Alaska Workers' Compensation Appeals Commission

Shawn Murphy, Appellant/Cross-Appellee, vs. Fairbanks North Star Borough, Appellee/Cross-Appellant.	Final Decision Decision No. 262 June 21, 2019 AWCAC Appeal No. 18-008 AWCB Decision No. 18-0043 AWCB Case No. 199806756

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0043, issued at Fairbanks, Alaska, on May 9, 2018, by northern panel members Robert Vollmer, Chair, and Lake Williams, Member for Labor.

Appearances: Andrew D. Wilson, Rehbock and Wilson, for appellant, Shawn Murphy; Zane D. Wilson, CSG, Inc., for appellee, Fairbanks North Star Borough.

Commission proceedings: Appeal filed June 8, 2018; cross-appeal filed June 20, 2018; briefing completed January 14, 2019; oral argument held on March 28, 2019.

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

By: Deirdre D. Ford, Chair.

1. Introduction.

The Alaska Workers' Compensation Board (Board) heard the claim of Shawn Murphy for additional permanent partial impairment (PPI) benefits on March 22, 2018, in Fairbanks, Alaska.[1] Mr. Murphy was injured in the course and scope of his employment with Fairbanks North Star Borough (FNSB). He asserted he was owed additional PPI, even though he was paid for a PPI rating in 2001, because FNSB paid the lower of two ratings, one done in 2000 by his surgical doctor, and one in 2001 by his treating doctor in Fairbanks.

[1] *Murphy v. Fairbanks North Star Borough*, Alaska Workers' Comp. Bd. Dec. No. 18-0043 (May 9, 2018) (*Murphy*).

FNSB contended Mr. Murphy's claim was barred by the statute of limitations in AS 23.30.105(a), AS 23.30.100, or AS 09.10.100. AS 09.10.100 provides that actions for a cause "not otherwise provided for may be commenced within 10 years after the cause of action has accrued."[2]

The Board awarded Mr. Murphy some additional transportation expenses, a penalty on some late paid expenses, and attorney fees and costs in the amount of $4,195.58. The Board denied his claim for additional PPI, finding the claim time-barred under AS 23.30.105, but allowed FNSB's statute of limitations defense under AS 09.10.100. Mr. Murphy timely appealed the denial of additional PPI to the Alaska Workers' Compensation Appeals Commission (Commission), and oral argument was heard on March 28, 2019. The Commission now affirms the Board's decision.

2. *Factual background and proceedings.*[3]

In June 1995, Mr. Murphy injured his lower back while working as a heavy vehicle mechanic and was diagnosed with a right L4-5 extruded disk with nerve root impingement and spondylosis. On June 19, 1995, he underwent right L4-5 laminotomy and discectomy.[4]

On July 8, 1996, John W. Joosse, M.D., evaluated Mr. Murphy and rated his whole person PPI at 10 percent under the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment* (*Guides*).[5] FNSB paid Mr. Murphy the 10 percent whole person PPI rating on July 15, 1996.[6]

Mr. Murphy, on April 9, 1998, re-injured his back while changing winter tires at work and developed right leg pain with numbness and weakness, along with foot drop. The following month, Mr. Murphy underwent another lumbar surgery consisting of

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[2] AS 09.10.100.

[3] 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.

[4] *Murphy* at 3-4, No. 1.

[5] *Id.* at 4, No. 2.

[6] *Id.*, No. 3.

laminotomy and discectomy on the right at L5.[7] Mr. Murphy had further surgery, consisting of an interbody fusion with bone dowel grafts at L4-5 and L5-S1, on August 10, 1998.[8]

On January 18, 1999, because of suspected recurring stenosis and settling of the bone grafts, Mr. Murphy underwent lumbar laminectomy, discectomy, decompression, posterolateral fusion, and pedicle screw fixation at L4-5 and L5-S1.[9] Noel D. Goldthwaite, M.D., surgeon, on February 5, 2001, recounted Mr. Murphy's surgical history and noted Mr. Murphy was "Permanent and Stationary" on December 30, 1999, "having plateaued in his improvement for several months and there being no further improvements anticipated." Dr. Goldthwaite rated Mr. Murphy as having a whole person PPI of 30 percent using the Fourth Edition of the *Guides*.[10]

On February 15, 2001, Mr. Murphy began treating with Richard H. Cobden, M.D., in Fairbanks, who planned to perform a PPI rating once Mr. Murphy's "old" medical records arrived.[11] Effective February 28, 2001, PPI ratings under the Alaska Workers' Compensation Act (Act) were to be calculated in accordance with the Fifth Edition of the *Guides*.[12]

On March 29, 2001, Mr. Murphy followed-up with Dr. Cobden, who reviewed Dr. Goldthwaite's February 5, 2001, rating. Following Dr. Goldthwaite's methodology, and then comparing the Fourth Edition of the *Guides* to the Fifth Edition, Dr. Cobden concurred Mr. Murphy's total impairment "would be a minimum of 30 percent" under the

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7 *Murphy* at 4, No. 4.

8 *Id.*, No. 5.

9 *Id.*, No. 6.

10 *Id.*, No. 7. It does not appear from the record before the Commission that FNSB ever controverted this rating. If so, a penalty was due to Mr. Murphy for the failure to pay or controvert this rating. However, Mr. Murphy did not raise the issue of a possible penalty at hearing or in his briefing on appeal. Therefore, the Commission does not address it.

11 *Id.*, No. 8.

12 *Id.*, No. 9 (R. 000365: Bulletin No. 00-14, Dec. 15, 2000).

former edition. Dr. Cobden instructed Mr. Murphy to return several weeks later "so that we can review these figures and . . . discuss any further problems with [Mr. Murphy]. For example, [Mr. Murphy] does have a residual right foot drop and has MRI evidence of a recurrent disc protrusion. We need to discuss these things before this report is finalized."[13]

Mr. Murphy, on April 19, 2001, reported he had gradually improved since his last visit and his back pain had not worsened. Dr. Cobden thought Mr. Murphy's back fusion had "taken successfully" and Mr. Murphy was ready for a PPI rating. He assessed Mr. Murphy a 23 percent PPI, using the Fifth Edition of the *Guides*.[14] FNSB paid Mr. Murphy an additional 13 percent whole person PPI.[15]

From 2001 until 2016, there is a gap in case activity.[16]

On January 27, 2017, Mr. Murphy claimed temporary total disability, temporary partial disability, medical costs, including pre-authorization of surgery, transportation costs, penalty, interest, and attorney fees. He also contended he was underpaid PPI because it was paid according to the "wrong" edition of the *Guides*. Later, at hearing, Mr. Murphy alternatively contended it was not clear which of the two ratings was the "correct" rating.[17]

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[13] *Murphy* at 4-5, No. 10.

[14] *Id*. at 5, No. 11.

[15] *Id*., No. 12. Fortuitously for FNSB, Dr. Cobden performed his PPI rating on April 19, 2001, which was after the effective date for using the *AMA Guides* Fifth Edition. Had Dr. Cobden performed the rating on February 15, 2001, when he first spoke with Mr. Murphy, Mr. Murphy would probably have been paid PPI based on the 30 percent rating from the Fourth Edition. On March 29, 2001, Dr. Cobden concurred with the rating by Dr. Goldthwaite who used the Fourth Edition, stating the rating appeared to be correct. Dr. Cobden then made his own rating using the Fifth Edition on April 19, 2001, giving Mr. Murphy a 23 percent PPI rating. FNSB paid the additional 13 percent PPI rating to Mr. Murphy because he was paid a 10 percent PPI rating in 1996. Therefore, Mr. Murphy was paid the difference between the new 23 percent rating and the previously paid 10 percent rating, according to AS 23.30.190(c).

[16] *Id*., No. 13.

[17] *Id*., No. 15.

On February 21, 2017, FNSB answered and controverted Mr. Murphy's claim, contending all transportation costs were paid when owed and no further transportation costs were due. It also contended Mr. Murphy's claim for PPI was time-barred by AS 23.30.105.[18] On March 6, 2017, FNSB amended its answer, contending Mr. Murphy's claim was time barred under AS 23.30.110, as well as under AS 23.30.105.[19]

At the March 14, 2018, prehearing conference, FNSB asked to ensure its defenses, including its contention Mr. Murphy's claim for PPI was untimely, were included as issues for hearing. Mr. Murphy agreed FNSB's answer to the claim, including its defenses, were issues arising under the claim itself, so FNSB's defenses should be included as issues for hearing.[20]

On March 15, 2018, the parties filed their hearing briefs. Based on the Alaska Supreme Court's (Court) holding in *Alaska Airlines v. Darrow*, 403 P.3d 1116 (Alaska 2017), Mr. Murphy argued AS 23.30.105(a) did not bar his claim seeking additional PPI since PPI was not "compensation for disability," per the language in AS 23.30.105(a). The following day, FNSB filed an amended answer, contending Mr. Murphy's claim for additional PPI was time-barred by either AS 23.30.105 or AS 09.10.100.[21]

On March 16, 2018, Mr. Murphy claimed $26,520.78 in attorney and paralegal fees and $364.53 in litigation costs. He utilized "block billing," which the Board found made it impossible to discern the amount of time spent on many tasks. Mr. Murphy's statement also frequently failed to specify which issues for which an activity was undertaken, such as "legal research," "benefits calculations," and "phone call with [Employer's attorney]." Many entries were for "email correspondence," but did not specify with whom the attorney was emailing or why. Some paralegal time was billed for work that was clearly clerical in nature, such as "organize new file," "scan documents," and "print documents." Other activities were cryptic, such as "case management," or for non-legal work, such as

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18 *Murphy* at 5, No. 16.

19 *Id.*, No. 17.

20 *Id.* at 7, No. 29.

21 *Id.*, No. 30.

"staff instruction," "staff direction," and "staff discussion." Attorney and paralegal time following the parties' November 29, 2017, stipulation amounted to $6,791.25.[22]

At hearing, Mr. Murphy directed his opening and closing statements to the PPI issue. FNSB, at hearing, offered Mr. Murphy additional time following the hearing to respond to its recently pleaded statute of limitations defense under AS 09.10.100. Mr. Murphy declined FNSB's offer.[23] Also, at hearing, FNSB acknowledged limitations statutes are generally disfavored, but contended this case exemplifies why they were created. FNSB noted that Dr. Cobden is retired, Dr. Joosse is retired, and memories had faded with time. Consequently, FNSB contended this case involved a stale issue.[24]

At hearing, Melody Kokrine testified she was FNSB's former adjuster and she adjusted Mr. Murphy's claim. Mr. Murphy had two different PPI ratings, the first was 30 percent under the Fourth Edition of the *Guides*, and the other was 23 percent under the Fifth Edition of the *Guides*. Ms. Kokrine considered the second rating an amendment by Dr. Cobden, Mr. Murphy's treating physician. She thought she paid the lower rating and did not recall if Mr. Murphy complained at the time about being paid the lower rating. Her compensation reports would accurately reflect the amounts Mr. Murphy was paid and the dates of those payments. She "might have" begun advance payments of PPI in September 2000 because Mr. Murphy had undergone surgery and was in job retraining, and "perhaps" Mr. Murphy had a doctor's visit around September 2000 where there was an indication Mr. Murphy was medically stable. Ms. Kokrine thought it was appropriate to rely on the second rating by Dr. Cobden because "improvement can always happen," and because Dr. Cobden was Mr. Murphy's treating physician. She also explained documents showing she overpaid Mr. Murphy's 23 percent PPI by $3,413.38 because she initially forgot to deduct Mr. Murphy's prior 10 percent rating from the new 23 percent

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22 *Murphy* at 7, No. 31.

23 *Id*. at 8, Nos. 33-34.

24 *Id*., No. 35.

rating.[25] At various times during her testimony, Ms. Kokrine remarked, "It's been a lot of years," "Boy, you're going back a long ways," and "this was a lot of years ago."[26]

Also at hearing, Nicole Hansen testified she was FNSB's current adjuster and had reviewed Mr. Murphy's file, including past payments to Mr. Murphy. She was currently responsible for payment of Mr. Murphy's medical and transportation costs.[27] She would consider Mr. Murphy's second rating to be the "correct" rating because it came from Mr. Murphy's treating doctor.[28]

Ms. Hansen presented as confident and competent and she testified spontaneously and the Board found that she was credible.[29]

On March 26, 2018, Mr. Murphy supplemented his claimed attorney fees and costs, claiming an additional $1,845.00 in attorney and paralegal time, for a grand total of $28,365.78; and an additional $9.80 in litigation costs, for a grand total of $374.33. Mr. Murphy's paralegals did not submit affidavits pursuant to regulation. Paralegal time after the parties' November 29, 2017, stipulation amounts to $993.75.[30]

On March 30, 2018, FNSB objected to Mr. Murphy's attorney fees and contended Mr. Murphy should receive fees only for those issues on which he prevailed.[31]

3. Standard of review.

The findings of fact by the Board are to 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.[32] Substantial evidence is relevant evidence that a reasonable mind might accept

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25 Hr'g Tr. at 32:3; 33:6, 9-17; 35:4; 38:16, 23; 40:1-5, 10-13; 41:6, Mar. 22, 2018.

26 *Id*.

27 *Id.* at 43:5-7.

28 *Id.* at 43:8-10.

29 *Murphy* at 10, No. 40.

30 *Id.*, No. 41.

31 *Id.*, No. 42.

32 AS 23.30.128(b); *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000).

as adequate to support a conclusion.[33] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[34]

The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.[35] The Board's findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.[36]

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."[37]

4. Discussion.

a. *Was Mr. Murphy's claim for additional PPI barred by the applicable statute of limitations?*

At issue here is the statutory construction of the statute of limitations in AS 23.30.105(a) which states "[t]he right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement."[38] Mr. Murphy alleges his right to PPI benefits is not encompassed within this statute because the statute refers only to "disability" and not to "impairment"

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[33] *See*, *e.g.*, *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

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

[35] AS 23.30.122.

[36] AS 23.30.122.

[37] AS 23.30.128(b).

[38] AS 23.30.105(a)

benefits which arose out of the disability. Therefore, he says this statute of limitations does not apply to his claim for additional PPI.

The crux of Mr. Murphy's argument is the meaning of the word "disability" in AS 23.30.105(a) which bars the bringing of a claim for benefits more than two years after knowledge of the claim.

> (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, and the right to compensation for death is barred unless a claim therefor is filed within one year after the death, except that, if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding.
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> (b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard.[39]

However, he does not address that this statute also states "a claim may be filed within two years after the date of the last payment of benefits under AS . . . 23.30.190. . . ."[40] AS 23.30.190 is the statute governing the payment of PPI benefits.[41]

Mr. Murphy relies on the Court decision in *Alaska Airlines, Inc. v. Darrow* that held, for purposes of AS 23.30.180(a) which permits an offset for permanent partial disability (PPD) benefits paid from permanent total disability (PTD) benefits, PPI benefits are not

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[39] AS 23.30.105 (a) and (b).

[40] *Id.*; *Collins v. Arctic Builders, Inc.*, 31 P.3d 1286, 1290 (Alaska 2001) (*Collins*).

[41] The Commission takes note that the Court found the four-year limitation in this statute was repealed by the 1962 amendment to the statute. *W. R. Grasle Co. v. Alaska Workmen's Comp. Bd.*, 517 P.2d 999, 1002 (Alaska 1974). The rest of the statute was not affected by the 1962 amendment. *See, Collins*, 31 P.3d at 1290.

the same as PPD benefits.[42] He asserts that pursuant to this decision about the difference in meaning between "disability" and "impairment," the limitation on bringing a claim in two years does not apply to PPI and that PPI is not encompassed in this statute or any other section of the Act.[43] In *Darrow*, the Court looked specifically at the provision allowing for an offset of "permanent partial disability" payments made prior to the injured worker being paid PTD benefits. This provision was not changed when the Legislature discarded PPD benefits in favor of PPI benefits and changed the concept from "incapacity because of injury to earn the wages which the employee was receiving at the time of injury" to one of permanent partial physical impairment to the injured worker's body based on a whole person analysis.[44]

Mr. Murphy also points to the Court's decision in *Rydwell* where the Court first looked at the difference between disability and impairment in the context of reemployment benefits.[45] There, a 0 percent impairment rating precluded the injured worker from reemployment benefits even though she could not return to her former job.[46]

However, in AS 23.30.105(a), the statute specifically includes a reference to AS 23.30.190. AS 23.30.190 formerly referred to PPD benefits but was rewritten to refer to PPI benefits. Statutory construction requires that statutes be harmonized if possible.[47] Thus, to make sense of both sentences in AS 23.30.105(a), it is necessary to conclude that the reference to AS 23.30.190 is intended to mean that the two-year statute of limitations in the first sentence encompasses through the second sentence PPI benefits.

In *Trudell v. Hibbert*, the Court stated that in construing statutory language, the meaning of the words and legislative history is considered, including the purpose of the

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42 *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1128-1129 (Alaska 2017) (*Darrow*).

43 *Darrow*, 403 P.3d 1116.

44 AS 23.30.395(16); AS 23.30.190(a).

45 *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 529-30 (Alaska 1993).

46 *Id.*

47 *See, e.g., Darrow*, 403 P.3d at 1125.

statute.[48] In looking at AS 23.30.105(a), the specific reference to AS 23.30.190 is *prima facie* evidence the Legislature intended a two-year limitation on claims for PPI benefits. If, as Mr. Murphy asserts, the Legislature intended to drop PPI benefits from coverage under AS 23.30.105(a), his argument fails. The express inclusion of a two-year limitation for filing a claim for PPI benefits "after the last payment of benefits under . . . AS 23.30.190 . . ." is strong evidence that the legislature intended for the two-year statute of limitations to apply to PPI benefits.[49] Even if disability in the first sentence would not limit the time for filing a claim for PPI benefits, the next sentence expressly limits such a claim to the necessity of being filed within two years of the last payment of PPI benefits.

According to the compensation reports in the Board's record, Mr. Murphy received his last PPI payment on or about June 1, 2001, when FNSB began paying him AS 23.30.041(k) stipend benefits, as Mr. Murphy was still in the reemployment process.[50] Mr. Murphy should have been aware of the change from PPI benefits in 2001 to AS 23.30.041(k) benefits since there would have been a significant drop in his weekly amount. Pursuant to AS 23.30.041(k), "[i]f the employee's permanent impairment benefits are exhausted before the completion . . . of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages. . . ."[51] Therefore, Mr. Murphy had until June 2003 to file a claim for additional PPI benefits.

The simple fact is that Mr. Murphy was last paid PPI benefits in 2001. He then waited over 15 years before he questioned whether he had been paid correctly.[52] The Court has noted on more than one occasion that "though the defense of statute of limitations is a legitimate defense, we look on it with disfavor and 'will strain neither the

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48 *Trudell v. Hibbert*, 272 P.3d 331, 336-337 (Alaska 2012).

49 AS 23.30.105(a).

50 R. 000017-18.

51 AS 23.30.041(k); R. 000017-20.

52 *Irby v. Fairbanks Gold Mining, Inc.*, 203 P.3d 1138 (Alaska 2009) (*Irby*).

law nor the facts in its aid.'"[53] Nonetheless, a person may not sleep on rights that could be timely asserted. The Court has barred claims from people who did not timely pursue their rights, and, thereby, protected employers from stale claims.[54]

Mr. Murphy knew, or should have known, in June 2001 when he received his last PPI payment that there might be a question as to the proper amount of PPI owed to him. He had two years from the date of the last payment to question the amount of PPI benefits owed to him. His claim in 2017 was untimely and is barred by AS 23.30.105(a).

b. Did FNSB properly assert a statute of limitations defense?

FNSB initially raised in its pleadings a statute of limitations defense citing to AS 23.30.105(a). In its Answer dated February 21, 2017, FNSB cited as an affirmative defense "Employer asserts that Employee's claim for PPI benefits is time barred pursuant to AS 23.30.105 where Employer paid PPI benefits in approximately 2001."[55] FNSB reaffirmed this defense in its Answer dated March 6, 2017.[56] In its Answer dated September 25, 2017, FNSB again asserted a statute of limitations defense in AS 23.30.105 and added a defense under AS 23.30.110.[57]

After Mr. Murphy filed his hearing brief, FNSB filed an amended Answer adding another statute of limitations defense, namely AS 09.10.100. This statute states "[a]n action for a cause not otherwise provided for may be commenced within 10 years after the cause of action has accrued."[58] This appears to be a catch-all statute of limitations to ensure that stale claims or causes of action are barred from litigation.

Mr. Murphy asserts this statute would not apply to him because in workers' compensation an injured employee files a claim, but not an action. He also alleges this

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53 *Irby* at 1143, citing *Fred Meyer of Alaska, Inc. v. Bailey*, 100 P.3d 881, 886 (Alaska 2004).

54 *Fred Meyer of Alaska, Inc. v. Bailey*, 100 P.3d at 886; *See also, Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947, 949 (Alaska 1989).

55 R. 000091.

56 R. 000096.

57 R. 000188-189.

58 AS 09.10.100.

defense was untimely raised, just a day before the hearing. In regard to this latter assertion, both FNSB and the Board agreed Mr. Murphy should have time to respond to this new statute of limitations defense. The Court has previously agreed that a defense which is already included in a previous statement of affirmative defenses may be allowed if the other party is allowed sufficient time to make an adequate response.[59] FNSB asserted a statute of limitations defense in its first answer to Mr. Murphy's claim. Therefore, Mr. Murphy was on notice that FNSB was claiming that his claim was untimely. The way to cure the last raised statute is to provide additional time for briefing and arguing the new statute, which differs from AS 23.30.105(a) only in the length of time in which to seek a benefit.[60] Here, both FNSB and the Board offered Mr. Murphy additional time to respond the statute of limitations defense in AS 09.10.100. Mr. Murphy declined the time for a response and, thus, waived his right to so.

Nonetheless, the Board declined to reach a decision as to whether AS 09.10.100 would apply in a workers' compensation matter since it had decided Mr. Murphy's claim was barred by AS 23.30.105(a). The Commission reaches the same conclusion.

Another question not raised nor briefed is whether FNSB should be estopped from raising a statute of limitations defense since it never controverted the 30 percent PPI rating by Dr. Goldthwaite.[61] FNSB, on its own, adopted the lower rating from Dr. Cobden and never apprised Mr. Murphy of this decision. A Notice of Controversion would have put Mr. Murphy on notice that there was an issue over the correct rating, enabling him to raise the issue timely. Mr. Murphy noted in his brief that FNSB should have controverted the 30 percent PPI rating in 2001 and did not. He did not address how the failure to controvert should now affect the statute of limitations in AS 23.30.105(a) and his claim. Since the question of estoppel was not raised either before the Board or the

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[59] *See, e.g.*, *Gamble v. Northstore Partnership*, 907 P.2d 477, 482 (Alaska 1995); *Groom v. State, Dep't of Transp.*, 169 P.3d 626, 636 (Alaska 2007).

[60] *See, e.g., North State Tel. Co., Inc. v. Alaska Public Utilities Comm'n*, 522 P.2d 711, 714 (Alaska 1974); *Schmidt v. Beeson Plumbing and Heating, Inc.*, 869 P.2d 1170, 1176 (Alaska 1994).

[61] *See, e.g., Wausau Ins. Cos. v. Van Biene*, 847 P.2d 584 (Alaska 1993).

Commission, and Mr. Murphy did not fully address the lack of controversion, the Commission declines to address the issue of estoppel and/or the effect of the lack of controversion.

c. Was the award of attorney fees properly decided by the Board?

Mr. Murphy asserts his requests for attorney fees was improperly reduced by the Board. FNSB asserts Mr. Murphy was improperly awarded attorney fees since he did not prevail on the material issue in the claim. FNSB also contends that if fees were to be awarded the fees should have been based on the amount of benefits which Mr. Murphy received.

Attorney fees are governed by AS 23.30.145, which states:

> (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.
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> (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 Board found that Mr. Murphy did not state under which section of this statute he was seeking fees and decided that Section (b) would be the applicable section. It awarded him fees under that section, finding the only benefit the attorney obtained for Mr. Murphy at hearing was a penalty on some travel costs. The penalty came to $160.90.

The Board then considered that the need for an award of fees should be sufficient to ensure that competent counsel is available to represent injured workers. The Board evaluated the nature, length, and complexity of the legal services rendered on the issues heard and noted that fees awarded should be reasonable and fully compensatory.[62] Mr. Murphy did not succeed on the most significant issue, that of whether his claim for additional PPI was timely. The Board then considered the effort necessary to secure payment of transportation expenses. Transportation costs, although disputed by FNSB were ultimately paid, although some were paid late. The Board found the effort put forth by Mr. Murphy on this issue was not great and that it "was only through Employer's current adjuster's diligent and time consuming investigation, and this panel['s] efforts to 'verify . . . and calculate the outstanding penalty,' that a penalty was accessed."[63]

The Board then considered the amount of fees and costs requested by Mr. Murphy. It eliminated the paralegal costs (see below) and time for clerical activities, both reasonable deductions. The Board then, relying on the need for competent counsel for injured workers, awarded Mr. Murphy 50 percent of the remaining requested fees.[64] Further, under *Childs* an award under AS 23.30.145(b) should be based on succeeding on the claim itself and not on a collateral issue.[65]

FNSB appealed this award contending that Mr. Murphy succeeded on only one minimal aspect of his claim and asserted the award of 50 percent of the reduced fees was greatly disproportionate to the award of one small penalty to Mr. Murphy at hearing. Mr. Murphy, on appeal, contends the award was not "manifestly unreasonable" and therefore should be affirmed.[66] In *Arant*, the Court held that an award of attorney fees

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62 *Wise Mech. Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986).

63 *Murphy* at 28.

64 The Commission is well aware of the importance of ensuring competent counsel for injured workers.

65 *Childs v. Copper Valley Elec. Ass'n*, 806 P.2d 1184, 1193 (Alaska 1993).

66 *Wien Air Alaska v. Arant,* 592 P.2d 352 (Alaska 1979) (*Arant*).

is at the discretion of the trial court and should be set aside only for abuse of discretion when the fee awarded is "unreasonable."[67]

It is important public policy, along with Legislative intent, that injured workers are able to find competent counsel to represent them. The best way to ensure competent counsel will represent injured workers is to provide them with adequate and reasonable fees even when they do not succeed in obtaining all the benefits sought for their client. The Board provided a good explanation for the basis for awarding Mr. Murphy 50 percent of the reduced attorney fees. The Board exercised its discretion and the result is not manifestly unreasonable. The Commission affirms the award of attorney fees.

d. Is the Board regulation requiring an affidavit of fees from a paralegal unconstitutional and unenforceable?

Mr. Murphy contends the Board regulation at 8 AAC 45.180(f), requiring a paralegal to file an affidavit affirming the time and tasks charged were performed, is unconstitutional and unenforceable because an affidavit from a paralegal constitutes the unauthorized practice of law. The regulation states in pertinent part:

> (f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:
>
> . . . .
>
> (14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk
>
> (A) is employed by an attorney licensed in this or another state;
>
> (B) performed the work under the supervision of a licensed attorney;
>
> (C) performed work that is not clerical in nature;
>
> (D) files an affidavit itemizing the services performed and the time spent in performing each service; and
>
> (E) does not duplicate work for which an attorney's fee was awarded[.]

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[67] *Arant*, 592 P.2d at 366.

In support of his argument, Mr. Murphy cites to a statute and to the Alaska Bar Rules. AS 08.08.230 states:

> (a) A person not an active member of the Alaska Bar and not licensed to practice law in Alaska who engages in the practice of law or holds out as entitled to engage in the practice of law as that term is defined in the Alaska Bar Rules, or an active member of the Alaska Bar who wilfully employs such a person knowing that the person is engaging in the practice of law or holding out as entitled to so engage is guilty of a class A misdemeanor.
>
> (b) This section does not prohibit the use of paralegal personnel as defined by rules of the Alaska supreme court.

Alaska Bar Rule 63 provides:

> For purposes of AS 08.08.230 (making unauthorized practice of law a misdemeanor), "practice of law" is defined as:
>
> (a) representing oneself by words or conduct to be an attorney, and, if the person is authorized to practice law in another jurisdiction but is not a member of the Alaska Bar Association, representing oneself to be a member of the Alaska Bar Association; and
>
> (b) either (i) representing another before a court or governmental body which is operating in its adjudicative capacity, including the submission of pleadings, or (ii), for compensation, providing advice or preparing documents for another which affect legal rights or duties.

The Commission notes that AS 08.08.230 in subsection (b) specifically exempts supervised paralegals from the definition of unauthorized practice of law. Since Mr. Murphy's attorney agreed he supervised his paralegal, AS 08.08.230 does not bar the affidavit of his paralegal.

Further, to qualify for unauthorized practice of law under Alaska Bar Rule 63, the paralegal must represent that the paralegal is acting as an attorney. The reading of the Bar Rule reveals it does not pertain to the services of a supervised paralegal as the paralegal here who was operating under the supervision of Mr. Murphy's attorney. The Alaska Bar Rule 63 is designed to prevent a paralegal, operating without a supervising attorney, from holding him or herself out as an attorney. Mr. Murphy's attorney agreed he supervised his paralegal, and nowhere does it appear his paralegal represented that the paralegal was acting as an attorney.

The regulation at 8 AAC 45.180(f) is designed to assist the Board in awarding costs which include the services rendered by an attorney's paralegal. The method chosen by the Board for providing it with sufficient information is for the paralegal to provide an affidavit. This affidavit is intended to assist the Board in ascertaining whether the costs sought are appropriate and to show that the paralegal and the attorney are not duplicating work for which the attorney will be awarded fees. Moreover, an affidavit from the paralegal stating the work billed was performed and did not duplicate the work of the attorney is not burdensome.

Mr. Murphy is correct that it is the attorney who is paid attorney fees in an award by the Board. Paralegal fees are included as costs. However, in determining whether the costs associated with the paralegal's work are appropriate, the Board has solicited an affidavit of the activities performed by the paralegal. The attorney, in the attorney's affidavit, asserts that the paralegal was supervised and acting at the direction of the attorney, but does not detail the actual activities performed by the paralegal.

Contrary to the assertions of Mr. Murphy, an affidavit from a paralegal describing activities performed at the direction of the supervising attorney is no more the practice of law than an affidavit from the attorney's secretary or administrative assistant that the proper documents were served on the proper parties. An affidavit is merely a statement that a certain activity took place. The affidavit in 8 AAC 45.180(f) is clearly designed to aid the Board in determining the appropriate award of attorney fees and costs when the party represented by the attorney prevailed in a claim before the Board.

There is no reason why Mr. Murphy's attorney should decline to assist the Board in determining what is a reasonable attorney fee and what are reasonable costs to be awarded. The regulation is enforceable as it was apparently adopted pursuant to proper procedures, since no argument was made that it was not. Moreover, it is a reasonable way to provide necessary information to the Board to enable it to make a proper award of fees and costs.

Mr. Murphy also contended the regulation was unconstitutional. The Commission does not generally decide constitutional issues. Moreover, no specific arguments were

made as to why the regulation is unconstitutional. Therefore, the Commission does not find the regulation is unconstitutional.

The Board's right to an affidavit from an attorney's paralegal, asserting the time and tasks billed were undertaken under the supervision of a licensed attorney, are not clerical, and do not duplicate the attorney's work on the case, is reasonable and prudent. The reduction in the requested costs due to the lack of the paralegal's affidavit is also reasonable. The deduction is affirmed as is the Board's decision regarding the need for the affidavit.

5. Conclusion.

The Board's decision is AFFIRMED.

Date: *21 June 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. 262, issued in the matter of *Shawn Murphy vs. Fairbanks North Star Borough*, AWCAC Appeal No. 18-008, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 21, 2019.

Date: *June 26, 2019*

Signed

K. Morrison, Appeals Commission Clerk