Alaska Workers' Compensation Appeals Commission

Dolores J. Bundy, Appellant, Cross-Appellee, vs. State of Alaska, Department of Health & Social Services, Appellee, Cross-Appellant.	Final Decision Decision No. 142 December 20, 2010 AWCAC Appeal No. 10-006 AWCB Decision No. 10-0002 AWCB Case No. 200408624

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 10-0002, issued at Anchorage on January 7, 2010, by southcentral panel members Deirdre D. Ford, Chair, James P. Fassler, Member for Labor, Robert C. Weel, Member for Industry.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, Inc., for appellant, cross-appellee, Dolores J. Bundy; Daniel N. Cadra, Assistant Attorney General, for appellee, cross-appellant, State of Alaska, Department of Health & Social Services.

Commission proceedings: Appeal filed February 3, 2010; Cross-appeal filed February 13, 2010; briefing completed July 26, 2010; oral argument presented September 23, 2010.

Commissioners: Jim Robison, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

Appellant, cross-appellee, Dolores J. Bundy (Bundy), worked as a Certified Nursing Aide at the Anchorage Pioneer Home, in the employ of appellee, cross-appellant, State of Alaska, Department of Health & Social Services (DHSS or Department). On May 10, 2004, Bundy injured her left shoulder, left arm, and neck, while attempting to prevent one of the residents from falling out of a wheelchair.[1] In the ensuing twenty-two months, three cervical surgeries were performed on Bundy.

[1] R. 1, Sept. 15 and 18, 2009, Hr'g Tr. 109.

Despite this treatment, Bundy continued to complain of pain. In due course, her workers' compensation claim went to hearing before the Alaska Workers' Compensation Board (board) on September 15 and 18, 2009. In its Final Decision and Order (D&O), the board concluded: 1) Bundy's second and third cervical surgeries are not work-related; 2) she is not permanently and totally disabled (PTD); 3) she is entitled to permanent partial impairment (PPI) benefits commensurate with a 25% rating; and 4) she is entitled to an award of attorney fees.[2] Bundy appeals the first two rulings and the Department cross-appeals the board's award of attorney fees and denial of a "credit" for prior payment of reemployment benefits against the amount owed and paid Bundy in additional PPI benefits.[3] The commission affirms the board in all respects except two. We remand to the board on the issues whether Bundy is PTD and whether DHSS is entitled to any reimbursement under AS 23.30.155(j) for overpayment of AS 23.30.041(k) stipend benefits, and if so, in what amount.

1. Factual background and proceedings.

On May 17, 2004, a week after the May 10, 2004, incident in which Bundy was injured, she consulted Timothy D. Coalwell, M.D., complaining of neck and shoulder pain, including a popping in her shoulder.[4] His diagnosis was neck and left shoulder strain with degenerative disk disease of the cervical spine.[5] That same day, an x-ray of her cervical spine showed marked disk space narrowing at C3 and C5 with some neural foraminal encroachment.[6] The impression was severe degenerative disk disease at C3 and C5.[7]

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[2] *Dolores J. Bundy v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 10-0002, 21 (Jan. 7, 2010)(*Bundy*).

[3] At oral argument, counsel for the respective parties conceded that the board had not ordered DHSS to pay Bundy for future medical treatment, thus mooting any present issue in respect of payment of future medical benefits. *See Bundy*, Bd. Dec. No. 10-0002 at 22.

[4] Cross-Appellant's Exc. X-002.

[5] *Id.* at X-003.

[6] *Id.* at X-004.

[7] *Id*.

The x-ray also revealed intense sclerosis in the vertebral endplates, C3-4 and C5-6.[8] An x-ray of the left shoulder showed abnormalities of the acromion clavicular (AC) joint and coracoclavicular junction.[9] Dr. Coalwell arranged for a magnetic resonance imaging (MRI) study of Bundy's cervical spine and left shoulder,[10] which was done on May 20, 2004. It showed a small-to-moderate-sized protrusion to the left at C6-7 and a moderate-sized protrusion slightly to the left of midline at C5-6, causing mild left foraminal stenosis.[11]

On May 25, 2004, Bundy was referred to Larry Kroop, M.D., of Interventional Pain Consultants of Alaska, for pain management and possible steroid injection to the AC joint.[12] Two days later, Dr. Kroop performed a cervical selective nerve root block C6 for the cervical nerve root compression with radiculopathy.[13] On June 24, 2004, at the request of Dr. Kroop, Eric M. Kussro, D.O., performed sensory and motor nerve conduction studies and needle electromyogram in the left upper extremity. Dr. Kussro found no focal compressive median or ulnar neuropathy affecting the left upper extremity and no evidence of active cervical radiculopathy.[14]

On July 7, 2004, Dr. Coalwell refined his diagnosis to neck pain with radiculopathy secondary to degenerative disk disease of the cervical spine and referred Bundy to Louis L. Kralick, M.D.[15] On July 15, 2004, Dr. Kralick evaluated Bundy and recommended a two-level disk excision and instrumented anterior fusion.[16] Later that month, on July 22, 2004, Dr. Kralick performed an anterior diskectomy and osteophyte removal with canal and

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8 Cross-Appellant's Exc. X-004.

9 *Id.*

10 *Id.* at X-002-03.

11 *Id.* at X-005-06.

12 R. 350-53.

13 Cross-Appellant's Exc. X-012-13.

14 *Id.* at X-018-20.

15 R. 358-59.

16 Cross-Appellant's Exc. X-024-26.

nerve decompression, C5-6 and C6-7. His post-operative diagnosis was cervical spondylosis with root compression and radiculopathy at C5-6 and C6-7.[17]

Bundy followed up with both Dr. Kralick and Dr. Coalwell over the next year. On September 7, 2004, Dr. Kralick saw Bundy and reported her incision was well-healed.[18] He noted she had some limitation in her range of motion, but had no tenderness to palpation and no obvious sensory deficit.[19] Bundy was instructed to increase her activity level and to wean to a soft collar.[20] A cervical spine x-ray showed a stable appearance of the instrumentation and allograft construct[21] and moderate degenerative disk changes at C3-4 with narrowing of the disk space, sclerosis along the disk margin, and hypertrophic spurring.[22]

Dr. Kralick saw Bundy on November 2, 2004, and reported that she was comfortable on examination with improved range of motion, stable strength, and tone that was normal with subdued but present tendon responses.[23] A cervical spine x-ray taken that day showed: 1) a stable appearance at the operative level; 2) bone grafts in stable position with less distinct margins indicating beginning fusion; 3) anterior hardware was stable and bone alignment was also stable; and 4) moderate, but stable degenerative disk changes at C3-4.[24]

Dr. Coalwell saw Bundy on November 10, 2004, and noted her neck was still stiff and she was still wearing a brace.[25] He saw her again on November 24, 2004, and noted she was reporting ongoing pain, including migraines, which she thought were caused by

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17 Cross-Appellant's Exc. X-027-29.

18 *Id.* at X-031.

19 *Id.*

20 *Id.*

21 *Id.*

22 R. 645.

23 R. 376.

24 R. 664.

25 R. 1319.

neck pain, and numbness and tingling in both legs. He believed an MRI might be needed if the tingling persisted.[26]

On January 4, 2005, Bundy consulted Dr. Kralick, who stated she was making satisfactory progress and was benefiting from physical therapy. She had improved range of motion and no focal sensory deficit. Strength was normal and tendon responses, although subdued, were present and symmetric.[27]

On February 14 and 24, 2005, Dr. Coalwell saw Bundy, who was complaining of continuing pain and migraines, which she said she did not have prior to the work injury. A new MRI did not show any acute changes. Dr. Coalwell prescribed Wellbutrin.[28]

On April 11, 2005, Shannan F. Schewe, Occupational Therapist, wrote to Dr. Coalwell stating that Bundy's progress had been impeded by "multiple medical and psychosocial stressors" and she attended only 43 out of 64 appointments. She was released by Ms. Schewe to a home exercise program with no further therapy indicated.[29]

Dr. Kralick saw Bundy on April 19, 2005, and reported she had continued, but slow progress, with residual head and neck ache and nonspecific sensory symptoms. There was no evidence of long-track sign abnormalities on exam and he recommended a follow-up visit in one year.[30]

On May 19, 2005, Dr. Coalwell saw Bundy, who reported to him that she had pain in her neck and the back of her scalp radiating down her right arm with numbness in her fingers bilaterally. She also reported numbness in her legs.[31] Bundy saw Dr. Coalwell again on June 27, 2005. He ordered a urine drug screen and noted a follow-up appointment with Dr. Kralick on referral from Dr. Kroop. Dr. Kroop did not want to do any more injections until Bundy was seen by the surgeon. Dr. Coalwell noted Bundy was

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26 Cross-Appellant's Exc. X-035.

27 R. 420.

28 R. 689, 692.

29 SIME Records, Vol. 2 of 3, No. 373.

30 R. 707.

31 Cross-Appellant's Exc. X-043-44.

taking greater than 100 mg of Oxycontin per day with only fair relief.[32] That same day, Bundy also saw Dr. Kroop. He noted she was scheduled for another MRI by Dr. Kralick's office, the massage therapy did not seem to be helping, and her hydrocodone prescription might need adjustment.[33]

On July 6, 2005, the urinalysis report showed no evidence of Oxycontin, but was positive for cocaine and marijuana.[34] On July 8, 2005, Dr. Coalwell's office wrote to Bundy dismissing her from his care immediately.[35] On July 12, 2005, he filled out a request from Rehabilitation Specialist Mark Kemberling stating Bundy could participate in development of a reemployment plan, but adding that he no longer treated her.[36]

Bundy had a cervical spine MRI performed on July 21, 2005, which showed surgical changes with disk disease at C3-4, causing minimal central canal stenosis and mild-to-moderate neural foraminal stenosis, right greater than left.[37] On August 2, 2005, Bundy saw Dr. Kralick, who reviewed the MRI with her and ruled out further surgical intervention. Dr. Kralick discussed appropriate conservative management options for her residual cervical and lumbar symptoms. The MRI showed minimal degenerative changes at C3-4 without any significant canal stenosis and only minimal foraminal narrowing.[38]

Bundy relocated to Fresno, California, and on September 15, 2005, consulted William Garnica, M.D. He diagnosed radiculitis, migraine, and neck pain, and referred her to a neurosurgeon.[39] On October 11, 2005, Dr. Garnica completed a reemployment form for the Reemployment Benefits Administrator stating that Bundy could return to work as a

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32 Cross-Appellant's Exc. X-048.

33 R. 738.

34 R. 539-40.

35 Cross-Appellant's Exc. X-052.

36 *Id.* at X-053-54.

37 SIME Records, Vol. 2 of 3, No. 449.

38 Cross-Appellant's Exc. X-058.

39 *Id.* at X-061.

motor vehicle dispatcher.[40] He did so again on November 3, 2005, approving employment as an answering service operator, in addition to motor vehicle dispatcher, but disapproving employment as a collection or data entry clerk.[41]

On October 21, 2005, on referral from Dr. Garnica, Bundy saw Ali Najafi, M.D. He had x-rays and MRIs of the cervical spine performed, which showed adequate interbody fusion at C5-6 and C6-7 with minimal-to-no nerve root compression. At C4-5 there was no nerve root compression and adequate disk height. There was significant disk space narrowing with end plate changes and foraminal narrowing at C3-4. His impression was cervicalgia, cervical radiculopathy, and degenerative disk disease at C3-4. He recommended an anterior cervical disk decompression at C3-4 for decompression of nerve roots and fusion and stabilization.[42] A month later, on November 21, 2005, Dr. Najafi performed an anterior cervical diskectomy at C3-4 for decompression of nerve roots, anterior cervical arthrodesis at C3-4, anterior cervical plating at C3-4, interbody device placement at C3-4, and bone graft.[43]

Over the next three months, Bundy followed up with Dr. Najafi. On December 2, 2005, she complained of bilateral numbness in her hands and was told to wean off wearing the soft collar and was given a Medrol Dosepak along with Neurontin.[44]

On December 28, 2005, Bundy had another MRI of her cervical spine. The radiologist, who had no prior MRIs available for comparison, read the MRI as showing postoperative corpectomies at different levels with near anatomic alignment, minimal disk osteophyte noted at the level of lateral recess at C3-4 and C5-6 with minimal encroachment on the respective neural foramina on the left side with no evidence of spinal canal stenosis.[45]

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40 SIME Records, Vol. 2 of 3, No. 474.

41 R. 1693.

42 Cross-Appellant's Exc. X-063-65.

43 *Id.* at X-066-67.

44 R. 795-96.

45 R. 798-800.

On January 17, 2006, Dr. Najafi saw Bundy for complaints of increasing neck pain. He found her in acute distress with limited range of motion. He planned to treat her with an increase in medication, but with an ultimate plan to decompress the nerve root at C4-5 with stabilization and removal of previous cervical plates and fusion from C3-4 to C7.[46] When Bundy consulted Dr. Najafi again on March 3, 2006, she reported a worsening of symptoms. The disk at C4-5 showed significant degeneration. He suggested surgery for removal of plates and an extension of the fusion from C3 through C7 by performance of a diskectomy at C4-5 with fusion and instrumentation. Bundy wanted to proceed with surgery.[47]

On March 6, 2006, Dr. Najafi performed anterior cervical removal of plates at C3-4 and at C5 through C7, diskectomy at C4-5 for decompression of nerve roots, interbody device placement at C4-5 for fusion, arthrodesis C4-5 anterior cervical, and placement of anterior cervical plates C3 through C5.[48] When he saw Bundy in follow-up on April 11, 2006, he thought she was making the expected recovery.[49]

As of June 21, 2006, Bundy came under the care of William E. von Kaenel, M.D., for pain complaints.[50] She demonstrated "decided surfeit of nonspecific somatic symptoms, as well as pain behaviors."[51] Dr. von Kaenel performed facet joint steroid injections on the left at C3-4, C4-5, C5-6, and C6-7, which gave Bundy immediate pain relief. However, the following day she reported no subsequent pain relief. He suggested that she consider medial branch blocks for diagnostic purposes.[52]

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46 Cross-Appellant's Exc. X-070-71.

47 *Id.* at X-072-73.

48 *Id.* at X-074-75.

49 *Id.* at X-078-79.

50 *Id.* at X-080-86.

51 *Id.* at X-083.

52 *Id.* at X-085-86.

On August 30, 2006, Dr. von Kaenel saw Bundy because she had an increase in numbness in her hands bilaterally along with "hot and cold chills."[53] Dr. von Kaenel saw Bundy again on October 10, 2006, for increased pain despite having a fentanyl patch and hydrocodone. He found cervical and axial pain and again recommended medial branch blocks of the posterior primary ramus on the left side at C3, C4, C5, C6, as well as the third occipital nerve.[54]

On October 13, 2006, Dr. von Kaenel intended to perform the medial branch blocks; however, Bundy was uncooperative, thrashing her head, and moving in flexion, extension, and rotation. "Given the proximity of vital neurological structures such as the spinal cord, I judged it to be unsafe to perform the procedure . . . I, thus, abandoned the procedure." Bundy was unaware the block had not been performed and reported no pain relief.[55] On October 31, 2006, Dr. von Kaenel reported the fact that, because Bundy had reported no pain relief from the attempted block, it ruled out the placebo effect. His impression was cervical and axial pain for which no further interventions would be helpful.[56]

Dr. Najafi saw Bundy on November 17, 2006. He reported that following surgery she was doing well, although she now had constant neck pain. His opinion was the disk space at C4-5 had collapsed and foraminal narrowing had developed. Dr. Najafi recommended increased use of medications, but suggested the best plan would be decompression of the nerve root at this level, with fusion and stabilization and removal of the cervical plates, and incorporating the fusion from C3-4 to C7.[57]

On February 2, 2007, Bundy consulted Dr. von Kaenel for cervical and axial pain. According to him, she remained at maximum medical benefit from the medial branch

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53 Cross-Appellant's Exc. X-087.

54 *Id.* at X-089-90.

55 *Id.* at X-091-92.

56 *Id.* at X-093-94.

57 *Id.* at X-095-96.

block procedure and he was reluctant to proceed with any further procedures, given the patient cooperation issues from the medial branch block procedure.[58]

On March 8, 2007, Bundy had another cervical MRI performed. The impression was no high-grade central canal or neural foraminal stenosis, status post fusion from C3-7, and C4-5 minimal retrolisthesis of approximately 1-2 mm.[59]

On April 4, 2007, Bundy had an MRI study of the lumbar spine which showed broad-based disk herniation and osteophytes with prominent narrowing of the neural foramina bilaterally at L5-S1, mild broad-based bulge at L4-5, mild bulging disk at L3-4, no frank central spinal stenosis, minimal fluid intensity within L5-S1 space, may be degenerative in nature, and fluid intensity in the right liver which needed to be further evaluated.[60]

On April 13, 2007, Franklin C. Wong, M.D., Physical Medicine Rehabilitation, and Patrick F. Golden, M.D., a neurosurgeon, performed an Employer's Medical Evaluation (EME) of Bundy. The diagnoses were C6-7 disk herniation with radiculopathy due to the work injury of May 10, 2004, pre-existing cervical spondylosis, lumbar spondylosis unrelated to the work injury, and functional overlay with significant psychosomatic disorder. They thought Bundy's current complaints were not supported by objective findings. They concluded that the C5-6 diskectomy and interbody fusion with fixation incorporated into the C6-7 procedure by Dr. Kralick was work-related, because it was a necessary component due to the severely degenerated level next to the pathologic level of C6-7. They also concluded that Bundy's current medical treatment was reasonable and necessary for her degenerative spine condition, but was not necessitated by the work injury. They recommended no additional treatment for the work injury. The doctors' opinion was that Bundy was medically stable from the work injury as of July 1, 2005, when she was discharged from treatment for testing positive for cocaine and marijuana. Using the American Medical Association Guides to the Evaluation of Permanent

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58 Cross-Appellant's Exc. X-097-98.

59 *Id.* at X-099-101.

60 *Id.* at X-102-05.

Impairment, 5th Edition, they found she met the criteria for diagnosis-related estimate Cervical Category III. Drs. Wong and Golden also believed she could perform sedentary work.[61] They issued an Addendum to the EME report on June 12, 2007, providing a PPI rating of 15% whole person.[62]

When Dr. Najafi saw Bundy on April 20, 2007, she was complaining of constant pain located in her suboccipital region with extension to upper and lower neck. She also had complaints of mid-to-low back pain with radiation into her buttocks, thigh, and calf. The recent MRI showed facet hypertrophy of the upper cervical spine at C2-3. He planned to continue her on anti-inflammatories and referred Bundy to pain management for facet injections at C2-3 and C4-5.[63]

On May 14, 2008, Bruce M. McCormack, M.D., performed a Second Independent Medical Evaluation (SIME). His opinion was the surgery performed by Dr. Kralick on July 22, 2004, was reasonable and necessary as a result of the work injury. He believed Bundy was medically stable on August 2, 2005, when she was last evaluated by Dr. Kralick, who stated no further surgery was needed. According to Dr. McCormack, the surgeries by Dr. Najafi in 2005 and 2006, while reasonable and necessary, were not related to and did not arise out of the 2004 work injury; Dr. Najafi performed surgery for pre-existing degenerative changes evidenced in the first imaging studies and described in the first operative report. Dr. McCormack gave Bundy a 25% PPI rating for the 2004 work injury. Dr. McCormack concluded her low back condition was unrelated to the 2004 work injury. She remained medically stable from the work injury with no need for palliative care. Bundy was able to perform sedentary work with no lifting over 15 pounds, no overhead work, and no repetitive neck movements.[64]

Both Drs. Wong and Golden testified at the hearing on September 15 and 18, 2009. The board found their testimony to be consistent with their EME report.

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61 Cross-Appellant's Exc. X-106-22.

62 *Id.* at X-125-27.

63 *Id.* at X-123-24.

64 *Id.* at X-154-78.

Dr. Wong testified that the initial cervical fusion performed by Dr. Kralick was reasonable and necessary as a result of the 2004 work injury, because there was correlation between Bundy's neck and arm pain and the MRI findings. However, the fusion at C5-7 performed by Dr. Kralick did not cause or necessitate the two subsequent surgeries performed by Dr. Najafi and, therefore, were not the result of the work injury. The second and third surgeries performed by Dr. Najafi were not based on objective findings, as her examination was normal, but rather on Bundy's subjective pain complaints. Moreover, her subjective complaints were not consistent with the objective findings during the EME physical examination. Dr. Wong noted she demonstrated greater physical capacities when distracted than when being examined and measured. Dr. Wong concluded that Bundy was medically stable as of July 1, 2005, with a 15% PPI rating, and was physically capable of working as a receptionist.[65]

Dr. Golden testified that the surgery on November 21, 2005, at C3 and C4 was not related to the work injury nor necessitated by the surgery at C5-7 by Dr. Kralick. The C3-4 level was already degenerative when Dr. Kralick operated at C5-7 and the MRI upon which Dr. Najafi relied showed a solid fusion at C5-7. The lumbar condition was likewise unrelated to the work injury because there is no definitive medical literature which correlates a cervical condition with a later developing lumbar degeneration. To a reasonable degree of medical probability, Dr. Golden believed the work injury did not cause Bundy's lumbar complaints. He also agreed with the SIME 25% PPI rating. He agreed that Bundy has the physical capacities to perform work as a receptionist.[66]

Dr. Najafi testified by deposition on October 7, 2009. He related the two surgeries in 2005 and 2006 to the work injury in 2004 and held the opinion that Bundy was permanently disabled from the work injury although medically stable. He had insufficient evidence to link the lumbar condition to the work injury. While he thought he had a complete medical record for Bundy, he agreed he did not have the complete file at the time of the deposition. He also conceded he did not follow-up with Dr. Garnica,

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65 *See Bundy*, Bd. Dec. No. 10-0002 at 10.

66 *Id.* at 11.

Dr. Kralick, or Dr. Coalwell. He initially treated Bundy for headaches and neck pain associated with degeneration at C3-4, and agreed the fusion performed by Dr. Kralick at C5-7 was solid. When he examined Bundy on October 25, 2005, the musculoskeletal, strength, ambulation, and neurological examinations were all normal. She had limited range of motion in her cervical spine. He based his recommendation for surgery on Bundy's subjective complaints of neck pain. He was not presently prescribing any pain medication for her, and opined that Bundy did not need additional medical treatment, other than ongoing pain medication. However, he thought she might require additional surgery sometime in the distant future.[67]

In the D&O, the board made credibility findings with respect to Dr. Wong, Dr. Golden, Dr. McCormack, Dr. Najafi, and Bundy.[68] It found the testimony of Drs. Wong and Golden credible, based on such factors as having thoroughly examined Bundy and having reviewed her entire medical file.[69] The board also found Dr. McCormack credible because, among other things, he had reviewed Bundy's entire medical file.[70] On the other hand, the board found Dr. Najafi "less credible than the SIME physician and the EME physicians based on his more limited experience and practice and his lack of familiarity with [Bundy's] prior history and medical records."[71] The board found that Bundy was not credible for a number of reasons, including conflicts between her testimony and her son's, and her inconsistent testimony regarding marijuana use.[72] Because Bundy was not credible, the board found that Dr. Najafi's reliance on her subjective complaints, rather than on any objective findings, when treating her, rendered his opinions less credible.[73]

Bundy was paid temporary total disability (TTD) benefits from May 18, 2004,

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67 *See Bundy*, Bd. Dec. No. 10-0002 at 11.

68 *Id.* at 10-12.

69 *Id.* at 10-11.

70 *Id.* at 10.

71 *Bundy*, Bd. Dec. No. 10-0002 at 11.

72 *See Bundy*, Bd. Dec. No. 10-0002 at 12.

73 *Id.* at 11.

through April 5, 2007. She was paid PPI benefits biweekly, based on a 15% PPI rating, from April 6, 2007, through July 15, 2008. She has been paid AS 23.30.041(k) stipend benefits since July, 16, 2008.

2. Standard of review.

The board has the exclusive power to determine the credibility of a witness.[74] Its findings regarding the credibility of the testimony of a witness are binding on the commission.[75] A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions.[76]

The commission is to uphold the board's findings of fact if they are supported by substantial evidence.[77] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question

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[74] *See* AS 23.30.122, which reads:

> **Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

[75] *See* AS 23.30.128(b), which states:

> The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

[76] *See* AS 23.30.122.

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

of law"[78] and therefore independently reviewed by the commission.[79] Attorney fee awards are reviewed under the abuse of discretion standard.[80]

3. Discussion.

a. There is substantial evidence in the record supporting the board's conclusion that Bundy's second and third cervical surgeries are not work-related.

In concluding that the two cervical surgeries performed by Dr. Najafi are not compensable, the board applied the three-step presumption of compensability analysis.[81] Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable.[82] To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment.[83] If the employee establishes this preliminary link, the presumption may be overcome if the employer presents substantial evidence that the injury was not

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[78] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[79] *See* AS 23.30.128(b). Whether medical evidence is credible and the weight to be accorded that evidence are related issues. *See, e.g., Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 793 (Alaska 2007). Here, as previously noted, the board weighed the conflicting medical evidence provided by Dr. Wong, Dr. Golden, Dr. McCormack, and Dr. Najafi. In the process, it found the evidence provided by the EME doctors, Wong and Golden, and the SIME doctor, McCormack, more credible than the evidence provided by Bundy's treating physician, Najafi. Those findings are the exclusive province of the board to make, although they are still subject to appellate review under the substantial evidence standard. *See, e.g., Smith*, 172 P.3d at 793; *Brown v. Patriot Maintenance, Inc.*, 99 P.3d 544, 548 (Alaska 2004).

[80] *See, e.g., Williams v. Abood*, 53 P.3d 134, 139 (Alaska 2002).

[81] *See Bundy*, Bd. Dec. No. 10-0002 at 16-18.

[82] *See, e.g., Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996).

[83] *See, e.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999).

work-related.[84] Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility of the parties and witnesses is not examined at this point.[85] If the board finds that the employer's evidence is sufficient, then the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence.[86] This means that the employee must "induce a belief" in the minds of the board members that the facts being asserted are probably true.[87] At this point, the board weighs the evidence, determines what inferences to draw from the evidence, and considers the question of credibility.

The board found the presumption attached through the testimony of Bundy and Dr. Najafi, the latter indicating the surgeries he performed were related to the ongoing deterioration in her neck following her work injury and the fusion surgery by Dr. Kralick.[88] It determined that DHSS had rebutted the presumption, through the presentation of substantial evidence, in the form of the EME report and testimony of Drs. Wong and Golden.[89] These doctors unequivocally stated that the surgeries performed by Dr. Najafi, though necessary, were not work-related.[90] We find the board

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[84] *See Tolbert*, 973 P.2d at 611 (explaining that to rebut the presumption "an employer must present substantial evidence that either '(1) provides an alternative explanation which, if accepted, would *exclude* work-related factors as a substantial cause of the disability; or (2) directly eliminates *any reasonable possibility* that employment was a factor in causing the disability.'") (Italics in original, footnote omitted); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978).

[85] *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

[86] *Miller*, 577 P.2d at 1046.

[87] *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

[88] *See Bundy*, Bd. Dec. No. 10-0002 at 17.

[89] *See id*.

[90] *See id.* It is well-established that presentation of a qualified expert's opinion that the claimant's work was probably not a substantial cause of an injury or disability rebuts the presumption. *See, e.g., Cowen v. Wal-Mart*, 93 P.3d 420, 424-25 (Alaska 2004).

did not err in its conclusions that the presumption attached and was rebutted by substantial evidence.

The burden then fell on Bundy to prove, by a preponderance of the evidence, that Dr. Najafi's surgeries were work-related and compensable. There is substantial evidence in the record as a whole supporting the board's conclusion that Bundy failed to meet this burden. The board found the preponderance of the evidence showed that those surgeries were *not* work-related.[91] This is another way of saying that Bundy failed to meet her burden because logically, only one side of a legal dispute, in this instance DHSS, can satisfy the preponderance of the evidence standard as to a particular issue. The board pointed out that in October 2005, prior to performing any surgeries, Dr. Najafi found Bundy's neurological, musculoskeletal, ambulatory, and strength testing were all normal, and an MRI study showed the fusion performed by Dr. Kralick was solid. He based his recommendation for further surgery on Bundy's subjective complaints, which were implicitly suspect owing to Bundy's lack of credibility. The opinions of the EME physicians, Drs. Wong and Golden, were consistent in finding that Bundy's employment was not a factor in the need for the surgeries by Dr. Najafi, but her pre-existing degenerative changes were. The SIME physician, Dr. McCormack, agreed.[92]

Bundy argues that, even though Dr. Najafi's surgeries may not have been work-related, they are compensable because he performed them in good faith.[93] Alaska law

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91 *See Bundy*, Bd. Dec. No. 10-0002 at 17.

92 *See id*.

93 *See* Appellant's Br. at 17-20.

does not support this argument. To be compensable, "[t]he medical treatment must be reasonable and necessitated by the work-related injury."[94] We infer from this pronouncement that medical treatment based on a good faith, but mistaken, belief that the injury being treated is work-related, is not compensable. Bundy also argues that by paying for the surgeries, DHSS impliedly waived contesting their compensability.[95] However, the failure to timely pay for medical treatment may subject an employer to a penalty.[96] Where an employer pays for medical treatment rather than run the risk of being penalized for late payment for that treatment, we are reluctant to find that the employer has waived contesting medical expenses.[97]

b. The board made insufficient findings on the issue whether Bundy is PTD.

Bundy's position at hearing was that she was PTD. The board found the presumption that she was PTD attached through the testimony of Dr. Najafi.[98] The board also found that DHSS had presented substantial evidence rebutting the presumption, which consisted primarily of the opinions of Drs. Wong, Golden, and McCormack that she could work in a sedentary job.[99] Ultimately, the board concluded

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[94] *Philip Weidner & Assoc., Inc. v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999)(footnote omitted). Bundy cites no Alaska law that supports her proposition that the test for the compensability of medical treatment is the treating physician's subjective good faith in rendering it, rather than its work-relatedness. She does cite *Ribar v. H&S Earthmovers*, 618 P.2d 582, 584 (Alaska 1980), which is inapposite. In *Ribar*, diagnosis of the employee's Hodgkin's disease was delayed, with negative consequences, because his work injury masked the symptoms of Hodgkin's disease.

[95] *See* Appellant's Br. at 17-20.

[96] *See Williams, supra*, 53 P.3d at 145 and AS 23.30.155(e).

[97] A waiver typically involves an intentional relinquishment of a known right. *See, e.g., Sherrod v. Municipality of Anchorage, Water/Sewer Refuse Utility*, 803 P.2d 874, 875-76 (Alaska 1990).

[98] *See Bundy*, Bd. Dec. No. 10-0002 at 20.

[99] *See id*. To rebut the presumption of compensability on a PTD claim, "an employer must show that there is regular and continuously available work in the area suited to the employee's capabilities, i.e., that [he or she] is not an odd lot worker." *Leigh v. Seekins Ford*, 136 P.3d 214, 216 (Alaska 2006) quoting *Carlson v. Doyon Universal-Ogden Services*, 995 P.2d 224, 229 (Alaska 2000).

that Bundy had not met her burden of proving she was PTD by a preponderance of the evidence.[100] However, underpinning her PTD claim is her argument that she is unable to work because of constant pain and the effects of pain medication.[101] While the D&O makes reference to Bundy's pain complaints and use of narcotic medications, it is lacking in specific findings as to their effect on her employability. Under Alaska law, it is clear that the board is required to make such findings on a claim such as Bundy's.

In *Leigh, supra*, the underlying facts relative to the issue whether the employee, Leigh, was PTD, are similar to the facts here that bear on Bundy's PTD claim. Leigh had four back surgeries.[102] He contended that he was PTD because he was in constant pain and had to use substantial amounts of pain medication, which made it impossible for him to hold down a job.[103] The board found the presumption attached and was rebutted by substantial evidence "that [Leigh] has the physical and mental abilities to perform 'regularly and continuously available' work that is available in the area."[104] In remanding to the board, the supreme court held that the board had not made sufficient findings to support its conclusion that Leigh was not totally and permanently disabled, even though he was suffering from severe, debilitating pain. "When the claimant introduces evidence that chronic pain prevents him or her from working, the board must therefore make findings that address whether that pain, either by itself or in combination with other circumstances, including the effect of pain medication, renders the claimant permanently and totally disabled."[105]

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[100] *See Bundy,* Bd. Dec. No. 10-0002 at 20-21. "If the employer presents substantial evidence that the employee is not PTD, the 'presumption disappears and the employee must prove [his or her] PTD claim by a preponderance of the evidence.'" *Leigh*, 136 P.3d at 216 quoting *Carlson*, 995 P.2d at 227.

[101] *See* Appellant's Br. at 21. In support of this argument, Bundy cites Dr. Najafi's deposition testimony that she is permanently disabled because she requires chronic pain management.

[102] *See Leigh*, 136 P.3d at 215.

[103] *Id.* at 215, 217.

[104] *Leigh*, 136 P.3d at 215 (quotation marks in original).

[105] *Leigh*, 136 P.3d at 218.

Here, the board's findings in these respects shed inadequate light on its thought process in concluding that Bundy was not PTD.[106] The board accorded little weight to the opinion of Dr. Najafi, even though he specifically testified in his deposition that he believed Bundy's need for chronic pain management treatment would make her permanently disabled.[107] On the other hand, the board accorded more weight to the opinions of the EME and SIME doctors. However, in their EME report and testimony, Drs. Wong and Golden did not comment on how or whether Bundy's pain or pain medication usage would impact her employability. Neither did Dr. McCormack in his SIME report.[108]

In the circumstances, the commission is unable to effectively review the board's conclusion that Bundy has failed to prove by a preponderance of evidence that she was PTD, particularly as any permanent disability might relate to her pain and pain medication usage. As in *Leigh*, there are insufficient board findings that address whether her alleged pain, either by itself or in combination with other circumstances, including the alleged effect of pain medication, renders Bundy permanently and totally disabled. We remand to the board to make findings and rule in this respect.

c. There is no legal authority for giving DHSS a credit for overpayment of reemployment benefits; its remedy is reimbursement under AS 23.30.155(j).

Having been found eligible for reemployment benefits, Bundy was in the reemployment process when EME doctors Wong and Golden concluded she was medically stable and gave her a 15% PPI rating in their EME report dated April 13, 2007. By statute, once an employee who is in the reemployment process is found medically stable, TTD benefits are no longer owed; instead, PPI benefits are to be paid by the employer at

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106 *See Bundy*, Bd. Dec. No. 10-0002 at 20-21.

107 *See* Appellant's Br. at 21 quoting Najafi deposition at 12-13.

108 Cross-Appellant's Exc. X-106-22, X-130-31, X-154-78.

the TTD rate.[109] Accordingly, on April 6, 2007, DHSS began paying Bundy PPI benefits at her weekly TTD rate ($397.74), based on the 15% PPI rating. The statute also provides that if PPI benefits are exhausted before completion or termination of the reemployment process, the employer owes AS 23.30.041(k) stipend benefits until the process is completed or terminated.[110] Bundy's PPI benefits, based on the 15% rating, were

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109 *See* AS 23.30.041(k), which reads:

> 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 process, 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 process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process 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 or permanent partial impairment 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 or permanent partial impairment 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.

110 *See id*.

exhausted on July 15, 2008. The following day, July 16, 2008, DHSS started paying her subsection .041(k) stipend benefits at the weekly rate of $348.03.[111] In its D&O, the board ordered the Department to pay Bundy PPI benefits based on the 25% rating by the SIME physician, Dr. McCormack, less any PPI already paid.[112] Accordingly, DHSS paid Bundy additional PPI benefits in a lump sum of $17,700 on January 14, 2010.[113] The board also ordered DHSS to pay Bundy either PPI benefits or .041(k) stipend benefits until completion of her reemployment plan.[114] Bundy's PPI benefits are exhausted. Apparently, she has not completed her reemployment plan and DHSS continues to pay Bundy .041(k) stipend benefits.

The Department argued before the board, and now argues on cross-appeal, that the board erred in awarding additional PPI benefits without giving DHSS credit for .041(k) stipend benefits it previously paid.[115] While candidly acknowledging that there is no case law in support of this argument, DHSS nevertheless maintains that a rule allowing a "credit" would be the most persuasive in light of precedent, reason, and policy.[116] Furthermore, it would comport with the legislature's exhortation to interpret the Alaska Workers' Compensation Act (Act) "so as to insure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions" of the Act.[117]

The essence of the Department's argument is as follows. In hindsight, the parties now know that Bundy's PPI rating is 25%, not 15%, which means that her PPI benefits were not exhausted on July 15, 2008, when DHSS started paying her .041(k) stipend benefits. Based on current information, DHSS should have been paying Bundy PPI

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111 *See* Cross-Appellant's Br. at 35.

112 *See Bundy*, Bd. Dec. No. 10-0002 at 22.

113 *See* Cross-Appellant's Br. at 35.

114 *See Bundy*, Bd. Dec. No. 10-0002 at 22.

115 *See* Cross-Appellant's Br. at 32-36.

116 *See id.* at 35-36.

117 *Id.* at 36 quoting AS 23.30.001(1).

benefits, instead of .041(k) stipend benefits, from July 16, 2008, onward, until an additional $17,700 in PPI benefits were paid out, on or about June 1, 2009. It was not until then that DHSS should have commenced paying Bundy .041(k) stipend benefits. Thus, the $17,700 in additional PPI benefits DHSS paid Bundy in a lump sum on January 14, 2010, was duplicative of the .041(k) stipend benefits Bundy was paid from mid-July 2008 to approximately June 1, 2009. According to DHSS, this duplication (overpayment) of benefits represents a windfall to Bundy and in fairness should be rectified with a credit for the .041(k) stipend benefits previously paid against the additional PPI benefits the board awarded.

DHSS offers a number of calculations purportedly designed to substantiate and quantify overpayments of both PPI and .041(k) stipend benefits.[118] However, DHSS has paid what it owed Bundy in PPI benefits, $44,250, based on a 25% whole person rating. Initially, it paid them bi-weekly, between April 6, 2007, and July 15, 2008, and later, in a lump sum on January 14, 2010. Thus, there is no basis for DHSS to argue that it overpaid PPI benefits. Any overpayment it has arguably made would be for .041(k) stipend benefits, because DHSS was paying .041(k) stipend benefits when, in hindsight, it should have been paying Bundy PPI benefits, based on a 25% rating, until such benefits were exhausted.

Based on the EME doctors' medical stability finding and 15% PPI rating provided in April 2007, pursuant to AS 23.30.041(k), DHSS could and did begin paying Bundy PPI benefits because she was in the reemployment process. Even though Dr. McCormack's 25% rating was known to the parties when he issued his SIME report dated May 14, 2008, at that time, DHSS was not required to pay benefits in accordance with his rating. That is, it could consider Bundy's PPI benefits based on the 15% rating exhausted as of July 15, 2008, and commence paying her .041(k) stipend benefits until completion or termination of the reemployment process. It was not until the board awarded Bundy PPI benefits based on a 25% rating in January 2010 that it was known that the benefits Bundy should

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[118] *See* Cross-Appellant's Br. at 34-35.

have been paid from July 16, 2008, to approximately June 1, 2009, were PPI benefits, not .041(k) stipend benefits.

Assuming an overpayment occurred once DHSS made the lump sum PPI payment of $17,700 without receiving a credit for the .041(k) stipend benefits it previously paid, what is the Department's remedy? It is not a credit, as DHSS argues; it is an incremental reimbursement pursuant to AS 23.30.155(j).[119] That statute has been construed as providing the exclusive remedy for an employer to recover overpayments of compensation by withholding up to 20% out of each unpaid installment of compensation due.[120] Elsewhere in its briefing, DHSS appears to acknowledge as much by requesting the commission to remand this matter to the board so that it can calculate the amount the Department should be reimbursed under AS 23.30.155(j).[121]

Having no case law to guide us, we conclude that AS 23.30.155(j) allows for reimbursement of employers for overpayments of .041(k) stipend benefits because the statute does not discriminate between different types of compensation for the purposes of reimbursement. Where overpayment of compensation has occurred, presumably including overpayment of .041(k) stipend benefits, an employer is entitled to reimbursement consistent with the provisions of AS 23.30.155(j). Here, DHSS may withhold 20% out of each unpaid installment of .041(k) stipend benefits until DHSS is reimbursed or Bundy is no longer owed .041(k) stipend benefits, having completed or

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[119] AS 23.30.155(j) states:

> If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

[120] *See Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064 (Alaska 1991). If, by using a term like credit, offset, or some other term to describe its remedy, DHSS is suggesting it can recover overpayments in a lump sum, the suggestion is at odds with AS 23.30.155(j) and the holding in *Croft*.

[121] *See* Cross-Appellant's Br. at 36.

terminated the reemployment process. We remand to the board to make the necessary findings and calculations.

d. The commission affirms the board's attorney fees award.

We review attorney fee awards by the board under the abuse of discretion standard. The board awarded Bundy 80% of her attorney fees plus 80% of her attorney fees documented in a supplemental affidavit.[122] DHSS ultimately paid Bundy a total of $23,919.25 in attorney fees based on the board's award.[123]

DHSS contends that attorney fees under AS 23.30.145(b)[124] are to be awarded in those cases where the claimant successfully prosecuted claims which were resisted by the employer. According to DHSS, Bundy was unsuccessful on her PTD claim and DHSS did not resist certain aspects of her claim, including the 25% PPI rating and medical treatment for injury to her cervical spine at C5-7.[125] Bundy counters that the Department controverted or denied future medical benefits related to her C5-7 injury.[126]

We find that Bundy successfully prosecuted her claim for medical benefits related to her C5-7 injury and a 25% PPI rating. However, DHSS resisted only the medical benefits. Moreover, although Bundy was denied PTD benefits at the board level, our decision here does not foreclose the possibility that she may ultimately be successful on

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122 *See Bundy*, Bd. Dec. No. 10-0002 at 22 and Cross-Appellant's Br. at 36.

123 *See* Cross-Appellant's Br. at 36.

124 AS 23.30.145(b) states:

> 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.

125 *See* Cross-Appellant's Br. at 37-39.

126 *See* Appellant's Responsive Br. at 2-5.

her PTD claim. Under the circumstances, it would be premature to conclude that Bundy unsuccessfully prosecuted her PTD claim. Finally, Bundy's counsel has argued against DHSS receiving a credit for PPI it had paid. These services benefited Bundy.

We are not to substitute our judgment for the board's with respect to attorney fee awards. The board is in a far better position than the commission to evaluate the nature, length, and complexity of the services performed, whether a party successfully prosecuted a claim, and any other consideration bearing on the attorney fee issue. We find that the board did not abuse its discretion in awarding Bundy attorney fees and affirm the award.

4. Conclusion and order.

In accordance with the foregoing opinion, the commission AFFIRMS the board's Dec. No. 10-0002 dated January 7, 2010, in part, and VACATES that decision and REMANDS this matter to the board, in part. The decision is vacated and the matter remanded, in part, for findings and rulings in accordance with this opinion in two respects: 1) whether Bundy is PTD; and 2) whether DHSS is entitled to any reimbursement under AS 23.30.155(j) for overpayment of AS 23.30.041(k) stipend benefits, and if so, in what amount.

Date: *20 December 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirmed the board's decision in part and vacated and remanded the board's decision in part. 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 it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) 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. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

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

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 for reconsideration must be filed with the commission within 30 days after this decision was distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the Final Decision No. 142 issued in the matter of *Bundy v. State of Alaska, Department of Health & Social Services,* AWCAC Appeal No. 10-006, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 20, 2010.

Date: *December 28, 2010*

Signed

B. Ward, Appeals Commission Clerk