and the parties’ stipulation established the compensability of Mr. Cavitt’s injury as occurring within the course and scope of his employment with D & D. The Board found D & D must provide medical treatment “which the nature of the injury or the process of recovery requires.”⁶⁹

Since Mr. Cavitt admitted he had not filed any requests for transportation costs, these were denied. His claim for past TTD from February 13, 2018, through April 12, 2018, was granted. Any future TTD was to be paid in accordance with the Act. His claim

⁶⁵ *Underwater Constr., Inc. v. Shirley*, 884 P.2d 150, 161 (Alaska 1994).

⁶⁶ *Cavitt III* at 16, No. 84.

⁶⁷ *Id.*, No. 86; Thomas depo. at 35:21 – 36:12.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.* at 44-45.

for PTD benefits was denied because no evidence was presented that Mr. Cavitt is permanently totally disabled at this time. His claim for modification of the March 18, 2016, reemployment benefits eligibility evaluation was denied; however, the matter was remanded to the RBA for reconsideration. His claim for reemployment stipend benefits was denied as was his claim for penalties. The Board, in *Cavitt I*, awarded TTD “until medically stable.” This is a medically verifiable event. The Board found that D & D had controverted TTD asserting it had not received a medical release from Mr. Cavitt, but there was no evidence D & D actually stopped payment of TTD. Mr. Cavitt was awarded interest on TTD benefits from February 13, 2018, through April 12, 2018, and on any late paid medical bills. He was awarded attorney fees and costs in the amount of \$35,966.63, as well as an additional \$2,968.90 related to *Cavitt I*.⁷⁰

Mr. Cavitt timely filed a Notice of Appeal on July 20, 2018. He claims the Board erred in denying him specific future medical treatment recommended by his treating physician, Dr. Thomas, including annual check-ups and lifetime care, as well as failing to order future surgeries he might need. He also asserted the Board erred in failing to award him penalties on past medical benefits and late-paid TTD.

4. *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.⁷¹ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁷² “The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.”⁷³

⁷⁰ *Cavitt III* at 44-45.

⁷¹ AS 23.30.128(b).

⁷² *See, e.g., Norcon, Inc. v. Alaska Workers’ Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁷³ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.⁷⁴ The Board's findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.⁷⁵

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."⁷⁶

5. *Discussion.*

a. *Was Mr. Cavitt entitled to an order for specific future medical benefits?*

Mr. Cavitt asserts the Board erred in not giving him a specific order that D & D must pay for all future medical treatment as identified by Dr. Thomas, his treating doctor. Specifically, Mr. Cavitt contends the Board should have made an express order for future medical benefits in the form of lifetime follow-up care, including future annual check-ups, and prosthesis replacement when necessary. The Act requires an employer to provide medical care "which the nature of the injury or the process of recovery requires" for the first two years.⁷⁷ After the first two years, the Board may authorize continued treatment as the process of recovery requires.⁷⁸ The Act further requires that before medical treatment is compensable, employment must be the substantial cause "in relation to other causes" for the "need for medical treatment."⁷⁹ The Act does not require unfettered

⁷⁴ AS 23.30.122.

⁷⁵ *Id.*

⁷⁶ AS 23.30.128(b).

⁷⁷ AS 23.30.095(a).

⁷⁸ *Id.*

⁷⁹ AS 23.30.010(a).

access to medical care, but requires an employer to pay for medical care that is reasonable and necessary.⁸⁰

Mr. Cavitt relies, in part, on *Summers v. Korobkin Construction*, in which the Alaska Supreme Court (Court) held that “an injured worker who has been receiving medical treatment should have the right to a prospective determination” on whether his condition is compensable.⁸¹ The employer in *Summers* paid the employee’s medical bills and attorney fees, but never “acknowledge[d] the compensability” of the employee’s injury nor did it “waive any of its defenses to [employee’s] claim.”⁸² *Summers*, however, does not stand for the proposition that an employer may be ordered to provide treatment that may or may not be needed or sought in the future.

Mr. Cavitt also relies on *Phillip Weidner & Associates, Inc. v. Hibdon* in support of his contention the Board should have ordered the specifically recommended future medical benefits of a lifetime follow-up care plan.⁸³ In *Hibdon*, the Court held review by the Board of medical treatment sought within the first two years of the injury is “limited to [determining] whether the treatment sought is reasonable and necessary.”⁸⁴ Ms. Hibdon sought approval for surgery and the recommendation for surgery was made within two years of her injury.⁸⁵ Mr. Cavitt’s reliance on *Hibdon* is misplaced. In *Hibdon*, the Court did not order that future treatment must be approved; rather, the Court held that within the first two years of an injury the medicals must be paid by the employer if the treatment is reasonable and “within the realm of medically accepted opinion.”⁸⁶

⁸⁰ See, e.g., *Phillip Weidner & Assocs., Inc. v. Hibdon*, 989 P.2d 727, 733 (Alaska 1999)(*Hibdon*).

⁸¹ *Summers v. Korobkin Constr.*, 814 P.2d 1369, 1372-73 (Alaska 1991).

⁸² *Id.* at 1370.

⁸³ *Hibdon*, 989 P.2d 727.

⁸⁴ *Id.* at 731.

⁸⁵ *Id.*

⁸⁶ *Id.* at 732.

Mr. Cavitt also cites to *Bockness v. Brown Jug, Inc.*, stating that the Court has indicated the Board may order medical treatment as “the process of recovery may require.”⁸⁷ Certainly the role of the Board is to review disputed medical treatment and in that role may order specific treatment that is substantially caused by the employment and necessary to the process of recovery. *Bockness* looked at whether the medical treatment provided was that “which the nature of the injury or the process of recovery requires.”⁸⁸ The Court noted that a rule requiring employers to pay for any and all medical treatment chosen by the employee was “inconsistent with the Act’s goal of keeping medical costs stable and reasonable.”⁸⁹ The Court further stated “an employer cannot arbitrarily deny payment for benefits . . . without notifying the employee in advance that it is contesting certain medical care.”⁹⁰ Controversions need to be based on reasonable medical opinions.

Here, D & D has accepted and acknowledged the compensability of Mr. Cavitt’s injury, although it continues to question when and what future medical treatment he may need. There is no need for a prospective determination of compensability because D & D has admitted its liability. While Mr. Cavitt’s treating doctor has indicated future treatment should include annual check-ups and eventual replacement of his prosthesis, D & D has the right to investigate the treatment sought and to determine whether his work injury is still the substantial cause for the medical treatment sought by Mr. Cavitt.⁹¹ The Board, in fact, ordered D & D to pay future medical benefits pursuant to the Act. So, D & D will need significant reason to question any future treatment Mr. Cavitt may seek.

The other issue is whether the Board should have ordered specific medical treatment recommended by the treating doctor, but taking place well beyond the first two years after the injury. *Hibdon* does not require that. Nonetheless, the Board did, in

⁸⁷ *Bockness v. Brown Jug, Inc.*, 980 P.2d 462, 466 (Alaska 1999).

⁸⁸ *Id.*

⁸⁹ *Id.* at 467.

⁹⁰ *Id.*

⁹¹ AS 23.30.010(a).

fact, order D & D to pay Mr. Cavitt's future medical treatment "in accordance with the Act."⁹² This order protects Mr. Cavitt's right to future medical treatment while protecting D & D's right to ascertain if the treatment is substantially caused by the work injury.

The Commission's analysis of the law regarding provision of medical care finds the Board's order that Mr. Cavity is entitled to medical care "in accordance with the Act" is within established law.⁹³ Moreover, substantial evidence in the record as a whole supports the Board's order. Mr. Cavitt's treating physician testified that Mr. Cavitt will need ongoing medical care for the elbow injury, including replacement of the prosthesis at some point in the future. In deposition, Dr. Thomas indicated that a variety of medical treatment might be needed, from check-ups every year or two, including future treatment which might include a revision of the radial head arthroplasty, potential lysis of adhesions surgery to increase range of motion, or a total elbow arthroplasty.⁹⁴ This testimony indicated that the precise care Mr. Cavitt will need is subject to a wide variation, depending on many factors. His testimony supports the more general order of the Board that Mr. Cavitt is entitled to medical treatment in accordance with the requirements of the Act.

The Commission notes that medicine is an evolving field and the kind of medical treatment Mr. Cavitt will need in the future for the elbow injury may not be known at this time. The current prosthesis, per Dr. Thomas, will fail in about 10 years, but it is not known when the prosthesis will need to be replaced nor what kind of surgery will be state-of-the-art at that time. Likewise, while Dr. Thomas suggested annual check-ups, he agreed it is not known if Mr. Cavitt will need annual check-ups or if he will need additional medical treatment more or less frequently than annually. Mr. Cavitt may find he needs more or less frequent medical attention. By requiring that he receive medical treatment in accordance with the Act, neither he nor D & D is limited in the kind of medical

⁹² *Cavitt III* at 44.

⁹³ *Id.*

⁹⁴ Thomas Dep. at 8:11-13, 20-24.

treatment he may need. The Board's holding is affirmed as supported by the law and substantial evidence in the record.

b. Was Mr. Cavitt entitled to a finding of frivolous controversion and should he have been awarded a penalty?

Mr. Cavitt asserts D & D frivolously controverted TTD from February 13, 2018, through April 12, 2018, when it relied on its EME report from Dr. Bauer dated January 25, 2018. The Board ordered payment of the controverted TTD with interest.

The Court, in *Harp v. ARCO Alaska, Inc.*, stated “[a] controversion notice must be filed in good faith to protect an employer from imposition of a penalty.”⁹⁵ The Court further opined, “[i]n circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper.”⁹⁶ In *Kinley’s Restaurant & Bar v. Gurnett*, the Commission held “the good faith of a notice of controversion is assessed based on the evidence in the possession of the employer when the controversion was mailed.”⁹⁷ The test is whether the employer possessed “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.”⁹⁸ The evidence to support a controversion is, like the evidence to rebut the presumption of compensability, examined in isolation and without consideration of credibility.⁹⁹

Mr. Cavitt argues on appeal that the medical report of Dr. Bauer, D & D’s EME, is not credible evidence on which D & D should have relied. First, an argument may not be

⁹⁵ *Harp v. ARCO Alaska, Inc.*, 813 P.2d 352, 358 (Alaska 1992)(citation omitted)(*Harp*).

⁹⁶ *Id.* (citations omitted).

⁹⁷ *Kinley’s Restaurant & Bar v. Gurnett*, Alaska Workers’ Comp. App. Comm’n Dec. No. 121 at 17 (Nov. 24, 2009)(*Kinley’s*).

⁹⁸ *Harp*, 813 P.2d at 358 (citation omitted).

⁹⁹ *Kinley’s* at 13, citing *Municipality of Anchorage v. Monfore*, Alaska Workers’ Comp. App. Comm’n Dec. No. 081, at 12 (June 18, 2008).

raised for the first time on appeal.¹⁰⁰ Mr. Cavitt did not argue before the Board that Dr. Bauer's report was not reliable. In determining whether Dr. Bauer's report is sufficient to support D & D's controversion, the credibility of his report is not examined at the time of the controversion. As noted above, the question is whether the employer has enough evidence that if the employee does not produce contrary evidence, the employer's evidence is sufficient to deny the employee's claim.¹⁰¹

The report by Dr. Bauer, standing alone, provided a bona fide medical opinion that Mr. Cavitt had reached medical stability and, at present, only needs some additional physical therapy. Dr. Thomas, Mr. Cavitt's treating physician, found Dr. Bauer's report to be excellent and agreed with its conclusions. Even if the Board were to weigh the credibility of Dr. Bauer's report, the fact that Dr. Thomas found the report "excellent" supports the conclusion that D & D's controversion was based on a reasonable medical report. The Board was correct in holding that D & D's controversion was not frivolous and was filed in good faith. Therefore, no penalty was owed.

Rather, Mr. Cavitt sought to exclude his report contending the report contained some unknown markings and that he had filed a request to cross-examine Dr. Bauer. The Board did not exclude the report for the unknown markings because no report was produced at hearing with the objected to markings. The Board did agree that since D & D did not depose Dr. Bauer and did not produce him to testify at hearing, his report would be excluded from consideration by the Board in its decision.

The law and substantial evidence in the record support the Board's decision that the controversion by D & D was not in bad faith or frivolous and that no penalty was due to Mr. Cavitt.

¹⁰⁰ See, e.g., *Anchorage Asphalt Paving Co. v. Lewis*, 629 P.2d 65, 70 (Alaska 1981); *King v. Petroleum Servs. Corp.*, 536 P.2d 116, 121 (Alaska 1975).

¹⁰¹ *Harp*, 831 P.2d at 358.

6. *Conclusion.*

The Board's order is AFFIRMED.

Date: 29 March 2019 Alaska Workers' Compensation Appeals Commission



Signed

James N. Rhodes, 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, this is a full and correct copy of Final Decision No. 259, issued in the matter of *Kiel L. Cavitt vs. D & D Services, LLC d/b/a Novus Auto Glass and Ohio Casualty Insurance Company*, AWCAC Appeal No. 18-012, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 29, 2019.

Date: April 1, 2019



Signed

K. Morrison, Appeals Commission Clerk