# Alaska Workers' Compensation Appeals Commission

Robert L. Griffiths,
Appellant,

vs.

Andy's Body & Frame, Inc., and Alaska National Insurance Co.
Appellees.

Final Decision
Decision No. 119 October 27, 2009

AWCAC Appeal No. 08-035
AWCB Decision No. 08-0226
Case No. 200112948

Appeal from Alaska Workers' Compensation Board Decision No. 08-0226, issued at Anchorage, Alaska on November 19, 2008, by southcentral panel members Patricia Vollendorf, Member for Labor, Robert Weel, Member for Industry, and Darryl Jacquot, Chair.

Appearances: Burt Mason, Esq., for appellant Robert Griffiths. Theresa Hennemann, Holmes Weddle & Barcott, PC, for appellees Andy's Body & Frame, Inc., and Alaska National Insurance Co.

Commission proceedings: Appeal filed December 8, 2008. Motion to supplement the record denied April 29, 2009. Notice of appeals commissioner conflict and change of appeals commissioner given June 3, 2009. Oral argument rescheduled June 10, 2009. Oral argument on appeal presented July 28, 2009.

Appeals commissioners: Philip Ulmer, Jim Robison, Kristin Knudsen.

By: Kristin Knudsen, Chair.

Robert Griffiths appeals a decision by the Alaska Workers' Compensation Board limiting his right to supplementary reemployment compensation to two years based on the Supreme Court's decision in *Carter v. B & B Construction, Inc.,* Slip Op. No. 6277 (Alaska June 27, 2009). In December 2008, the Court withdrew Opinion No. 6277 and issued *Carter v. B & B Construction, Inc.*, 199 P.3d 1150 (Alaska 2008). Griffiths argues that the board's reasoning is incorrect because it was based on a withdrawn opinion. He argues that he is entitled to receive supplementary reemployment compensation

under AS 23.30.041(k) (referred to as a "stipend") from the date he was first denied reemployment benefits based on lack of a ratable impairment, together with interest on that amount, because, by appealing the decision denying him modification of the board's original decision in June 2003, he has been "actively and aggressively pursuing rehabilitation benefits during the entire 'gap' period."[1] He argues that this appeal is also an active pursuit of reemployment benefits, so that he is not required to engage in the planning process while his entitlement to stipend is undecided. He also argues that he is entitled to a greater award of attorney fees.

The appellees, Andy's Body & Frame, Inc., and Alaska National Insurance Co., (jointly referred to as "Andy's Body & Frame"), argue that the Supreme Court's decision in *Carter* was not a reversal of its first decision in Opinion No. 6277, and that the board had discretion to limit Griffiths to two years of stipend. Andy's Body & Frame argues that Griffiths's appeal to the Supreme Court was not the "active pursuit of reemployment benefits," which in *Carlson v. Doyon Universal-Ogden Services,*[2] permitted the board to award stipend during the "gap" between the cessation of temporary disability compensation or permanent partial impairment compensation and the approval of a reemployment plan. The appellees also argue that until the board decided in May 2008 to modify its June 2003 decision, Griffiths was not entitled to stipend at all because the Supreme Court did not vacate the board's June 2003 decision denying reemployment benefits. In any event, the appellees argue, Griffiths is not entitled to benefits after May 27, 2008, because he has not engaged in the active pursuit of reemployment benefits since the board modified its order and found him entitled to reemployment benefits.

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1 Appellant's Br. 8.

2 995 P.2d 224 (Alaska 2004).

The parties' contentions require the commission to address issues related to the interpretation of AS 23.30.041(k)[3] and the effect of the Supreme Court's decisions in *Carter v. B & B Construction, Inc.* and in *Griffiths v. Andy's Body & Frame, Inc*.[4] First, the commission must decide if AS 23.30.041 limits the period of stipend payable under AS 23.30.041(k). Second, if the supplementary period is limited, the commission must decide if Griffiths's appeal tolled the running of that period and the effect of the

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[3] At the time Griffiths was injured, AS 23.30.041(k) (2001) provided:

> (k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the plan, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the plan to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.

[4] 165 P.3d 619 (Alaska 2007).

decision on appeal. Third, the commission must decide the effect of Griffiths's current appeal on his claim for continuing future stipend. Finally, the commission is asked to address issues relating to claims for penalties, interest, and attorney fees.

The commission concludes that the 2-year limit on payment of stipend (supplementary reemployment compensation under AS 23.30.041(k)) applies only to the period "from the date of plan approval or acceptance, whichever date occurs first." The commission concludes, however, that an employee is not entitled to an indefinite period of stipend. The commission remands the case to the board for further proceedings.

*1. Facts and proceedings.*

Robert Griffiths worked for Andy's Body and Frame as a "sheet metal repairer" beginning in 1996. He reported bilateral hand and wrist pain in 2001, which he attributed to working with air (pneumatic) tools.[5] He was then 56 years old.[6] Griffiths had bilateral wrist surgeries. His California physician reported he was medically stable, but predicted that he would be unable to return to auto repair work.[7] She declined to perform a permanent impairment rating.[8]

On November 16, 2002, Griffiths was seen in Alaska by the employer's medical examiner,[9] who reported that Griffiths was medically stable, and, while he had a one percent impairment of the right hand, he had no whole person impairment rating under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.[10] While he believed Griffiths was able to work, he felt he should "probably not return to work as a body and fender repairman."[11]

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5 R. 0001.

6 *Id*.

7 R. 0047.

8 R. 0049.

9 R. 0053-59.

10 R. 0058.

11 *Id.*

*a. Proceedings before the reemployment benefits administrator.*

Griffiths filed a request for vocational reemployment benefits on January 7, 2002.[12] The reemployment benefits administrator responded, explaining she could not act on his request because (1) his request was filed more than 90 days after his employer knew about the injury, and (2) his physician had reported he could return to work at the same employment.[13] Griffiths had moved to Elk Grove, California, by the end of January 2002, and responded with an explanation of his reasons for delay.[14] The administrator responded, explaining once again that his physician released him to full duty on November 26, 2001.[15] In March 2002, Griffiths saw a California hand surgeon who declared he was unable to do body and paint repairman work.[16] This report was sent to the administrator April 23, 2002, with a request from Andy's Body & Frame's insurer to "refer Mr. Griffiths for an eligibility evaluation."[17] A month later, the reemployment benefits administrator assigned a California vocational rehabilitation specialist, Thomas Sartoris, to do an eligibility evaluation.[18] The specialist filed a report July 15, 2002, but the administrator rejected it as incomplete.[19] An addendum completing the report was filed August 19, 2002.[20]

Almost a month later, the administrator determined that Griffiths was eligible for reemployment benefits.[21] On October 30, about six weeks after being found eligible,

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12 R. 0462.

13 R. 0470.

14 R. 0471.

15 R. 0472.

16 R. 0474.

17 R. 0743.

18 R. 0476.

19 R. 0577. The specialist was advised July 8, 2002, that he was already 20 days past the deadline for his report of findings. R. 0572.

20 R. 0582.

21 R. 0586 (Sept. 16, 2002).

Griffiths filed a notice he accepted reemployment benefits and selected an Alaskan reemployment specialist.[22] The employer promptly objected to his selection,[23] and on November 8, 2002, the administrator assigned a California specialist, apparently believing that Griffiths was in California still.[24] When informed that Griffiths resided in Alaska, the administrator assigned Ms. Williams as his specialist on November 13, 2002.[25]

Ms. Williams filed a closing report with the administrator on February 24, 2003, because she had been unable to develop a plan in 90 days.[26] In it she explained that Griffiths "moved to the lower 48 states and says he will remain there. He lives in a motor home with his wife, who is disabled."[27] He was "currently . . . in Oregon, but often stays with his daughter in California, close to Sacramento."[28] She was unable to reach him by telephone, so she sent a letter to his prior California address in Elk Grove.[29]

After an informal conference in March 2003, the administrator extended the planning period 30 days so that Griffiths could attend further evaluation with Thomas Sartoris in Sacramento.[30] Sartoris filed a progress report in April 2003, but no plan.[31] In May 2003, Sartoris wrote to Griffiths because he had been unable to reach Griffiths by telephone, asking Griffiths to contact him about his testing results.[32] On June 12,

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22 R. 0588.

23 R. 0590.

24 R. 0592.

25 R. 0595.

26 R. 0598-0601.

27 R. 0600.

28 *Id.*

29 R. 0602.

30 R. 0605.

31 R. 0608-11.

32 R. 0621.

2003, Williams filed a closing report with the administrator, noting that the board had determined Griffiths was not eligible for reemployment benefits.[33]

*b. Proceedings prior to this appeal.*

The commission describes the proceedings before the board, and the courts, prior to this appeal in detail because the issues in this appeal concern the consequences of those proceedings.

*i. The board decides a petition to modify the administrator's determination of eligibility.*

Andy's Body & Frame filed a petition for modification of the administrator's decision that Griffiths was eligible for reemployment benefits on February 21, 2003.[34] The next month, Andy's filed an affidavit requesting a hearing on the petition.[35] The board heard the petition on May 13, 2003, and Griffiths appeared at the hearing by telephone.[36] Andy's argued that under *Rydwell v. Anchorage School District,* 864 P.2d 526, 531 n.5 (Alaska 1993), a determination of eligibility for reemployment benefits must be modified when the vocational reemployment process is triggered by a prediction of permanent partial impairment, but a subsequent rating of 0 percent is assessed.[37] The board agreed, and, notwithstanding that the physicians agreed Griffiths could no longer work as a body and fender repairman, issued a final decision that "the employee is no longer eligible for reemployment benefits."[38] The board's decision, however, also contained the following language:

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[33] R. 0622-23.

[34] R. 0026-65. No date stamp appears on the petition, but the brief is stamped. R. 0028. A note attached to the face of the petition dated "2-21-03" contains a note that "pet. was behind brief . . . ." R. 0026.

[35] R. 0066.

[36] R. 0067.

[37] R. 0033.

[38] *Robert L. Griffiths v. Andy's Body & Frame, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 03-0130, 5 (June 6, 2003) (D. Jacquot, Chair). The decision may be found at R. 0067-71.

> Nonetheless, we note that the employee has never been actually rated by his treating physicians. As the employee points out, neither of his surgical physicians performs impairment ratings. There is certainly no prohibition barring the employee to seek a referral from an attending physician to a physician who may provide a rating with a different result than that of Dr. Baker. Should the employee receive a rating indicating he does have a permanent impairment, he may seek modification under the provisions of AS 23.30.130 (see below).[39]

*ii. Griffiths seeks modification of the board decision modifying the administrator's order.*

Griffiths, who was still self-represented, filed a petition for modification March 16, 2004.[40] He described his petition as a "Pet to modify 6/6/03 D&O. to toll statute of limitations as I need further treatment & I've never had a PPI rating."[41] The employer petitioned to dismiss the petition as untimely, because it was filed more than one year after the original administrator determination, and because the employee had failed to show a basis for modification, as required by AS 23.30.130.[42] Griffiths subsequently filed a petition to amend his petition for modification,[43] two workers' compensation claims,[44] and a request to continue the hearing on his petition for modification.[45]

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39 *Robert L. Griffiths,* Bd. Dec. No. 03-0130 at 5.

40 R. 0075-77.

41 R. 0076.

42 R. 0081-82.

43 R. 0128-29

44 R. 0139-40. The claim of "CTS-bilaterally; trigger finger-bilaterally" filed Sept. 27, 2004, was for "TTD, PPI-when rated for trigger finger, Rehab-Eligibility Evaluation, Travel-mileage, Costs and fees, Med Treatment-continuing." R. 0140. The claim was answered, R. 0143-45, and controverted, R. 0022. He filed a duplicate of this claim on October 26, 2004. R. 0141-42. It was also answered, R. 0154-55.

45 R. 0448-51.

### *iii. The board decides Griffiths's petition was filed too late.*

Griffiths's petition for modification was heard on April 5, 2005.[46] Griffiths was represented at this hearing.[47] He argued that a permanent partial impairment rating reported by Larry Levine, M.D., in May 2004 constituted evidence of a mistake of fact justifying modification of the board's June 6, 2003, decision.[48] He argued the March 2004 petition was timely as filed within one year of the date a claim is rejected, which he argued was the day the board found he was no longer eligible for benefits.[49] Andy's Body & Frame argued that the petition was untimely because it was the administrator's September 16, 2002, decision that was modified, so the period to request modification under AS 23.30.130 ended September 16, 2003.[50] Andy's also contended that a mere disagreement about the rating was insufficient to support a request for modification and Griffiths failed to demonstrate that the board had mistaken the facts in its 2003 decision.[51]

The board decided that Griffiths's petition was untimely.[52] The board added that even if it had found the petition was timely,

> we would still deny and dismiss the request for modification. We find the employee did not obtain the report from Dr. Levine until May 27, 2004, and did not depose Dr. Levine until February 25, 2005. We find, that with due diligence, this evidence certainly could have been produced for the original hearing in May of 2003. The employee has failed to provide an affidavit explaining why this could not have been produced contemporaneous with the 2003 hearing as required under 8 AAC 45.150(d) (1)-(3).

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46 R. 0625.

47 *Id.*

48 R. 0151.

49 R. 0150.

50 R. 0086.

51 R. 0087.

52 *Robert L. Griffiths v. Andy's Body & Frame, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 05-0118, 5 (Apr. 28, 2005) (D. Jacquot, chair); R.0629.

> Accordingly, we conclude we would also deny and dismiss the request for modification for this failure.[53]

*iv. Griffiths appeals to the courts.*

Griffiths appealed to the Superior Court,[54] and then to the Supreme Court. The Supreme Court reversed the board's 2005 order denying the petition for modification.[55] After noting Griffiths was unrepresented at the first hearing, the Supreme Court held

> The board's decision and order advised [Griffiths] that nothing prevented him from obtaining a referral to a physician for a new PPI rating; the decision and order then unequivocally declared that "[s]hould the employee receive a rating indicating he does have a permanent impairment, he may seek modification under the provisions of AS 23.30.130." We think that a reasonable worker in Griffiths's position would understand the 2003 decision and order as allowing Griffiths to submit a petition for modification within one year based on a new PPI rating, without the need to explain why greater diligence might not have produced an earlier rating. The reasonableness of this interpretation seems especially clear in light of the board's apparent failure to enforce the due diligence requirement in 2003 when it granted Andy's Body's petition for modification based on Dr. Baker's unfavorable rating.
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> Given the provisions of the 2003 decision and order, we conclude that the board abused its discretion and violated Griffiths's reasonable procedural expectations by invoking 8 AAC 45.150(d) as a basis for its decision and order denying his petition for modification. We must therefore vacate the board's decision and remand with directions to decide, based on the evidence in the record upon conclusion of Griffiths's hearing, whether Griffiths had a ratable permanent impairment entitling him to reemployment benefits.[56]

The Supreme Court's opinion was announced August 17, 2007. Jurisdiction was returned to the board by order of the Superior Court on September 11, 2007.[57]

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53 *Id.*

54 R. 0635. The Superior Court's decision is found at R. 0781-86.

55 *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619 (Alaska 2007).

56 *Id.* at 624. (emphasis added).

57 R. 0801.

*v. Before the board again, Griffiths seeks an award of stipend from June 2003 and continuing indefinitely.*

Griffiths filed another workers' compensation claim on September 20, 2007,[58] and a petition for an award of attorney fees.[59] The employer answered the claim, contending that Griffiths was not entitled to receive "stipend" until he was determined to be eligible for vocational reemployment benefits.[60] Griffiths requested an oral hearing, and announced he would present testimony from two witnesses,[61] notwithstanding the Court's order that the board was to decide the petition "based on the evidence in the record upon conclusion of Griffiths's hearing."[62]

*vi. The board modifies the 2003 decision, making Griffiths eligible for reemployment benefits.*

On January 10, 2008, the board reheard the petition for modification and the board's decision was issued May 27, 2008.[63] The board decided:

> The Supreme Court has given the Board clear direction in this case. We are to decide whether the employee had a ratable impairment entitling him to reemployment benefits. We find, based on Dr. Levine's reports and deposition testimony, that the employee did in fact have at least a 1% permanent partial impairment rating, entitling him to reemployment benefits. We find no need to remand to the RBA to re-decide that the employee is in fact entitled to reemployment benefits. The

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58 R. 0651-52. Although in 2004 Griffiths had asserted he had a 15 percent impairment, R. 0151, he did not list Permanent Partial Impairment compensation in this claim, only past and future stipend, vocational rehabilitation, costs and fees, and interest. R. 0652.

59 R. 0653.

60 R. 0662.

61 R. 0663.

62 165 P.3d at 624.

63 *Robert L. Griffiths v. Andy's Body & Frame, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 08-0096, 1 (May 27, 2008) (D. Jacquot, chair).

> employee's petition for modification is granted. We conclude the employee is entitled to reemployment benefits.[64]

The board order states, "The employee's petition for Modification is granted. The employee is entitled to reemployment benefits."[65] This decision and order was not appealed.

Andy's Body & Frame began paying Griffiths § .041(k) stipend biweekly May 28, 2008, the day following the board's decision.[66] On July 3, 2008, the adjuster reported a lump sum payment of $39,648.00, asserting the employee was entitled to two years of stipend under the Supreme Court's decision in "*Carter v. B & B Construction*."[67]

### *vii. Griffiths asks the board to award five years of past stipend, penalty, and interest.*

Because the board's May 27, 2008, decision retained jurisdiction to consider an award of attorney fees, interest, and the claim for § .041(k) stipend payments from May 31, 2003, a second hearing was held July 10, 2008.[68] At this hearing, Griffiths made many of the same arguments that he is making to the commission: that during his appellate litigation, he was in the active pursuit of reemployment benefits; that he should not be forced to live without compensation benefits during "gap" periods in the rehabilitation process; that the Supreme Court's decision in *Carter* is not applicable because no plan has ever been approved or accepted, so the two year time period has not yet started; and, *Carter* is also distinguishable because Griffiths has never asserted a claim for permanent total disability.[69] Griffiths also argued that penalty and interest

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[64] *Id*. at 8. Although the board decided Griffiths had at least a one percent impairment, it did not decide how much of an impairment he suffered, possibly because Griffiths dropped his claim for permanent partial impairment compensation in the September 20, 2007, claim. R. 0652.

[65] Bd. Dec. No. 08-0096 at 9.

[66] R. 0744.

[67] R. 0742, 0746, 0743.

[68] R. 0802; *Robert L. Griffiths v. Andy's Body & Frame, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 08-0226, 1 (Nov. 19, 2008) (D. Jacquot, chair).

[69] R. 0809; Bd. Dec. No. 08-0226 at 8.

were due on the unpaid stipend.[70] Andy's Body & Frame argued that, by paying 104 weeks of stipend in a lump sum, it had fully discharged its liability to Griffiths and no further stipend was due.[71]

In a decision issued November 19, 2008, the board concluded that "the Court in *Carter*, clearly and unambiguously held that the maximum amount of section .041(k) stipend benefits [is] to be strictly limited to two years."[72] It noted that the Supreme Court "in *Binder* concluded that the two year limitation in .041(k) should be strictly construed to avoid subjecting an employer to unlimited exposure for reemployment benefits."[73] The board then decided that

> the "reemployment process" begins when the employee actively pursues reemployment benefits, and that ... "process" includes time spent on review or appeal. We find the employee's PPI has long been exhausted; we also find that after receipt of the *Carter* decision, the employer promptly paid the employee's remaining .041(k) stipend in a lump sum. We conclude the employee has exhausted his entitlement to section .041(k) stipend benefits. The employee's petition for retroactive stipend benefits from June 1, 2003 and continuing is denied and dismissed. The ancillary requests for interest and penalty are also accordingly denied and dismissed.[74]

The board also awarded Griffiths an attorney fee of $17,200.00 in attorney fees and costs of $1,655.80.[75] Griffiths appeals the board's decision.

*2. Standard of review.*

"The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."[76] A board determination of the

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70 Bd. Dec. No. 08-0226 at 8.

71 *Id.*

72 R. 0811; Bd. Dec. No. 08-0226 at 10.

73 R. 0812; Bd. Dec. No. 08-0226 at 11 (citing *Binder v. Fairbanks Historical Pres. Found.*, 880 P.2d 117, 123 (Alaska 1994)).

74 R. 0812, Bd. Dec. No. 08-0226 at 11.

75 R. 0813; Bd. Dec. No. 08-0226 at 12.

76 AS 23.30.128(b).

credibility of a witness who testifies before the board is binding on the commission.[77] "The board has the sole power to determine the credibility of a witness" and to weigh the evidence from a witness's testimony, including medical testimony and reports.[78] Because the commission makes its decision based on the record before the board, the briefs, and oral argument, no new evidence in respect to the appeal may be presented to the commission.[79] The commission "do[es] not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of weight to be accorded evidence is the task assigned to the board, . . . The commission will not reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive."[80]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Alaska Workers' Compensation Act.[81] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[82]

*3. Discussion.*

*a. The 2-year limit in the first sentence of § .041(k) applies after plan approval or acceptance.*

AS 23.30.041(k)[83] begins, "Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire." Griffiths argues that the board erred in

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77 *Id*.

78 AS 23.30.122.

79 AS 23.30.128(a).

80 *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (August 28, 2007) (citing AS 23.30.122).

81 AS 23.30.128(b).

82 *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

83 For the text of AS 23.30.041(k) (2001) see note 2 above.

applying this 2-year limit to stipend[84] payments "related to the reemployment plan" during the period between exhaustion of permanent partial impairment or cessation of temporary disability compensation and the date of plan approval or acceptance, known as the "gap" period.

When interpreting a statute, the Supreme Court has stated,

> ". . . we consider its language, its purpose, and its legislative history, in an attempt to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others." The plainer the language of the statute, the more convincing the evidence of contrary legislative intent must be. We "will ignore the plain meaning of an enactment ... where that meaning leads to absurd results or defeats the usefulness of the enactment."[85]

In this case, the language of the first sentence of § .041(k) is so clear with respect to the cap's starting point, "from date of plan approval or acceptance, whichever date occurs first," that evidence of contrary legislative intent must be very convincing. The commission is not persuaded by Andy's Body & Frame's argument that the legislature intended that "from date of plan approval or acceptance" to mean *from date of first payment of compensation under this subsection following exhaustion of permanent partial impairment compensation*. If the legislature had intended to limit the time that stipend may be paid under AS 23.30.041(k) to no more than two years, the legislature could have done so. For example, inserting the parenthetical phrase ", for not more than two years," between "employer shall provide" and "compensation" would limit the employer's liability for stipend, without affecting the expiration date established in the

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[84] The benefits are properly described as supplementary reemployment compensation, as they supplement any wages the employee earns while participating in the plan and supplement the gap between the cessation of permanent partial disability compensation and the termination of the plan. The commission refers to this supplementary reemployment compensation as "stipend."

[85] *Martinez v. Cape Fox Corp.*, 113 P.3d 1226, 1230 (Alaska 2005) (citations omitted). *See also Gerber v. Juneau Bartlett Mem'l Hosp.*, 2 P.3d 74, 76 (Alaska 2000) (quoting *Gossman v. Greatland Directional Drilling, Inc.,* 973 P.2d 93, 96 (Alaska 1999) for the proposition that "the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent.").

first sentence of § .041(k) for employer liability for other benefits related to the reemployment plan. Instead, the first sentence of AS 23.30.041(k) caps *all* benefits *related to the reemployment plan*, not just stipend, providing a definitive expiration to reemployment plans, benefits, and the employer's liability. The commission concludes the board erred by limiting Andy's Body & Frame's liability for stipend under § .041(k) to a total period not exceeding two years.

*b. Reasonable pre-plan stipend awards should not exceed the time periods established by the legislature in AS 23.30.041 for reemployment benefits.*

Having established that the first sentence of AS 23.30.041(k) does not cap the payment of stipend at two years, the commission must determine if the legislature intended that there should be any time limit on payment of § .041(k) stipend. Supreme Court cases dealing with § .041(k) have resolved two statutory interpretation questions. First, the Court held that § .041(k) "contains a two-year cap on benefits after a reemployment plan is accepted or approved."[86] The Court concluded this cap is in line with the Legislature's goals of controlling the costs of vocational rehabilitation and of

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[86] *Carter*, 199 P.3d at 1159 (citing *Binder*, 880 P.2d at 121). In the withdrawn *Carter* opinion, this sentence stated, "We note initially that B&B is correct that AS 23.30.041(k) contains a two-year cap on benefits." Slip Op. 6277 (June 27, 2008) (withdrawn). On rehearing *Carter,* the Court added the important qualifying language – "after a reemployment plan is accepted or approved." 199 P.3d at 1159.

In *Binder*, 880 P.2d at 122, the Court stated that the cap in .041(k) was "unambiguous," citing to *Yahara v. Constr. & Rigging, Inc.*, 851 P.2d 69, 72 (Alaska 1993) for the proposition that "this court 'will neither modify nor extend a statute if its language is unambiguous and expresses the legislature's intent, and if its legislative history reveals no ambiguity,'" and *Zoerb v. Chugach Elec. Ass'n*, 798 P.2d 1258, 1260 (Alaska 1990) for the proposition that "where a statute's meaning appears clear and unambiguous, the party asserting a different meaning bears a heavy burden of demonstrating contrary legislative intent." The Court concluded that Binder had not met the heavy burden of demonstrating that in spite of the clear statutory language, the Legislature intended the cap in § .041(k) to restart with a new reemployment plan when the first plan is unsuccessful, thus allowing him to collect benefits for a period exceeding two years. *Id*. The Court held that "an employer's exposure for any number of reemployment plans an employee pursues must be capped at . . . two years in time." *Id*.

returning injured workers back to work as quickly as possible.[87] Second, the Court concluded that an employee may receive stipend benefits before a reemployment plan is accepted or approved as long as the employee "has begun the reemployment process."[88] The Court held that participating in the reemployment process begins when "the employee begins his active pursuit of reemployment benefits," such as by requesting an eligibility evaluation.[89] The Court construed the statute in this way to prevent a gap "between the expiration of PPI benefits and the commencement of reemployment benefits for employees who are vigorously pursuing eligibility evaluations before their PPI benefits expire."[90] The Court concluded the Legislature wanted to avoid a gap because § .041(k) provided "a fall-back source of income."[91]

Griffiths argues that these propositions compel a conclusion that there is no time limit on his entitlement to § .041(k) stipend as long as he is actively pursuing reemployment benefits. However, this argument is inconsistent with the Supreme Court's reasoning in *Carlson v. Doyon Universal-Ogden Services*.[92] If the Court believed that there was no limit on entitlement to § .041(k) stipend during the "gap" period, the Court could not have held, as it did in *Carlson,* that Carlson was not entitled to an award of "gap" stipend during the reemployment eligibility determination process:

> Carlson makes a valid point about a potential "gap" in benefits for the period between the expiration of PPI and the initiation of rehabilitation benefits. We do not believe, however, that the

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87 *Binder*, 880 P.2d at 122 (citing legislative history that mentioned the goal of controlling costs and studies that showed the longer an employee is out of the work force, the less likely that employee will return to it successfully).

88 *Carter*, 199 P.3d at 1159.

89 *Id*. at 1160.

90 *Id*.

91 *Id*. The Court also noted that the Legislature ratified the Board's longstanding policy of awarding .041(k) benefits before the commencement of an employee's plan when the employee was participating in the reemployment process by changing references in the statute from "reemployment plan" to "reemployment process." *Id*. at 1159 n.49.

92 995 P.2d 224 (Alaska 2000).

> circumstances of this case justify a retroactive award of rehabilitation benefits for the time that Carlson received no compensation. Because the legislature intended the rehabilitation process to be voluntary, the onus was on Carlson to pursue rehabilitation vigorously.[93]

*Carlson* is inconsistent with an automatic entitlement to stipend in the gap between exhaustion of temporary and permanent partial impairment compensation and the onset of a reemployment plan; by referring to the "circumstances of this case," the Court suggests that awards of stipend in the "gap" period are subject to the board's discretion.

In *Carter*, the employee appealed the denial of reemployment stipend for four years, from July 14, 1994, to January 30, 1999, instead of the two years allowed by the board.[94] Carter made the same argument on appeal to the Supreme Court as Carlson. The Supreme Court held that Carter's entitlement to stipend may begin before a plan is accepted or approved, but the Court also stated it was not deciding whether § .041(k) stipend benefits "may be payable for more than two years if they start before acceptance or approval of a reemployment plan."[95] Again, the Court's language suggests that § .041(k) stipend benefits are not an indefinite entitlement.

AS 23.30.041 is intended to work as a whole, and it should be interpreted as a whole, giving effect to each part of the statute.[96] The Legislature's overarching intent in enacting § .041 was to return injured workers to employment as quickly as possible and to control the costs of vocational rehabilitation to employers. Throughout § .041,

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93 995 P.2d at 230 (citations omitted).

94 199 P.3d at 1158.

95 *Carter,* 199 P.3d at 1160.

96 *See, e.g., Hotel, Motel, Rest., Constr. Camp Employees and Bartenders Union Local 879 v. Thomas,* 551 P.2d 942, 944 (Alaska 1976) (stating that "the intention of the legislature must be determined by construing the provision in question with reference to the purpose of the entire legislative enactment."); *W. R. Grasle Co. v. Alaska Workmen's Comp. Bd.*, 517 P.2d 999, 1002-03 (Alaska 1974) (construing 1962 amendment to AS 23.30.105(a) as repealing 4-year statute of limitation on claims and noting the courts must "give intelligent effect to as much of a single enactment as possible.").

the Legislature included time limits designed to ensure that workers did not linger in the reemployment process. There is a limit on the period to request reemployment benefits,[97] the period to evaluate the employee's right to reemployment benefits,[98] the period to select a specialist,[99] and for development of a plan.[100] In *Carter,* the Court found that the Legislature did not intend that there should be a "gap" period before plan approval. The Legislature unambiguously provided in § .041(k) that stipend is only payable if other compensation has been exhausted during the "gap" period. The deadlines provided in the statute, if followed, are designed to make any gap short.[101]

The deadlines provided in the statute reflect the Legislature's intent that the period between a referral for eligibility evaluation and eligibility determination would not exceed 74 days; between a finding of eligibility and submission of an accepted plan should not consume more than 129 days; and, between submission of an unaccepted

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[97] *See* AS 23.30.041(c) (2001) providing in part that the employee "shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request."

[98] See AS 23.30.041(d) (2001) providing in part that "Within 30 days after the referral by the administrator, the . . . specialist shall perform the eligibility evaluation and issue a report . . . ." The administrator could grant a 30-day extension, at the specialist's request. *Id.* Within 14 days after receipt of the specialist's report, the administrator had to notify the parties of his decision. *Id.* The parties had 10 days to file an appeal to the board. *Id.*

[99] See AS 23.30.041(g) (2001), providing in part that "Within 15 days after the employee receives the administrator's notification of eligibility . . . an employee who desires to use these benefits shall give written notice to the employer of the employee's selection of a rehabilitation specialist . . . ." 8 AAC 45.535(b) gave the employer 10 days to object, or, if no objection was received, in 14 days the administrator notified the specialist to begin under § .535(c). If an objection was received, the administrator assigned another specialist, and the parties had another 10-day objection period. Thus, the administrator should notify the specialist to begin plan development within 34 days of notification of eligibility.

[100] AS 23.30.041(h) (2001) provided that "Within 90 days after the rehabilitation specialist's selection . . . the reemployment plan must be formulated and approved."

[101] 199 P.3d at 1159-60.

plan and administrator approval or denial would not exceed 14 days. These statutory periods total of 217 days (about 30 weeks) between referral and plan approval.[102] While the Legislature did not impose a specific limit on pre-plan stipend, these time periods reflect the Legislature's judgment of the number of days that make up a reasonable time to reach plan approval. Such a period is consistent with the recognized legislative goal of achieving reemployment in the shortest possible time.

A completely open-ended entitlement to § .041(k) stipend would defeat the legitimate legislative goals of returning employees to the workforce as quickly as possible and reducing the costs of rehabilitation to employers by creating an incentive for employees to drag out the pre-plan reemployment process. A reasonable limit based on the statutory time periods set forth in AS 23.30.041(k) avoids the absurd result that an employee receives more in pre-plan stipend than he or she may be entitled to receive during an approved plan.[103] An unlimited right to § .041(k) stipend would undermine an important purpose of the statute, reducing predictability, increasing costs, and lessening the probability of a quick return to work. The

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[102] The Legislature did not establish a time for the administrator to respond to a request for reemployment benefits, but under 8 AAC 45.510(c) the administrator had 30 days to respond to a request for an evaluation and, under 8 AAC 45.520(b), 30 days to determine if the employee's circumstances excused a delay in requesting benefits.

[103] *See Underwater Constr., Inc., v. Shirley*, 884 P.2d 150, 155 n.21 (Alaska 1994) (finding no "glaringly absurd" result where under the Court's interpretation of AS 23.30.225(b), the Social Security offset would mean less compensation for an employee because "the legislature clearly intended to reduce employer–paid benefits under the state scheme where federal assistance was available."); *Sherman v. Holiday Constr. Co.*, 435 P.2d 16, 18 & n.3 (Alaska 1967) (interpreting permanent partial disability statute to avoid the absurd result of an injured employee suffering a 25 percent loss of earning capacity because of a non-scheduled injury receiving more than someone suffering a more serious scheduled injury but the dissent found no absurdity, 435 P.2d at 19-20). *See also Wilson v. State*, *Dep't of Corr.*, 127 P.3d 826, 833-34 (Alaska 2006) (majority notes that interpreting statute that requires the Department of Corrections to return a released prisoner to his "place of arrest" taken too literally could mean returning a prisoner to a place near the victim's location; but dissent concludes intent of statute was to get prisoner back home not merely to the community nearest his place of arrest.).

commission finds unpersuasive Griffiths's arguments that the statutory time periods in AS 23.30.041 should be disregarded.

Thus, including the initial 30 days the administrator has to respond to a request for benefits,[104] the commission holds that the outside limit of a reasonable stipend award for the gap period before a plan is accepted or approved is 247 days. The commission cautions that employees are not *entitled* to 247 days of pre-plan stipend. Rather, the commission concludes that, as a matter of law, a board award of pre-plan gap stipend not exceeding 247 days would be considered reasonable if the employee was not eligible for temporary compensation benefits; the employee had exhausted permanent partial impairment benefits prior to the request for benefits (or no impairment rating was yet provided);[105] the employee was vigorously pursuing reemployment benefits as required by AS 23.30.041 during the entire 247 days; and, the employer did not unreasonably impede the progress of the evaluation or plan.[106] The commission applies this rule prospectively only.

*c. Vacating the board's 2005 order denying modification returned the parties to their status at the end of the day of the board hearing.*

The Supreme Court ordered that the board's order was vacated, and that the case was remanded to the board to decide, on the record developed at the hearing on

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[104] 8 AAC 45.510.

[105] Once a permanent impairment rating is provided, the gap period may disappear, as the employer pays the permanent partial impairment compensation owed. The employee may not receive both stipend and compensation for the same period.

[106] Unreasonable impediment does not include the exercise of objections the employer or employee has a right to make under AS 23.30.041, as the period for objections by employer or employee is included in the calculation of the 242 days. On the other hand, it is not reasonable to use 45 days to exercise a right that the statute provides should be exercised within ten days, as the administrator allowed in this case. Nor is it reasonable to include periods of delay due to an employee's, employee's specialist's, or employee's physician's failure to provide a response to the administrator so that the progress toward the employee's plan continues within the statutory timeframe.

the employee's petition to modify, if a modification was justified.[107] The effect of a reviewing court's reversal that vacates a judgment is to return the case to the same posture as it was before the judgment was entered.[108] The Supreme Court's intention to do so here is reinforced by the Court's order vacating the board's order and mandating that that the board decide the petition for modification on the record developed *at the hearing*.[109] It directed that no new evidence or argument should be heard except perhaps on one limited point, but that the board should decide the petition for modification on the existing record.[110] In other words, the Supreme Court returned the case to its posture just before the board's decision. Therefore, the board's May 2008 order was, in effect, the decision that would have been made in April 2005, had the board not erred in barring the petition as untimely.

*d. The earliest effective date of a modification issued under AS 23.30.130(a) of an order with prospective effect is the date of the request for modification.*

Griffiths argues he is entitled to an award of stipend from the day stipend payments ceased after the board's order in June 2003. The unspoken premise underlying Griffiths's argument is that the effective date of modification of an order is the date of the order that was modified, that is, that orders modifying prior orders are always retroactive. Griffiths cited no authority for this premise.

AS 23.30.130(a) provides that the board may "issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or

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107 *Griffiths,* 165 P.3d at 624.

108 *Shilts v. Young*, 643 P.2d 686, 688 (Alaska 1981).

109 *Griffiths*, 165 P.3d at 624.

110 *Id*. at 624 & n.9 (noting "Griffiths separately argues on appeal that the board erred in its 2003 decision by relying on Dr. Baker's PPI rating because Dr. Baker incorrectly applied the *AMA Guides* in calculating the rating. The board's 2004 decision does not address this issue, and our decision remanding the case to the board makes it unnecessary to decide the issue here. On remand, however, the board may allow further *argument on the point* if it believes that the additional argument would be helpful."). The record does not explain why the board's adjudication staff permitted the parties to make additional arguments, notwithstanding the terms of the remand.

award compensation" following a petition for modification. All compensation orders become "effective when filed with the office of the board,"[111] but this does not mean that the board is limited to prospective awards only on petitions for modification. Although AS 23.30.130(a) is silent on the board's authority to make retroactive modifications of prior awards, AS 23.30.130(b) makes special provision for retroactive modification of compensation rates only.

The maxim of statutory construction known as *expressio unius est exclusio alterius* provides that "to express or include one thing implies the exclusion of the other."[112] The absence of an explicit provision in § .130(a) for retroactive modification, contrasts with the explicit provision in § .130(b) that "[a] new order does not affect compensation previously paid," and the list benefits that may be retroactively modified. No provision is made in AS 23.30.130 for retroactive modification of orders terminating or suspending compensation, so we infer the silence is deliberate.[113]

AS 23.30.130(b) specifically provides that, excepting changes in compensation rate, an order on modification "does not affect compensation previously paid." In *Interior Paint Co. v. Rodgers,* the Supreme Court held that the board's broad authority to modify an award based on mistake of fact "originates in the initial claim for compensation," suggesting that the board may retroactively modify its decision and order to the date of the original claim.[114] But, the commission is not certain that the Supreme Court meant, in holding that "an application to modify a prior order invokes the Board's jurisdiction over the original claim,"[115] that the board should rehear the

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111 AS 23.30.125(a).

112 BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

113 *See Ranney v. Whitewater Eng'g*, 122 P.3d 214, 218-19 (Alaska 2005) (applying the rule that "where certain things are designated in a statute, all omissions should be understood as exclusions" to a statute that began a list "payable in the following amounts to or for the benefit of the following persons."); *but see State, Dep't of Revenue v. Deleon*, 103 P.3d 897, 900 (Alaska 2004) (*expressio unius* maxim not applicable if "contrary to the purpose of the statute.").

114 522 P.2d 164, 167 (Alaska 1974).

115 *Hulsey v. Johnson & Holen*, 814 P.2d 327, 328 (Alaska 1991).

original claim on every petition for modification.[116] Construing a different part of AS 23.30, in *Metcalf v. Felec Services*,[117] the Supreme Court held that the board could not retroactively ratify a suspension of benefits under AS 23.30.095(d).

There are good reasons why, where the statute makes no provision for retroactive modification, the board's order modifying a prior order should not extend past the date of the request for modification. First, the date of the petition for modification is close in time to the date the opposing party receives notice of the challenge to the board's order.[118] The party relying on a board order may continue to rely on its effectiveness and finality until notice of the challenge is given. Second, this approach encourages prompt resolution of such petitions, as the parties defending the board's order have less incentive to delay the decision on the petition for modification. As the Supreme Court noted in *Tillmon v. Tillmon*, limiting retroactive modification to the date of the motion for modification encourages prompt filing of motions for modification.[119] The commission agrees, especially as AS 23.30.130(b) limits the board's power to modify compensation paid pursuant to a prior order.

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[116] *Interior Paint,* 522 P.2d at 169 (noting that a requirement of full review under AS 23.30.130 "would be particularly susceptible to abuse.") *See* 8 AAC 45.150(d). A distinction should be drawn between petitions that are, in effect, requests for reconsideration invoked immediately after the board's order, and a request for modification based on mistake that is merely a delayed request for reconsideration. The requirements of 8 AAC 45.150(d)(2) enforce a general policy of finality in board orders and sufficient preparation for hearing. However, the lesson of *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d at 624, is that when a party seeking relief from a board order under AS 23.30.130(a) was not represented before the board, the burden of justifying his delay may be lower if the board's order is not explicit.

[117] 784 P.2d 1386, 1389 (Alaska 1990).

[118] *See Dresser Indus., Inc./Atlas Div. v. Hiestand,* 702 P.2d 244, 248 (Alaska 1985) (holding that while board has broad authority to modify its prior findings under AS 23.30.130(a), the board is subject to limits of AS 23.30.110, including providing notice and opportunity to respond to its decision to consider modification, even when the decision is prospectively modified only).

[119] 189 P.3d 1022, 1030 n.22 (Alaska 2008). The commission notes that 8 AAC 45.150 draws upon the language of Alaska R. Civ. P. 60(b) regarding relief from judgments based on mistake or newly discovered evidence.

Unless the board by regulation adopts a different rule, or the Legislature amends AS 23.30.130(a), the commission adopts a rule that modification of a prior board order having prospective effect ordered under AS 23.30.130(a) is effective on the date of the new order, unless the board makes modification retroactive to the date the modification was requested. This rule does not apply to orders issued under AS 23.30.130(b), or to petitions for modification that seek timely reconsideration of the board's decision and order under AS 44.62.

Therefore, because the order finding Griffiths ineligible had prospective effect, and the order reinstating eligibility did not specifically direct retroactive application, the order on modification that reinstated eligibility is effective on the date of the order of modification. But, in this case, because the Supreme Court returned the case to its posture the day of the hearing in 2005, the effective date of the order reinstating eligibility is April 28, 2005. Griffiths is entitled to stipend from the effective date of the order reinstating eligibility.

*e. Griffiths is not eligible to receive stipend after June 9, 2008, because he failed to notify the administrator that he wished to receive reemployment benefits.*

Griffiths maintains that he continues to be eligible for the stipend because he has appealed the board's November 19, 2008, order. Griffiths characterizes his present pursuant of stipend as the active pursuant of benefits. Stipend, however important, is secondary to the primary reemployment benefit, which is monitored assistance in developing a plan for reemployment with aid from qualified specialists, and monitored performance of the plan itself. Nothing in the record suggests that Griffiths contacted the administrator to obtain an appointment of a new specialist to help him develop a plan after he became eligible in 2008,[120] or that he did any other activity required of a

[120] *See* AS 23.30.041(g) (2001) providing in part that "Within 15 days after the employee receives the administrator's notification of eligibility for benefits, an employee who desires to use these benefits shall give written notice to the employer of the employee's selection of a rehabilitation specialist who shall provide a complete reemployment benefits plan." *See also Carlson*, 995 P.2d at 230-31 n.45 (concluding

reemployment beneficiary. Receipt of stipend after exhaustion of temporary compensation and permanent partial impairment compensation is contingent upon the active pursuit of reemployment benefits – not the active pursuit of stipend.

The commission is not persuaded by Griffiths's argument that he needed to know if he would receive stipend during the 90 days allowed to develop a plan before he contacted the administrator because (1) he was receiving weekly stipend payments when he failed to contact the administrator and (2) shortly afterward, he received a lump sum equivalent to two years of stipend. Griffiths's argument that he needed to know how he could support himself *before* he requested reappointment of a specialist puts the cart before the horse – stipend *follows* the active participation in the reemployment process. Griffiths's argument that he had not been paid for years, so he needed to be reimbursed before beginning reemployment activity, is also without merit. The lump sum of two years of stipend was not paid, or accepted, in settlement of liability for past due stipend, as Griffiths's present appeal demonstrates. Engagement in the reemployment process would not constitute a waiver of a right to past benefits.

Therefore, when Griffiths failed to timely contact the administrator in June 2008 after being notified his eligibility was reinstated, he ceased to actively pursue a reemployment plan, and thus, he ceased to be entitled to "gap" period stipend.[121] The commission does not consider whether the employer was at fault for extending the period of litigation by using tactics that delayed the award of rehabilitation benefits[122]

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that employee had not actively pursued reemployment benefits but noting that if she had, it might have been appropriate to award retroactive gap .041(k) benefits).

[121] *Carter*, 199 P.3d at 1160.

[122] *See Carlson*, 995 P.2d at 231 n.45 (stating that "If Carlson had presented evidence that she repeatedly attempted to reinitiate the rehabilitation process while she pursued PTD benefits or that her employer had used tactics which delayed the award of rehabilitation benefits, then an award of benefits retroactively might be appropriate.").

because the commission views the Supreme Court's direction on remand as controlling.[123]

The commission concludes that the board erred in limiting Griffiths to two years of stipend. The commission concludes that Griffiths's entitlement to stipend resumed on the effective date of the modification order, which in this case is April 28, 2005. The commission concludes that Griffiths ceased to be entitled to stipend when he failed to timely contact the administrator and request appointment of a specialist within 15 days of notification of eligibility. In this case, notification occurred May 27, 2008; so that, with allowance for mailing, his eligibility ceased June 14, 2008. Eligibility for stipend during the gap will resume when active pursuit of reemployment resumes, provided that permanent partial impairment compensation is exhausted.[124]

*f. Penalty, interest and attorney fees.*

The board's April 28, 2005, decision denying modification was vacated, and the board was directed to decide if it would modify its prior decision. The Supreme Court did not direct the board to modify its 2003 decision. Therefore, until the board entered an order on the petition to modify in 2008, Griffiths had no right to payment of stipend; the 2003 order terminating eligibility was still in effect. The Supreme Court order returned the posture of the case to the point of the 2005 hearing, when Andy's Body & Frame had a right to controvert Griffiths's entitlement to benefits based on its understanding of the competing ratings. Therefore, Griffiths's argument that the board erred in failing to award a penalty for a frivolous and unfair controversion of benefits

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[123] The effect of the appeal and the Supreme Court's order was to toll the period between April 28, 2005, and May 27, 2008. Therefore, a new reasonable period of "gap" stipend began May 28, 2008.

[124] The commission notes that the board stated that PPI (permanent partial impairment compensation) had long been exhausted. But the commission found no record of payment of PPI, and no record that Griffiths requested a hearing on his PPI claim once his petition for modification was denied. The commission notes that Griffiths did not include PPI in his most recent claim. However, because the board found Griffiths had sustained at least one percent permanent partial impairment, the issue of how much PPI Griffiths was paid – or waived by failing to request a hearing on the claim – is not necessary for the commission to know in order to decide this appeal.

from June 1, 2003, to May 27, 2008, is without merit. Because the board did not complete its decision until November 19, 2008, Griffiths's assertion that the board erred in failing to award penalties for failure to timely pay an award of stipend that the board had not yet ordered is equally without merit.

The assessment of interest and attorney fees for proceedings before the board in this case requires further fact-finding by the board in light of this decision.

*4. Conclusion.*

The commission concludes that the 2-year limit on payment of supplementary reemployment compensation (stipend) applies only to the period "from the date of plan approval or acceptance, whichever date occurs first." The commission concludes, however, that an employee is not entitled to an indefinite period of stipend prior to the date of plan approval or acceptance. The commission concludes that AS 23.30.041, taken together, establishes that a reasonable time for the reemployment process to be completed is 242 days; therefore, the payment of stipend in a gap between the cessation of temporary compensation and exhaustion of permanent partial disability compensation and the approval or acceptance of a plan should not exceed 242 days, under conditions described in the body of this decision. The commission concludes that in this case the effect of the Supreme Court's order was to put the case in the posture it was the day of the hearing in 2005; the commission further concludes the board did not make the order retroactive to the date of the request for modification; therefore, the order modifying the board's 2003 order was the date of the board's 2005 order.

The commission concludes that, as a matter of law, the right to stipend in the "gap" period is contingent upon active pursuit of reemployment benefits, which in this case was development of a reemployment plan. Griffiths failed to contact the administrator within 15 days of notification of reinstatement to eligibility for reemployment benefits; at that point he ceased to actively pursue development of a reemployment plan. Appealing an order denying retroactive stipend is not active pursuit of the prospective reemployment benefits to which Griffiths was reinstated.

Therefore, the commission REVERSES the board's November 19, 2008, order denying payment of retroactive stipend. The commission REMANDS this case to the board with instructions to determine the amount of stipend owed in light of this decision, based on the record already developed, with a credit for past payments of stipend and permanent partial impairment compensation, and to calculate interest owed. If the board's review of the record results in a determination that no permanent partial impairment was paid or awarded, the board may open the record to determine Griffiths' right, if any, to permanent partial impairment compensation.

The commission VACATES the board's order awarding attorney fees, and REMANDS the case to the board with instructions to determine an award of attorney fees in light of its order on remand, based on the record before the board.

Date: *27 Oct 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

*Signed*
Philip Ulmer, Appeals Commissioner

*Signed*
Jim Robison, Appeals Commissioner

*Signed*
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal, reversing the Alaska Workers' Compensation Board's Decision and Order No. 08-0226 and remanding the case to the board with instructions to calculate and enter an award of benefits.

This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date this decision is distributed, look at the date in the box on the last page.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed 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.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If you wish to appeal (or petition for review or hearing) 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

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of the Final Decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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).

## CERTIFICATION

I certify that, with the exception of changes made in formatting for publication, the identification of attorney appearances, and correction of typographical errors, this is a full and correct copy of the text of the Final Decision in the matter of *Robert L. Griffiths v. Andy's Body & Frame, Inc., and Alaska National Insurance Co.,* AWCAC Appeal No. 08-035, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 27, 2009.

Date: *November 3, 2009*

*Signed*

Barbara Ward, Appeals Commission Clerk