Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage and NovaPro Risk Solutions, Appellants/Cross-Appellees, vs. Brad J. Hanson, Appellee/Cross-Appellant.	Final Decision Decision No. 182 June 12, 2013 AWCAC Appeal No. 12-013 AWCB Decision Nos. 10-0175, 12-0031, and 12-0058 AWCB Case No. 200808717

Final decision on appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 10-0175, issued at Anchorage on October 29, 2010, by southcentral panel members William Soule, Chair, Patricia Vollendorf, Member for Labor, and Don Gray, Member for Industry; Alaska Workers' Compensation Board Final Decision and Order No. 12-0031, issued at Anchorage on February 21, 2012, by southcentral panel members William Soule, Chair, Rick Traini, Member for Labor, and Robert C. Weel, Member for Industry; and, Alaska Workers' Compensation Board Final Decision and Order on Reconsideration No. 12-0058, issued at Anchorage on March 22, 2012, by southcentral panel members William Soule, Chair, Rick Traini, Member for Labor, and Robert C. Weel, Member for Industry.

Appearances: Trena L. Heikes, Office of the Municipal Attorney, for appellants/cross-appellees, Municipality of Anchorage and NovaPro Risk Solutions; Michael J. Jensen, Law Offices of Michael J. Jensen, for appellee/cross-appellant, Brad J. Hanson.

Commission proceedings: Appeal filed March 27, 2012, with Motion for Stay; Opposition to Appellants' Motion for Stay filed March 30, 2012; hearing on Motion for Stay held April 9, 2012; order granting Motion for Stay issued April 11, 2012; cross-appeal filed April 11, 2012; briefing completed December 13, 2012; oral argument held April 25, 2013.

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

By: Laurence Keyes, Chair.

1. Introduction.

Appellee/cross-appellant, Brad J. Hanson (Hanson), has worked for appellant/cross-appellee, the Municipality of Anchorage (MOA or Municipality), as a firefighter. In approximately 1992, when he worked in Utah, Hanson suffered a lower back injury that required surgery. Between then and 2008, with the exception of a couple of minor flare-ups, his back gave him no problems. On May 30, 2008, while working for the Municipality, Hanson injured his low back while removing and replacing hoses from a truck. Hanson had back surgery on October 23, 2008, and again on May 28, 2009. He filed a workers' compensation claim (WCC) on July 23, 2009. On August 18, 2009, the Municipality controverted his entitlement to certain benefits for the first time.

The Alaska Workers' Compensation Board (board) held two hearings on the claim, the first on August 19, 2010, which resulted in issuance of an Interlocutory Decision and Order,[1] and the second on December 20, 2011, resulting in the issuance of a Final Decision and Order.[2] MOA appealed two rulings by the board in *Hanson II* to the Workers' Compensation Appeals Commission (commission): 1) the attorney fee award and 2) an award of temporary total disability (TTD) benefits for two days when Hanson attended claim-related medical evaluations. Hanson cross-appealed the board's permanent partial impairment (PPI) rating. The commission reverses and remands the board's PPI award, reverses the board's award of two days' TTD benefits, and reverses and remands the board's attorney fee award.

2. Factual background and proceedings.

Edited, reordered, and paraphrased, the board's findings are as follows. The limited information concerning Hanson's 1992 low back injury and surgery included his

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[1] *See Brad J. Hanson v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 10-0175 (Oct. 29, 2010)(*Hanson I*).

[2] *See Brad J. Hanson v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 12-0031 (Feb. 21, 2012)(*Hanson II*). The board also issued a Final Decision and Order on Reconsideration, *see Brad J. Hanson v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 12-0058 (Mar. 22, 2012)(*Hanson III*).

acknowledgement of the injury with resultant surgery, which was first recorded in a medical record eight years later as a laminectomy.[3] There was no evidence of a PPI rating having ever been performed in relation to this injury and surgery, until those provided with respect to this claim.[4] According to Hanson, the surgery had a good result and several years passed without him experiencing any symptoms.[5] On December 3, 2003, Hanson had a magnetic resonance imaging (MRI) scan taken of his lumbar spine, which showed a right-sided L5-S1 disc protrusion with lateral recess narrowing and posterior right S1 root displacement. Surgical changes were noted, although not specified, at the L5-S1 level.[6]

On May 31, 2008, the day after Hanson injured his lower back working for the Municipality,[7] he sought treatment at Wasilla Medical Clinic.[8] An MRI taken on June 3, 2008, showed a normal L4-5 disc and a right-sided L5-S1 disc extrusion.[9]

On August 23, 2008, Douglas Bald, M.D., performed an employer's medical evaluation (EME). In his opinion, Hanson suffered an acute disc extrusion or herniation at L5-S1 and developed right lower extremity radiculopathy as a result.[10] In a letter dated October 6, 2008, Dr. Bald confirmed his prior opinion that Hanson injured his lower back on the job on May 30, 2008. He acknowledged that Hanson required surgical intervention and stated based upon medical probability, "by far the substantial cause of his need for surgical intervention is a direct consequence of the May 30, 2008[,] injury event."[11]

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3 *See Hanson II*, Bd. Dec. No. 12-0031 at 5.

4 *See id*. at 6.

5 Hanson Dep. 9:15-22, Feb. 9, 2010.

6 R. 1658.

7 R. 0001.

8 R. 1220-22.

9 R. 1227-28.

10 R. 1247; Bald Dep. 6:6-12, 8:23–9:1, Aug. 13, 2010.

11 R. 1251.

On October 23, 2008, Marshall E. Tolbert, M.D., performed a right, L5-S1 laminotomy, discectomy, and foraminotomy to address a right-sided L5-S1 herniated disc with radiculopathy.[12] On November 19, 2008, after Hanson reported he felt a pop in his low back and significant low back pain, another MRI was taken that showed new, mild disc bulging and degenerative changes at L4-5 with mild, bilateral neuroforaminal narrowing.[13] Dr. Tolbert referred him to Timothy I. Cohen, M.D., to discuss treatment options. Hanson saw Dr. Cohen on March 24, 2009. Dr. Cohen recommended that Hanson undergo an anterior lumbar discectomy and disc replacement at the L5-S1 level.[14]

On May 27, 2009, Rick B. Delamarter, M.D., performed a preoperative evaluation and noted Hanson had "some decreased sensation in the L5-S1 distribution on the right side, perhaps a half grade of weakness of the gastro[sc]oleus."[15] On May 28, 2009, vascular surgeon Salvador A. Brau, M.D., performed a preliminary surgical procedure on Hanson to move his organs, veins, and arteries, in preparation for an anterior, artificial disc replacement surgical procedure.[16] That same day, Dr. Delamarter and K. Brandon Strenge, M.D., performed anterior disc resections and bilateral neural foraminotomies at L4-5 and L5-S1, a ProDisc prosthetic disc replacement at L4-5, a partial corpectomy at L5-S1 in preparation for fusion, and an anterior interbody fusion at L5-S1 with instrumentation.[17]

On June 5, 2009, MOA controverted medical benefits related to L4-5 treatment.[18] On June 17, 2009, Hanson saw Grant T. Roderer, M.D., who had been asked by Dr. Delamarter to perform postoperative incision checks, a neurological evaluation, and to obtain x-ray studies of the lumbar spine in the anterior-posterior and lateral projections.

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12 R. 1260-61.

13 R. 1264, 1268.

14 R. 1460-61.

15 R. 1320.

16 R. 1327.3-27.5.

17 R. 1323-24.

18 Exc. 204.

Upon examination, Dr. Roderer found slight weakness on the right at the extensor hallucis longus and mild pain into Hanson's groin radiating into his lower extremities on the right greater than the left. Hanson reported some of his leg symptoms had already begun to resolve. Dr. Roderer provided his evaluation and x-rays to Dr. Delamarter.[19]

Hanson filed a WCC on July 24, 2009.[20] On August 18, 2009, the Municipality controverted medical benefits related to L4-5, fees, costs, penalties, and interest.[21] On August 20, 2009, Dr. Delamarter indicated that Hanson needed to be completely off work because of his work-related injury from May 28, 2009, through December 30, 2009.[22]

On February 5, 2010, Hanson saw Edward M. Tapper, M.D., for a second independent medical evaluation (SIME).[23] At his June 4, 2010, deposition, Dr. Tapper testified that after Hanson's May 30, 2008, injury, an MRI showed a large disc at L5-S1, which led to an L5-S1 laminectomy in October 2008. Subsequently, something popped in Hanson's back, immediately followed by back and leg pain. A second MRI showed the disc space collapsed and there were changes at L4-5, as well as a new disc bulge. When conservative treatment did not resolve the condition, the L5-S1 fusion and L4-5 artificial disc replacement surgical procedures were performed by Dr. Delamarter in May 2009, and Hanson returned to full duty work on January 1, 2010, with an excellent result except for a retrograde ejaculation complication.[24] Dr. Tapper did not think the 1992 work-related injury played any role in the 2008 work-related injury, except to

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19 R. 1448-49, 1451-52.

20 R. 0030-31.

21 R. 0011-12.

22 R. 3011.

23 R. 2055-69.

24 Tapper Dep. 10:5–11:2, June 4, 2010.

mention the 1992 L5-S1 laminectomy compromised Hanson's spine at that level.[25] As of February 5, 2010, he thought Hanson was medically stable.[26]

Dr. Tapper evaluated and rated Hanson's PPI under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (*Guides*) 6th Edition.[27] He diagnosed intervertebral disc herniations at multiple levels with surgery and residual radiculopathy, which placed Hanson in Class 3 impairment, based specifically on radiculopathy documented as weakness in Hanson's legs.[28] In placing Hanson in

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[25] Tapper Dep. 14:3-19.

[26] Tapper Dep. 19:8-13; R. 0415.

[27] Tapper Dep. 20:6-22 and Ex. C. Alaska used the *Guides* 3rd Edition to rate PPI between March 16, 1990, and April 21, 1996, the timeframe during which Hanson suffered his 1992 back injury. As of March 31, 2008, the *Guides* 6th Edition began to be used in Alaska to rate PPI for injuries occurring on or after that date, which would make that edition applicable to the injury Hanson suffered on May 30, 2008, that is the subject of his claim and this appeal.

[28] Tapper Dep. 21:1-18. According to the board, *see Hanson II* at 25, in the *Guides* 6th Edition, for spinal injuries, radiculopathy is defined in at least two places, as follows:

> **Radiculopathy**. For the purposes of the *Guides*, *radiculopathy* is defined as significant alteration in the function of a single or multiple nerve roots and is usually caused by mechanical or chemical irritation of one or several nerves. The diagnosis requires clinical findings including specific dermatomal distribution of pain, numbness, and/or paresthesias. Subjective reports of sensory changes are more difficult to assess; therefore, these complaints should be consistent and supported by other findings of radiculopathy. There may be associated motor weakness and loss of reflex. A root tension sign is usually positive. The identification of a condition that may be associated with radiculopathy (such as a herniated disc) on an imaging study is not sufficient to make a diagnosis of radiculopathy; clinical findings must correlate with the radiographic findings in order to be considered. *Guides* 6th Edition at 576.
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> . . .
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> **Radiculopathy**. Any pathological condition of the spinal nerve root, less commonly compression with or without inflammation, or less frequently another disorder such as traction, tumor, or infection. Radicular symptoms may include pain, numbness, tingling, and/or weakness and

(footnote continued)

Class 3 impairment, Dr. Tapper did not go through the grade modifiers in the *Guides* to reach his rating.[29] When reviewing the grade modifiers, based on the February 2010 evaluation, Dr. Tapper thought Hanson's grade modifier was probably zero, except motor strength was Grade 1.[30] Dr. Tapper conceded he had never used grade modifiers and, before he rated Hanson, had never used the *Guides* 6th Edition, and had no training in using them.[31]

On June 8, 2010, another EME was performed by Marilyn L. Yodlowski, M.D.[32]

On August 13, 2010, in deposition, Dr. Bald testified that he would put Hanson in Class 1 with 7% lumbar PPI because he had no residual radiculopathy. According to Dr. Bald, retrograde ejaculation is not "radiculopathy;" it is a complication of Hanson's 2009 lumbar surgery.[33]

On August 17, 2010, on referral from Dr. Delamarter, urologist Lawrence R. Strawbridge, M.D., evaluated Hanson for retrograde ejaculation, noting a history of this following the disc replacement surgery in 2009. In Dr. Strawbridge's opinion, Hanson had

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> distribution of the nerve root, usually involving an upper or lower extremity. Physical findings are weakness of the involved myotome (muscles innervated by the nerve root), diminution in or loss of the corresponding muscle stretch reflex (if any), diminished sensation in the appropriate dermatome (area of skin supplied by the nerve root), and/or positive root tension signs. As commonly used, and for purposes of the *Guides*, radiculopathy requires the presence of radicular physical findings, not just symptoms. *Guides* 6th Edition at 613.

According to the board, "[g]iven the context of these definitions, and their language, 'radiculopathy' for purposes of lumbar spine PPI ratings under the *Guides* 6th Edition, refers and relates to spinal nerve roots[.]" *Hanson II*, Bd. Dec. No. 12-0031 at 25.

[29] Grade modifiers are used to grade evidence of radiculopathy. Dr. Tapper did not consider these when he rated Hanson. *See Hanson II*, Bd. Dec. No. 12-0031 at 13.

[30] Tapper Dep. 22:3–23:3, June 4, 2010.

[31] Tapper Dep. 23:13-24.

[32] R. 2102-31.

[33] Bald Dep. 24:20–26:25, Aug. 13, 2010.

retrograde ejaculation because of a disturbance of the hypogastric plexus and/or sympathetic chain. He noted "[t]his is not unexpected in surgery in this location."[34]

At the first hearing on August 19, 2010, Hanson testified that he recovered completely from the 1992 work-related injury he suffered in Utah.[35] As for the May 2008 work-related injury, he testified he returned to full duty in January 2010 following his disc replacement surgery and had no problems that impacted his ability to perform his job. According to Hanson, although he had no pain, his physicians advised him he had muscle atrophy, muscle weakness, nerve issues, and he was personally aware of damage to nerves causing him to suffer retrograde ejaculation.[36] Hanson's wife, Debra, also testified. The record remained open until September 20, 2010, to enable the parties to obtain deposition testimony from witnesses who could not be deposed prior to the hearing.[37]

In its Interlocutory Decision and Order, among other things, the board found that the medical treatment at L4-5 was compensable, Hanson and his medical providers were entitled to interest, and Hanson was entitled to a penalty. It also held in abeyance any PPI award pending further medical evaluations. The board awarded Hanson attorney fees in the amount of $39,252.50 and $2,389.14 in costs.[38]

Dr. Yodlowski's deposition was taken on September 16, 2010. In her opinion, the substantial cause of Hanson's back pain after May 30, 2008, was the same as it was prior to his injury, the "ongoing process of the degenerative dis[c] disease and facet arthritis."[39] She thought the 1992 surgery probably did not have a direct effect on any subsequent low back condition because the prior surgery and discectomy had healed.[40] Dr. Yodlowski commented that the May 30, 2008, injury caused only a sprain/strain to the low back and

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34 R. 2157-58.

35 Hr'g Tr. 72:19-22, Aug. 19, 2010.

36 Hr'g Tr. 74:7–75:21.

37 *See Hanson I*, Bd. Dec. No. 10-0175 at 1.

38 *See id*. at 38-39.

39 Yodlowski Dep. 27:13-17, Sept. 16, 2010.

40 Yodlowski Dep. 27:18–28:5.

that she had never heard of a lumbar sprain/strain causing retrograde ejaculation. Accordingly, although conceding she is not a urologist, in her opinion Hanson's retrograde ejaculation was not caused by the work injury.[41] However, on cross-examination, Dr. Yodlowski allowed that Hanson's urological condition could be a result of his surgery on the low back using an anterior approach.[42]

Dr. Yodlowski acknowledged that, when Dr. Bald examined Hanson in August 2008, he noted evidence of radiculopathy[43] and in June 2009, another attending physician noted evidence of radiculopathy.[44] Moreover, she was unaware of any evidence Hanson had symptoms of radiculopathy prior to the May 30, 2008, work-related injury.[45] In her EME report, Dr. Yodlowski conceded that the May 2008 injury was the substantial cause of Hanson's symptoms, based upon his history. She also concluded that the treatment he received to address the injury was reasonable and necessary.[46]

On September 17, 2010, MOA controverted all benefits related to retrograde ejaculation based upon Dr. Yodlowski's evidence.[47]

On February 11, 2011, Hanson saw urologist James R. Downey, M.D., for an SIME.[48] After discussing the 2009 low back surgery, Dr. Downey noted: "However, the surgery itself seemed to cause a loss of ejaculatory function. He had been ejaculating normally before the surgery, but has never ejaculated successfully since."[49] Dr. Downey thought Hanson's retrograde ejaculation resulted from his spinal surgery and concluded the surgery was the primary cause of the retrograde ejaculation condition. In

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41 Yodlowski Dep. 31:1-18.

42 Yodlowski Dep. 39:21–40:2.

43 Yodlowski Dep. 44:6-21.

44 Yodlowski Dep. 41:9–42:6.

45 Yodlowski Dep. 47:21–48:1.

46 Yodlowski Dep. 61:8-25.

47 R. 0017-18.

48 R. 2263-64.

49 R. 2263.

Dr. Downey's opinion, retrograde ejaculation never caused any medical instability, so that, in terms of that condition, Hanson had always been medically stable and it would not improve. When asked to provide a PPI rating with respect to the retrograde ejaculation condition, using the *Guides* 6th Edition, Dr. Downey stated it was 0%.[50]

On April 27, 2011, Hanson was seen by Thomas L. Gritzka, M.D., for another SIME. Subsequently, Dr. Gritzka testified that during his examination of Hanson, he found no appreciable weakness on muscle testing, no radiculopathy, and the functional review was normal.[51] Dr. Gritzka indicated that, given the 2008 injury and subsequent surgeries, the disk herniation at a single level with resolved radiculopathy, in accordance with the *Guides* 6th Edition, Hanson would be in Class 1 with a 7% default PPI rating.[52] However, Dr. Gritzka did not believe Class 1 adequately rated Hanson, given his fusion and lumbar disc replacement. Accordingly, Dr. Gritzka "would put him at another percentage[.]"[53] Dr. Gritzka also stated that without records or a prior examination concurrent with Hanson's 1992 injury, the *Guides* prohibited giving a preexisting impairment rating and in this case, the PPI rating for Hanson's 1992 injury and surgery would be 0%.[54] On cross-examination, Dr. Gritzka admitted that "radiculopathy," as used in the lumbar spine section of the *Guides*, refers to some factor compromising a nerve root as it exits the lumbar spine. When he examined Hanson, he found none.[55] In Dr. Gritzka's opinion, strictly construing the *Guides*, Hanson had a Class 3 impairment.[56]

On May 27, 2011, Dr. Yodlowski reviewed and responded to Dr. Gritzka's SIME report. Complicating matters to some extent, she noted that Dr. Gritzka did not state

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50 R. 2264.

51 Gritzka Dep. 5:20–6:5, Oct. 26, 2011.

52 Gritzka Dep. 8:11–9:15, 12:6–13:6.

53 Gritzka Dep. 12:8–13:6.

54 Gritzka Dep. 15:1–16:20.

55 Gritzka Dep. 38:19–39:8.

56 Gritzka Dep. 45:21–46:12.

whether he used the *Guides* 6th Edition second printing, or the first printing, which contained errors that were corrected in the second.[57] In her opinion, using the corrected version of the *Guides* 6th Edition is important in providing a correct rating in this case. Dr. Yodlowski agreed with Dr. Gritzka that Hanson falls under the Motion Segment Lesions diagnostic category. Alteration of Motion Segment Integrity (AOMSI) referenced in Table 17-4, encompasses Hanson's surgical fusion performed at L5-S1. In Dr. Yodlowski's opinion, AOMSI also includes his disc replacement surgery at L4-5, putting Hanson in the

[57] In *Hanson II*, the board reproduced three versions of Table 17-4 from the *Guides* 6th Edition, each entitled Lumbar Spine Regional Grid. *See Hanson II*, Bd. Dec. No. 12-0031 at 18-20. For convenience, we provide relevant portions of the corrected version:

Lumbar Spine Regional Grid

Class	Class 0	Class 1	Class 2	Class 3	Class 4
IMPAIRMENT RATING (WPI %)	0	1%-9%	10%-14%	15%-24%	25%-33%
. . .	. . .	. . .	. . .	. . .	. . .
MOTION SEGMENT LESIONS					
Intervertebral disk herniation and/or AOMSI[a] Note: AOMSI includes instability (specifically as defined in the *Guides*), arthrodesis, failed arthrodesis, dynamic stabilization or arthroplasty, or combinations of those in multi-level conditions	0 Imaging findings of intervertebral disk herniation without a history of clinically correlating radicular symptoms	5 6 7 8 9 Intervertebral disk herniation(s) or documented AOMSI, at a **single level or multiple levels** with medically documented findings; with or without surgery ***and*** for disk herniation(s) with documented **resolved radiculopathy or nonverifiable radicular complaints at clinically appropriate level(s),** present at the time of examination[a]	10 11 12 13 14 Intervertebral disk herniation ~~and/~~or any AOMSI **at a single level** with medically documented findings; with or without surgery ***and*** with documented **residual radiculopathy at the clinically appropriate level** present at the time of examination (*see Physical Examination adjustment grid in Table 17-7 to grade radiculopathy*)	15 17 19 21 23 Intervertebral disk herniations ~~and/~~or AOMSI **at multiple levels**, with medically documented findings; with or without surgery ***and*** with ~~or without~~ **documented residual radiculopathy at a single clinically appropriate level** present at the time of examination (*see Table 17-7 to grade radiculopathy*)	25 27 29 31 33 Intervertebral disk herniations and/or AOMSI, **at multiple levels**, with medically documented findings; with or without surgery ***and*** with documented signs of **residual bilateral or multiple-level radiculopathy at the clinically appropriate levels** present at the time of examination (*see Table 17-7 to grade radiculopathy*)

[a] Or AOMSI in the absence of radiculopathy, or with documented resolved radiculopathy or nonverifiable radicular complaints at the clinically appropriate levels present at the time of examination.

motion segment lesions diagnostic category at two spinal levels. However, she disagreed with Dr. Gritzka placing Hanson in a Class 3 motion segment lesion diagnostic category simply because he has AOMSI at two spinal levels. She agreed with Dr. Gritzka that Hanson presented with a normal physical examination and functional history, and has a grade modifier of zero in each category because he had essentially a normal physical examination when Dr. Yodlowski examined him during the EME on June 8, 2010.[58]

As Hanson's physical findings were normal, according to Dr. Yodlowski, this by definition excluded objective findings of residual radiculopathy. Although she agreed that the AOMSI at multiple levels with medically documented findings with or without surgery correctly placed Hanson in Class 3, Dr. Yodlowski noted that the essential second part of the Class 3 description in the corrected *Guides* 6th Edition requires evidence of documented residual radiculopathy at a single clinically appropriate level present at the time of the examination. She further noted that the uncorrected, first printing of the *Guides* 6th Edition included the words "with or without" documented residual radiculopathy. According to Dr. Yodlowski, if Dr. Gritzka used the uncorrected first printing of the *Guides* 6th Edition in his rating, placing Hanson in Class 3 would be correct.[59]

However, using the corrected version precluded placing him in Class 3. In Dr. Yodlowski's opinion, Hanson fit into Class 1 because he has:

> Intervertebral disc herniations or documented AOMSI at single levels or multiple levels with medically documented findings with or without surgery and with documented resolved radiculopathy at clinically appropriate levels or nonverifiable radicular complaints at clinically appropriate levels present at the time of the examination.[60]

According to Dr. Yodlowski, these findings put Hanson within Class 1, the median default grade, yielding a 7% whole person impairment for his spine. Using the grade modifiers, as required, resulted in the default rating having an adjustment of -2. In Dr. Yodlowski's

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58 R. 2294-99.

59 R. 2295-96.

60 R. 2296.

opinion, Hanson has a 5% PPI rating for his lumbar sacral spine attributable to the work-related injury that is the subject of his claim. However, in her view, Hanson had a 5% PPI rating that predated his 2008 injury, which resulted in him having a 0% PPI rating for purposes of his claim.[61]

At his deposition on October 26, 2011, Dr. Gritzka testified that, when performing a PPI rating for Hanson, he found no appreciable weakness on muscle testing and no radiculopathy. His functional review was normal. He conceded that Hanson's 2008 work-related injury and surgeries put him in Class 1 with a 7% default PPI rating.[62]

On December 6, 2011, Edward J. Barrington, D.C., Hanson's attending medical provider,[63] based solely on a record review, testified in deposition that it would be problematic to derive a valid PPI rating for Hanson's 1992 low back surgery without medical records relating to that procedure.[64] In Dr. Barrington's opinion, damage to Hanson's hypogastric nerve as a realized risk of his 2009 lumbar surgery resulted in sexual dysfunction. The *Guides* 6th Edition provides a table for neurogenic sexual

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61 R. 2296-98.

62 Gritzka Dep. 5:20–6:5, 8:11–9:15, 12:6–13:6, Oct. 26, 2011.

63 *See Hanson II*, Bd. Dec. No. 12-0031 at 50.

64 Barrington Dep. 17:24–19:23, Dec. 6, 2011.

dysfunction.[65] Dr. Barrington would place Hanson's retrograde ejaculation in Class 1, 1% to 5%. However, because it related to the nerve component of Hanson's lumbar surgery, Dr. Barrington did not dispute Dr. Gritzka's 2% or 3% PPI rating for Hanson's retrograde ejaculation. Dr. Barrington would not defer to the SIME urologist because, in his opinion, the urologist incorrectly stated that the *Guides* did not address ejaculation as a sexual function issue. Dr. Barrington stated Hanson had a default 3% PPI rating under Table 13-15.[66]

Dr. Barrington also reviewed the Lumbar Spine Regional Grid.[67] In his opinion, Hanson fit under the motion segment lesions diagnostic category because he had alteration of motion segments in his spine at multiple levels. Dr. Barrington stated that Hanson's permanent nerve damage resulting in sexual dysfunction met the first part of the *Guides*' definition of radiculopathy. He also indicated that Hanson's lingering symptoms radiating from his low back into his hip were radiculopathy from a spinal nerve root, which did not go into his leg, but instead, went to his sexual organs. Dr. Barrington placed Hanson in Class 3 impairment for the lumbar spine. Based on the disc replacement, Dr. Barrington put Hanson in a Grade 2 modifier, which resulted in a

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[65] The *Guides* 6th Edition Neurogenic Dysfunction table, Table 13-15, states:

Neurogenic Sexual Dysfunction				
Class	Class 0	Class 1	Class 2	Class 3
WHOLE PERSON IMPAIRMENT RATING (%)	0%	1%-5%	6%-10%	11%-15%
DESCRIPTION	No impairment of sexual function	Individual has some sexual function but with difficulty of . . . ejaculation in men	. . . .	. . . .

[66] Barrington Dep. 21:13–22:8, 23:2-12, 49:3-23, Dec. 6, 2011.

[67] *See* n.57, *supra*.

15% PPI rating for the lumbar spine.[68] Dr. Barrington agreed that if Hanson had no radiculopathy, he would fall into Class 1 on Table 17-4.[69]

At the second hearing on December 20, 2011, Hanson testified that he agreed with Dr. Tapper's report dated February 5, 2010, where Dr. Tapper stated that Hanson was asymptomatic and performed all activities of daily living without problems,[70] although he still had residual right buttock pain when Dr. Gritzka evaluated him in April 2011. Hanson stated he continued to experience minimal back pain and right buttock pain, which was almost always present and made worse through various activities. If his pain became particularly bad, he would take over-the-counter medication.[71]

At that hearing, Dr. Yodlowski testified that she had special training in the use of the *Guides* 6th Edition, and taught its use to other physicians. Her testimony was generally consistent with her previous reports, critiquing Dr. Gritzka's PPI rating.[72] Dr. Yodlowski stated that in her opinion, the MRI from December 3, 2003, showing a disc protrusion at L5-S1 and surgical changes at that level, was adequate information and data on which to base a preexisting PPI related to the 1992 injury and surgery.[73] In Dr. Yodlowski's opinion, the *Guides* 6th Edition requires apportionment or reduction of a current, total PPI rating by a rating for a preexisting condition, by utilizing the latest edition of the *Guides* for both ratings.[74]

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68 Barrington Dep. 24:1–41:10, Dec. 6, 2011.

69 Barrington Dep. 51:13–52:1.

70 Hr'g Tr. 186:1-11, Dec. 20, 2011.

71 Hr'g Tr. 197:15–198:25.

72 Hr'g Tr. 221:18–222:13, 234:7–235:12.

73 Hr'g Tr. 278:6–279:21.

74 Hr'g Tr. 241:7–242:23.

Based on the evidence before it,[75] the board made the specific finding that Hanson had no residual radiculopathy as defined in the *Guides* at the time of any of his PPI rating appointments.[76]

With respect to other issues, the board observed that if MOA requires an employee to have an EME, it will pay up to three hours pay for travel time to and from a medical evaluation. If, on the other hand, an SIME is required, the Municipality makes no contributions to an employee for time lost.[77] Hanson lost the following time from work to attend EME and SIME examinations:

- April 18, 2009: Dr. Bald EME -- 3 hours
- February 5, 2010: Dr. Tapper SIME -- 42 hours
- June 8, 2010: Dr. Yodlowski EME -- 3 hours
- February 11, 2011: Dr. Downey SIME -- 34 hours
- April 27, 2011: Dr. Gritzka SIME -- 3 hours[78]

Relative to the attorney fee issue, the board noted that since September 1, 2010, Hanson's counsel had billed at the rate of $385.00 per hour for himself, and $165.00 per

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[75] Helpfully, the board's decision provides a table summarizing the PPI rating evidence, *see Hanson II*, Bd. Dec. No. 12-0031 at 26, which we reproduce here for reference.

Physician	Date offered in report or deposition	Anatomy or function	Rating	Reduction?	Modifiers used?	Strictly & solely under Guides 6th Edition?
SIME Tapper	6/4/10	Lumbar spine	23%	Up to 13%	No	No
SIME Tapper	6/4/10	Sexual dysfunction	5%	0%	N/A	Yes
EME Bald	8/13/10	Lumbar spine	7%	0%	No	No
SIME Downey	2/11/11	Sexual dysfunction	0%	N/A	N/A	No
SIME Gritzka	10/26/11	Lumbar spine	19%	0%	No	No
SIME Gritzka	10/26/11	Sexual dysfunction	3%	0%	N/A	Yes
Barrington	12/6/11	Lumbar spine	15%	0%	No	No
Barrington	12/6/11	Sexual dysfunction	3%	0%	N/A	Yes
Yodlowski	12/20/11	Lumbar spine	5%	5%	Yes	Yes

[76] *See Hanson II*, Bd. Dec. No. 12-0031 at 27.

[77] *See id.* at 26.

[78] *See id*. at 27-28.

hour for his paralegal.[79] Hanson requested an award of attorney fees totaling $26,911.50, paralegal costs of $6,220.50, and revised costs of $2,652.40.[80]

On December 20, 2011, the Municipality filed an objection to Hanson's counsel's December 14, 2011, fee affidavit, arguing the fees were excessive. MOA also argued that no more than a statutory minimum fee could be awarded under AS 23.30.145(a), because the claim was controverted. As far as the Municipality was concerned, the hearing involved only the straightforward PPI issue and the fee affidavit did not include enough detail to discern the amount of time spent on unsuccessful issues, clerical matters, or frivolous endeavors.[81]

On January 3, 2012, Hanson's counsel responded to MOA's opposition to his December 14, 2011, fee affidavit.[82] He explained entries with which the Municipality took issue to the board's satisfaction.[83] That same day, Hanson's counsel filed a final supplemental affidavit of attorney fees regarding services since December 20, 2011.[84] MOA objected to Hanson's December 20, 2011, supplemental affidavit of fees.[85] On January 5, 2012, Hanson's counsel responded to the Municipality's objection to his supplemental affidavit.[86]

In its Final Decision and Order, the board awarded PPI benefits to Hanson based on a 3% PPI rating for his sexual dysfunction, TTD benefits for April 18, 2009, when he attended an EME, and February 5, 2010, when he attended an SIME, an attorney fee award of $26,911.50, paralegal costs of $6,220.50, and costs of $2,652.40.[87] The board

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79 *See Hanson II*, Bd. Dec. No. 12-0031 at 28.

80 R. 1033-42, 1176-77, 1179, 3268.

81 R. 1129-38.

82 R. 1168-70.

83 *See Hanson II*, Bd. Dec. No. 12-0031 at 28.

84 R. 1176-77.

85 R. 1139-44.

86 R. 1179-80.

87 *See Hanson II*, Bd. Dec. No. 12-0031 at 61.

did not award any benefits to Hanson for lumbar PPI. Apparently following an analysis similar to Dr. Yodlowski's,[88] although it opted to use the *Guides* 3rd Edition for rating Hanson's lumbar impairment from the 1992 low back injury and subsequent surgery, the board found he became medically stable and ratable using the *Guides*. Under the *Guides* 3rd Edition, Hanson would have been rated at a minimum 8% whole-person PPI because he had a medically documented intervertebral disc injury to the lumbar spine, surgically treated, with no recorded residuals.[89] According to the board, the record disclosed no

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[88] *See* discussion of Dr. Yodlowski's PPI rating reduction at pp. 12-13, *supra*.

[89] *See Hanson II,* Bd. Dec. No. 12-0031 at 6 and *Hanson III,* Bd. Dec. No. 12-0058 at 7. The *Guides* 3rd Edition, page 73, states in pertinent part:

Table 49. Impairments Due to Specific Disorders of the Spine

Disorder	**% Impairment of Whole Person**		
	Cerv	**Thor**	**Lumb**
. . .	. . .	. . .	. . .
II. Intervertebral disc or other soft tissue lesions			
A. Unoperated, with no residuals	0	0	0
B. Unoperated with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm or rigidity associated with none-to-minimal degenerative changes on structural tests	4	2	5
C. Unoperated, with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm, or rigidity associated with moderate to severe degenerative changes on structural tests, including unoperated herniated nucleus pulposus, with or without radiculopathy	6	3	7
D. Surgically treated disc lesion, with no residuals	7	4	8
E. Surgically treated disc lesion, with residual symptoms. . . .	9	5	10

. . .

Note: All impairment ratings above should be combined with the appropriate values of residuals, such as:

1. Ankylosis (fusion) in the spinal area or extremities
2. Abnormal motion in the spinal area (i.e., objectively measured rigidity) or extremities
3. Spinal cord and spinal nerve root injuries, with neurologic impairment (see Upper Extremity and Lower Extremity sections of Chapter 3 and Peripheral Nervous System section of Chapter 4
4. Any combination of the above using the Combined Values Chart.

basis for reducing the minimum 8% PPI rating to which Hanson would have been entitled under the *Guides* 3rd Edition for his 1992 low back injury and surgery, for any preexisting, ratable impairment to his lumbar spine prior to 1992.[90] Thus, because of the extent to which Hanson had preexisting lumbar impairment, he had no additional lumbar impairment in connection with his claim.

In its Final Decision and Order on Reconsideration, the board's analysis was primarily devoted to a further explanation of its reasoning in ruling as it did on the lumbar PPI rating issue in *Hanson II*.[91] First, the board opted to follow the suggestion in the *Guides* 6th Edition that, for Hanson's unrated impairment from the 1992 injury and surgery, the edition of the *Guides* that best describes Hanson's prior impairment ought to be used in determining the ultimate lumbar PPI rating for Hanson.[92] In the board's view, the *Guides* 3rd Edition was better suited for that purpose.[93]

Second, using that edition, the board described the process it followed.

> Under the *Guides* 3rd Edition, a spinal PPI rating involves several steps. First, the rater selects the primarily impaired spinal region. Next, the rater refers to Table 49 to obtain a diagnosis-based impairment percentage. The regional range of motion of the primarily impaired region is tested to obtain the percentage of impairment due to abnormal spine motion. All range of motion impairments are added together for the impaired region. The rater uses the Combined Values Chart to combine the diagnosis-based impairment with the impairment due to limited range of segmental spine motion. These steps are repeated for any secondarily impaired spinal region. Impairment ratings for affected spinal regions are combined using the Combined Values Chart. The rater identifies any impairment due to neurological deficits as determined in the *Guides*, including radiculopathy and peripheral nerve injuries. Lastly, all radicular and peripheral nerve injury impairments are combined with impairments of the whole person due

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90 *See Hanson II*, Bd. Dec. No. 12-0031 at 6.

91 *See Hanson III*, Bd. Dec. No. 12-0058 at 3-17.

92 *See Hanson II,* Bd. Dec. No. 12-0031 at 24-25.

93 *See Hanson III,* Bd. Dec. No. 12-0058 at 30-31.

to spinal impairments using the Combined Values Chart, for a complete whole-person rating.[94]

The board found that, based on the available information, Hanson could not be given a complete PPI rating for his 1992 lumbar injury or surgery, including any loss of range of motion or neurological impairments, but he could be provided with a partial PPI rating in accordance with the *Guides* 3rd Edition.[95] As for the 1992 injury and surgery, there were no recorded range of motion measurements for Hanson's lumbar spine, no secondarily impaired spinal region, and no known neurological deficits including radiculopathy or peripheral nerve damage.[96] Moreover, the December 3, 2003, lumbar MRI showed, among other things, surgical changes at the L5-S1 level, consistent with Hanson's testimony he had a herniated disc and surgery at L5-S1 in 1992.[97] According to the board, this MRI provided adequate information and data upon which to base a preexisting PPI rating.[98] Based on this evidence, the board concluded there was a factual basis for a partial lumbar PPI rating including only a diagnosis-based percentage of impairment from Table 49 of the *Guides* 3rd Edition. Any additional range of motion or neurological impairment from 1992, if available, would only increase the preexisting PPI rating.[99]

Furthermore, the board found that a diagnosis-based rating from Table 49, even though it is not a complete PPI rating, is nevertheless an impairment rating.[100] Under the *Guides* 3rd Edition, Hanson would have been rated at a minimum 8% whole-person lumbar PPI simply because he had, by his own admission, a herniated disc at L5-S1 surgically

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94 *Hansen III,* Bd. Dec. No. 12-0058 at 6.

95 *See Hanson III*, Bd. Dec. No. 12-0058 at 6.

96 *See id*. at 6.

97 *See id*. at 7.

98 *See id*.

99 *See id.*

100 *See id*. at 8.

treated, with no residuals.[101] The record provided no basis for reducing the minimum 8% lumbar PPI rating under the *Guides* 3rd Edition for Hanson's 1992 low back injury and resultant surgery, for any preexisting, ratable impairment to his lumbar spine prior to 1992.[102]

Turning its attention to the May 30, 2008, work-related injury, the board noted that, after that injury and prior to his 2008 surgery, Hanson had a documented history of right leg radiculopathy.[103] Following the second surgery, on August 19, 2009, Hanson reported he had good muscle strength in his lower extremities and no radicular symptoms.[104] Moreover, Hanson was asymptomatic, could perform all activities of daily living without problems, and could not detect any loss of strength in either leg.[105] When Dr. Gritzka evaluated him in April 2011, Hanson still experienced minimal back pain and residual right buttock pain, which was almost always present and made worse through various activities.[106] His pain complaints diminished since his disc replacement surgery, however, Hanson still had frequent complaints of back pain and pain radiating into his buttock.[107]

Ultimately, the board declined to reconsider its PPI rating for Hanson's lumbar spine.[108]

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101 *See Hanson III*, Bd. Dec. No. 12-0058 at 8 (citing *Guides* 3rd Edition, Table 49, at 73).

102 *See Hanson III,* Bd. Dec. No. 12-0058 at 8 (citing the record).

103 R. 1264-65.

104 R. 1484.

105 Hr'g Tr. 186:3–188:11, Dec. 20, 2011.

106 Hr'g Tr. 175:22–176:17, 198:13-25.

107 Hr'g Tr. 175:25–176:17, 204:19–206:14.

108 *See Hanson III*, Bd. Dec. No. 12-0058 at 32.

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.[109] The board's credibility findings are binding on the commission.[110] Its weight findings are conclusive.[111] We exercise our independent judgment when reviewing questions of law and procedure.[112]

The reasonable basis "standard of review is generally appropriate when '[an] agency [such as the board] is making law by creating standards to be used in evaluating the case before it and future cases,' and 'when a case requires resolution of policy questions which lie within the agency's area of expertise and are inseparable from the facts underlying the agency's decision.'"[113]

When review of the board's attorney fee award involves statutory interpretation, substitution of judgment is the appropriate standard of review.[114] Otherwise, attorney fee awards are reviewed under the abuse of discretion standard.[115]

4. Discussion.

a. The commission is not empowered to decide the constitutional issues raised by Hanson.

In his briefing to the commission, Hanson argued that the board's application of AS 23.30.190 denied him equal protection under the Alaska Constitution.[116] The Alaska Supreme Court (supreme court) has held that administrative agencies, like the

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[109] 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).

[110] *See* AS 23.30.128(b).

[111] *See* AS 23.30.122.

[112] *See* AS 23.30.128(b).

[113] *Konecky v. Camco Wireline, Inc.*, 920 P.2d 277, 281 n.8 (Alaska 1996) (quoting *Earth Resources Co. of Alaska v. State, Dep't of Revenue*, 665 P.2d 960, 964 (Alaska 1983) (citing *Galt v. Stanton*, 591 P.2d 960, 965-66 (Alaska 1979))).

[114] *See Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150 (Alaska 2007).

[115] *State, Dep't of Revenue v. Cowgill*, 115 P.3d 522, 524 (Alaska 2005).

[116] *See* Appellee's/Cross-Appellant's Br. 31-35.

commission, "do not have jurisdiction to decide issues of constitutional law."[117] While Hanson may be preserving this argument for any appeal to the supreme court, nevertheless, we cannot address it.

b. The board's PPI rating is reversed and remanded for further proceedings.

The board used the *Guides* 3rd Edition to rate Hanson's impairment attributable to the 1992 injury and surgery and the *Guides* 6th Edition to rate the 2008 injury and surgeries. It then apportioned Hanson's impairment between those two injuries. Hanson has argued that the 1992 injury cannot be rated, but if it is possible to rate the 1992 injury, the board should have used the *Guides* 6th Edition to rate both the 1992 injury and surgery and the 2008 injury and surgeries.[118] Applying the reasonable basis standard of review,[119] for a number of reasons discussed below, we agree, reverse, and remand this matter to the board to revisit the PPI rating issue and, if appropriate, apportion Hanson's impairment between them, as recommended by the *Guides* 6th Edition.

In relevant part, AS 23.30.190(b) requires the board to determine PPI ratings for compensable injuries using the *Guides*, and subsection .190(c) requires it to reduce ratings by any preexisting impairment.[120] By regulation, once issued, the various

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[117] *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007) (citing *Dougan v. Aurora Elec. Inc.*, 50 P.3d 789, 795 n.27 (Alaska 2002)).

[118] *See* Appellee's/Cross-Appellant's Br. 19-30.

[119] *See* Part 3, *supra*.

[120] **AS 23.30.190. Compensation for permanent partial impairment; rating guides.**

. . . .

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment[.]

(c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury.

editions of the *Guides* are adopted for use by the board.[121] Citing some of its own decisions as authority,[122] here, the board concluded that it would use the *Guides* 3rd Edition to rate Hanson's lumbar PPI attributable to the 1992 injury and surgery.[123]

Again, it was argued that Hanson's 1992 injury cannot be rated, no matter which edition of the *Guides*, the 3rd or the 6th, is used, because there was insufficient evidence on which to base a rating. First, there were no contemporaneous medical records available to the board. Second, at least some of the medical experts involved in evaluating Hanson, including Drs. Gritzka and Barrington, expressed their conviction that the 1992 injury could not be rated absent such records.[124] Third, as discussed below, there were no range of motion measurements and no known neurological deficits on which to base a rating.[125]

The central premise for the argument against use of the *Guides* 3rd Edition to rate the 1992 injury is that the *Guides* 6th Edition represents "a 'paradigm shift' to the assessment of impairment."[126] Preliminarily, the 6th Edition defines impairment as "a significant deviation, loss, or loss of use of any body structure or body function in an

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[121] *See* 8 AAC 45.122(a).

[122] No supreme court authority has been cited to the commission on this issue.

[123] *See Hanson II*, Bd. Dec. No. 12-0031 at 41-42 (citing *Popa v. Schlumberger Wireline*, Alaska Workers' Comp. Bd. Dec. No. 09-0076 (Apr. 27, 2009), *Osborne v. State*, Alaska Workers' Comp. Bd. Dec. No. 06-0237 (Aug. 30, 2006), *Brandt v. Anchorage School District*, Alaska Workers' Comp. Bd. Dec. No. 98-0258 (Oct. 8, 1998), and *Sellers v. Houston Contracting Co.*, Alaska Workers' Comp. Bd. Dec. No. 96-0407 (Oct. 2, 1996)). However, these board decisions did not involve ratings under the *Guides* 6th Edition, although the decision in *Popa v. Schlumberger* was handed down after that edition was adopted for use.

[124] Gritzka Dep. 15:14–16:18, Oct. 26, 2011; Barrington Dep. 19:19–20:5, 42:6–43:7, Dec. 6, 2011.

[125] *See Hansen III,* Bd. Dec. No. 12-0058 at 6.

[126] *Guides* 6th Edition, §1.1.

individual with a health condition, disorder, or disease."[127] Like other editions, the 6th emphasizes the importance of an accurate diagnosis by the rating physician.[128] It lists four criteria for making an accurate diagnosis: 1) history of clinical presentation, 2) physical findings, 3) clinical studies or objective test results, and 4) functional history or assessment.[129] Once that diagnosis is made, the rating process can be undertaken. To illustrate the rating process under the 6th Edition, we will use Dr. Yodlowski's impairment rating for Hanson's 2008 lumbar injury, as that was the rating which the board assigned the greater weight.[130]

The *Guides* 6th Edition consists of tables or grids for rating the impairment to various body parts, organs, or organ systems, as exemplified by the Lumbar Spine Regional Grid that appears above.[131] Each grid or table is divided into classes, ranging from 0 to 3, 4, or 5.[132] For example, using Table 17-4, the Lumbar Spine Regional Grid, Dr. Yodlowski placed Hanson in the Motion Segment Lesions diagnostic category, Class 1, because he had surgery at two spinal levels, L4-5 and L5-S1. Within each of the functional-loss classes is a range of numerical values for the impairment. The range within each class is divided into five impairment grades, from low to high, with the median value in the class as the default rating.[133] Dr. Yodlowski concluded that, in accordance with her finding that Hanson had documented resolved radiculopathy at clinically appropriate levels at the time of her examination, she would put Hanson in the default impairment grade within Class 1, which corresponded to a 7% whole person

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127 *Guides* 6th Edition, §1.3d.

128 *See Guides* 6th Edition, §2.3b.

129 *See id.*, §§ 1.8b, 17.1.

130 *See Hanson II*, Bd. Dec. No. 12-0031 at 53.

131 *See* n.57, *supra*.

132 *See, e.g., Guides* 6th Edition, Tables 13-15, 13-16, and 17-4.

133 *See Guides* 6th Edition, §§ 1.8c, 1.9, 17.2.

impairment for his lumbar spine. Applying the grade modifiers, Dr. Yodlowski adjusted his impairment rating downward by two grades, yielding an ultimate rating of 5%.[134]

In contrast to this more systematic approach to an impairment rating for the lumbar spine, Table 49 in the *Guides* 3rd Edition simply provides that, for a lumbar "[s]urgically treated disc lesion, with no residuals[,]" the corresponding whole person impairment rating is 8%.[135] According to the board's description of the process to be followed to rate the 1992 injury, the emphasis would be placed on Hanson's loss of range of motion in his lumbar spine combined with any neurological deficits.[136] However, the board then acknowledged that there were no recorded range of motion measurements for Hanson's lumbar spine and no known neurological deficits.[137] In the end, because Hanson had, by his own admission, a herniated disc at L5-S1 that was surgically treated with no residuals, the board rated him at a minimum 8% impairment for the 1992 injury.[138]

Another factor working against the reasonableness of the board's approach, that is, its use of the 3rd Edition to rate Hanson's 1992 injury, is the methodology for apportionment between injuries provided for in the *Guides* 6th Edition.

> *Apportionment* is an allocation of causation among multiple factors that caused or significantly contributed to the injury or disease or resulting impairment. Apportionment requires a determination of percentage of impairment directly attributable to preexisting as compared with resulting conditions and directly contributing to the total impairment rating derived. In such cases the rating physician may estimate these contributions by first developing the following contingent ratings as based on earlier work:
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> 1. A "total" impairment rating (A) (all-inclusive current rating) is derived irrespective of preexisting and resulting conditions.

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134 R. 2296-98.

135 *See* n.89, *supra*.

136 *See Hansen III,* Bd. Dec. No. 12-0058 at 6.

137 *See id*. at 6.

138 *See id*. at 8 (citing *Guides* 3rd Edition, Table 49, at 73).

2. A second "baseline" rating (B) is derived that accounts solely for preexisting conditions without associated or aggravating reinjury.
3. The final rating (C) is derived in which preexisting conditions are discounted by subtracting the second from the first rating (A – B).

If apportionment is needed, the analysis must consider the nature of the impairment and its relationship to each alleged causative factor, along with an explanation of the medical basis for all conclusions and opinions. Using this approach to apportionment requires accurate information and data to determine all impairment ratings both before and after the most recent injury. If different editions of the *Guides* have been used, the physician must assess their similarity. If the basis of the ratings is similar, a subtraction is appropriate. If the bases of the ratings differ markedly, the physician should evaluate the circumstances and determine whether conversion to the earlier or latest edition of the *Guides* for both ratings is possible. The determination should follow the local jurisdiction's guidelines and consider whichever edition best describes the individual's impairment. If no rating was previously assigned, the examiner must use available information to estimate what the rating was before the new injury, and subtract this from the "new" rating as noted earlier.[139]

Here, as discussed above, the bases for the rating for the 1992 injury using the *Guides* 3rd Edition and the rating for the 2008 injury under the *Guides* 6th Edition, according to the apportionment instructions in the latter, "differ markedly." In such circumstances, the 6th Edition instructs the physician to determine whether conversion to one edition or another for both ratings *is possible*. Because the respective methodologies are dissimilar, we question whether the 1992 injury, assuming it can be rated at all, and the 2008 injury, can be rated using the same edition of the *Guides*, whatever edition that might be. However, one conclusion is inescapable: Under the circumstances, different editions of the *Guides* should not be used, notwithstanding board precedent for doing so. Moreover, the recommendation in the *Guides* 6th Edition to refer to the local jurisdiction's guidelines and consider whichever edition best describes the individual's impairment would suggest that the ratings must be made under the same edition. Finally, where, as here, no rating was previously assigned, the board, as distinguished from the evaluators, would need to use available information to estimate what the

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[139] *Guides* 6th Edition, §2.5c.

rating was before the new injury, and subtract this from the "new" rating. As noted earlier, there is a scant amount of information available to rate the 1992 injury, making an estimated rating for that injury problematic.

In summary, applying the reasonable basis standard of review, there are a number of reasons for concluding that the board erred when it used the *Guides* 3rd Edition for rating Hanson's 1992 injury. Among them are the lack of evidence relative to the 1992 injury,[140] the markedly different methodologies between the 3rd and 6th editions for rating lumbar spine impairment, and the admonition to use the same edition of the *Guides* when apportioning PPI between injuries. On remand, the board should determine whether the 1992 injury can be rated under either the 3rd or 6th edition of the *Guides*, whether both injuries can be rated using the same edition of the *Guides*,[141] and apportion impairment between the injuries, if, in the board's estimation, that is possible. In the process, the board should state its findings in each of these respects.

c. Hanson is not entitled to TTD benefits for attending the EME and the SIME.

AS 23.30.185 provides in relevant part that TTD benefits "shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring *after the date of medical stability*."[142] The board awarded Hanson TTD benefits for April 18, 2009, when he attended an EME, and for February 5, 2010, when he attended an SIME. Coincidentally, February 5, 2010, happened to be the date that Hanson was determined to be medically stable. As the Municipality pointed out in its briefing, on April 18, 2009, Hanson worked and was paid for

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[140] This consideration would apply to rating the 1992 injury using the *Guides* 6th Edition as well.

[141] Ordinarily, the 2008 injury would have to be rated under the *Guides* 6th Edition. *See* AS 23.30.190(d) and 8 AAC 45.122(a). However, the 6th Edition instructs that the edition that best describes the individual's impairment should be used for apportionment. *See* n.139, *supra*. Thus, all other considerations aside, the 3rd Edition might arguably be used to rate the 2008 injury.

[142] Italics for emphasis.

a full day of work, and on February 5, 2010, it was his day off. Citing one of its own decisions as authority,[143] the board concluded that, because Hanson was medically stable *after* February 5, 2010, he was entitled to TTD benefits for the two days that he attended the claim-related evaluations.

We disagree with the board for two reasons. Admittedly, AS 23.30.185 references medical stability as the operative factor in determining whether or not an employee is entitled to TTD benefits. However, TTD benefits are, in both name and purpose, benefits that are owed on account of *total disability* related to employment. It would be counterintuitive to consider Hanson disabled in terms of his employment when he was working. Second, the award of TTD benefits, in addition to either getting paid or having the day off, results in an unjustifiable double recovery for Hanson.[144] He would receive both disability benefits and employment benefits in the form of pay or time off.

For the foregoing reasons, the commission reverses the board's award of TTD benefits for April 18, 2009, and for February 5, 2010.

d. The board did not make adequate findings in support of its attorney fee award.

Initially, the commission concludes that its review of the attorney fee award does not involve statutory interpretation. Instead, it involves application of the statute governing attorney fee awards, AS 23.30.145. Therefore, the appropriate standard of review is whether the board abused its discretion in awarding the attorney fees it ordered to be paid. We do not substitute our judgment for the board's in this respect.[145] However, here, the issue is not so much whether the board abused its discretion. Instead, the issue is whether the board made adequate findings to support its award of attorney fees.

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[143] *See Hanson II*, Bd. Dec. No. 12-0031 at 58 (citing *Johnson v. Custom Interiors By Day*, Alaska Workers' Comp. Bd. Dec. No. 07-0005 (Jan. 8, 2007)).

[144] Conceptually, it is somewhat more difficult to appreciate that there was a double recovery for the day off. It would consist of receipt of the TTD benefits on the one hand, and on the other, the opportunity to enjoy the time off.

[145] *See* Part 3, *supra*.

As mentioned at the outset of this decision, the commission has concluded that the board's attorney fee award must be reversed and remanded.[146] We do so for three reasons: 1) the board's findings that MOA otherwise resisted payment of compensation, in support of its decision to award fees under AS 23.30.145(b), are not adequate for that purpose; 2) the board's findings do not satisfy the requirement set forth in *Lewis-Walunga v. Municipality of Anchorage*[147] that the board explain its reasons for awarding fees under AS 23.30.145(b) when a claim is controverted; and 3) given our disposition of the PPI rating issue, the board may wish to revisit and revise its award.

In *Lewis-Walunga*, the board reduced the claimant's attorney fees request by 30%, from $38,920, to $27,244, and awarded fees in the lower amount. Its reason for doing so was that the board found the fee request to be "a little too high." On appeal, the commission began its analysis of the board's attorney fee award by pointing out the differences between subsections (a) and (b) of AS 23.30.145[148] that the supreme court

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[146] The Municipality did not object to Hanson's counsel's hourly rate; it is not at issue.

[147] Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009).

[148] **AS 23.30.145. Attorney fees.**

> (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges,
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> (footnote continued)

articulated in *Harnish Group, Inc. v. Moore* (*Harnish*).[149] Subsection .145(a), generally speaking, applies to fee awards where the employer has controverted the claim by filing a formal controversion, denying the claim in its answer, or controverting the claim in fact. Subsection .145(b) covers fee awards where the employer delays or otherwise resists payment of compensation and the employee's attorney successfully prosecutes the claim.[150] In *Harnish*, after noting that the employee's claim was not controverted formally or in fact, the supreme court remanded the matter to the board to determine a reasonable attorney fee award under AS 23.30.145(b).[151]

Here, as in *Lewis-Walunga*, although in contrast to *Harnish*, Hanson's claim was formally controverted, which would suggest that the fee award ought to have been made under AS 23.30.145(a). However, the board made its attorney fee award under AS 23.30.145(b), with the explanation:

> AS 23.30.145(b) also applies if an employer "fails to pay" medical or other benefits within 15 days of the date they become due, and applies if the employer "otherwise resists" paying compensation. *Harnish*, because of its facts, does not stand for the idea an injured worker may not seek and obtain fees under AS 23.30.145(b) in a case in which the employer timely controverted a workers' compensation "claim" and the employee's

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> and the benefits resulting from the services to the compensation beneficiaries.
>
> (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.

149 160 P.3d 146 (Alaska 2007).

150 *See Lewis-Walunga*, App. Comm'n Dec. No. 123 at 5-6 (quoting *Harnish Group*, 160 P.3d at 151 (internal quotation marks omitted)).

151 *See Harnish*, 160 P.3d at 154.

> attorney successfully prosecuted the case. Furthermore, decisional law supports an award of [an] actual fee under both §145(a) and §145(b).[152]

The board found that the Municipality had otherwise resisted the payment of compensation. Presumably, as examples of the Municipality's resistance to paying compensation and in support of its use of AS 23.30.145(b) to award fees, the board found that Hanson's medical and legal issues were complex and varied.[153] In the commission's view, the fact that the issues were complex and varied is not necessarily indicative of *resistance* on the part of the Municipality to paying compensation. We think that a better example of its resistance to the payment of compensation might be the retention of Dr. Yodlowski to perform another EME in June 2010. She subsequently testified at length both in deposition and at the hearing on December 20, 2011. As it turned out, both MOA and the board relied heavily on Dr. Yodlowski's opinions, which were central to the board's resolution of the PPI issue. Because we question the basis for the board's finding that the Municipality resisted payment of compensation, a remand is in order so that the board can make specific, relevant findings to support an award of attorney fees under AS 23.30.145(b).

Second, in *Lewis-Walunga*, the commission did not rule out an award of fees under subsection .145(b), notwithstanding the controversion filed in that matter. However, we concluded that the board was required "to adequately explain its reasons for awarding fees solely under [subsection] .145(b)."[154] Here, rather than providing an explanation for awarding fees under subsection .145(b), as required, the board simply declared that the holding in *Harnish* did not preclude an award of fees under subsection .145(b).[155] However, *Harnish* is distinguishable; the claim was not controverted. Thus, the board needs to make findings that support an award of attorney fees under AS 23.30.145(b), given the Municipality's controversions.

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152 *Hanson II*, Bd. Dec. No. 12-0031 at 59.

153 *See Hanson II*, Bd. Dec. No. 12-0031 at 59.

154 *Lewis-Walunga*, App. Comm'n Dec. No. 123 at 5.

155 *See Hanson II*, Bd. Dec. No. 12-0031 at 59.

Third, we have reversed the PPI rating issue and remanded that issue to the board. On remand, the board may or may not decide that 1) the 1992 injury can be rated under either the 3rd or 6th Edition of the *Guides*; 2) both injuries can be rated using the same edition of the *Guides*; or 3) impairment can be apportioned between the 1992 and 2008 injuries. All these factors may cause the board to reconsider its original PPI rating, in which case it may find it desirable to adjust its attorney fee award upward or downward.

Summarizing, the board may award fees under AS 23.30.145(b), provided that it makes adequate findings. Moreover, it may wish to revisit its award, depending on its disposition of the PPI rating issue.

5. Conclusion.

Based on our reasoning discussed above, we REVERSE the board's award of two days' TTD benefits, and we REVERSE and REMAND the board's PPI award and attorney fee award.

Date: *12 June 2013* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

This is a final decision on the merits of this appeal as to the appeals commission's reversal in part of the board's decision. This is a non-final decision as to the appeals commission's reversal and remand in part of those matters to the board. The final decision portion of this decision becomes effective when distributed (mailed) unless proceedings to 1) reconsider the final decision portion are instituted (started), pursuant to AS 23.30.128(f) and 8 AAC 57.230, or 2) unless proceedings to appeal the final decision portion to the Alaska Supreme Court, pursuant to AS 23.30.129(a) are instituted. See Reconsideration and Appeal Procedures sections below.

The non-final portion of this decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted. See Petition for Review section below.

To see the date of distribution look at the box below.

RECONSIDERATION

A party may request the commission to reconsider this decision as to the final decision portion by filing a motion for reconsideration. AS 23.30.128(e) and 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 (mailed) to the parties. If a request for reconsideration of a final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

APPEAL PROCEDURES

Appeal

The commission's final decision portion becomes effective when distributed unless proceedings to appeal to the Alaska Supreme Court are instituted (started). 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 distributed[156] 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.

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[156] A party has 30 days after the distribution of a final decision of the commission to file an appeal with 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.

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/

Petition for Review

A party may petition the Alaska Supreme Court for review of that portion of the commission's decision that is non-final. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.[157]

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition the Alaska Supreme Court for review, 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/

I certify that, with the exception of correction of grammatical errors, this is a full and correct copy of the Final Decision No. 182 issued in the matter of *Municipality of Anchorage and NovaPro Risk Solutions vs. Brad J. Hanson,* AWCAC Appeal No. 12-013, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 12, 2013.

Date: *June 13, 2013*

Signed
K. Morrison, Deputy Commission Clerk

[157] A party has 10 days after the distribution of a non-final decision of the commission to file a petition for review with the Alaska Supreme Court. If the commission's decision was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c). *See* n.156 for Rule of Appellate Procedure 502(c).