Alaska Workers' Compensation Appeals Commission

Mayflower Contract Services, Inc. and Travelers Insurance Co., Appellants, vs. Marcie Redgrave, Appellee.	Final Decision Decision No. 141 December 14, 2010 AWCAC Appeal No. 09-028 AWCB Decision No. 09-0188 AWCB Case No. 199401080

Final decision on appeal from Alaska Workers' Compensation Board Decision and Order No. 09-0188, issued at Anchorage on December 7, 2009, by southcentral panel members William J. Soule, Chair, Linda Hutchings, Member for Industry, Patricia Vollendorf, Member for Labor.

Appearances: Krista M. Schwarting, Griffin & Smith, for appellants Mayflower Contract Services, Inc. and Travelers Insurance Company. Marcie Redgrave, self-represented appellee.

Proceedings: Appeal filed December 11, 2009; Motions for Stay filed December 11, 2009; Motions for Stay heard on January 5, 2009; Order on Motions for Stay issued on February 25, 2010; Clerk's Notice of Correction regarding Motions for Stay issued on March 5, 2010; briefing completed May 28, 2010; oral argument presented July 15, 2010.

Appeals Commissioners: David Richards, Philip Ulmer, Andrew M. Hemenway, Chair *Pro Tempore*.

By: Andrew M. Hemenway, Chair *Pro Tempore*.

1. Introduction.

Marcie Redgrave incurred an on-the-job injury in 1994. She was provided temporary total disability (TTD) benefits for several months and continued medical care for several years, but after 2001 she did not obtain further treatment for that injury. On June 26, 2007, Ms. Redgrave requested authorization for an examination by a neurologist. Further compensation was controverted on August 7, 2007, and, following

an employer's medical examination (EME), on December 11, 2008. Following a hearing on June 25, 2009, the board on December 7, 2009, issued a decision denying TTD benefits after August 12, 1994, but finding that Ms. Redgrave was entitled to continued medical treatment. The board ruled that the August 7, 2007, controversion was in bad faith, frivolous and unfair, and it imposed a penalty and ordered a copy of its decision sent to the division of insurance.

Mayflower Contract Services, Inc. and Traveler's Insurance Company (Mayflower) appeal. Mayflower asserts that the board erred in determining that Ms. Redgrave needs continued medical care for her on-the-job injury. Mayflower also asserts that the board erred in determining that the controversion was in bad faith, frivolous and unfair. We conclude that there is substantial evidence to support the board's determination that Ms. Redgrave is in need of continued treatment for the injury she incurred in 1994, and we therefore affirm the board's factual determination on that issue. We also conclude that the board erred in imposing a penalty and in its determination that the controversion was in bad faith, frivolous and unfair, and we therefore reverse the penalty and vacate the determination.

2. Factual and Procedural Background.[1]

Marcie Redgrave was employed as a bus driver by Mayflower Contract Services, Inc., when, on January 10, 1994, she slipped on the ice and struck her head and neck against a bus. She experienced head and neck pain, headaches, blurred vision, and numbness in the hands, which she attributed to the incident. She filed a timely claim for workers' compensation benefits, and her employer paid TTD benefits through August 12, 1994.

Ms. Redgrave returned to work in different employment in May 1995. From 1994-2001, Ms. Redgrave was periodically examined or treated by various doctors and other medical practitioners in connection with her symptoms, which several of them attributed to the 1994 injury. Mayflower paid medical benefits for those visits, which

[1] We summarize the material facts as they are stated in the board's decision dated December 7, 2009. We make no independent findings of fact.

included multiple examinations by neurologists and mental health professionals. She was consistently found to be in need of psychological counseling in connection with her symptoms resulting from the 1994 injury, but she did not obtain such treatment. After 2001, Ms. Redgrave's symptoms continued, but she dealt with them without obtaining medical treatment.

Eventually, on June 26, 2007, Ms. Redgrave submitted a handwritten request for authorization to see a neurologist. The adjuster denied the request, and on August 7, 2007, Mayflower controverted continued medical treatment on the grounds that continued treatment was barred due to the lack of treatment for more than two years, and that there was no recommendation for treatment. On December 13, 2007, Ms. Redgrave attended an EME. On December 11, 2008, based in part on the report from the prior year's examination, Mayflower controverted payment of benefits for medical treatment, TTD after April 10, 1994, vocational rehabilitation, and a rating for permanent partial impairment (PPI).

Ms. Redgrave's claim was heard by the board on June 25, 2009. The board's decision was issued on December 7, 2009. The board determined that the presumption of compensability attached to Ms. Redgrave's claim for TTD payments from August 13, 1994, until she returned to work in 1995, that Mayflower had presented substantial evidence to rebut the presumption, and that the preponderance of the evidence did not support an award of TTD compensation after August 12, 1994. The board determined that the presumption of compensability attached to the claim for continued medical treatment and that Mayflower had presented substantial evidence sufficient to rebut the presumption. The board determined that the preponderance of the evidence established a need for continuing medical treatment arising out of the on-the-job injury and that, based on Dr. Pervier's 1994 "prescription for neuropsychological therapy," she was "entitled to pre-authorization of that treatment."[2] The board determined that if recommended by her physician, "cranial therapy" and treatment from a physiatrist was

[2] *Redgrave v. Mayflower Contract Services, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 09-0188, 38 (December 7, 2009) (hereinafter, *Redgrave*).

also pre-authorized.[3] The board determined that Ms. Redgrave was entitled to payment for a rating for PPI, if referred for a rating by her physician.[4] The board directed Ms. Redgrave to file copies of any prior medical bills that she believed were work-related with the board, and retained jurisdiction to consider payment of those bills.[5] Finally, the board determined that the August 7, 2007, controversion was in bad faith, unfair and frivolous, because it was based on an incorrect interpretation of AS 23.30.095(a),[6] and therefore imposed a penalty on the value of the controverted evaluation and directed that a copy of its decision be provided to the division of insurance.[7]

3. Issues Raised.

Mayflower's brief argues that (A) the board erred in determining that Ms. Redgrave is in need of continued medical treatment for her 1994 injury because (1) she did not provide a current medical opinion connecting a need for treatment to the on-the-job injury[8] and the claim is time-barred by (2) AS 23.30.095(a)[9] or (3) the doctrine of laches.[10]

Mayflower's brief also argues that (B) the board erred in determining that the August 7, 2007, controversion was in bad faith, unfair and frivolous, because a

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3 *Redgrave,* Bd. Dec. No. 09-0188 at 39.

4 *Id.* at 41.

5 *Id.* at 39-40.

6 *Id.* at 44 ("Accordingly, because Employer's legal interpretation of §095(a) was incorrect, the controversion is invalid, made in bad faith.").

7 *Redgrave,* Bd. Dec. No. 09-0188 at 44-45.

8 Appellants' Br. at 21-23. Mayflower's argument to the board was that there was no recommendation for treatment at all. *See* June 25, 2009, Hr'g Tr. 50:11-13, 53:20-22, 54:6-9. However, on appeal, Mayflower's argument is that there are no "current recommendations for treatment linked to the injury" that is, recommendations issued by one of "[t]he physicians from whom [Ms. Redgrave] has sought treatment since returning to Alaska [sometime after 2001]." Appellant's Br. at 22, 21.

9 Appellants' Br. at 24-25.

10 *Id.*

controversion based on AS 23.30.095(a) had "*some* legal basis" and was "not designed to mislead or deceive."[11]

4. Standard of Review.

We must affirm the board's factual findings if they are supported by substantial evidence in light of the record as a whole.[12] Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support a conclusion.[13] Whether AS 23.30.095(a) bars claims for medical treatment occurring more than two years after the date of injury or the date of last treatment is a legal question as to which we exercise our independent judgment.[14] Whether the board has applied the correct legal test in determining that a controversion is in bad faith, unfair and frivolous is also a legal question, upon which we exercise our independent judgment.

5. Discussion.

a. *The board did not err in finding a need for continued treatment.*

i. A current medical opinion was not required.

The centerpiece of Mayflower's argument that the board erred in its determination that Ms. Redgrave is presently in need of treatment for her 1994 injury is this:

> The physicians from whom [Ms. Redgrave] has sought treatment since returning to Alaska [after 2001] have not specifically related the need for that treatment to the 1994 work injury. While the physicians have recorded the employee's assertions that her symptoms have been present since the 1994 work injury, there is no evidence that any of them have

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[11] Appellants' Br. at 27-28.

[12] AS 23.20.128(b) ("The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."). *See, e.g., Martin v. Nabors Alaska Drilling, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 139, 14 (October 5, 2010) (hereinafter, *Martin*).

[13] *See Martin,* App. Comm'n Dec. No. 139 at 14 n.103, *citing Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[14] AS 23.30.128(b) ("In reviewing questions of law and procedure, the commission shall exercise its independent judgment."). *See, e.g., Martin*, App. Comm'n Dec. No. 139 at 14.

> reviewed all of the medical records and made specific findings as to the causation of any need for further treatment. Absent that sort of specific evidence, [Ms. Redgrave] cannot prove her claim for further medical benefits by a preponderance of the evidence.[15]

As stated in this passage, it appears to be Mayflower's position that for claims filed more than two years after the date of injury, or perhaps only for claims filed more than two years after the last date of treatment, a current medical opinion must be provided or the board must find that the employee has failed to prove the claim by a preponderance of the evidence. In support of this proposition, Mayflower references *Hibdon.*[16]

In *Hibdon*, the claimant incurred a back injury and received a recommendation for back surgery within the initial two-year period. The claim was heard by the board beyond the two-year period, by which time the claimant's doctor was of the view that "he would want to run additional diagnostic tests before renewing his recommendation for surgery."[17] The court observed that the superior court had "correctly avoid[ed] this potential dilemma by pre-approving the recommended surgery contingent upon a new examination indicating the procedure is still medically warranted."[18] The case is not precedent for the proposition that a current medical opinion is necessary for all claims for continued treatment beyond the initial two-year period. Rather, it is precedent for the proposition that if the claimant's treating physician states that his own prior opinion for treatment needs to be updated, then it may be appropriate to pre-approve treatment contingent on a renewed opinion. The board's decision is not inconsistent with *Hibdon*: Dr. Pervier has not limited his own prior opinion.

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[15] Appellants' Br. at 21 (citations omitted; emphasis added).

[16] Appellants' Br. at 21, *citing Phillip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727 (Alaska 1999) (hereinafter, *Hibdon*). Mayflower also references AS 23.30.095(a). Appellants' Brief at 21-22. However, that statute says nothing at all about the need for a current medical opinion.

[17] *Hibdon*, 989 P.2d at 732.

[18] *Id.*

The Alaska Supreme Court has consistently ruled, in the context of claims for medical benefits filed within two years of the injury, that a claim may be upheld in the absence of a medical opinion connecting the employee's condition with the on-the-job injury, and that while a medical opinion may be needed to attach the presumption of compensability in medically complex cases, there is no evidentiary requirement for such evidence in every case.[19] We have ruled that in some cases it will be necessary to provide a medical opinion in order to establish the presumption of compensability,[20] but we have never suggested that there is a requirement for a medical opinion in every case.[21]

Moreover, Mayflower's argument on appeal is inconsistent with its assertion that a current medical opinion was necessary. Mayflower concedes that the presumption attached to Ms. Redgrave's claim for continued medical treatment,[22] but it argues that the medical opinion she presented is stale.[23] Mayflower's concession that the presumption attached means that either the case is not medically complex (such that no medical opinion was required) or that a sufficient medical opinion was provided; the argument that the medical opinion is stale goes to its weight rather than to its existence.

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[19] *See generally, Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 789-790 (Alaska 2007); *Veco, Inc. v. Wolfer*, 693 P.2d 865, 870-871 (Alaska 1985); *Commercial Union Companies v. Smallwood*, 550 P.2d 1261, 1267 (Alaska 1976); *Employers Commercial Union Co. v. Libor*, 536 P.2d 129, 131-132 (Alaska 1975); *Beauchamp v. Emloyers Liability Assur. Corp.*, 477 P.2d 993, 996 n.8 (Alaska 1970).

[20] *See, e.g., Smith v. Anchorage School District*, Alaska Workers' Comp. App. Comm'n Dec. No. 050, 14 (July 25, 2007) (hereinafter, *Smith*).

[21] *See, e.g., Tire Distribution Systems, Inc. v. Chesser*, Alaska Workers' Comp. App. Comm'n Dec. No. 090, 10-11 (October 10, 2008).

[22] Appellants' Br. at 20 ("Appellants do not dispute that Appellee attached the presumption of compensability to her claim for ongoing medical treatment; however, they assert that the Board erred in finding that once the presumption dropped out Appellee proved her claim by a preponderance of the evidence.").

[23] Appellants' Br. at 22 ("Short of relying on stale recommendations from the two years post-injury, the Board was unable to point to any current recommendations for treatment linked to the work injury.").

We note that Mayflower's brief does not argue that the board's factual finding that Ms. Redgrave is in need of continued medical treatment lacks substantial evidence, except insofar as it lacks support in a current medical opinion.[24] In particular, Mayflower does not suggest that there is no substantial evidence from the 1994-2001 time period that connects Ms. Redgrave's condition during that time to the on-the-job injury. The primary factual issue before the board was whether Ms. Redgrave was, in 2007, still in need of treatment as a result of that injury. The central factual finding made by the board is that she was. The board stated:

> [Ms. Redgrave] proved any need for medical care still arises out of and in the course of her employment with [Mayflower] by a preponderance of the evidence. In other words, her 1994 work-related injury remains a substantial factor in her symptoms and need for medical care or treatment to address those symptoms. . . . [Ms. Redgrave] testified credibly and convincingly she continued to suffer most of the symptoms which arose shortly after her injury and continued for the last 15 years. Her testimony is corroborated by the available medical records, with the sole exception of the most recent EME from Drs. Bell and Glass.[25]

The evidence cited by the board in support of this finding is to the effect that Ms. Redgrave established, by her own testimony, that she continues to experience substantially the same symptoms (headaches and vision problems) that she did during the 1994-2001 period, which a variety of medical practitioners had previously ascribed to her 1994 on-the-job injury, and for which Mayflower had provided medical benefits over a lengthy period of time extending well beyond two years from the date of injury. This is not a case in which the current symptoms are unlike those which occurred at the time of the injury,[26] or in which there is no support in the record for finding that the symptoms continued to need treatment that had previously been recommended

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[24] The caption to Mayflower's first argument asserts that the board's determination regarding future medical benefits is not supported by substantial evidence. Appellants' Br. at 20. However, the text of the argument addresses only the absence of a current medical opinion.

[25] *Redgrave,* Bd. Dec. No. 09-0188 at 35.

[26] *Compare Smith,* App. Comm'n Dec. No. 050 (affirming denial of 2004 claim for medical treatment for avascular necrosis that became symptomatic in 2001 and was allegedly incurred as a result of 1990 kick to the groin).

notwithstanding the lengthy passage of time.[27] To the contrary, in finding that the injury continued to need treatment, more than thirteen years after it was incurred, the board stated that it was particularly persuaded by the report of Dr. Pervier. Mayflower argues that Dr. Pervier's 1994 recommendation for psychological counseling is stale.[28] However, the board found that Ms. Redgrave received multiple other recommendations for psychological counseling relating to her symptoms arising out of the 1994 injury, most recently in 1998.[29] Moreover, Dr. Pervier's prediction was that in the absence of such treatment Ms. Redgrave "would continue her symptomatology for a much prolonged time period than would normally be expected."[30] Mayflower has not shown that the board's finding that Ms. Redgrave is in need of continued medical treatment in the form of "neuropsychological therapy"[31] for her 1994 injury lacks substantial evidence in light of the record as a whole, notwithstanding the lack of a current medical opinion.

ii. AS 23.30.095(a) does not bar Ms. Redgrave's claim.

Mayflower argues that AS 23.30.095(a) is "essentially" a statute of limitations.[32] It bases that argument on *dicta* in a number of prior board cases in which AS 23.30.095

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[27] *Compare, Floyd v. Urethane Specialties, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 05-0344 (December 22, 2005).

[28] *See* Appellants' Br. at 22 n.32.

[29] *See Redgrave,* Bd. Dec. No. 09-0188 at 6, ¶ 13 (April 6, 1994, Dr. Craig); *Id.* at 7, ¶ 16 (May 23, 1994, Dr. Mancini); *Id.* at 14, ¶¶ 43, 45 (February 6, 1998, and September 11, 1998, Dr. Stanek). In addition to identifying these specific recommendations, the board noted that other practitioners opined that Ms. Redgrave's condition had a psychological component. *See Redgrave,* Bd. Dec. No. 09-0188 at 10, ¶ 26 (September 7, 1994, M.M.P.I-2 test report); *Id.* at 11, ¶ 29 (November 17, 1994, Dr. Johnson); *Id.* at 15, ¶ 48 (February 13, 2001, Dr. Foote).

[30] *Redgrave,* Bd. Dec. No. 09-0188 at 9.

[31] *Id.* at 38.

[32] Appellants' Br. at 25.

is characterized as a statute of limitations.[33] None of the cited cases is persuasive. In *Floyd,* which Mayflower primarily relies on, the board's decision states: "the employer controverted all benefits based upon the statutes of limitations in subsection .105(a) and .095(a)," and the board characterized the issue before it as whether "the employee's claims . . . is [*sic*] barred under AS 23.30.095(a)."[34] In addition, footnote 2 of the board's decision observes that the board found that the employee's claim was "statutorily barred."[35] However, the board explained its ruling thus: "Based on the complete lack of any medical (or lay) evidence that the employee's minor injury in 1980 requires any treatment beyond the statutory two-year presumption[,] the employee's claims for medical treatment beyond two years of the 1980 injury are denied and dismissed."[36] Quite plainly, the board's decision was a factual one. It did not rule that AS 23.30.095(a) is a statute of limitations; rather, it concluded that payment was "barred" because the employee had not provided any evidence, medical or lay, in support of the claim.

The other cited cases do not suggest that AS 23.30.095(a) is "essentially" a statute of limitations. Indeed, quite to the contrary: they expressly hold that

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[33] *See* Appellants' Br. at 24-25 nn.36, 37, 40, *citing Floyd v. Urethane Specialties,* Alaska Workers' Comp. Bd. Dec. No. 05-0344 (December 22, 2005) (hereinafter, *Floyd*)*; Rayson v. Framers Loop Market,* Alaska Workers' Comp. Bd. Dec. No. 91-0281, 1991 WL 333812 (October 28, 1991) (hereinafter, *Rayson*); *Wolfer v. Veco Inc.*, Alaska Workers' Comp. Bd. Dec. No. 89-0087, 1989 WL 236255 (April 14, 1989) at *5 (hereinafter, *Wolfer*); *Luhrs v. Alaska International Air*, Alaska Workers' Comp. Bd. Dec. No. 90-0029, 1990 WL 264835 (February 26, 1990) at *4 (hereinafter, *Luhrs*).

Mayflower also asserts that the Alaska Supreme Court has characterized AS 23.30.095(a) as a statute of limitations, but its brief did not cite to any such case in support of that assertion. *See* Appellants' Br. at 25. At oral argument, Mayflower cited to *W. R. Grasle Co. v. Alaska Workmen's Compensation Bd.*, 517 P.2d 999 (Alaska 1974). The court's reference in that case to the "limitation of AS 23.30.095(a)" concerns the first two sentences of subsection (a), not continued treatment beyond the initial two-year period. *See id.* at 1004, n.10.

[34] *Floyd,* Bd. Dec. No. 05-0344 at 2, 3.

[35] *Id.* at 2 n.2.

[36] *Id.* at 5.

AS 23.30.095 does not bar an award of medical benefits more than two years after the date of injury. In identical language, they note that the board has "long held that AS 23.30.105(a) and AS 23.30.095 provide two different statutes of limitations one for time loss benefits and one for medical benefits."[37] However, the decisions go on to observe that AS 23.30.095(a) does not bar claims for medical benefits after two years:

> AS 23.30.095(a) mandates medical benefits for two years following the injury giving rise to the claim, or two years following the discovery of any work-related latent condition. The treatment sought by the employee falls outside of the two-year period authorized, and the employers argue their liability is at an end. Nevertheless, this same section of the statute gives the employee the right to have us review her medical benefits. We have the authority and responsibility to order continued medical benefits beyond the two year limit if the process of recovery requires it.[38]

Notwithstanding that these decisions refer to AS 23.30.095 as a statute of limitations, it is quite apparent that AS 23.30.095(a) does not *operate* as a statute of limitations. A statute of limitations bars an otherwise valid claim after the specified period of time. As these decisions recognize, and as Mayflower acknowledges,[39] AS 23.30.095(a) provides the board with authority to award medical benefits beyond the initial two-year period after the injury. That the board has been loose in its terminology does not mean that the plain language of AS 23.30.095(a) may be disregarded.

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[37] *Rayson,* Bd. Dec. No. 91-0281, 1991 WL 333812 at *4; *Wolfer*, Bd. Dec. No. 89-0087, 1989 WL 236255 at *5; *Luhrs,* Bd. Dec. No. 90-0029, 1990 WL 264835 at *4.

[38] *Rayson,* Bd. Dec. No. 91-0281, 1991 WL 333812 at *4. *See Wolfer,* Bd. Dec. No. 89-0087, 1989 WL 236255 at *5 (noting Professor Larson's observation that "in 44 states medical benefits are essentially unlimited as to duration and amount."); *Luhrs,* Bd. Dec. No. 90-0029, 1990 WL 264835 at *4.

[39] "[A]n employer may controvert treatment beyond the two-year period if the treatment is not medically reasonable and necessary, or if the employee has unreasonably delayed in receiving the requested treatment." Appellants' Br. at 23 (emphasis added). This is, in effect, a concession that AS 23.30.095(a) is not a statute of limitations.

iii. Mayflower did not assert or establish a laches defense.

Mayflower argues that the board's decision was an abuse of discretion in this particular case because of the lengthy period of time that transpired between Ms. Redgrave's injury (1994) and her last date of treatment (2001), and the date of her request for continued treatment (2007). Specifically, it argues that the board improperly interpreted *Hibdon* "to grant an indefinite right of review for medical treatment after two years, stating that this review could go on '*ad infinitum*.'"[40] Mayflower argues that this is improper "in light of either AS 23.30.095(a) as a statute of limitations or a laches theory."[41]

Mayflower's specific arguments as to why the board's decision should be considered an abuse of discretion are not persuasive. As we have previously pointed out, AS 23.30.095(a) is not a statute of limitations. Moreover, Mayflower did not controvert the claim based on a laches defense, and it did not raise the defense of laches before the board. Indeed, apart from asserting that the claim should be denied because it was filed a long time after the injury occurred and after a substantial lapse in treatment, Mayflower's brief did not even attempt to show that the elements of a laches defense apply. We conclude that for purposes of this appeal, the laches argument is waived.[42]

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[40] Appellants' Br. at 23.

[41] *Id.* at 25.

[42] Mayflower asserts that a laches defense may be raised by the employer against a claimant, citing multiple decisions by the board to that effect. *See* Appellants' Br. at 24 nn.37, 38; *Id.* at 26 nn.43, 45, 47. Mayflower also references an Alaska Supreme Court decision stating that "the Board has the discretion to invoke equitable principles, such as implied waiver or equitable estoppel, to bar an employer from asserting statutory rights." Appellants' Brief at 26 n.44, *citing Schmidt v. Beeson Plumbing and Heating, Inc.*, 869 P.2d 1170, 1175 (Alaska 1994) (emphasis added). We have stated: "Laches is a defense to an action in equity, not in law . . . It is not available as a defense to enforcement of the workers' compensation statutes;" *Sourdough Express, Inc. v. Barron,* Alaska Workers' Comp. App. Comm'n Dec. No. 069, 5-6 n.24 (February 7, 2008)(citation omitted), *citing Wausau Ins. Companies v. Van Biene*, 847 P.2d 584, 589 n.15 (Alaska 1993). Because Mayflower has waived a laches argument for purposes of this appeal, we have no occasion to address whether an employer may assert laches as a defense to an otherwise valid claim.

More generally, Mayflower's position may be that although there is substantial evidence to support the board's factual determinations, nonetheless under the circumstances of this case the board had discretion to deny continued medical benefits. However, apart from the lapse of time, the only circumstance that Mayflower points to as warranting such an exercise of discretion is that Ms. Redgrave allegedly failed to mitigate her damages, because she did not obtain psychological counseling at an earlier time.[43] But Mayflower never sought to terminate further benefits on the ground that Ms. Redgrave had refused to obtain reasonable and necessary treatment,[44] and it did not request the board to make any findings to that effect. We conclude that this argument, too, is waived for purposes of this appeal.[45]

b. The board erred in imposing a penalty and referral.

On August 7, 2007, Mayflower controverted continued medical treatment based on a lapse in treatment of more than two years and the absence of a recommendation for treatment. On appeal, Mayflower argues that in light of AS 23.30.095(a), the controversion "has *some* legal basis and is not designed to mislead or deceive,"[46] and that the insurer therefore should not have been referred to the division of insurance,[47] and no penalty should have been imposed.[48]

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[43] Appellants' Br. at 22 n.32.

[44] *See generally*, *Metcalf v. Felec Services*, 784 P.2d 1386 (Alaska 1990).

[45] Because the argument is waived, we have no need to address Mayflower's apparent suggestion that the board has discretion to altogether deny medical benefits to a claimant notwithstanding a factual finding, supported by substantial evidence, that the claimant needs continuing treatment, even if it is not the specific treatment requested. The Alaska Supreme Court has stated that when reviewing a claim for continued medical treatment beyond the two-year period, "the Board is not limited to reviewing the reasonableness and necessity of the particular treatment sought, but has some latitude to choose among reasonable alternatives." *Hibdon*, 989 P.2d at 731, *citing Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991).

[46] Appellants' Br. at 27.

[47] *Id.* at 28.

[48] *Id.* at 29-30.

i. No penalty is owed under AS 23.30.155(e).

Authority for imposition of a penalty is provided in AS 23.30.155(e), which states:

> If any installment of compensation payable without an award is not paid within seven days after it becomes due, . . . there shall be added to the unpaid installment an amount equal to 25 percent of the installment.

The penalty provision applies to the late payment of medical benefits. However, in order for the penalty to apply, the payment must be late.[49] A payment of medical benefits is not due until after a bill or report is presented to the employer.[50] As Mayflower points out,[51] Ms. Redgrave did not present any evidence that she had incurred any medical expenses that were unpaid, as is necessary for imposition of a penalty.[52] Indeed, the board's order was for a penalty on the value of treatment that had not yet been provided, rather than on an expense incurred.[53] There is simply no basis under AS 23.30.155(e) for imposing a penalty for the non-payment of medical benefits for services that have not yet been provided, much less presented for payment. The board's order is unauthorized by law.

ii. AS 23.30.155(o): referral to the division was error.

AS 23.30.155(o) provides:

> The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice

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[49] *Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 632 (Alaska 1995).

[50] AS 23.30.097(d). *See, e.g., Williams v. Abood*, 53 P.3d 134, 146 (Alaska 2002).

[51] Appellants' Br. at 29.

[52] *See State, Department of Education v. Ford*, Alaska Workers' Comp. App. Comm'n Dec. No. 133, 37-38 (April 9, 2010) (hereinafter, *Ford*) ("The requirement that a penalty for late payment under AS 23.30.0155(e) be supported by some evidence of late payment [is] well-established in Alaska law.").

[53] *See Redgrave,* Bd. Dec. No. 09-0188 at 46 ("Employee is entitled to a penalty on the value of the medical evaluation controverted by Employer's August 7, 2007 controversion.").

> from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.[54]

In this case, the board concluded that the controversion was based on a mistake of law regarding the interpretation of AS 23.30.095(a), and that because it was based on a mistake of law the controversion was in bad faith, frivolous and unfair as a matter of law.[55] Mayflower argues that the board's conclusion is contrary to our decisions in *Kinley's* and *Sourdough Express*.[56] Mayflower is correct: those decisions are incompatible with the idea that a controversion based on a mistake of law is necessarily a bad faith controversion, or that it is necessarily frivolous or unfair.[57]

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[54] Prior to an amendment to AS 23.30.155(o) in 2005, notice to the division was provided by the board, rather than the director. *See* ch. 10 FSSLA 2005. The board's regulation on point, 8 AAC 45.182(d)(1), continues to reflect AS 23.30.155(o) as it existed prior to 2005, and provides for the board to furnish the notice. We note that under the current version of AS 23.30.155(o), the division is not obliged to do anything in response to a notice received from the board, rather than the director. Indeed, even under the prior version of AS 23.30.155(o), it was the division's general practice to await resolution of an appeal before conducting an investigation. *See Crawford & Co. v. Baker-Withrow*, 81 P.3d 982, 986 (Alaska 2003).

[55] "[B]ecause Employer's legal interpretation of §095(a) was incorrect, the controversion is invalid, made in bad faith, and is unfair and frivolous. Alternatively, even if this controversion was not deliberately entered in 'bad faith,' it was still a 'mistake of law,' unfair and frivolous under this case's facts, . . ." *Redgrave,* Bd. Dec. No. 09-0188 at 44.

[56] Appellants' Br. at 27, 29, *citing Kinley's Restaurant & Bar v. Michael S. Gurnett,* Alaska Workers' Comp. App. Comm'n Dec. No. 121, 15 (November 24, 2009) (hereinafter, *Kinley's*) and *Sourdough Express, Inc. v. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069, 11-12, 18, and 20 (hereinafter, *Sourdough Express*).

[57] *See Kinley's,* App. Comm'n Dec. No. 121 at 14-16; *Sourdough Express,* App. Comm'n Dec. No. 069 at 20-22. The board's perception that a controversion based on a mistake of law is necessarily a bad faith controversion seems to have been based on *Stafford v. Westchester Fire Ins. Co. of New York, Inc.*, 526 P.2d 37, 41 (Alaska 1974). *See Redgrave,* Bd. Dec. No. 09-0188 at 29. The court in that case stated that a penalty is imposed when nonpayment is based on "bad faith reliance on counsel's advice, or mistake of law." *Id.* In our view, the phrase "bad faith" in that statement should be read as modifying both "reliance on counsel" and "mistake of law." *See Irby v. Fairbanks Gold Min., Inc.*, 203 P.3d 1138, 1147 (Alaska 2009) (controversion based on a plausible, but unsuccessful, legal defense was a good faith controversion).

Recently, we outlined the analysis that the board must engage in before making a determination that a controversion is frivolous or unfair within the meaning of AS 23.30.155(o):

> First, examining the controversion, and the evidence on which it was based in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion, the board must decide if the controversion is a "good faith" controversion. Second, if the board concludes that the controversion is not a good faith controversion, the board must decide if it is a controversion that is frivolous or unfair. If the controversion lacks a plausible legal defense or lacks the evidence to support a fact-based controversion, it is frivolous; if it is the product of dishonesty, fraud, bias, or prejudice, it is unfair. But, to find that a frivolous controversion was issued in bad faith requires a third step – a subjective inquiry in to the motives or belief of the controversion author.[58]

In this case, the board did not engage in the appropriate analysis.[59] A controversion based upon a legal defense (such as that AS 23.30.095(a) barred the claim, or that a current medical opinion was required) is a "good faith" controversion (the first step of the analysis) if it is objectively "not legally implausible" or consists of "colorable legal arguments . . . based in part on undisputed facts[;]"[60] it is frivolous (the second step of the analysis) if it is "completely lacking" in plausibility.[61] It may be found to be subjectively in bad faith (the third step of the analysis), if it is "utterly frivolous," that is, has "such a complete absence of legal basis . . . that . . . there is no possibility of mistake, misunderstanding, . . . or other conduct falling in the borderland between bad faith and good faith."[62] We observe that in considering whether a controversion based on AS 23.30.095 and the absence of a current medical opinion was frivolous or unfair, the board's prior characterization of AS 23.30.095(a) and the specific

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[58] *Ford*, App. Comm'n Dec. No. 133 at 21.

[59] We note that the board did not have, at the time of its decision, the benefit of our decision in *Ford*.

[60] *See Ford,* App. Comm'n Dec. No. 133 at 17, *citing Irby*, 203 P.3d at 1147.

[61] *See id.* at 21; *Kinley's,* App. Comm'n Dec. No. 121 at 16.

[62] *Rockstad v. Chugach Eareckson*, Alaska Workers' Comp. App. Comm'n Dec. No. 108, 5 (May 11, 2009).

wording of AS 23.30.095(a) as it pertains to claims for continued treatment are relevant considerations.

5. Conclusion.

The commission concludes that there is substantial evidence to support the board's factual finding that Ms. Redgrave is in need of continuing treatment arising out of her 1994 on-the-job injury, and its decision to award continuing medical benefits is therefore AFFIRMED. The commission concludes that the board lacked statutory authority to impose a penalty under the facts of this case, and the penalty is therefore REVERSED. The commission concludes that the board failed to apply the correct legal analysis in making its determination that the controversion was frivolous, unfair, and in bad faith, and that determination is therefore VACATED and REMANDED. No other grounds for reversal having been raised on appeal, the remainder of the board's decision is AFFIRMED.[63]

Date: *December 14, 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David Richards, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Andrew Hemenway, Chair Pro Tempore

[63] We note that there is no express statutory authority for pre-authorization of the payment of medical benefits. We have not previously considered whether pre-authorization of payment of medical benefits is permissible. In this case, the board has concluded that the employee is entitled to a specified form of treatment ("neuropsychological therapy"), but it did not order, in advance, the payment of a particular sum. Because Mayflower did not specify either the pre-authorization of medical benefits, or a prospective determination as to the compensability of a specified form of treatment, as an issue on appeal, and it did not address either issue in its brief on appeal, we do not reach those issues and we express no opinion on them. *See generally*, *Summers v. Korobkin Const.*, 814 P.2d 1369 (Alaska 1991).

APPEAL PROCEDURES

This is a final decision on the merits of this appeal taken by Mayflower Contract Services, Inc. from Alaska Workers' Compensation Board Decision No. 09-0188. The commission concludes that there is substantial evidence to support the board's factual finding that Ms. Redgrave is in need of continuing treatment arising out of her 1994 on-the-job injury, and its decision to award continuing medical benefits is therefore AFFIRMED. The commission concludes that the board lacked statutory authority to impose a penalty under the facts of this case, and the penalty is therefore REVERSED. The commission concludes that the board failed to apply the correct legal analysis in making its determination that the controversion was frivolous, unfair, and in bad faith, and that determination is therefore VACATED and REMANDED. No other grounds for reversal having been raised on appeal, the remainder of the board's decision is AFFIRMED.

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). 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 of this decision being 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. 141 issued in the matter of *Mayflower Contract Services, Inc. v. Redgrave,* AWCAC Appeal No. 09-028, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 14, 2010.

Date: *December 21, 2010*

Signed

B. Ward, Appeals Commission Clerk