

Alaska Workers' Compensation Appeals Commission

Matthew Lubov,
Appellant/Cross-Appellee,

vs.

McDougall Lodge, LLC,
Appellee,

and

State of Alaska, Workers' Compensation
Benefits Guaranty Fund,
Appellee/Cross-Appellant.

Final Decision

Decision No. 257

March 7, 2019

AWCAC Appeal No. 18-005

AWCB Decision Nos. 18-0028, 18-0035

AWCB Case No. 201613050

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0028, issued at Anchorage, Alaska, on March 21, 2018, by southcentral panel members Ronald P. Ringel, Chair, and Bradley Evans, Member for Industry; and, Final Decision and Order on Reconsideration No. 18-0035, issued at Anchorage, Alaska, on April 4, 2018, by southcentral panel members Ronald P. Ringel, Chair, and Bradley Evans, Member for Industry.

Appearances: Andrew D. Wilson, Rehbock & Wilson, for appellant/cross-appellee, Matthew Lubov; J. John Franich, Franich Law Office, LLC, for appellee, McDougall Lodge, LLC; Kevin G. Clarkson, Attorney General, and Siobhan McIntyre, Assistant Attorney General, for appellee/cross-appellant, State of Alaska, Workers' Compensation Benefits Guaranty Fund.

Commission proceedings: Appeal filed April 20, 2018; cross-appeal filed May 11, 2018; briefing completed November 13, 2018; oral argument was not requested by any of the parties.

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

By: Deirdre D. Ford, Chair.

1. Introduction.

Matthew Lubov asserted an injury to his back while working for McDougall Lodge, LLC (McDougall) in 2016.¹ At a prehearing in March 2017, the Alaska Workers' Compensation Board (Board) designee advised the parties the Alaska Workers' Compensation Benefits Guaranty Fund (Fund) would be joined as a party because McDougall was an uninsured employer. Mr. Lubov objected to the joinder, but the Board sustained the joinder in a hearing on April 5, 2017.² Mr. Lubov did not appeal the decision on joinder.

The Board heard the merits of Mr. Lubov's claim for benefits on January 24, 2018,³ and found Mr. Lubov entitled to Temporary Total Disability (TTD) benefits and medical costs, plus penalty and interest.⁴ The Board further awarded Mr. Lubov statutory attorney fees on the benefits awarded, and ordered the Fund to pay the awarded benefits if McDougall failed to pay within 30 days of the order.⁵ The Board dismissed Medicaid as a party and found Mr. Lubov's work with McDougall was the substantial cause of his disability and need for medical treatment.⁶

Mr. Lubov's and McDougall's petitions for reconsideration were heard on the written record on March 29, 2018, and the Board reconsidered the period of time for

¹ *Lubov v. McDougall Lodge, LLC and Alaska Workers' Compensation Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 17-0046 at 2, No. 1 (Apr. 27, 2017)(*Lubov I*).

² *Lubov I* at 14.

³ *Lubov v. McDougall Lodge, LLC, Alaska Department of Health and Social Services, Division of Health Care Services, and Alaska Workers' Compensation Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 18-0028 (Mar. 21, 2018)(*Lubov II*).

⁴ *Lubov II* at 23.

⁵ *Id.* at 23-24.

⁶ *Id.* at 23.

which TTD benefits were owed. The Board declined to recalculate the amount of TTD or Temporary Partial Disability (TPD) benefits owed.⁷

Mr. Lubov timely appealed asserting the Board erred in failing to provide an order declaring an amount of default for purposes of obtaining a lien, the Board erred in denying Mr. Lubov an opportunity to supplement his attorney fee affidavit, and the Board erred in denying Mr. Lubov his reasonable and actual attorney fees.⁸ The Fund filed a cross-appeal asserting the Board erred in finding Mr. Lubov had not yet reached medical stability.⁹

None of the parties requested oral argument and the Alaska Workers' Compensation Appeals Commission (Commission) now decides these issues based on the parties' briefing. The Commission affirms the Board's orders declining to issue a notice of default and awarding statutory attorney fees pursuant to AS 23.30.145(a). The Commission reverses the Board's finding that Mr. Lubov was not medically stable.

*2. Factual background.*¹⁰

For several years, Mr. Lubov worked as a substitute teacher during the school year, then worked as a fishing guide for McDougall, followed by work as a fishing guide for another lodge in the late summer before returning to work as a substitute teacher.¹¹ McDougall operates McDougall Lodge, a fishing lodge on the Yentna River. Access to the lodge is by float plane from Anchorage or a several hour trip by boat.¹² Float planes land in the upstream direction and are tied off at the lodge's dock. Because the planes must

⁷ *Lubov v. McDougall Lodge, LLC, Alaska Department of Health and Social Services, Division of Health Care Services, and Alaska Workers' Compensation Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 18-0035 (Apr. 4, 2018)(*Lubov III*).

⁸ Notice of Appeal, April 20, 2018.

⁹ Fund's Notice of Cross-Appeal, May 11, 2018.

¹⁰ 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.

¹¹ *Lubov II* at 2, No. 1.

¹² *Id.* at 3, No. 2.

take off in the downstream direction, they are rotated or “flipped” at the dock. Flipping a plane is a two–person job. One person unties the nose of the plane and pushes it away from the dock into the current where it is carried downstream. The person at the tail holds on and, as the plane approaches the downstream direction, shoves the tail away from the dock.¹³

In 2015, while working for another lodge, Mr. Lubov experienced low back pain after chopping wood. He did not seek medical treatment until the season ended and he returned to Juneau.¹⁴ On September 28, 2015, Mr. Lubov saw Jillian Peterson, D.C., and reported back pain that started about two weeks earlier, which he described as “cramp-like,” but not bad enough to require any pain medication.¹⁵ Mr. Lubov again saw Dr. Peterson on October 1, 2015.¹⁶ Between December 4, 2015, and December 29, 2015, Mr. Lubov treated at City Center Chiropractic Clinic.¹⁷

On January 19, 2016, Mr. Lubov saw John Bursell, M.D., at the Juneau Bone & Joint Center and reported low back pain that had begun in September, with pain radiating to his right foot, and right leg weakness. The pain had subsided until about a month before, when he experienced a flare up after exercising at a gym. Dr. Bursell noted that Mr. Lubov’s pain was likely from a disc injury, and prescribed oral steroids.¹⁸

On May 13, 2016, Mr. Lubov returned to Dr. Bursell. He was doing well, but requested a repeat dose of oral steroids because he was leaving for the summer to work at a remote lodge and was worried about a recurrence of symptoms.¹⁹ On May 17 or 18, 2016, Mr. Lubov returned to McDougall Lodge for the season, which would end about September 1, 2016. Because of its remote location, Mr. Lubov lived at the lodge with his

¹³ *Lubov II* at 3, No. 3.

¹⁴ *Id.*, No. 4.

¹⁵ *Id.*, No. 5.

¹⁶ *Id.*, No. 6.

¹⁷ *Id.*, No. 7.

¹⁸ *Id.*, No. 8.

¹⁹ *Id.*, No. 9.

dog. Mr. Lubov's back continued to bother him, and he generally treated it by stretching and by immersion in the cold river, with occasional use of the oral steroids prescribed by Dr. Bursell.²⁰

Mr. Lubov testified that on July 13, 2016, he felt some tightness in his low back after flipping a plane, but had no immediate pain. He awoke about 2:30 the next morning in excruciating pain and when he stood up, his right foot collapsed. He further stated he slowly made his way to the lodge dining room looking for help, but no one was there. He then wrote on a white board that his back was out. He took the oral steroids and immersed himself in the cold river without relief. The next day, he borrowed a tens unit from another employee, but it was also ineffective. On July 15, 2016, he took the plane back to Anchorage.²¹

On July 15, 2016, Mr. Lubov saw PA-C Raymond Farrell and reported he had back pain for a year and wondered if his work as a fishing guide was causing his discomfort. PA-C Farrell noted an x-ray showed narrowing at the L4-5 and L5-S1 levels. He discussed with Mr. Lubov the possibility of epidural steroid injections, but explained a magnetic resonance imaging (MRI) would be needed before that could be done.²² The July 15, 2016, radiology report identified a loss of disc space height at L4-5, but did not mention any abnormality at the L5-S1 level.²³ Later on the same day, he went to the emergency room at Providence Medical Center, where he saw Vincent Imbriani, M.D. Mr. Lubov explained he wished to return to the lodge, and then go to Juneau for follow-up care with his primary physician. Dr. Imbriani found no signs of a herniated disc, but prescribed steroids and recommended Mr. Lubov get an MRI.²⁴

On July 21, 2016, Mr. Lubov returned to Dr. Bursell and reported that while working at a fishing lodge he had a recurrence of right radicular pain, which he treated

²⁰ *Lubov II* at 3-4, No. 10.

²¹ *Id.* at 4, No. 11.

²² *Id.*, No. 13.

²³ *Id.*, No. 14.

²⁴ *Id.*, No. 15.

with oral steroids. He noted an MRI was recommended in Anchorage, but he chose to return home to Juneau for further care. Dr. Bursell ordered an MRI.²⁵

The MRI, on August 8, 2016, showed a small disc herniation at L4-5, a right posterolateral extrusion, and an epidural hematoma at L5-S1 that was causing a severe compression of the S1 nerve root.²⁶ Dr. Bursell performed epidural steroid injections on August 11, 2016, and August 25, 2016.²⁷

On September 22, 2016, Dr. Bursell wrote a “to whom it may concern” letter explaining that the August 8, 2016, MRI showed a right L5-S1 disc extrusion with a hematoma, which was the cause of Mr. Lubov’s back pain and right leg symptoms. He explained that while he had previously treated Mr. Lubov for similar symptoms, the presence of the hematoma indicated a recent injury. Dr. Bursell concluded Mr. Lubov’s earlier symptoms were the result of a lumbar disc injury, and the injury in July likely resulted in the lumbar disc extrusion and hematoma.²⁸

On September 26, 2016, Dr. Bursell completed an off-work slip stating Mr. Lubov had been unable to work from July 14, 2016, through September 25, 2016, and released him to light duty on that date.²⁹ Dr. Bursell, on October 27, 2016, performed a third epidural steroid injection.³⁰

On April 6, 2017, Mr. Lubov saw PA-C Darcie Sorenson (at the request of the Fund). She noted that Mr. Lubov had significantly improved after the July 13, 2016, injury, and was neurologically stable. She recommended continued conservative care.³¹

²⁵ *Lubov II* at 4-5, No. 16.

²⁶ *Id.* at 5, No. 17.

²⁷ *Id.*, No. 18.

²⁸ *Id.*, No. 20.

²⁹ *Id.*, No. 21.

³⁰ *Id.*, No. 22.

³¹ *Id.* at 6, No. 27.

An MRI on August 10, 2017, showed the extrusion at L5-S1 was much smaller than in the previous MRI and the hematoma was resorbed. Although Mr. Lubov had “near complete resolution” of the extrusion, Dr. Bursell did mention the possibility of surgery.³²

Anthony Bove was the chef at McDougall Lodge during the summer of 2016. He provided Mr. Lubov with bags of frozen vegetables to use as ice packs on his back and he saw Mr. Lubov, along with others, immersing himself in the river. Mr. Bove noted Mr. Lubov appeared to be in more discomfort after the July 13, 2016, incident.³³

Ron Jewett was the manager of McDougall lodge and knew Mr. Lubov from his prior work at the lodge. In 2016, he was aware Mr. Lubov had low back pain. After the injury, he arranged for Mr. Lubov to travel to Anchorage for medical care, but he expected Mr. Lubov would return to work. McDougall would have accommodated Mr. Lubov’s job restrictions if he had returned.³⁴

McDougall filed the statement of Colleen Dye, an employee at the lodge, who stated that on July 13, 2016, Mr. Lubov had been “wrestling” with his dog on the ramp to the dock, when he slipped and partially fell.³⁵

Dr. Bursell was deposed on January 18, 2018. When he saw Mr. Lubov in July 2016, Mr. Lubov was in more pain than before and was limping, which he had not done before. Dr. Bursell explained the hematoma shown on the August 8, 2016, MRI indicated relatively recent trauma. Although the time cannot be determined with precision, hematomas are resorbed within three months to one year, and the hematoma indicated the injury happened within days or a few weeks. Based on the description of “flipping” the plane, Dr. Bursell opined that action could definitely cause a disc to herniate and result in a hematoma, and it was highly unlikely Mr. Lubov had the hematoma before that time. Dr. Bursell explained that it was likely Mr. Lubov had initially injured his L5-S1 disc in the 2015 incident resulting in an annular tear or bulge, and his symptoms decreased

³² *Lubov II* at 7, No. 33.

³³ *Id.*, No. 35.

³⁴ *Id.*, No. 36.

³⁵ *Id.*, No. 37.

with conservative care. Then, the 2016 incident caused the disc to “pop,” extruding a fragment and causing the hematoma. He recommended Mr. Lubov not return to work as a fishing guide.³⁶

3. Procedural History.

On August 12, 2016, Mr. Lubov reported that he had injured his low back on July 13, 2016, while working for McDougall.³⁷ On August 30, 2016, the Fund sent Mr. Lubov a letter informing him that McDougall may have been uninsured at the time of his injury and further explained that, if McDougall were uninsured, Mr. Lubov might receive benefits from the Fund, but he needed to file a claim against the Fund as well as against McDougall.³⁸ Mr. Lubov did not work at the other lodge in 2016, but did return to work as a substitute teacher, which was light-duty work, on August 23, 2016.³⁹ McDougall paid Mr. Lubov through July 15, 2016.⁴⁰

On September 6, 2016, Mr. Lubov filed a claim against both McDougall and the Fund, seeking TTD, TPD, and medical costs.⁴¹ On September 15, 2016, the Fund filed its answer to Mr. Lubov’s claim, stating it appeared McDougall was uninsured at the time of the injury, and it was unclear whether there was an employer-employee relationship between Mr. Lubov and McDougall.⁴²

On November 28, 2016, Mr. Lubov filed two claims, both of which stated they were amendments to his September 6, 2016, claim.⁴³ One of the amended claims named McDougall and the other named the Fund. Both claims sought TTD, TPD, and permanent

³⁶ *Lubov II* at 7-8, No. 38.

³⁷ *Lubov I* at 2, No. 1.

³⁸ *Id.*, No. 2.

³⁹ *Lubov II* at 5, No. 23.

⁴⁰ *Lubov II* at 8, No. 39.

⁴¹ *Lubov I* at 2, No. 4.

⁴² *Id.* at 3, No. 5.

⁴³ AS 23.30.082(c). “In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers’ compensation claim. The fund may assert the same defenses as an insured employer”

partial impairment (PPI) benefits, medical and transportation costs, penalty, interest, and attorney fees and costs.⁴⁴ On December 12, 2016, the Fund filed an answer to Mr. Lubov's amended claim which was identical to the Fund's September 15, 2016, answer.⁴⁵

On January 23, 2017, Medicaid sent Mr. Lubov's attorney notice of a Medicaid lien. The letter indicated Medicaid had paid some of Mr. Lubov's medical costs related to the work injury, and Mr. Lubov was required to repay those benefits if he recovered from a third party. At the time, Medicaid had paid \$5,241.72. The letter concluded by stating, "The State considers itself a party with an interest in the recovery at issue and in any payments made in settlement."⁴⁶

On January 24, 2017, Mr. Lubov filed an affidavit of readiness for hearing on his September 6, 2016, claim as amended on November 28, 2016. The affidavit identified McDougall as his employer and stated the business operated by McDougall was uninsured.⁴⁷ On March 8, 2017, McDougall filed an answer to Mr. Lubov's "November 28, 2015" claim and denied Mr. Lubov was entitled to the requested benefits, alleging Mr. Lubov was not injured in the course and scope of his employment with McDougall.⁴⁸

On March 8, 2017, McDougall filed an answer to Mr. Lubov's November 28, 2016, claim, denying all requested benefits.⁴⁹ At the prehearing conference on March 8, 2017, the Board designee issued a "notice to join" ordering that McDougall and the Fund be joined to the claim against the other unless an objection was filed within 20 days. On his own motion, the Board designee set a hearing for April 5, 2017, to consider the following issues:

- (1) The board will first decide any objection to the "Notice to Join," filed by any party. If there are no timely objections to the Notice to Join, this issue

⁴⁴ *Lubov I* at 3, No. 10.

⁴⁵ *Id.*, No. 11.

⁴⁶ *Lubov II* at 5-6, No. 25.

⁴⁷ *Lubov I* at 4, No. 13.

⁴⁸ *Id.*, No. 16.

⁴⁹ *Lubov II* at 6, No. 26.

will become moot, as the parties will have been joined under 8 AAC 45.040(h)(2).

(2) The board will then determine if [Mr. Lubov] may pursue his claim in whole or in part against [McDougall] at a subsequent hearing without the Fund's participation, regardless of whether or not all parties are joined in the two, pending claims.⁵⁰

On March 14, 2017, Mr. Lubov filed an objection to the Board designee's notice to join, contending that because McDougall's liability under the Act had not yet been established, the claim against the Fund was not ripe. The objection was served on Mr. Lubov and McDougall, but was not served on McDougall's attorney or on the Fund.⁵¹ On March 14 2017, Mr. Lubov also filed a petition which contended the Board designee had abused his discretion by failing to set a hearing on Mr. Lubov's claim against McDougall.⁵² On March 28, 2017, Mr. Lubov filed a notice of withdrawal of all claims against the Fund, without prejudice.⁵³

At the April 5, 2017, hearing, Mr. Lubov's attorney contended that neither the March 14, 2017, objection to join nor the appeal of the Board designee's decision had been served on the Fund or McDougall's attorney. He asked that the issues be considered at the hearing, or that the hearing be continued. Both the Fund and McDougall agreed to proceed to hearing on the objection to joinder, but McDougall objected to hearing Mr. Lubov's appeal of the Board designee's decision. At hearing, Mr. Lubov's attorney asserted that intent of the Fund is to provide benefits to employees injured while working for uninsured employers, and the Fund is not intended to benefit the uninsured employer. Under the Act, failure to insure or qualify to self-insure is a felony, and AS 23.30.082(c) allows the Fund to raise defenses that McDougall might have raised. Therefore, to allow the Fund to participate in the hearing of an employee's claim against an uninsured employer, results in the Fund's assets being used to defend the criminally uninsured

⁵⁰ *Lubov I* at 4, No. 17.

⁵¹ *Lubov I* at 4-5, No. 18.

⁵² *Id.* at 5, No. 19.

⁵³ *Id.*, No. 20.

employer rather than benefitting injured employees. Further, the Fund is not a necessary party, because if Mr. Lubov prevailed against McDougall, AS 23.30.165 and AS 23.30.170 provide a potential method of recovering any benefits awarded through the courts without the necessity of involving the Fund. Mr. Lubov conceded that if he was to prevail in a hearing against McDougall, the result would not be binding in any later hearing against the Fund.⁵⁴

On January 19, 2018, Mr. Lubov filed an Affidavit of Fees and Costs. In the affidavit, Mr. Lubov's attorney represented his statements were made under oath, but the notarization is blank. Additionally, the affidavit stated attorney fees, paralegal fees, and costs totaled \$39,060.00 to date, and of that amount, costs were \$1,236.58. The affidavit did not provide any details or itemization of either the fees or the costs.⁵⁵

Lubov II was issued on March 21, 2018. In analyzing whether Mr. Lubov was entitled to TTD, *Lubov II* stated "Mr. Lubov was temporarily totally disabled from July 16, 2016 through August 22, 2016."⁵⁶ There is no record of Mr. Lubov's earnings for 2014, and the record of his 2015 earnings is incomplete. The Fund filed Mr. Lubov's 2015 W-2s from McDougall and the school district, but Mr. Lubov's earnings from the other lodge are not included.⁵⁷

In its analysis of Mr. Lubov's entitlement to TTD and TPD, *Lubov II* stated:

Although [Mr. Lubov] asked that this decision set out the amount of benefits due, that cannot be done based on the current record. [Mr. Lubov's] compensation rate is based on his spendable weekly wage. Because [Mr. Lubov] was paid by the day, his spendable weekly wage is calculated under AS 23.30.220(a)(4), based on the higher of his gross earnings in either of the two preceding calendar years. The Fund's hearing brief suggests the parties may have that information, but it has not been filed with the Board, and his compensation rate cannot be determined.

[Mr. Lubov] may also be entitled to TPD for dates after August 22, 2016, however, under AS 23.30.200, TPD is calculated by comparing an

⁵⁴ *Lubov I* at 5, Nos. 21-22.

⁵⁵ *Lubov II* at 8-9, No. 43.

⁵⁶ *Lubov II* at 20.

⁵⁷ *Lubov III* at 2.

employee's actual weekly earnings with his spendable weekly wage. Because [Mr. Lubov's] spendable weekly wage cannot be determined based on the current record, whether, or for what periods, [Mr. Lubov] may be entitled to TPD also cannot be determined.⁵⁸

Lubov II ordered statutory rather than actual attorney fees based on Mr. Lubov's failure to file an affidavit itemizing the hours expended or identifying the extent and character of the work performed.⁵⁹

The Board issued *Lubov III* in reconsideration of *Lubov II*. The Board corrected the amount of TTD benefits payable to Mr. Lubov. Originally, the Board found "[Mr. Lubov] is entitled to TTD benefits from June 15, 2016 through August 22, 2016."⁶⁰ The Board then corrected the Order in *Lubov III* holding Mr. Lubov was entitled to TTD benefits from July 16, 2016, and not from June 15, 2016,⁶¹ because McDougall paid Mr. Lubov a daily rate of \$104.16 per day, and paid him through July 15, 2016.⁶² The Board reaffirmed its finding that there is no record of Mr. Lubov's earnings for 2104, and the record of his 2015 earnings is incomplete. The Fund filed Mr. Lubov's 2015 W-2s from McDougall and the school district, but Mr. Lubov's earnings from the other lodge were not included.⁶³ The Board could not, and did not, calculate TPD benefits for Mr. Lubov, and Mr. Lubov did not provide the Board with any evidence as to the amount of TPD he thought he was owed.

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.⁶⁴ On questions of law and procedure, the Commission does not defer to the Board's

⁵⁸ *Lubov II* at 21.

⁵⁹ *Id.* at 23.

⁶⁰ *Lubov III* at 3.

⁶¹ *Id.* at 6.

⁶² *Lubov II* at 8, No. 39.

⁶³ *Id.*, No. 40.

⁶⁴ AS 23.30.128(b).

conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."⁶⁵ The Board's findings of credibility are binding on the Commission because the Board "has the sole power to determine the credibility of a witness."⁶⁶ Such a determination by the Board is conclusive "even if the evidence is conflicting or susceptible to contrary conclusions."⁶⁷ The Commission reviews the Board's award of attorney fees on the basis of whether the decision is manifestly unreasonable.⁶⁸

5. *Discussion.*

a. *Is Mr. Lubov medically stable from the McDougall work injury?*

The Board, in *Lubov II*, stated it was unclear if Mr. Lubov was medically stable since Dr. Bursell, in noting that the hematoma had resorbed and the extrusion was "near complete resolution," also mentioned the possibility of surgery in the future.⁶⁹ The Board also found Mr. Lubov was not entitled to a PPI rating since "there is not yet evidence [Mr. Lubov] is medically stable"⁷⁰

McDougall has cross-appealed this finding as contrary to the definition of medical stability in the Act. AS 23.30.395, in pertinent part, states:

(28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence[.]

⁶⁵ AS 23.30.128(b).

⁶⁶ AS 23.30.122.

⁶⁷ AS 23.30.122.

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

⁶⁹ *Lubov II* at 7, No. 33.

⁷⁰ *Id.* at 21.

The substantial evidence in the record supports McDougall's position. Dr. Bursell opined Mr. Lubov returned to pre-injury status between May and June 2017.⁷¹ In fact, Dr. Bursell clarified that when he saw Mr. Lubov on August 18, 2017, the only recommended treatment was his continuing exercise program and that when he was discharged from physical therapy, Mr. Lubov would no longer see any objective measurable improvement.⁷² Dr. Bursell also stated that Mr. Lubov would likely have zero percent PPI from the injury with McDougall.⁷³ He further stated that Mr. Lubov returned to his pre-injury status between May and June of 2017, his status prior to the work injury.⁷⁴

Substantial evidence in the record as a whole does not support the Board's finding that Mr. Lubov was not yet medically stable. His treating doctor stated he had returned to pre-injury status. His treating doctor agreed there was no objectively measurable improvement in his condition after completion of physical therapy in the summer of 2017. The potential of future surgery, which may or may not be related to the McDougall work injury, is not substantial evidence that Mr. Lubov is not now medically stable. By statute, medical stability must be presumed "in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence[.]"⁷⁵ The evidence of Dr. Bursell was that Mr. Lubov was medically stable in the summer of 2017, by June at the latest.

Mr. Lubov did not produce clear and convincing evidence to the contrary. The only evidence that he might not be medically stable is the remote possibility of surgery sometime in the future. Mr. Lubov did not provide any evidence showing objectively measurable improvement after August 2017, and, therefore, by statute Mr. Lubov is presumed to be medically stable. The Board's finding to the contrary is not supported by

⁷¹ John Bursell Dep., Jan. 12, 2018, at 44:2-5.

⁷² Bursell Dep. at 21:16 – 22:10.

⁷³ Bursell Dep. at 37:16-21.

⁷⁴ Bursell Dep. at 44:2-5.

⁷⁵ AS 23.30.395(28).

substantial evidence in the record as a whole. Mr. Lubov was medically stable by July 2017, when, according to Dr. Bursell's last visit with Mr. Lubov, he had returned to pre-injury status.

b. Should the Board have calculated TPD benefits for Mr. Lubov?

Mr. Lubov asserts the Board had an obligation to determine a date of medical stability in order to ascertain if, and how much TPD benefits might be due to Mr. Lubov. This was not a point on appeal in his Notice of Appeal and, therefore, should be considered waived. However, Mr. Lubov, McDougall, and the Fund all addressed the issue in their briefs so the Commission will address the issue of whether the Board properly declined to calculate what, if any, TPD benefits Mr. Lubov might be owed.

There is a difference between disability which results in a decrease in earning capacity and the date of medical stability after which no temporary benefits are owed. AS 23.30.395(16) provides "'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]'"

The burden is on Mr. Lubov to provide sufficient evidence to the Board to support his claim for TPD benefits, by showing he could not earn the wages he was receiving at the time of injury due to the work injury. AS 23.30.200 provides the conditions for receiving TPD benefits. The statute states:

(a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

(b) The wage-earning capacity of an injured employee is determined by the actual spendable weekly wage of the employee if the actual spendable weekly wage fairly and reasonably represents the wage-earning capacity of the employee. The board may, in the interest of justice, fix the wage-earning capacity that is reasonable, having due regard to the nature of the injury, the degree of physical impairment, the usual employment, and other factors or circumstances in the case that may affect the capacity of the

employee to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future.⁷⁶

In order to ascertain whether Mr. Lubov is entitled to TPD, he was required to provide a complete earnings history for the period of time in which he claims TPD. He did not provide an earnings history. The Board correctly found that TPD is determined by comparing Mr. Lubov's actual weekly earnings with his spendable weekly wage. Mr. Lubov failed to provide the Board with evidence of his actual earnings between July 2016 and July 2017. Since TPD is based on his actual earnings, the Board had no evidence upon which to base a calculation. The Board does not create relevant facts or documentation. The burden is on Mr. Lubov to provide the Board with the evidence necessary to support the benefit he seeks. He did not do so here.

Furthermore, the evidence in the record as a whole demonstrates Mr. Lubov was medically stable by July 2017 when, according to Dr. Bursell, his physical condition had returned to pre-injury status. Mr. Lubov is not entitled to TPD after July 2017 as he was then medically stable as required by statute.

c. Did the Board correctly refuse to enter a default order?

Mr. Lubov appealed the decision by the Board that the time was not yet ripe for issuing a default order under AS 23.30.170. He contends that the Board should have issued the default order at the same time the Board ordered benefits paid to Mr. Lubov by McDougall.

The statute is clear on the procedure for a default order:

(a) In case of default by the employer in the payment of compensation due under an award of compensation for a period of 30 days after the compensation is due, the person to whom the compensation is payable may, within one year after the default, apply to the board making the compensation order for a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in AS 23.30.110, the board shall make a supplementary order declaring the amount of the default. The order shall be filed in the same manner as the compensation order.⁷⁷

⁷⁶ AS 23.30.200.

⁷⁷ AS 23.30.170(a).

The Board ordered payment of TTD and medical benefits to or on behalf of Mr. Lubov in its decision dated March 21, 2018. It further ordered the Fund to pay those benefits if McDougall did not make the ordered payments within 30 days.⁷⁸ The Board reaffirmed its order on reconsideration in its Final Decision and Order on Reconsideration dated April 4, 2018.⁷⁹

Until McDougall failed to make payment pursuant to this order, a default order was premature. McDougall, by statute, was not in default until 30 days after it was ordered to pay the benefits awarded. If the employer defaults making payment of an award of compensation for a period of 30 days, “the person to whom the compensation is payable may, within one year after the default, apply to the board making the compensation order for a supplementary order declaring the amount of the default.”⁸⁰ Mr. Lubov had to wait 30 days following the Board’s order to allow McDougall time to pay the benefits ordered. If McDougall did not, then, and only then, was Mr. Lubov in position to request a supplementary order of default.

Further, the supplementary order will be granted only after “investigation, notice, and hearing”⁸¹ Mr. Lubov, in his request for a default order, must provide the Board with evidence McDougall failed to make the ordered payments and the Board may hold a hearing on the issue of a default order.

Mr. Lubov’s request for a supplementary order at the time of hearing was premature and the Board correctly denied the request. The Board’s denial is supported by substantial evidence in the record as the time had not yet elapsed for McDougall to pay the benefits, which were ordered as a result of the hearing. Therefore, the Board could not issue a supplementary order of default at that time because there was no evidence McDougall had defaulted. Even though McDougall did not have workers’ compensation insurance, failure to insure alone is not evidence an employer will not pay

⁷⁸ *Lubov II* at 23-24.

⁷⁹ *Lubov III* at 6.

⁸⁰ AS 23.30.170(a).

⁸¹ *Id.*

the benefits ordered by the Board. McDougall was entitled to the time allowed by statute to pay the benefits ordered. The Board acted correctly and declined to enter a supplementary order of default in *Lubov II* and *Lubov III*.

d. Did the Board properly award statutory attorney fees to Mr. Lubov?

Mr. Lubov requests an award of his actual fees. AS 23.30.145 states, in pertinent part:

(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, 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.

The regulation at 8 AAC 45.180 provides:

(b) A fee under AS 23.30.145 (a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145 (a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the

services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

...

(d) The board will award a fee under AS 23.30.145 (b) only to an attorney licensed to practice law under the laws of this or another state. (1) A request for a fee under AS 23.30.145 (b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145 (a), if AS 23.30.145 (a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section. (2) In awarding a reasonable fee under AS 23.30.145 (b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

Mr. Lubov asserts the Board erred in not allowing him an opportunity to supplement his original attorney fee affidavit, and in failing to award him his reasonable and actual fees in excess of statutory fees. Mr. Lubov ignores that it was his own refusal to comply with the statutory and regulatory rules by providing both the Board and McDougall/Fund with a proper affidavit detailing his time and costs that led the Board to award statutory fees.

Mr. Lubov contends that to provide a detailed analysis of his time and costs at the time of the hearing is in violation of the rules of the Alaska Bar Association. However, he provided neither to the Board nor to the Commission the identity of the rules he would be potentially violating. He further asserts the practice in his office was to file an affidavit following the hearing with more details. However, Mr. Lubov did not offer to the Board,

post hearing, such an affidavit, even as part of his motion for reconsideration. Further, the Commission takes judicial notice that since 1959, lawyers representing claimants have routinely filed affidavits in compliance with the statute and regulation without difficulty.

An award of fees will be upheld unless it is manifestly unreasonable.⁸² The express language in AS 23.30.145(a) requires the Board to determine the reasonableness of each request for fees by taking “into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.”⁸³ The claimant bears the burden of producing evidence to support the claim for fees and must persuade the Board of the reasonableness of the request.⁸⁴ The Board is obligated to review any request for attorney fees by looking at the complexity, nature, and length of services performed. Without evidence to support a claim for fees, the Board cannot undertake such an analysis.

Any award of fees is at the discretion of the Board.⁸⁵ In *Rusch*, a major complaint was the use of block billing, which Mr. Lubov’s attorney has managed to take to an extreme. The Alaska Supreme Court (Court) affirmed the right of the Board to rely on its own expertise and observations in *Fairbanks North Star Borough v. Rogers and Babler*.⁸⁶ The Court held that the Board is entitled to base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the Board’s experience, judgment, observations, and unique or peculiar facts of the case.

⁸² *Bailey v. Litwin*, 780 P.2d 1007 (Alaska 1989).

⁸³ AS 23.30.145(a).

⁸⁴ *Lewis-Walunga v. Municipality of Anchorage*, Alaska Workers’ Comp. App. Comm’n Dec. No. 123 at 13 (Dec. 28, 2009).

⁸⁵ *Rusch v. Southeast Alaska Regional Health Consortium*, Alaska Workers’ Comp. App. Comm’n Dec. No. 245 (Mar. 29, 2018).

⁸⁶ *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

The Commission previously looked at an award of statutory fees when the attorney fee affidavit was one day late in *Israelson v. Alaska Marine Trucking*.⁸⁷ The Commission looked at two regulations that permit the Board to extend deadlines. 8 AAC 45.063 provides the Board with authority to extend a time period “for good cause.” 8 AAC 45.195 provides the Board with authority to waive a procedural requirement “if manifest injustice to a party would result from strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.”

Unlike the situation here, in *Israelson* his attorney filed a proper affidavit albeit one day late. Here, Mr. Lubov filed an incomplete affidavit that was not notarized, which requirement the Board was willing to waive since Mr. Lubov’s attorney affirmed on the record his affidavit was accurate. However, and more importantly, Mr. Lubov’s attorney indicated to the Board he did not intend to file a more detailed affidavit until after the hearing, even if given his requested opportunity to supplement his affidavit. Both McDougall and the Fund timely objected to the incomplete affidavit and opposed any extension of time for supplementation.

Further, the issues here were not complex and the benefits not substantial. The medical issue did not require a Second Independent Medical Evaluation and only the treating doctor was deposed. Mr. Lubov obtained slightly more than two months of TTD and did not present sufficient evidence to support a calculation for TPD. The Board found McDougall and the Fund were prejudiced by the lack of a proper affidavit timely filed because they were denied an opportunity to review the claimed fees and make timely objection. Furthermore, the Board could not evaluate the basis and reasonableness of the requested fees.

Therefore, the Commission affirms the Board’s award of statutory fees to Mr. Lubov, finding the Board’s order was not unreasonable.

⁸⁷ *Israelson v. Alaska Marine Trucking, LLC*, Alaska Workers’ Comp. App. Comm’n Dec. No. 226 (May 27, 2016).

6. *Conclusion.*

The Board's order on medical stability is REVERSED with a finding that Mr. Lubov was medically stable by July 2017. Otherwise, the Board's decision and order is AFFIRMED.

Date: 7 March 2019 Alaska Workers' Compensation Appeals Commission



Signed

Michael J. Notar, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 257, issued in the matter of *Matthew Lubov vs. McDougall Lodge, LLC and State of Alaska, Workers' Compensation Benefits Guaranty Fund*, AWCAC Appeal No. 18-005, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 7, 2019.

Date: March 12, 2019



Signed

K. Morrison, Appeals Commission Clerk