

Alaska Workers' Compensation Appeals Commission

Samantha L. Atlas,
Appellant,

vs.

State of Alaska,
Appellee.

Final Decision

Decision No. 292 November 19, 2021

AWCAC Appeal No. 20-015
AWCB Decision No. 20-0072
AWCB Case No. 201617084

Final decision on appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 20-0072, issued at Anchorage, Alaska, on August 17, 2020, by southcentral panel members Ronald P. Ringel, Chair; Bronson Frye, Member for Labor; and Sara Faulkner, Member for Industry.

Appearances: Samantha L. Atlas, self-represented appellant, assisted by non-attorney, Barbara Williams; Treg R. Taylor, Attorney General, and Anderson K. Grossman, Assistant Attorney General, for appellee, State of Alaska.

Commission proceedings: Appeal filed October 28, 2020; briefing completed August 5, 2021; neither party requested oral argument.

Commissioners: James N. Rhodes, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Samantha L. Atlas filed a notice of appeal with the Alaska Workers' Compensation Appeals Commission (Commission) as a self-represented litigant on October 28, 2020, from the Alaska Workers' Compensation Board's (Board) Interlocutory Decision and Order No. 20-0072.¹ The Board granted the State of Alaska's (SOA) petition to permit it to

¹ *Atlas v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 20-0072 (Aug. 17, 2020)(*Atlas*). This decision was entitled Interlocutory Decision and Order and, therefore, Ms. Atlas should have filed a petition for review. The Commission inadvertently accepted the designation of Ms. Atlas, a self-represented litigant, as an appeal and briefs were filed for an appeal.

withhold forty percent, instead of the statutory twenty percent, of future benefits in order to recoup a substantial overpayment. Ms. Atlas has been assisted in her briefing by Barbara Williams, who was the non-attorney representative for Ms. Atlas before the Board.² The Commission's regulations do not provide for non-attorneys to represent clients before the Commission, but the Commission does allow the non-attorney to assist in briefing preparation. Neither party requested oral argument and, thus, the Commission decides this matter based on the parties' briefing and the record. The Commission now affirms the Board.

*2. Factual background and proceedings.*³

a. Ms. Atlas's medical history.

Ms. Atlas worked for SOA as a Psychiatric Nurse Assistant III at Alaska Psychiatric Institute (API). On November 19, 2016, an altercation occurred between two patients. When she attempted to intervene, she was punched in the head and abdomen.⁴ She was taken to the Alaska Regional Hospital (ARH) emergency room where she was diagnosed with a chest wall contusion. She denied any head injury or loss of consciousness and the examining physician found no evidence of a head injury. A computerized tomography scan of Ms. Atlas's head showed no abnormalities. She was discharged with instructions to see her primary care doctor and was restricted from work for three days.⁵

On November 25, 2016, Ms. Atlas returned to the ARH emergency room complaining her gait had "been off" and she had shortness of breath and dizziness. She said that while her assailant could have hit her more than once, she had not been hit in

² The Commission takes notice of the fact that Ms. Williams has been assisting self-represented litigants before the Board for over twenty years and has developed knowledge and skills for helping unrepresented claimants.

³ We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

⁴ R. 2; 1361.

⁵ R. 2991-3024.

the head. The doctor noted a tender spot on her occipital scalp and noted she may have hit her head when she fell to the ground. He diagnosed a concussion with loss of consciousness of 30 minutes or less, and again restricted her from work for three days.⁶

On November 29, 2016, Ms. Atlas saw Harbir S. Makin, M.D., and told him she was knocked unconscious for a brief period, but was not aware of having a head injury. Dr. Makin diagnosed a probable concussion and recommended an eye examination to rule out retinal detachment. He restricted Ms. Atlas from work for one week.⁷

On December 6, 2016, Ms. Atlas told Dr. Makin she was still having intermittent headaches and fear and anxiety for no reason. Dr. Macon diagnosed a concussion with posttraumatic headaches, and he recommended an appointment with a different ophthalmologist who could see her sooner. He released Ms. Atlas to work as of December 7, 2016.⁸

On December 15, 2016, Ms. Atlas saw Mari C. Hatelly, M.D., at U.S. HealthWorks. Ms. Atlas told Dr. Hatelly she had been knocked unconscious in the assault at work and did not wake up until she was in the ambulance on the way to the emergency room. Ms. Atlas reported she had been having headaches, mood and vision changes, and a decrease in short-term memory since the incident. She said she had tried going back to work, but the staff felt she was having too many problems and sent her home. Dr. Hatelly restricted Ms. Atlas from work until she could be seen for a follow-up visit.⁹

On December 20, 2016, Ms. Atlas had not significantly improved and Dr. Hatelly referred her to an ophthalmologist and for magnetic resonance imaging. Dr. Hatelly continued to restrict Ms. Atlas from work.¹⁰

Ms. Atlas saw Scot D. Hines, M.D., on January 4, 2017, who diagnosed anxiety, depression, and an element of posttraumatic stress disorder (PTSD) and said she may

⁶ R. 3025-3036.

⁷ R. 4700-4701.

⁸ R. 4703-4704.

⁹ R. 3048-3051.

¹⁰ R. 3057-3062.

need to see a behavioral health expert or psychiatrist. Dr. Hines did not recommend further neurological workup or testing.¹¹

On January 6, 2017, Dr. Hately added PTSD to her previous diagnoses of traumatic brain injury (TBI) and concussion with loss of consciousness. She restricted Ms. Atlas from work for an additional fourteen days.¹² Dr. Hately, on January 20, 2017, found Ms. Atlas had not significantly improved and kept her off work for eighteen more days.¹³ On February 6, 2017, Dr. Hately restricted Ms. Atlas from work for an additional thirty days and transferred her care to family nurse practitioner (FNP) Katherine Hardy.¹⁴ On February 15, 2017, FNP Hardy took Ms. Atlas off work indefinitely.¹⁵

On March 11, 2017, Ms. Atlas saw Eugene Wong, M.D., and Michael R. Fraser, Jr., M.D., for an employer's medical evaluation (EME). The doctors examined Ms. Atlas and reviewed her medical records since the work injury. They opined the injury caused only contusions and stated that Ms. Atlas's perception of her physical symptoms might be colored by her emotional response to the assault. They did not believe Ms. Atlas had any cognitive residual from a TBI, but she was showing psychiatric symptoms. They recommended neuropsychological testing.¹⁶

On March 17, 2017, FNP Hardy continued to restrict Ms. Atlas from work.¹⁷ However, on May 11, 2017, she released Ms. Atlas to limited duty work. Ms. Atlas was allowed to work four hours, with the following two days off, and she was not to be involved in direct patient care.¹⁸

¹¹ R. 3070-3072.

¹² R. 3073-3077.

¹³ R. 3091-3095.

¹⁴ R. 3123-3126.

¹⁵ R. 3147-3150.

¹⁶ R. 3183-3206.

¹⁷ R. 3230-3233.

¹⁸ R. 3330-3333.

Ms. Atlas, on May 26, 2017, saw Christopher Albert, PA-C, at Tower Orthopedics for right shoulder and arm pain. PA-C Albert stated the pain was likely secondary to neck trauma sustained in the assault at work.¹⁹

On December 12, 2017, FNP Hardy issued a progress report stating Ms. Atlas could return to work on December 16, 2017, and nothing in her chart note indicated Ms. Atlas had any restrictions, but she noted that December 12 through 15, 2017, were Ms. Atlas's regular days off.²⁰

On February 7, 2018, FNP Hardy issued a progress report stating Ms. Atlas could return to work on February 10, 2018, and her chart note indicated Ms. Atlas was being restricted from direct contact with patients. February 7, 2018, through February 9, 2018, were Ms. Atlas's regular days off.²¹

On March 28, 2018, M. Sean Green, M.D., a neurologist, performed a records-review EME. Dr. Green stated the medical records at the time of injury are the most reliable guide to the damage caused by a work injury. Based on the records, he concluded Ms. Atlas's chronic pain and pseudo-neurologic symptoms were not plausibly related to the work injury, and the work injury was only the substantial cause of her sternal contusion. Dr. Green questioned the diagnoses of "serious" TBI and PTSD, and recommended Ms. Atlas be evaluated by a forensic psychiatrist and forensic neuropsychologist.²²

On July 20, 2018, Ms. Atlas saw Bradley Sparks, M.D., who recommended arthroscopic surgery to address impingement and a partial thickness rotator cuff tear in Ms. Atlas's right shoulder.²³

¹⁹ R. 3359-3363.

²⁰ R. 2728-2738.

²¹ R. 2812-2823.

²² R. 130-168.

²³ R. 2163.

On August 23, 2018, Dr. Sparks operated on Ms. Atlas's shoulder and restricted her from work for three weeks.²⁴

On September 4, 2018, Ashley Moser, adjuster for SOA, spoke to Ms. Atlas about her shoulder surgery. She asked Ms. Atlas to email her any work status notes she received from the doctor, and Ms. Atlas agreed.²⁵

On September 18, 2018, and September 19, 2018, Ms. Atlas was seen by Paul L. Craig, Ph.D., for a neuropsychological EME. In describing the work injury, Ms. Atlas stated she had lost consciousness during the assault. Dr. Craig opined Ms. Atlas had preexisting somatic symptom disorder aggravated by the November 2016 work injury. He also diagnosed PTSD resulting from the November 2016 assault, as well as other assaults that had happened at work, but he found no evidence of TBI or concussion. He recommended behavioral therapy and stated Ms. Atlas would not be medically stable until she received such treatment.²⁶

On November 5, 2018, Ms. Moser spoke to Ms. Atlas who said she had worked October 20, 2018, and October 21, 2018, but not October 22, 27, 28, 29, 2018, or November 3, 4, or 5, 2018, but Ms. Atlas confirmed she had not been taken off work by a doctor.²⁷

On November 6, 2018, FNP Hardy released Ms. Atlas to light duty work with restrictions for eight weeks. She explained Ms. Atlas "may need additional time out as approaching 2nd anniversary of injury. If increase in anxiety or stress (exposure to threatening environments), then remove to admin. position without direct patient care." FNP Hardy also referred Ms. Atlas to the Rehabilitation Institute of Washington, PLLC's (RIW) TBI clinic.²⁸

²⁴ R. 1060-1062; 2200.

²⁵ R. 766.

²⁶ R. 2248-2334.

²⁷ R. 768.

²⁸ R. 2411-2428.

On December 5, 2018, Jared Kirkham, M.D., rated Ms. Atlas as having a three percent permanent partial impairment (PPI) due to her right shoulder.²⁹

On December 6, 2018, FNP Hardy responded to a letter from SOA asking for clarification of when Ms. Atlas had been restricted from work. FNP Hardy responded Ms. Atlas had been totally restricted from work from November 19, 2016, through May 30, 2017, and released to restricted duty from May 30, 2017, to the present. FNP Hardy did not specify what the restrictions were, only that they were “per WC forms, FMLA forms per employer – restrictions in place continue.”³⁰

b. Ms. Atlas’s work schedule and TTD payments.

Ms. Atlas’s weekly temporary total disability (TTD) compensation rate was set at \$1,211.00, or \$2,422.00 for each two-week benefit period.³¹ The Board found that it was unclear from the record whether Ms. Atlas returned to work on December 6 or 7, 2016, but she was paid TTD from November 20, 2016, through December 5, 2016.³² On December 20, 2016, SOA resumed paying Ms. Atlas TTD after Dr. Hately restricted her from working.³³

On May 30, 2017, Ms. Atlas worked four hours. She was also paid for seven and one-half hours for the Memorial Day holiday on May 29, 2017.³⁴ On May 31, 2017, Ms. Atlas reported to FNP Hardy that she had returned to work the previous day.³⁵ On June 1, 2017, Ms. Atlas again worked four hours.³⁶

²⁹ R. 1702-1794.

³⁰ R. 1706.

³¹ R. 783.

³² R. 1581.

³³ R. 1581.

³⁴ R. 1532.

³⁵ R. 1374.

³⁶ R. 1533.

Despite the fact Ms. Atlas had worked on May 30, 2017, and June 1, 2017, she was paid her full TTD rate for the two-week period from May 21, 2017, through June 3, 2017, although it was categorized as temporary partial disability (TPD).³⁷

Ms. Moser testified that the TPD benefits for the period of May 21, 2017, to June 3, 2017, should have been \$2,052.77, which meant Ms. Atlas was overpaid \$369.73.³⁸ The Board found, however, there was no evidence of Ms. Atlas's earnings for the period, and so, her TPD rate could not be calculated.³⁹

On June 29, 2017, FNP Hardy changed Ms. Atlas's work restrictions allowing her to work six hours with the next two days off.⁴⁰ On July 14, 2017, Ms. Atlas worked three hours.⁴¹ On July 19, 2017, Ms. Atlas was paid \$2,328.44 in TPD for the period from July 2, 2017, through July 15, 2017.⁴² The Board, again, found there was no evidence of Ms. Atlas's earnings for the period and so, again, noted her TPD rate could not be calculated.⁴³

On August 21, 2017, FNP Hardy released Ms. Atlas to full duty work on August 26, 2017, and August 28, 2017, with a return to a full schedule on September 1, 2017.⁴⁴ The Board found that by providing a return to work date a few days in the future, FNP Hardy was not restricting Ms. Atlas from work, but was authorizing her return on her next scheduled workday.⁴⁵

³⁷ R. 1581.

³⁸ R. 760.

³⁹ *Atlas* at 6, No. 32.

⁴⁰ R. 2434-2442.

⁴¹ R. 1536.

⁴² R. 1581.

⁴³ *Atlas* at 6, No. 36.

⁴⁴ R. 2526-2536.

⁴⁵ *Atlas* at 7, No. 41.

Although Ms. Atlas occasionally missed work during this time, the Board found there was no evidence in the record that a physician restricted her from working or that the absences were due to her work injury.⁴⁶

Ms. Atlas worked full shifts on August 26, 2017, and August 28, 2017.⁴⁷ Because there was no evidence of Ms. Atlas's earnings for the period, the Board found the TPD rate could not be calculated.⁴⁸

Ms. Atlas resumed her regular weekly full-time schedule on September 2, 2017, and worked full-time from September 2, 2017, through July 15, 2018.⁴⁹ Ms. Atlas's return to work on September 2, 2017, was overlooked and SOA continued to pay Ms. Atlas TTD from September 2, 2017, through July 15, 2018.⁵⁰ From September 2, 2017, through July 15, 2018, is forty-five weeks and two days. At Ms. Atlas's weekly compensation rate of \$1,211.00, this resulted in an overpayment of TTD of \$54,841.00 ($\$1,211.00 \times 45 \frac{2}{7}$).⁵¹

Around August 2, 2018, Ms. Atlas contacted the prior adjuster asking about five TTD checks she had not received.⁵² On August 3, 2018, the adjuster confirmed Ms. Atlas had returned to work on September 2, 2017.⁵³

On August 3, 2018, SOA voided five checks to Ms. Atlas which she stated she had not received:

Check No. 370450 for TTD from December 3, 2017, to December 16, 2017;

Check No. 371818 for TTD from January 29, 2018, to February 11, 2018;

Check No. 372629 for TTD from February 12, 2018, to February 25, 2018;

⁴⁶ R. 1538-1547; 1519-1530; SOA Exc. 106; *Atlas* at 7, No. 42.

⁴⁷ R. 1538.

⁴⁸ *Atlas* at 6, No. 36.

⁴⁹ R. 1538-1547; 1519-1530; SOA Exc. 106.

⁵⁰ R. 1580-1581; *Atlas* at 6, Nos. 37 and 38.

⁵¹ *Atlas* at 7, No. 43.

⁵² R. 743.

⁵³ R. 743.

Check No. 373857 for TTD from March 26, 2018, to April 8, 2018; and
Check No. 375050 for TTD from April 23, 2018, to May 6, 2018.

Ms. Moser testified that on SOA's transaction log, the voiding of the checks is indicated by a negative amount. Each of the checks was for \$2,422.00.⁵⁴ Because Ms. Atlas had been working during the periods covered by the voided checks, SOA did not re-issue them.⁵⁵ Because the checks were not cashed and were not reissued, the \$54,841.00 overpayment was reduced by the total of the five checks, or \$12,110.00, resulting in an overpayment of \$42,731.00.⁵⁶

On August 3, 2018, the adjuster spoke with Ms. Atlas, confirmed she had returned to work, and that there had been an overpayment of benefits. Ms. Atlas said she would send a money order for the overpayment, but the adjuster told her to wait.⁵⁷

On August 9, 2018, Ms. Atlas told the adjuster she had mailed a check for \$24,044.00.⁵⁸

On August 10, 2018, the claims manager spoke to Ms. Atlas and explained that after the overpayment was calculated, SOA could recoup the overpayment only by withholding twenty percent of future disability payments. The claims manager explained SOA could not accept the check she had mailed and it would be returned to her.⁵⁹

On August 23, 2018, Ms. Moser wrote to Ms. Atlas returning her check and explaining that under AS 23.30.155(j), SOA could only recover an overpayment by withholding twenty percent from future disability payments. Ms. Moser stated Ms. Atlas would be notified when the overpayment was calculated and when the recovery would begin.⁶⁰

⁵⁴ R. 1580.

⁵⁵ Hr'g Tr. at 133:10-18, Feb. 6, 2020.

⁵⁶ *Atlas* at 8, No. 49.

⁵⁷ R. 743.

⁵⁸ R. 743.

⁵⁹ R. 743.

⁶⁰ R. 1305.

On September 5, 2018, Ms. Atlas was paid \$1,937.60 in TTD for the period of August 23, 2018, to September 5, 2018. This was her normal biweekly TTD of \$2,422.00 reduced by twenty percent or \$484.40.⁶¹

On September 12, 2018, Ms. Moser asked Ms. Atlas to let her know if she was released to work.⁶² On September 19, 2018, Ms. Atlas was paid \$1,937.60 in TTD for the period from September 6, 2018, through September 19, 2018. Again, there was a twenty percent reduction of \$484.40 from her normal rate.⁶³

On October 3, 2018, Ms. Atlas was paid \$1,937.60 in TTD for the period from September 20, 2018, through October 3, 2018. This was a reduction of \$484.40 from her normal rate.⁶⁴ On October 4, 2018, Ms. Moser spoke to Ms. Atlas who said she had not yet been released to work.⁶⁵

Dr. Sparks, on October 17, 2018, released Ms. Atlas to work without restrictions.⁶⁶ On October 17, 2018, Ms. Atlas was paid \$1,937.60 in TTD for the period from October 4, 2018, through October 17, 2018. This was a reduction of \$484.40 from her normal rate.⁶⁷ On November 1, 2018, Ms. Atlas was paid \$276.80 in TTD for October 18 and 19, 2018. This was twice her daily rate ($\$1,211.00 \div 7$, or \$173.00) less twenty percent (\$69.20).⁶⁸

On October 18, 2018, FNP Hardy released Ms. Atlas to return to work on October 20, 2018, but she was limited to a "36' work week" and she was required to wear the glasses recommended by the ocular therapist.⁶⁹

⁶¹ R. 1580.

⁶² R. 749.

⁶³ R. 1580.

⁶⁴ R. 1580.

⁶⁵ R. 750.

⁶⁶ R. 1204.

⁶⁷ R. 1580; *Atlas* at 9, No. 63.

⁶⁸ R. 1580; *Atlas* at 9, No. 64.

⁶⁹ R. 2378-2392.

On October 29, 2018, Ms. Moser notified Ms. Atlas she had received Dr. Spark's work release and asked if Ms. Atlas had returned to work.⁷⁰ On October 31, 2018, SOA controverted further TTD benefits based on FNP Hardy's October 18, 2018, work release.⁷¹

On November 2, 2018, Ms. Moser wrote to Ms. Atlas explaining an audit of her claim showed she had been incorrectly paid TTD from August 26, 2017, to July 15, 2018, resulting in an overpayment of \$43,942.00. The letter explained that under AS 23.30.155(j), SOA would reduce future disability payments by twenty percent until the overpayment was recovered.⁷²

SOA was unable to accommodate the restriction in FNP Hardy's November 6, 2018, work release and SOA restarted TTD that day.⁷³ On November 19, 2018, FNP Hardy released Ms. Atlas to work with the restrictions of "glasses per ocular therapy" and "36' workweek."⁷⁴ On December 1, 2018, Ms. Atlas returned to full-time work despite FNP Hardy's November 6, 2018, restriction. Ms. Atlas did not inform the adjuster she had returned to work.⁷⁵

On December 7, 2018, SOA paid Ms. Atlas \$3,875.20 in TTD for the period from November 6, 2018, through December 3, 2018. This amount was twenty-eight days at Ms. Atlas's daily TTD rate of \$173.00, less twenty percent, or \$34.60, for a net of \$138.40 per day. Because Ms. Atlas had returned to work on December 1, 2018, she was overpaid three days, or by \$415.20. The twenty percent reduction from November 6, 2018, through November 30, 2018, was \$865.00.⁷⁶

⁷⁰ R. 750.

⁷¹ R. 65.

⁷² R. 1637.

⁷³ R. 744; 1580.

⁷⁴ R. 3998-4010.

⁷⁵ R. 744.

⁷⁶ R. 1580.

Ms. Atlas continued to work full-time from December 1, 2018, through December 16, 2018.⁷⁷

On December 14, 2018, Ms. Atlas was paid \$1,937.60 in TTD for the period from December 4, 2018, through December 17, 2018. As Ms. Atlas worked all but one day during this time, she was overpaid for thirteen days. At her daily TTD rate of \$173.00, less twenty percent, or \$34.60, she was overpaid \$138.40 per day. For the thirteen days that totals \$1,799.20. SOA recouped \$34.60 from TTD paid for December 17, 2018.⁷⁸

On December 20, 2018, FNP Hardy took Ms. Atlas off work until she had returned from RIW.⁷⁹ On December 27, 2018, Ms. Atlas was paid \$1,937.60 in TTD for the period from December 18, 2018, through December 31, 2018. This was again a reduction of \$484.40 from her normal rate.⁸⁰

The Board found that changes to the \$42,371.00 net overpayment from August 3, 2018, through December 31, 2018, should be summarized as follows:⁸¹

	DATE	AMOUNT		BALANCE
Net Overpayment on 8/3/2018				\$42,371.00
Overpayment Recouped	9/5/2018		484.40	
	9/19/2018		\$484.40	
	10/3/2018		484.40	
	10/17/2018		484.40	
	11/1/2018		69.20	
	12/7/2018		865.00	
	12/14/2018		34.60	
	12/27/2018		484.40	
Total Recouped				3,390.80
Additional Overpayments	12/7/2018	415.20		
	12/14/2018	1,799.20		
Total Additional Overpayments				2,214.40
Net Overpayment as of 12/31/2018				41,194.60

⁷⁷ R. 745.

⁷⁸ R. 1580; *Atlas* at 11, No. 78.

⁷⁹ R. 1733-1749.

⁸⁰ R. 1580; *Atlas* at 11, No. 80.

⁸¹ *Atlas* at 11-12, No. 81.

On January 28, 2019, SOA issued check number 383862 to Ms. Atlas for \$1,937.60 for TTD for January 15, 2019, through January 28, 2019. On February 13, 2019, SOA voided check number 383862, and on February 14, it issued check number 384389 for \$1,937.60 to Ms. Atlas for TTD for January 15, 2019, through January 28, 2019.⁸²

On March 13, 2019, SOA paid the three percent PPI (\$5,310.00) less twenty percent, or \$1,062.00.⁸³

On April 11, 2019, Ms. Atlas filed a claim for TTD, permanent total disability (PTD), PPI, medical and transportation costs, a compensation rate adjustment, attorney fees and costs, and a finding of an unfair or frivolous controversion.⁸⁴

c. Hearing procedures and issues.

In May 2019, Ms. Atlas requested the Division of Workers' Compensation (Division) provide accommodations under the Americans with Disabilities Act (ADA). One request was that written information be in either Lexi or Comic Sans font. The Division agreed to do so, except for official decisions and notices which would follow established procedures.⁸⁵

On June 26, 2019, SOA filed a petition seeking to increase the percentage of ongoing disability payments it could recoup to forty percent.⁸⁶

On January 8, 2020, Ms. Moser signed an affidavit stating she worked for Penser North America, Inc. (Penser), SOA's adjuster, and she was the adjuster assigned to Ms. Atlas's claim. Attached to the affidavit were two documents Ms. Moser had created, a "Timeline of TTD & Overpayment," and a "Contact Timeline Re: Work Status."⁸⁷

On January 21, 2020, Ms. Atlas filed evidence for the February 6, 2020, hearing, including Ms. Moser's January 8, 2020, affidavit, Ms. Atlas's timesheets for January 1,

⁸² R. 1580.

⁸³ R. 1580.

⁸⁴ R. 375.

⁸⁵ *Atlas* at 12, No. 85.

⁸⁶ R. 529.

⁸⁷ R. 740-751.

2017, through June 30, 2018, a spreadsheet showing all disability payments to Ms. Atlas for November 20, 2016, through July 15, 2018, including whether SOA believed there was an under or overpayment or recovery for each and the total remaining overpayment, and SOA's transaction log showing all payments made in Ms. Atlas's case for November 21, 2016, through August 2, 2019, including check numbers, dates, amounts, and the purpose of the expenditure.⁸⁸

On January 29, 2020, Ms. Atlas's non-attorney representative requested seven subpoenas requiring Penser North America/Angie Farnsworth, Penser North America/Ashley Moser, Penser North America/Carolyn Corey, Penser North America/Memoree Polleys, Penser North America/Michael Robinson, Penser North America/Monica Gant, and Penser North America/Records Custodian to appear at the February 6, 2020, hearing. All of the subpoenas showed Penser's Anchorage address. The subpoenas were signed and returned to Ms. Atlas's non-attorney representative the same day.⁸⁹

As a preliminary issue for the February 6, 2020, hearing, Ms. Williams asked for a "roll call" to determine who had appeared in response to the subpoenas Ms. Atlas had served at the offices of Penser. Ms. Moser and Ms. Polleys were present. SOA questioned whether Monica Gant and Angie Farnsworth had been served as SOA believed they no longer lived in Alaska. Ms. Williams stated all of the individuals had been served at Penser's office. The designated chair asked if the subpoenas had been served individually, and Ms. Williams stated the subpoenas had been taken to Penser's office, and Ms. Polleys accepted service on behalf the other individuals. The designated chair explained that subpoenas needed to be personally served on the individuals, and one individual could not accept service on behalf of someone else.⁹⁰ Ms. Williams showed photos of Penser's office and stated Barrington Coke had served the subpoenas. The Board found that no affidavit showing proof of service of the subpoenas was filed.⁹¹

⁸⁸ R. 758-906.

⁸⁹ R. 926-937; *Atlas* at 13, No. 89.

⁹⁰ See, Alaska R. Civ. P. 4.

⁹¹ *Atlas* at 13-14, Nos. 90 and 91.

Ms. Atlas contended all the individuals had played a part in the overpayment of benefits and SOA was now saying the overpayment was Ms. Atlas's fault. The designated chair pointed out that AS 23.30.155(j) does not have a fault requirement. SOA's right to recover an overpayment was not dependent on fault. Nonetheless, the designated chair asked why fault was relevant. Ms. Williams, for Ms. Atlas, did not answer the question; rather, she responded there was no accounting of the overpayment. The designated chair ruled that Ms. Moser would testify, but no decision would be made as to the other individuals until they were called.⁹²

Dr. Craig testified that in his September 2018 report he had recommended forty weeks of cognitive behavioral therapy for Ms. Atlas's psychological conditions.⁹³

Ms. Moser testified that shortly after taking over the case, she discovered Ms. Atlas had been overpaid. She prepared a timeline of events listing payments from the transaction log and entries from the adjusters' log. It listed dates or date ranges, whether Ms. Atlas was working or receiving disability benefits, and narrative explanations. The bulk of the overpayment to Ms. Atlas occurred from December 17, 2017, to July 15, 2018, when Ms. Atlas was working full-time, but continued to receive TTD. Ms. Moser calculated the total overpayment as of August 10, 2018, to be \$43,860.63. She explained that just prior to taking over Ms. Atlas's case, Ms. Atlas had called reporting she had not received five TTD checks; the prior adjuster determined Ms. Atlas had been working during those time periods and voided the checks on August 3, 2018. These checks were not reissued since Ms. Atlas was working. Ms. Moser explained the entries in the transaction log for August 3, 2018, were not when the TTD checks were issued, but when the checks were voided. She pointed out the check numbers matched the numbers for corresponding entries when the checks were issued. The entries voiding the checks are shown as a negative number and the status is "voided." The entries when the checks were issued are positive numbers, and when the checks are voided, their status changes from "issued" to "voided." The five voided checks were not included in SOA's overpayment calculation.

⁹² *Atlas* at 13-14, No. 91.

⁹³ Hr'g Tr at 37:13-16; 56:6-13; 59:6-12, Feb. 6, 2020.

Ms. Moser further testified that when the overpayment was determined, a letter was drafted to Ms. Atlas explaining the overpayment, how it would be recovered, and informing her that she could call if she had any questions. Ms. Moser never received a request from Ms. Atlas for more information. She stated that in February 2019 Ms. Atlas reported a lost check which was then cancelled, and the check reissued on February 14, 2019, because Ms. Atlas was entitled to TTD for the period. The contacts with Ms. Atlas in the "Contact Timeline Re: Work Status" attached to Ms. Moser's January 8, 2020, affidavit included all contacts in the adjuster's file regarding work status.⁹⁴

Mr. Coke testified he lives with Ms. Atlas and is her fiancé. He also works at API and has known Ms. Atlas since 2011. He and Ms. Atlas rent an apartment and they have no children, dependents, or pets living with them. He understood that Ms. Atlas had not received any workers' compensation benefits for some time. He said he pays the rent of \$1,100.00 and pays for gas and food. Utilities run from \$60.00 to \$80.00 per month, and Ms. Atlas sometimes contributes to those expenses. He does not have a clear idea of Ms. Atlas's financial obligations and she may have obligations he is not aware of. Mr. Coke took the subpoenas to the front desk at Penser's office and the receptionist called for the office manager. Ms. Polleys appeared and he gave the subpoenas to her.⁹⁵

Ms. Atlas testified she and Mr. Coke live together, but keep their finances separate. She buys a lot of the groceries, pays for a storage unit she shares with Mr. Coke, and pays for a cell phone and iPad, medicines, car repair expenses, and gas. The bill for the cell phone and iPad is from \$230.00 to \$250.00 per month, and electricity may be as high as \$170.00. Groceries run from \$300.00 to \$400.00 per month. In addition, she is making payments on some old medical bills that are in collection. She recalled that in August 2018, someone at Penser asked her about checks, and she told them she didn't remember receiving them. Ms. Atlas stated she wanted a list of when SOA began

⁹⁴ Hr'g Tr. at 101:20 – 102:5; 103:23 – 104:20; 107:6-19; 133:14 – 134:19; 143:22 – 144:2; 160:17-23; 161:15-20; 166:25 – 167:4; 201:17-24, Feb. 6, 2020.

⁹⁵ Hr'g Tr. at 243:25 – 244:1; 244:22 – 245:8; 246:9-17; 247:2-17; 248:21 – 249:7; 251:4 – 253:1; 256:12 – 259:1; 284:5-14; 287:15 – 290:1, Feb. 6, 2020.

recouping the overpayment and what she had been provided “don’t look like the same kind of numbers.”⁹⁶

On February 6, 2020, Ms. Atlas was testifying at the end of the hearing day. The designated chair stated the issue regarding the subpoenas, and whether the individuals would testify would carry over to the continuation of the hearing.⁹⁷

Notice of the June 18, 2020, hearing was sent to Ms. Atlas’s representative and SOA’s attorney by certified mail on May 5, 2020. The notice stated:

Hearings start at 9:00 am Alaska Standard Time. Cases are heard on a trailing calendar. Call the day before for an approximate hearing time.⁹⁸

On June 10, 2020, SOA filed an updated version of the spreadsheet it had filed on January 21, 2020, showing disability payments to Ms. Atlas. The updated spreadsheet included payments made from July 15, 2018, through June 2, 2020.⁹⁹

After December 31, 2018, when the balance of the overpayment was \$41,194.60, the overpayment continued to decrease as SOA recouped additional amounts. The Board found SOA recouped \$1,062.00 from the March 13, 2019, PPI payment. For the period from January 1, 2019, to June 2, 2020, SOA made thirty-seven TTD payments. Thirty-six of those payments were for fourteen-day periods, and Ms. Atlas was paid \$1,937.60, meaning SOA recouped \$484.40 from each payment, or \$17,798.40. The thirty-seventh TTD payment was for a fifteen-day period, and it was reduced by \$519.00. The Board determined that as a result, the balance of the overpayment at the time of the June 18, 2020, hearing was \$21,815.20.¹⁰⁰

At the beginning of the June 18, 2020, hearing, the designated chair noted Ms. Atlas had been testifying when the February 6, 2020, hearing was continued. Ms. Williams said she expected to have more questions for Ms. Atlas, but wanted to recall

⁹⁶ Hr’g Tr. at 333:2 – 335:20; 337:13-18; 339:24 – 340:21; 358:14 – 359:4, Feb. 6, 2020.

⁹⁷ Hr’g Tr. at 363:12-19, Feb. 6, 2020.

⁹⁸ R. 4376-4377.

⁹⁹ R. 1495-1501.

¹⁰⁰ *Atlas* at 16, No. 99.

Ms. Moser, who was not present, for a “refresher,” and she had some follow-up questions for Ms. Moser about the overpayment. The designated chair explained that Ms. Moser had appeared, testified, and been released. Ms. Williams said Ms. Polleys could answer the questions about the adjuster’s notes and calculations, but she noted Ms. Polleys was also not present, and she stated the parties had not received notice of the hearing time. SOA’s attorney stated Ms. Moser and Ms. Polleys were available if needed. The designated chair declined to recall Ms. Moser as a witness.¹⁰¹

Ms. Williams then noted that none of the seven individuals who had been subpoenaed were present, and the designated chair had stated the subpoenas would carry over. The designated chair clarified that while he had said the subpoenas carried over, he had also said there had been no ruling on whether the individuals had been properly served or would be permitted to testify over SOA’s objections. The designated chair pointed out that there was no evidence that several of the witnesses had been properly served and that could be addressed. Ms. Williams said Mr. Coke testified he had served all of the subpoenas on Ms. Polleys at Penser’s office. The designated chair asked Ms. Williams who she wanted to call. She named Donna Malone, Carolyn Corey, and Michael Robinson. The designated chair stated he saw no evidence Ms. Malone had been served and asked how she was served if she did not live in Alaska. Ms. Williams again stated Ms. Polleys had accepted service on behalf of all of the subpoenaed individuals. The designated chair explained that was not adequate service, and Ms. Malone had to have been served personally. The designated chair asked if Ms. Williams wanted to call Ms. Polleys now, because it appeared she had been served. Ms. Williams asked that Carolyn Corey and Penser’s records custodian be called because Ms. Polleys had accepted service on their behalf. The designated chair again explained that Ms. Polleys could not accept service on behalf of other individuals.¹⁰²

¹⁰¹ Hr’g Tr. at 371:9 – 374:1; 376:2-8, June 18, 2020.

¹⁰² Hr’g Tr. at 374:24 – 375:6; 376:19-25; 377:11-14; 378:6-15; 379:22 – 380:1; 380:23 – 381:22; 382:1-2; 383:3-16, June 18, 2020.

The designated chair suggested Ms. Williams call Ms. Polleys. SOA's attorney objected and asked for an offer of proof that the testimony would not be unduly repetitive or irrelevant to the issue for hearing. He stated Ms. Atlas had not pointed to any evidence that checks had not been paid or received as shown in SOA's exhibits. Ms. Williams stated Ms. Atlas was a person with disabilities to whom the Division had granted accommodations that included providing written information in a form she can read and understand, and the information SOA provided her, particularly the transaction log and overpayment spreadsheets, was not in a font she could easily read. Ms. Williams was offended that the Division was not making accommodations and the information in Penser's transaction log was not in a font Ms. Atlas could read. The designated chair noted the transaction log was not prepared by the Division, and asked if Ms. Atlas had requested accommodations from SOA or Penser. Ms. Williams said she had not. The designated chair stated it would require a substantial alteration of the Division's procedures to continue the hearing at that point in order to direct SOA to produce the document in another font.¹⁰³

Ms. Williams reiterated her request to call Ms. Polleys, and SOA's attorney again asked for an offer of proof as to her testimony. Ms. Williams stated she would be asking about the overpayments, and SOA's attorney pointed out Ms. Moser had testified extensively about the cancelled checks and the calculation of the overpayment and had been questioned exhaustively. Ms. Williams again stated there were discrepancies in the records in that numbers did not match, some timecards did not have Ms. Atlas's signature on them, and it was unclear whether Ms. Atlas had been reimbursed for out-of-pocket expenses. When asked to identify a number that did not match up, Ms. Williams said the voided checks don't add up for the days she worked. The designated chair stated the issue of the voided checks had been clearly addressed as Ms. Moser had gone over it. Ms. Williams pointed to the May 4, 2018, check,¹⁰⁴ and said it had been voided, but there

¹⁰³ Hr'g Tr. at 385:7-23; 386:13-16; 388:7-13; 389:23 – 391:2, 393:19 – 395:19, June 18, 2020.

¹⁰⁴ Hr'g Tr. at 396:20 – 406:15, June 18, 2020; R. 1580.

was no replacement check and it could not be matched to an entry voiding it. The designated chair ruled Ms. Polleys' testimony would be repetitive and redundant and would not aid in the resolution of the issue. Ms. Atlas had no other witnesses.¹⁰⁵

3. *Standard of review.*

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.¹⁰⁶ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.¹⁰⁷ "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."¹⁰⁸ The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.¹⁰⁹ The Board's conclusions with regard to credibility are binding on the Commission since the Board has the sole power to determine credibility of witnesses.¹¹⁰

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but exercises its independent judgment.¹¹¹ Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.¹¹²

¹⁰⁵ Hr'g Tr. at 419:4-9; 424:25 – 425:3, June 18, 2020.

¹⁰⁶ AS 23.30.128(b).

¹⁰⁷ *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

¹⁰⁸ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984).

¹⁰⁹ AS 23.30.122.

¹¹⁰ AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013).

¹¹¹ AS 23.30.128(b).

¹¹² *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985) (*Sheehan*).

4. Discussion.

Ms. Atlas contends the Board erred in finding a forty percent withholding from her TTD benefits for recovery of the overpayment would not be a financial hardship for her. She further asserts the Board abused its discretion in granting SOA's petition to increase the withholding from the statutory twenty percent. She also contends the Board erred in finding that her subpoenas of seven of Penser's employees were not properly served and the Board, thereby, erred in not requiring the subpoenaed witnesses to testify. Ms. Atlas also asserts she was denied an opportunity to present evidence that she has out-of-pocket expenses that have not been reimbursed, and suggests these expenses could be offset against the overpayment. Ms. Atlas further contends she waited several months for responses to her discovery requests.

SOA, on the other hand, asserts that the Board properly awarded it a forty percent withholding from future time loss benefits for recovery of the overpayment, primarily accruing from September 2017 to July 2018 when it paid TTD while Ms. Atlas was working full-time for SOA. SOA provided notice to Ms. Atlas of the overpayment in August 2018 and discussed it with her. SOA contends that the Board's finding is supported by substantial evidence in the record as a whole, and that the Board did not abuse its discretion in making the award. Furthermore, the Board correctly held that Ms. Atlas's subpoenas were not properly served, and it was proper to exclude the unserved witnesses from testifying. SOA notes the most important witness, Ms. Moser, did testify at length and was thoroughly cross-examined by Ms. Atlas's non-attorney representative. Ms. Moser is the witness who prepared the logs of conversations with Ms. Atlas, payments, voided checks, and amounts of overpayments and reductions. SOA also states that the testimony of Ms. Polleys would have been redundant and not helpful because she was the supervisor, and did not participate in the development of the logs, charts, and calculations, nor did she participate in the active day-to-day management of the claim.

a. Recoupment of an overpayment.

The Alaska Workers' Compensation Act (Act) provides one mechanism for the recovery of an overpayment of workers' compensation benefits. AS 23.30.155(j) provides

for withholding twenty percent by the employer from future benefits payable to the employee in order to recover an overpayment. The statute states in pertinent part:

(j) 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.

The Alaska Supreme Court (Court), in *Croft v. Pan Alaska Trucking, Inc.*, held that this statute provides the sole mechanism by which an employer may recover an overpayment of benefits paid to an injured worker.¹¹³ In *Green v. Kake Tribal Corporation*, the Court recognized that the statute allows, in appropriate circumstances, the Board to authorize withholding at greater than twenty percent.¹¹⁴ In *Green*, the Board authorized withholding at a one hundred percent rate.¹¹⁵

An employer may withhold twenty percent of future benefits without permission of the Board, after establishing that it overpaid benefits to an injured worker. The statute does not require fault by either the employer or the employee, merely an overpayment of the benefits due to the injured worker. Whereas here, the employer contends withholding at the rate of twenty percent will not allow it to recover the full amount of the overpayment, the statute allows the employer to petition the Board for an increase in the withholding percentage. The Board then decides whether to grant an increase of more than twenty percent in withholding from future unpaid installments of benefits.

Because the statute does not provide any criteria for determining when it is appropriate to allow an employer to withhold more than twenty percent, the Board looked to its own prior decisions regarding when to allow an increase. Among the criteria previously used by the Board are the following:

¹¹³ *Croft v. Pan Alaska Trucking Inc.*, 820 P.2d 1064, 1066 (Alaska 1991).

¹¹⁴ *Green v. Kake Tribal Corp.*, 816 P.2d 1363, 1366-1367 (Alaska 1991).

¹¹⁵ *Id.*

- (1) The financial hardship to the injured worker if the withholding is at a higher rate¹¹⁶;
- (2) The length of time the employee is expected to be disabled and whether the overpayment can be recouped within that time¹¹⁷; and
- (3) Whether the overpayment arose or was exacerbated by the employee's resistance to providing correct information to the employer.¹¹⁸

The Commission will uphold the Board's findings of fact by examining whether the Board's findings are supported by substantial evidence in light of the record as a whole.¹¹⁹ The Commission also must accept any findings of credibility made by the Board.¹²⁰ Since the Act provides authority to the Board to allow an employer to withhold more than twenty percent, the Board's decision is also looked at to see if the Board abused its discretion in allowing SOA to withhold forty percent of future benefit payments.

Here, the Board utilized the above criteria as a basis for determining whether to raise SOA's withholding to forty percent. First, the Board found there was no evidence that Ms. Atlas impeded SOA's collection of information or that she exacerbated the overpayment issue in any way. So, this criterion was not used by the Board in its analysis.

However, Ms. Atlas did provide, through her testimony and that of Mr. Coke, her housemate and fiancé, details of her monthly expenses. Mr. Coke testified that he paid the rent and bought most of the groceries. Beyond that he stated he did not know her expenses or her income. Ms. Atlas testified she paid her phone and iPad bills amounting to approximately \$250.00; paid the electric bill of about \$170.00; contributed to groceries in the amount of \$400.00; and paid for a storage unit, past medical bills, and a portion

¹¹⁶ *Barnett v. Lee's Custom Designs*, Alaska Workers' Comp. Bd. Dec. No. 99-0146 (July 8, 1999).

¹¹⁷ *Decker v. Price/Northland J.V.*, Alaska Workers' Comp. Bd. Dec. No. 93-0304 (Nov. 24, 1993).

¹¹⁸ *Bathony v. State*, Alaska Workers' Comp. Bd. Dec. No. 98-0101 (Apr. 22, 1998).

¹¹⁹ AS 23.30128(b).

¹²⁰ *Id.*

of car expenses which were not identified. The amounts provided total \$820.00 per month. The Board, in calculating the amount of the withholding, tripled these expenses to \$2,460.00. Her biweekly TTD rate is \$2,422.00. Her monthly TTD benefits with a twenty percent reduction come to approximately \$3,875.20. The increase in withholding to forty percent reduces her monthly benefits to about \$2,906.40. This benefit payment would leave her with about \$446.40 net, using the tripled amount of her itemized expenses. The Board found this rate of withholding would not impose a financial hardship on Ms. Atlas. Moreover, when the overpayment was first brought to Ms. Atlas's attention, she offered to repay the overpayment and indeed sent SOA a check in the amount of \$24,044.00. SOA informed Ms. Atlas it could not accept this check as it must recover the overpayment by withholding twenty percent of each future benefit payment, and SOA returned the check to Ms. Atlas in 2018.¹²¹

Ms. Atlas did not present any evidence to support a financial hardship if the withholding rate was increased to forty percent. Ms. Atlas did not dispute either the fact of an overpayment or the amount. The evidence cited above supports the Board's determination that withholding forty percent of her TTD benefits would not create a financial hardship for Ms. Atlas.

The Board also did not abuse its discretion in increasing the withholding percent to forty percent. The Board took Ms. Atlas's testimony about her contribution to the household's monthly expenses into full consideration. Ms. Atlas was given ample opportunity to explain to the Board what financial hardship an increase would have on her life. No evidence was presented to demonstrate that the Board acted in an arbitrary, capricious, or manifestly unreasonable manner. There is no evidence, likewise, that the Board's decision stemmed from an improper motive. The Board did not abuse its discretion in increasing the percentage of withholding from twenty percent to forty percent.

The Board's decision to increase the withholding from future benefits from twenty percent to forty percent is affirmed.

¹²¹ *Atlas* at 8, Nos. 50-53.

b. Issuance of subpoenas and witness testimony.

Ms. Atlas contends she served seven subpoenas for seven witnesses who had been involved in her workers' compensation claim on Penser's manager, Ms. Polleys, at Penser's offices. She asserts Ms. Polleys accepted the service on behalf of the employees and, therefore, service should have been considered properly made. Service was made by Mr. Coke who so testified at hearing. His testimony amounted to an affidavit which Ms. Atlas agreed had not been filed previously. Although the designated hearing officer explained that service was not executed properly, Ms. Atlas contends she should not have been held to the strict letter of the law since she was represented by a non-attorney representative. She further contends she should have been allowed to recall Ms. Moser for follow-up questioning and should have been allowed to call Ms. Polleys, because these witnesses could have clarified for her what she saw as discrepancies in the prior testimony and in the documentation provided by SOA through Ms. Moser. Ms. Atlas also contends the Board erred in not applying AS 23.30.015(g) to her claim.

SOA contends the Board properly found that service did not comport with either the letter or the spirit of the law which requires personal service on each individual. Two of the witnesses no longer work for Penser and live out of state. There is no way they could have known their presence was being requested at a hearing in Alaska. No arrangements had been made for them to fly to Anchorage or to attend by telephone. SOA points to the fact that the adjuster on the claim, Ms. Moser, testified at length regarding the discovery of the overpayment of benefits, the contacts with Ms. Atlas regarding the overpayment and means of recoupment by SOA, the development of the log of payments made to Ms. Atlas, the development of the log identifying the voided checks, the procurement of the time slips for Ms. Atlas's work at SOA during the pendency of her claim, and the calculation of the overpayment and the recoupment at twenty percent to date of the hearing on the overpayment.

Conduct of a hearing is at the discretion of the Board.¹²² On review, the Commission looks to see if the Board abused its discretion in its rulings on procedure of the hearing. The process for procuring and serving subpoenas is laid out in three places. In the Administrative Procedures Act (APA), provision is made for the APA to apply if the agency does not have statutes governing the issue in question. Specifically, the APA provides:

(a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 — 44.62.630. This procedure, including accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under AS 44.62.330 — 44.62.630 is limited to named functions of the agency.

. . . .

(12) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act;¹²³

The APA further provides instructions regarding the issuance of subpoenas:

(a) Before the hearing begins the agency shall issue subpoenas and subpoenas duces tecum at the request of a party in accordance with the rules of civil procedure. After the hearing begins the agency hearing a case or a hearing officer sitting alone may issue subpoenas and subpoenas duces tecum.

(b) A subpoena issued under (a) of this section extends to all parts of the state and shall be served in accordance with the rules of civil procedure. A witness is not obliged to attend at a place out of the house district in which the witness resides unless the distance is less than 100 miles from the place of residence, except that the agency, upon affidavit of a party showing that the testimony of the witness is material and necessary, may

¹²² See, e.g., *Rusch v. Southeast Alaska Reg'l Health Consortium*, 453 P.3d 784, 802, No. 70 (Alaska 2019) (*Rusch*).

¹²³ AS 44.62.330.

endorse on the subpoena an order requiring the attendance of the witness.¹²⁴

The Act provides only limited guidance for the procurement and service of subpoenas and, therefore, the APA must also be considered. The Act provides for discovery in its regulations. Two regulations apply to hearings. The first regulation addresses testimony of witnesses at a hearing by providing “[t]he testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure.”¹²⁵ The second regulation addresses the production of evidence. 8 AAC 45.120 provides:

(a) Witnesses at a hearing shall testify under oath or affirmation. The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . . .

(b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.

(c) Each party has the following rights at hearing:

(1) to call and examine witnesses;

(2) to introduce exhibits;

(3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;

(4) to impeach any witness regardless of which party first called the witness to testify; and

(5) to rebut contrary evidence.

(d) A party who does not testify in his own behalf may be called and examined by any party as if under cross-examination.

Both the workers’ compensation regulations and the APA cite to Alaska Rules of Civil Procedure for the means of service of subpoenas. The Civil Rule in question, 45(c), states:

¹²⁴ AS 44.62.430(a) and (b).

¹²⁵ 8 AAC 45.054

(a) For Attendance of Witnesses—Form—Issuance. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and title of the action, and shall command each person to whom it is directed to attend and give testimony or to produce documents at a time and place therein specified. The clerk shall issue a subpoena for the attendance of a witness, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. . . .

(c) Service. A subpoena may be served by a peace officer, or any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to the person the fees for one day's attendance and the mileage prescribed by rule. . . . Proof of service shall be made by affidavit.¹²⁶

The Civil Rule clearly requires personal service on the individual being subpoenaed. Ms. Atlas only served one subpoena on the person being summoned to testify – Ms. Polleys.

There is no evidence in the record that anyone other than Ms. Polleys was personally served with a subpoena. While Ms. Atlas may assert that Ms. Polleys accepted the subpoenas for each individual, the evidence is that Ms. Atlas did not effectuate personal service on the other six people for whom she sought the subpoenas. Service was ineffective as to six of the seven people for whom subpoenas were issued.

There is no evidence Ms. Polleys, upon receiving the subpoenas, intended to accept service for the other six people nor could she have done so according to Civil Rule 45. No affidavit of service was filed with the Board. No mileage or witness fees were provided. Two of the people no longer work for Penser nor live in Alaska. The subpoenas were not legal as to these two individuals.¹²⁷ They were not legally apprised of the request for their presence at the hearing on February 6, 2020. Service was not made on the other witnesses and, hence, they were not legally obligated to appear and testify at the hearing. Even the service, albeit personal, on Ms. Polleys was not compliant with Civil Rule 45 because she was not given her mileage or her witness fee at the time of service of the subpoena. The Civil Rule is clear that service must be made personally on

¹²⁶ Alaska R. Civ. P. 45(c).

¹²⁷ AS 44.62.430(b).

the subpoenaed witness along with payment for mileage and the witness fee. Neither Ms. Atlas nor Mr. Coke testified that payment was made. Neither testified to serving anyone other than Ms. Polleys with the subpoena. The designated hearing chair explained more than once that the subpoenas were not effective because personal service had not been made. Therefore, the Board did not abuse its discretion in finding that service on six of the witnesses was not made because they were not personally served.¹²⁸

Moreover, SOA made both Ms. Polleys and Ms. Moser available to testify at the February 6, 2020, hearing. Ms. Moser, the person most familiar with Ms. Atlas's case, testified at length and was cross-examined by Ms. Atlas through her non-attorney representative on the first day of the hearing. Ms. Moser testified in detail regarding the discovery of the overpayment, her contacts with Ms. Atlas regarding the overpayment, and the means by which SOA would attempt to recover the overpayment. Ms. Moser also testified in detail about the log she created showing the checks issued to Ms. Atlas, including date sent and date voided for the five checks Ms. Atlas claimed not to have received. Ms. Moser testified to the calculation of the overpayment based on doctors' releases for Ms. Atlas's return to work and her time slips. She stated that she did not include the five voided checks in the overpayment amount. She explained the reduction in the overpayment by each withholding from a new benefit payment to Ms. Atlas. She stated she invited Ms. Atlas to contact her for further explanation about the overpayment and the withholding of twenty percent from future checks, but Ms. Atlas did not follow-up with her.

The Board, at the second day of hearing on June 18, 2020, did not call Ms. Polleys to testify, finding her testimony was redundant to that of Ms. Moser and would not provide any additional assistance to the Board in weighing the evidence before it. The Board also

¹²⁸ The Commission notes the service of subpoenas requires some familiarity with the Act, the APA, and the Civil Rules. This can be complicated and difficult to understand by non-attorneys. If the Board does not have an information sheet available to self-represented litigants explaining how to serve a subpoena, it might consider the development of such an information sheet.

declined to recall Ms. Moser stating she had testified in detail and had been cross-examined on Ms. Atlas's behalf.

At the second day of hearing, Ms. Atlas indicated she had a few questions she wished to clarify, but the Board found the questions had been thoroughly addressed by Ms. Moser at the February hearing. As the Court noted in *Rusch*, the Board, pursuant to the APA, has the right to exclude evidence which is "irrelevant and unduly repetitious."¹²⁹ Unlike in *Rusch*, the evidence excluded here was not relevant to the issue of whether SOA should be allowed to increase its withholding from future benefits in order to recover as much as possible of the overpayment. Ms. Polleys was a supervisor and not involved in the creation of the logs nor did she participate in the day-to-day management of Ms. Atlas's claim. Her evidence would have been redundant and not relevant to the issue before the Board.

No evidence was presented to demonstrate that the Board acted in an arbitrary, capricious, or manifestly unreasonable manner in its finding that service of the subpoenas was not made pursuant to Civil Rule 45 and was, thus, ineffective. There is no evidence, likewise, that the Board's decision stemmed from an improper motive in reaching this conclusion. The Board's decision, both orally and in writing, regarding the disallowance of testimony from six of the seven witnesses Ms. Atlas sought to subpoena is affirmed.

Ms. Atlas also asserted that she should have been allowed to present evidence of her claimed unpaid out-of-pocket expenses. She suggested the overpayment could be further reduced by offsetting these claimed unpaid expenses. However, AS 23.30.155(j) does not permit, without Board approval, the offsetting of these amounts. Further, Ms. Atlas filed with the Board no evidence, such as receipts, mileage logs, etc., to support her claim of unpaid out-of-pocket expenses. This issue is still available to her for pursuit at a hearing on the merits of her claim.

Ms. Atlas has also contended that the Board erred in not applying AS 23.30.015(g) to her claim. This statute pertains to recovery of monies by an employer when an employee "recovers damages from the third person" responsible for the injuries to the

¹²⁹ *Rusch*, 453 P.3d at 802.

employee.¹³⁰ Ms. Atlas has not received damages from a third party in this claim; at least no evidence has been presented that she has. SOA has not made a claim to any such damages. Ms. Atlas apparently believes that SOA owes her for travel expenses and out-of-pocket medicals. SOA has indicated that these costs will be addressed at a future hearing on the merits of her claim or when she submits the requisite log and receipts. However, these costs are not the monies the language in AS 23.30.015(g) is intended to address. Therefore, this statute does not apply to Ms. Atlas's claim. The Board did not err in failing to consider this statute.

c. Denial of continuance.

At the June 2020 hearing, Ms. Atlas essentially requested a continuance because the transaction log and the list of disability payments were not in a font she had asked the Board to use. Ms. Atlas admitted she had not requested SOA to use a particular font. Moreover, she had had the original transaction log and list of disability payments since the February hearing (more than four months earlier) and had not indicated to SOA that she needed to have these documents in a different font. The Board indicated that it would delay the claim substantially and would cause a hardship on SOA to delay the hearing so SOA could produce the documents in a different font.

Ms. Atlas has asserted that SOA's production of discovery was not timely. However, Ms. Atlas was apprised of the overpayment in August 2018. The transaction logs were produced prior to the February hearing in accordance with the regulations and Ms. Atlas also had additional time prior to the continued hearing in June 2020 to review the materials proffered by SOA.

The Board declined to order a continuance, noting that continuances are not favored and at that late date would only be granted for good cause. The regulation at 8 AAC 45.074(b)(1) lists what constitutes good cause:

- (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

¹³⁰ AS 23.30.15(g).

(1) good cause exists only when

- (A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;
- (B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;
- (C) a party, a representative of a party, or a material witness becomes ill or dies;
- (D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;
- (E) the hearing was set under 8 AAC 45.160(d);
- (F) a second independent medical evaluation is required under AS 23.30.095(k);
- (G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;
- (H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;
- (I) the parties have agreed to and scheduled mediation;
- (J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);
- (K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
- (L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
- (M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has

not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing. . . .

The Board found that only three of these reasons might potentially apply. Criterion (K) allows a continuance for good cause when, despite a party's due diligence, evidence was obtained after the request for hearing which due process requires the party have time to develop rebuttal evidence. That is not the case here as Ms. Atlas had SOA's transactions log and list of disability payments since February 2020. The newly filed log and list on June 10, 2020, was the same list with additions for updated TTD payments. Ms. Atlas had had ample time to review these items prior to the June 2020 hearing.

The Board looked at criterion (L) which allows a continuance because additional evidence is needed to complete the hearing. Again, that is not the case here as the evidence regarding the need for a larger withholding was in evidence before and at the February 2020 hearing. There was no surprise or excusable neglect that would mandate a continuance. Under criterion (N), a continuance may be granted if irreparable harm may result. Ms. Atlas was unable to demonstrate that she had exercised due diligence in seeking from SOA production of the transaction log and list of payments in a font she claimed she needed, even though she had the documents in her possession from the February 2020 hearing. The Board found good cause did not exist to continue the hearing in June 2020 and this finding is supported by the regulation and the evidence in the record.

5. *Conclusion.*

The Board's decision is AFFIRMED.

Date: 19 November 2021 Alaska Workers' Compensation Appeals Commission



Signed

James N. Rhodes, Appeals Commissioner

Signed

Amy M. Steele, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

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

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 292 issued in the matter of *Samantha L. Atlas v. State of Alaska*, AWCAC Appeal No. 20-015, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on November 19, 2021.

Date: November 23, 2021



Signed

K. Morrison, Appeals Commission Clerk