

**Case:** *Dolores J. Bundy vs. State of Alaska, Department of Health and Social Services*, Alaska Workers' Comp. App. Comm'n Dec. No. 142 (December 20, 2010)

**Facts:** Dolores Bundy (Bundy), a certified nursing aide, injured her left shoulder, left arm and neck trying to prevent a resident from falling out of a wheelchair in May 2004. Bundy underwent three cervical surgeries but continued to complain of pain. The board heard her claims and decided that (1) Bundy's second and third cervical surgeries were not work-related; (2) she was not permanently and totally disabled (PTD); and (3) she was entitled to permanent partial impairment (PPI) benefits commensurate with a 25% rating; and awarded her attorney fees. Bundy appealed the decision on the compensability of the second and third surgeries and denying PTD. Her employer, State of Alaska, Department of Health and Social Services (DHSS), appealed the attorney fee award as well as the board's denial of a "credit" for prior payment of reemployment benefits against the amount owed and paid Bundy in additional PPI benefits.

**Applicable law:** AS 23.30.120(a) presumption of compensability and related case law laying out the three-step analysis.

"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." *Leigh v. Seekins Ford*, 136 P.3d 214, 218 (Alaska 2006) (claimant had had four back surgeries).

AS 23.30.041(k). Once an employee who is in the reemployment process is found medically stable, temporary total disability (TTD) benefits are no longer owed; instead, the employer pays PPI benefits at the TTD rate. 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.

AS 23.30.155(j) 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. *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064 (Alaska 1991).

AS 23.30.145(b) provides for attorney fees when "an employer . . . 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[.]"

**Issues:** Did the board have substantial evidence to conclude that the second and third cervical surgeries were not related to Bundy's work injury? Did the board make sufficient findings in concluding that Bundy was not PTD? Was DHSS entitled to a credit for the overpayment of stipend benefit? Did the board abuse its discretion in awarding attorney fees to Bundy?

**Holding/analysis:** The board had substantial evidence to conclude the second and third cervical surgeries were not work-related. In October 2005, prior to performing any surgeries, Dr. Najafi found Bundy's neurological, musculoskeletal, ambulatory, and

strength testing were all normal, and a magnetic resonance imaging study showed the fusion performed by Dr. Kralick (the first surgery that was work-related) 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 employer's medical evaluation (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 second independent medical evaluation (SIME) physician, Dr. McCormack, agreed. Dec. No. 142 at 17. The commission rejected Bundy's argument that Dr. Najafi's surgeries are compensable since he performed them in good faith because Alaska law requires medical treatment to be related to a work injury. The commission also rejected Bundy's argument that by paying for the surgeries, DHSS impliedly waived contesting their compensability. Because the failure to timely pay for medical treatment may subject an employer to a penalty, the commission would not conclude that prompt payment constitutes a waiver of the compensability of medical treatment.

Bundy's PTD claim was that she was unable to work because of constant pain and the effects of pain medication. The board decision lacked specific findings as to the effect of Bundy's pain complaints and use of narcotic medications on her employability. The board accorded more weight to the opinions of the EME and SIME doctors, but none of them commented on whether her pain or medication usage would affect her employability. The commission remanded to the board to make adequate findings.

DHSS paid PPI based on a 15% rating and then began payment of stipend benefits when the PPI was exhausted. But the board concluded that Bundy's PPI rating was 25%, not 15%, which meant her PPI benefits were not exhausted when the parties originally believed that they were. DHSS sought a credit for the overpayment of stipend benefits against the additional PPI benefits the board awarded. The commission concluded that because AS 23.30.155(j) was the exclusive remedy for overpayment of benefits, DHSS could withhold 20% out of each unpaid installment of AS 23.30.041(k) stipend benefits until DHSS was reimbursed or Bundy was no longer owed AS 23.30.041(k) stipend benefits, having completed or terminated the reemployment process. The commission remanded for the necessary findings and calculations. But DHSS was not entitled a "credit," i.e. to reduce the amount of additional PPI by the overpaid stipend amount.

The commission affirmed the attorney fee award:

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 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. Dec. No. 142 at 25-26.