Alaska Workers' Compensation Appeals Commission

State of Alaska, Department of Education,
Appellant, Cross-appellee,

vs.

Jason U. Ford,
Appellee, Cross-appellant.

Final Decision
Decision No. 133 April 9, 2010

AWCAC Appeal No. 09-004
AWCB Decision Nos. 08-0263, 09-0044, and 09-0155
AWCB Case No. 200716379

Appeal from Alaska Workers' Compensation Board Decision No. 08-0236 issued December 2, 2008, at Juneau by southeastern panel members Robert B. Briggs, Chair, Richard H. Behrends, Member for Industry, and Michael Notar, Member for Labor, on modification (*sua sponte*); Decision No. 09-0044, issued February 27, 2009, at Juneau by the same panel, and on petition for modification; Decision No. 09-0155 issued September 24, 2009, at Juneau by southeastern panel members Robert B. Briggs, Chair, Patricia Vollendorf,[1] Member for Labor, and Robert Weel,[2] Member for Industry.

Appearances: Daniel S. Sullivan, Attorney General, and Christopher A. Beltzer, Assistant Attorney General, Office of the Attorney General, for appellant, cross-appellant State of Alaska Department of Education. Paul M. Hoffman, Hoffman Silver Gilman & Blasco, P.C., for appellee, cross-appellant Jason U. Ford.

Commission proceedings: Appeal filed January 30, 2009, with Motion for Stay of Judgment. Appellant's Petition to Dismiss board proceedings filed February 9, 2009. Appellee's Partial Opposition to State's Motion for Stay of Judgment and Motion to Dismiss Appeal filed February 13, 2009. Appellant's Opposition to Appellee's Motion to

[1] Ms. Vollendorf is a member of one of five southcentral panels, sitting in the third judicial district, but apparently assigned to serve on the southern panel for the "prompt administration" of the Workers' Compensation Act. AS 23.30.005(a) and (e).

[2] Mr. Weel is a member of the at-large panel, which may sit in any judicial district. AS 23.30.005(a).

Dismiss Appeal filed February 18, 2009. Hearing on Motions to Stay and to Dismiss Appeal held February 20, 2009. Appellant's Supplemental Brief Regarding Referral to the Division of Insurance filed February 27, 2009. Stipulation on Procedure filed in the commission March 5, 2009. Order Approving Stipulation on Procedure and Extending Time to Prepare Record issued March 17, 2009. Appellant's amended statement of grounds for appeal filed March 31, 2009; cross-appeal filed April 3, 2009. Appellee's Motion to Dismiss Grounds for Appeal Numbers 5 and 6 filed May 1, 2009; appellant's opposition filed May 5, 2009. Appellee's Motion to Supplement Record on Appeal filed May 14, 2009; opposition filed May 19, 2009. Status conference held May 20, 2009, supplemental briefing ordered filed by May 27, 2009. Order on Motion to Dismiss Appeal Points 5 and 6 issued June 1, 2009. Order on Motion to Supplement Record on Appeal issued June 3, 2009. Order extending time to file unified brief issued June 11, 2009. Appellant's Motion to Suspend Appeals Commission Proceedings filed July 15, 2009, appellee's Opposition filed July 22, 2009. Order suspending commission proceedings for 60 days issued July 24, 2009. Second Motion to Suspend Appeals Commission Proceedings filed September 21, 2009. Status conference held September 29, 2009, and Order resuming proceedings and amending Instruction to File Briefs issued September 30, 2009. Appellee's Amended Statement of Grounds Upon Which Cross-Appeal Is Taken Re: D&O No. 09-0155 filed October 23, 2009. Request to Board to Supplement Record issued November 4, 2009. Briefing on appeal completed November 30, 2009. Oral argument presented January 8, 2010.[3] Transcript of August 18, 2009, board hearing filed February 8, 2010. Notice of appointment of chair pro tempore given March 1, 2010.

Appeals Commissioners: Philip E. Ulmer, David W. Richards, Kristin Knudsen.

[3] After oral argument on appeal, the board issued a "Final Decision and Order on Employer's Second Petition for Reconsideration," Alaska Workers' Comp. Bd. Dec. No. 10-0004 (Jan. 11, 2010) (R. Briggs, Chair) addressing the State's Oct. 7, 2009, petition for reconsideration.

By: Kristin Knudsen, Chair *pro tempore*.[4]

This appeal arises from a dispute regarding the handling of a workers' compensation claim. The board decided that a employer medical examiner's report did not support the State's nine-week controversion of Jason Ford's April 16, 2008, back surgery, decided that the employer had filed a bad faith controversion, and found the employer liable for a late payment penalty on medical benefits. In the same hearing, the board decided a pending petition, ordering the State to provide Ford copies at no charge.[5] The board also approved the attorney fees "paid thus far" to Ford, but declined to rule on his claim for attorney fees exceeding the statutory minimum.[6]

The State argues that the board placed too great a burden on the adjuster by requiring a controversion of medical care to be supported by sufficient evidence to meet the standards in *Philip Weidner & Associates, Inc. v. Hibdon.*[7] Relying on our decision in *Sourdough Express, Inc. v. Barron*,[8] the State argues the board did not review the controversion properly. The state argues the board confused the findings needed to impose late payment penalties under AS 23.30.155(e) with the findings needed to impose "bad faith" referrals under AS 23.30.155(o). The State argues that the board considered its petition for review of the prehearing officer's discovery orders without notifying the State and so did not afford it a fair hearing. Finally, the State argues that the prehearing officer erred in directing the State to provide free copies of all documents to Ford, because costs are recoverable by a successful claimant.

In response, Ford contends that the State has no business defending the adjuster, who is not a State employee. Ford argues that *Hibdon* sets the standard for

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[4] Ms. Knudsen's term as chair of the commission expired Mar. 1, 2010, but she was appointed chair *pro tempore* to continue as chair of the panel in this case.

[5] *Jason U. Ford v. State of Alaska, Alaska State Library,* Alaska Workers' Comp. Bd. Dec. No. 08-0236, 36-37 (Dec. 2, 2008) (R. Briggs, Chair).

[6] *Id.* at 37.

[7] 989 P.2d 727 (Alaska 1999).

[8] Alaska Workers' Comp. App. Comm'n Dec. No. 069, 2008 WL 400717 (Feb. 7, 2008).

an employee's claim for a particular form of treatment, and to controvert, the State needed to have evidence that, if not rebutted, would support denial of that form of treatment. Ford argues that the State invited error on the State's petition by asking the board to take up the issues raised by the prehearing officer's decision. Finally, Ford responds that the State's "egregious conduct"[9] should not be rewarded. He argues that, as a matter of policy, adjuster records should be made available to claimants without cost.

On cross-appeal, Ford argues that the board should have awarded a penalty on the disability compensation he was paid as well as the medical benefits. He also argues that his attorney is entitled to an award of full fees to date, instead of the statutory minimum fee awarded. Ford argues that a remand "with instruction on awarding fees with more leeway and imagination would be appropriate to meet the standard of providing for adequate fees so that competent counsel are available to injured workers."[10]

Following the board's decision denying modification of its order and admission of adjuster notes,[11] the commission allowed cross-appellant to supplement his cross-appeal. Ford additionally argues that the adjuster's notes should be admitted because they are relevant to the issue of penalty. He argues that the board erred in determining that he waived objections, but the State had made a judicial admission of liability for penalty. Lastly, he argues that the board erred in its application of AS 23.30.130.

In response to the cross-appeal, the State argues that the board's decision not to modify its decision was correct because the adjuster notes were not new evidence that

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[9] Br. of Cross-Appellant and Br. of Appellee 19.

[10] *Id.* at 11. The board noted that the requested attorney fee was $23,476.05. *Jason U. Ford,* Bd. Dec. No. 08-0236 at 16.

[11] *Jason U. Ford v. State of Alaska, Alaska State Library*, Alaska Workers' Comp. Bd. Dec. No. 09-0155 (Sept. 24, 2009) (R. Briggs, Chair), modified to correct caption and reconsideration denied, *Jason U. Ford v. State of Alaska, Alaska State Library*, Alaska Workers' Comp. Bd. Dec. No. 10-0004 (Jan. 11, 2010) (R. Briggs, Chair).

Ford could not have produced at hearing. The State argues that its payment of $564 is not an admission of liability. Finally, the State responds that the board did not abuse its discretion by making an award of attorney fees under AS 23.30.145(a) and deferring an award of attorney fees to the conclusion of the case.

The parties' contentions require the commission to address issues previously addressed regarding penalties and referrals for bad faith controversions in the context of a controversion of the reasonableness or necessity of medical treatment proposed by the employee's physician within two years of the injury. The commission concludes that the board did not apply the correct reasoning to its analysis of the controversion, but that the error is harmless, because the controversion of medical treatment was frivolous. However, the commission advises that referral of a self-insured employer should not be made without an accompanying finding addressing whether employer conduct was implicated in producing the controversion. The commission concludes that remand of the attorney fee award is required. The commission concludes that the board may not require prepayment of State employee discovery requests because payment of copy charges is governed by state regulation. Finally, the commission concludes that the board's error regarding relevancy of the adjuster notes is harmless because there were other grounds to deny modification.

1. Factual background and board proceedings.

Jason Ford was an administrative clerk who worked at the State Library in Juneau. On October 2, 2007, he felt lower back pain as he reached to catch a copier machine as it tipped off a dolly base. The next day, he bent at work to pick up a mat, and again felt lower back pain. Ford filed a notice of occupational injury October 5, 2007.[12] Ford continued to work until January 8, 2008, and eventually sought care that resulted in Dr. Bozarth's February 22, 2008, recommendation for surgery for a herniated disc,[13] which was scheduled for April 18, 2008. The State scheduled an

[12] R. 0001.

[13] R. 0785.

employer medical examination in March,[14] and, based on the examiner's report, its adjuster controverted the proposed surgery April 2, 2008.[15] This controversion was amended April 9, 2008.[16]

Ford received temporary total disability compensation (TTD) until he returned to work part-time, and temporary partial disability compensation (TPD) while he worked part-time for one week.[17] He underwent surgery for a herniated disc April 18, 2008.[18] He filed a workers' compensation claim May 14, 2008.[19] In its answer, filed within 20 days of board service of the claim, the State accepted liability for the claimed medical treatment and compensation through the date of the answer.[20] Ford filed an affidavit of readiness for hearing on June 12, 2008.[21] The State continued to pay compensation and formally withdrew its controversion on July 31, 2008.[22]

Meanwhile, Ford, who had earlier filed a petition for a protective order seeking a limit on the scope and age of records he was required to provide,[23] filed a petition to receive discovery from the State at no charge, claiming that the alternative offer of reviewing the files at the State's office was "facetious at best."[24]

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[14] R. 0469.

[15] R. 0005.

[16] R. 0007.

[17] R. 0011, 0208.

[18] R. 0542. Ford has since had two additional back surgeries at the same level: a repeat discectomy on June 23, 2008, R. 0656, and an artificial disc implant, R. 1374-76. His physician predicted that if the last surgery is successful, he should be able to return to work as a library assistant. R. 1549.

[19] R. 0055-56.

[20] R. 0072-75. A Compensation Report shows payment reinstated (retroactive to April 9, 2008) on June 11, 2008. R. 0012.

[21] R. 0076.

[22] R. 0095-97.

[23] R. 0016-17.

[24] R. 0077-78.

Ford's claim was heard by the board on September 9, 2008. The only witnesses were Jason Ford and his attorney, Paul Hoffman.[25] At the beginning of the hearing, the hearing officer stated the issues before the board: "[T]he issues before the Board panel today is the employee's claim for a late payment penalty and attorney's fees."[26] Ford's attorney agreed, but the State's attorney asked, "about the issues, if the Board wanted to address the issues raised in the pre-hearing conference summary, I'd be certainly welcome to do that and my brief kind of addressed that."[27] He did not identify which prehearing summary he meant. The hearing officer responded that he understood the hearing to be "on the merits of a particular claim"[28] and that the prehearing conference summary issued by Joireen Cohen on September 3, [2008] confirmed what the issues were to be presented at hearing.[29] In his opening statement, the State's attorney said:

> [A]nother just initial comment, you know, it's the – you know, the employer or the state's position that the petitions by Mr. Ford are not resolved and so if the Board doesn't address those today, I would submit that there's a process that allows review and the state is exploring that and so there has not been a final decision made on those and I think that's especially relevant regarding Mr. Ford's claim for attorney's fees.[30]

Ford's attorney responded to the argument that there had not been a final determination on his petition for a protective order as follows:

> It is, of course, noteworthy that the pre-hearing officer has decided, unlike what's alleged -- been stated in the hearing brief, that the issues on the petition for protective order and the petition for discovery would -- it stated were not decided in the

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[25] Sept. 9, 2008, Hrg. Tr. 12 – 32; 49 – 55.

[26] *Id*. at 4:6-8.

[27] *Id*. at 4:10, 17-20.

[28] *Id*. at 4:22-23.

[29] 2008 Hrg. Tr. 5:16-17. The prehearing conference summary states in the order that "An oral hearing is set for September 9, 2008, on the penalty and attorney's fees and costs issues." R. 0264.

[30] 2008 Hrg. Tr. at 8:8-15.

> plaintiff's favor. In fact, they have been at this point decided in the plaintiff's favor.[31]

The State filed an appeal of the prehearing officer's decision on Ford's petitions on September 11, 2008. The board gave no notice of an oral hearing, and there was no affidavit of readiness for hearing filed by the State. On October 14, 2008, the board met and deliberated, taking up the appeal of the prehearing officer's decision on the employee's petitions.[32]

a. The board's first decision.

The board issued a 37-page decision on December 2, 2008.[33] The board decided that Ford's case was "analogous to the facts of *Harp.*"[34] It acknowledged that the State had obtained an Employer Medical Examination, but found the examiner's report was not sufficient to support a controversion of back surgery.[35] The board stated it

> agree[d] with the employee's argument here, as have previous panels of the board, that a combined reading of *Harp* and Hibdon is that, to controvert in good faith a medical service or treatment that has been specifically prescribed by a treating physician within two years of injury, where work-relatedness is not questioned, the employer must adduce substantial evidence (as termed in *Hibdon*, a "heavy burden") that the prescribed service or treatment is "neither reasonable and necessary, nor within the realm of acceptable medical options under the particular facts."[36]

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[31] *Id*. at 67:11-17.

[32] *Jason U. Ford,* Bd. Dec. No. 08-0236 at 1. The board stated the parties misunderstood the issues set for hearing and that it limited its decision to "those issues that each party clearly had notice were at issue." *Id.* at 2 n.1.

[33] *Id.* Although the board stated its "recitation of facts is limited to those necessary to determine the issues," *id.* at 2, it described Ford's medical treatment in detail over 7 pages. *Id.* at 2-8.

[34] *Id.* at 26, referring to *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352 (Alaska 1992).

[35] *Id*.

[36] *Id.* at 26-27 (quoting *Philip Weidner & Assoc., Inc. v. Hibdon,* 989 P.2d 727, 732 (Alaska 1999)) (footnotes omitted).

The board found

> no evidence by Dr. Marks . . . that constitutes substantial evidence sufficient to support the employer's "heavy burden" under *Hibdon* to controvert the recommended surgery because it was not medically reasonable and necessary, or beyond the realm of medically-accepted practice. . . . Dr. Marks merely expressed an opinion for a different therapeutic plan.[37]

Therefore, the board concluded, a penalty was due under AS 23.30.155(e) for delays in payment of medical expenses. However, the board found that late payment penalties were not due on payment of TTD because the evidence was sufficient to support controversion. The board found it had no evidence on which to calculate a penalty on late-paid medical expenses. The board said that

> ordinarily we might reject the claim for late payment penalty for lack of proof, we note the on-going discovery disputes that include the employer's refusal to release records (including, perhaps, medical and billing records) to the employee on discovery request without advance payment . . . likely impeded the employee's preparation of evidence to support the late payment penalty claim.[38]

The board remanded the matter to its designee to "adduce evidence of late payment penalty due," and to schedule further hearing.[39] Ford was directed to send a copy of its decision to his group health insurer and providers of services so that they may file their own claims for penalties based on the board's findings.

On the claim for attorney fees, the board found that Ford's attorney had "been instrumental to the reversal of the employer's position and payment of benefits" and awarded fees under AS 23.30.145(a). The board decided that it would be premature to award fees under AS 23.30.145(b) because the claim "presumes future resistance of payment by the employer."[40] It found "[t]he only matter . . . has been litigated – and that on an incomplete record hampered by the parties' discovery disputes – has been

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37 *Jason U. Ford,* Bd. Dec. No. 08-0236 at 28.

38 *Id.* at 29.

39 *Id.*

40 *Id.* at 30-31.

late payment penalty, unfair/frivolous controversion, and the pending claim for attorney fees and costs."[41] If the State filed a future controversion or otherwise disputed Ford's "entitlement to medical or other future benefits, or even make a claim for retroactive offset for overpayments . . . [the board] will reach the issue of award of fees under AS 23.30.145(b)."[42] The board awarded attorney fees under AS 23.30.145(a) and declined to award fees under AS 23.30.145(b) "at this time."[43]

The board concluded that the prehearing officer abused her discretion in limiting the medical releases to two years prior to the injury and to the low back and lower left extremity only. The board reversed the officer's grant of Ford's petition for protective order, noting that the medical records sought may lead to admissible evidence.[44] On the other hand, the board upheld the grant of a protective order on vocational records because "there is no evidence the employee has reached medical stability, nor that the employee has been rated as permanently impaired."[45]

The board affirmed the prehearing officer's grant of the petition for discovery at no cost to Ford. The board stated that the modern Civil Rule 26 favored advance disclosures and distinguished as "outdated" older board decisions that permit a party to condition disclosure on prepayment of duplicating costs.[46] The board affirmed the order on grounds that self-insured employers or insurers are obligated to provide medical records at no cost to employees under AS 23.30.095(h); that because the adjuster records requested must include medical records, the "order will cause the

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41 *Id.* at 31.

42 *Id.*

43 *Id.* at 31-32.

44 *Id.* at 34.

45 *Id.*

46 *Id.* at 35.

employer to spend less than $100;"[47] and that the prehearing officer has discretion to allocate costs of discovery.[48]

b. The board's first modification of its decision.

Both parties petitioned for reconsideration of the board's decision.[49] The board did not respond to the petitions by issuing an order that they would reconsider within 30 days of their December 2, 2008, decision.[50] Instead, on February 3, 2009, the board's chair notified the parties by fax that the board would hear the petitions under AS 23.30.130.[51] The board decided *sua sponte* on February 17, 2009, to modify its decision, and issued a decision February 27, 2009.[52] The board modified its decision to add a finding that the State's controversions "were issued in bad faith as to the

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47 *Id.* at 36.

48 *Id.*

49 R. 0776-83; 0794-808.

50 AS 44.62.540 provides:

> **Reconsideration.** (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.
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> (b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence.

The board's power to order reconsideration expired Friday, January 2, 2009.

51 R. 0716-17.

52 *Jason U. Ford v. State of Alaska, Alaska State Library*, Alaska Workers' Comp. Bd. Dec. No. 09-0044, 1 (Feb. 27, 2009) (R. Briggs, Chair).

controversion of back surgery," and referred the State to the Commissioner of Labor and Workforce Development's designee under 8 AAC 45.182(d)(2).[53]

c. The board's second modification of its decision.

Ford petitioned the board to modify its decision based on documents contained in the adjuster files which were released to him.[54] The State petitioned to "quash" documents in Ford's May 22, 2009, Notice of Intent to Rely. The board, with new panel members, issued a 25-page decision denying the petition to quash the Notice of Intent to Rely as, in essence, an effort to delay the hearing on Ford's petition for modification.[55] The board rejected the argument that the penalty issue was moot.[56] The board found that some of the evidence offered as new evidence "was created after the board's decision, and thus cannot support a modification based on a mistake of the facts of record when the decision was made."[57] Some of the evidence, the board noted, was already in the record.[58] However, the board found the prehearing conference summary that contained the discovery order was served nearly two months after the conference and only six days before the hearing.[59] Thus, the board concluded, "this lateness would have supported a hearing continuance. Neither party, however, requested a hearing continuance on this ground."[60] The board concluded that the employee waived the right to request a continuance due to the late prehearing

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[53] *Id*. at 10.

[54] Ford also moved to supplement the commission record on appeal with the documents; the commission denied the motion. Order on Mot. to Supplement Record on Appeal issued June 3, 2009.

[55] *Jason U. Ford v. State of Alaska, Alaska State Library*, Alaska Workers' Comp. Bd. Dec. No. 09-0044, 14 (Sept. 24, 2009) (R. Briggs, Chair).

[56] *Id*. at 15.

[57] *Id.* at 17 (citing *Patrick v. Sedwick*, 413 P.2d 169, 177-78 (Alaska 1966)).

[58] *Id.* at 18.

[59] *Id.*

[60] *Id.*

conference summary.[61] After a lengthy discussion of the procedural status of the case heard on September 9, 2008, the board concluded that by failing to request a continuance on the penalty issue, Ford waived any opportunity to have the board decide the penalty claim with the undiscovered evidence in the record.[62] The board also concluded the documents did not present any evidence of a change of condition[63] and were not relevant to show that the State did not have evidence on which to base a controversion of disability compensation.[64] The board denied the State's petition to quash and Ford's petition to modify its first decision and order.[65]

The State appealed the board's first decision. The State amended its statement of grounds for appeal to include challenges to the board's first decision on modification, and Ford cross-appealed.[66] Following the board's second decision on modification, the commission allowed the cross-appellant to amend his points on appeal to include a challenge to the board's refusal to modify the decision then before the commission on appeal and directed the parties to file supplemental briefing.

2. Standard of review.

The board's findings of fact will be upheld by the commission if supported by substantial evidence in light of the whole record.[67] The commission "do[es] not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of weight to be accorded evidence is the task assigned to the board, . . . The commission will not reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded

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61 *Id.*

62 *Id.* at 20.

63 *Id.* at 22.

64 *Id.* at 23.

65 *Id.* at 24.

66 Appellant's Am. Statement of Grounds Upon Which Appeal Is Taken filed Mar. 31, 2009; Statement of Grounds Upon Which Cross-Appeal Is Taken filed Apr. 6, 2009.

67 AS 23.30.128(b).

conflicting evidence is conclusive."[68] Because the commission makes its decision based on the record before the board, the briefs, and oral argument, no new evidence may be presented to the commission.[69]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Alaska Workers' Compensation Act (Act).[70] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[71] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy,"[72] to preserve the benefits, balance, and structural integrity of the Alaska workers' compensation system.[73]

3. Discussion.

a. The conclusion that a controversion is unfair or frivolous for purposes of AS 23.30.155(o) requires a two-step analysis, and a three-step analysis to find "bad faith."

An employer must pay compensation "periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is

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

[69] AS 23.30.128(a).

[70] AS 23.30.128(b). The commission reviews board imposition of sanctions for discovery violations for abuse of discretion. *See Cameron v. TAB Elec.*, Alaska Workers' Comp. App. Comm'n Dec. No. 089, 17-19, 2008 WL 4427218 (Sept. 23, 2008) (holding board did not abuse its discretion in sanctioning employee who sought admission of late-filed medical records).

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

[72] *Cameron,* App. Comm'n Dec. No. 089, 11 (quoting *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

[73] *Conam Constr. Co. v. Bagula*, Alaska Workers' Comp. App. Comm'n Dec. No. 024, 5, 2007 WL 80650 (Jan. 9, 2007).

controverted by the employer."[74] If the employer "controverts the right to compensation after payments have begun," AS 23.30.155(d) provides that "the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due." AS 23.30.155(e) provides that if payment of compensation without an award is not made within seven days after it is due,

> . . . there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid . . . unless notice is filed under (d) of this section or unless the nonpayment is excused by the board [upon a showing that] owing to conditions over which the employer had no control the installment could not be paid within the period prescribed . . . .

AS 23.30.155(o) provides that the director of the workers' compensation division shall "promptly notify" the division of insurance "if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due." 8 AAC 45.182(d)(2) imposes a similar duty to notify the Commissioner of Labor and Workforce Development's designee if a self-insured employer frivolously or unfairly controverts compensation.

Although in *Harp v. ARCO Alaska, Inc.,* the Alaska Supreme Court acknowledged that AS 23.30.155 "does not state whether a controversion notice which is timely filed can under certain circumstances be ineffective to avert a penalty [for late payment],"[75] the quality of the controversion is clearly the trigger for board action under AS 23.30.155(o). The *Harp* Court noted it had previously held that "[i]n circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of the penalty provisions is improper. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the

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[74] AS 23.30.155(a).

[75] 831 P. 2d 352, 358 (1992).

penalty is imposed."[76] But, the Court held, a controversion that is filed in good faith will protect an employer from a penalty.[77] For a controversion to be filed in good faith, "the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits."[78]

Linda Harp was a security specialist at ARCO's Anchorage office building. She had surgery to relieve thoracic outlet syndrome in 1987 and returned to work the next month. While practicing CPR in class, she had immediate pain in her right shoulder. She stopped working three weeks later, and was paid TTD from August 25, 1987, to June 11, 1988. The employer controverted, stating on the notice that she had provided "no medical verification of ongoing disability," and that the CPR incident "was only a temporary aggravation of long-standing pre-existing non-work related cervical problems."[79]

The Court held that the employer could not rely on the absence of medical verification of ongoing disability because the Alaska Workers' Compensation Act does not require an employee to provide updates of her medical condition, the absence of evidence of continuing disability was neutral evidence – it did not provide evidence that she was *not* disabled.[80] Because the employer had no evidence she was not disabled, the absence of evidence would not overcome the presumption in favor of her claim. As

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[76] 831 P.2d at 358, (quoting *Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37, 42 (Alaska 1974)). *But see Irby v. Fairbanks Gold Mining, Inc.,* 203 P.3d 1138, 1147 (Alaska 2009) (holding that a controversion based on a plausible, but unsuccessful, legal defense is a good faith controversion).

[77] 831 P.2d at 358.

[78] *Id*.

[79] *Id*. at 353.

[80] *Id.* at 358. Linda Harp was injured before the 1988 amendment to AS 23.30.185, barring payment of temporary total disability compensation "for any period of disability occurring after the date of medical stability," § 33 ch 79 SLA 1988, and enactment of the definition of medical stability, now found at AS 23.30.395(27), establishing a presumption of medical stability in the "absence of objectively measurable improvement for a period of 45 days."

to the second reason, the Court held that a physician's statement that he was "at a loss to understand what [was] going on and why she had recurrent symptoms" after he previously opined that her disability was work-related, when viewed in context, was not sufficient to overcome the presumption as to the work-relatedness of the injury.[81] Thus, Harp was entitled to a late-payment penalty on the unpaid compensation, notwithstanding the timely controversion.

In a later case, the Supreme Court described the operation of the late-payment penalty succinctly:

> When an employer neither timely pays nor controverts a claim for [permanent partial impairment] compensation, AS 23.30.155(e) imposes a 25% penalty to be paid "at the same time as, and in addition to" the unpaid compensation. Thus, the failure to controvert compensation within 21 days does not bar the employer from later filing a controversion nor does it mean that the level of impairment is established. . . . [F]ailure to file a controversion within 21 days results in a 25% penalty under AS 23.30.155(e) if the employer is ultimately found liable for the disputed compensation.[82]

In a recent case, the Supreme Court held that a controversion need not be fact-based to constitute a good faith controversion; "a good-faith controversion can be based on a legal defense" that, even if not successful, is "not legally implausible."[83] Or, put another way, "colorable legal arguments . . . based in part on undisputed facts" were sufficient to support a controversion.[84] Finally, the Court noted that "doubt from a legal standpoint is a permissible basis for a controversion."[85]

It is not enough to show that a controversion is not a "good faith" controversion to award a penalty under AS 23.30.155(e). Bad faith alone, the Supreme Court held in *Sumner v. Eagle Nest Hotel*, does not provide a legal basis for imposition of penalty; the

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81 *Harp,* 831 P.2d at 359.

82 *Bauder v. Alaska Airlines, Inc.*, 52 P.3d 166, 176 (Alaska 2002).

83 *Irby v. Fairbanks Gold Mining, Inc.*, 203 P.3d 1138, 1147 (Alaska 2009).

84 *Id.*

85 *Id.* at n.45 (citing *Kerley v. Workmen's Comp. App. Bd.*, 4 Cal. 3d 223, 93 Cal. Rptr. 192, 481 P.2d 200, 205 (1971)).

compensation on which the penalty is based must also be paid late.[86] Thus, to obtain a penalty under AS 23.30.155(e), the proponent of the penalty must also show that the amount payable without an award was not paid within the time provided by statute.

However, in *Harp,* the Court did not consider whether the board was required to report the insurer (or in this case, a self-insured employer) under AS 23.30.155(o) simply because the evidence relied upon by the insurer for a fact-based controversion was insufficient to protect the employer from imposition of a penalty under AS 23.30.155(e). In *Crawford & Co. v. Baker-Withrow*,[87] the Supreme Court described the effect of a referral as a "determination [that] has an adverse effect on the insurer since it is binding on the Division of Insurance."[88] The implication is that referral under AS 23.30.155(o) is a separate determination than a late payment penalty determination under AS 23.30.155(e), which may, after all, be imposed when a good faith controversion is filed late, or no controversion is filed at all.

When the board assesses a penalty under AS 23.30.155(e), it examines the controversion to determine if it is a good faith controversion. "Good faith" was not defined by the legislature in the Alaska Workers' Compensation Act and the Supreme Court has defined a good faith controversion in terms of the content of the notice of controversion rather than the subjective motive of the employer or its insurer when deciding to controvert a claim. In other legal contexts, a determination of "good faith" sometimes requires an inquiry into the subjective belief of the actor; that is, that a landlord acted with "honesty in fact in the conduct of the transaction"[89] or that a claimant to adverse possession had an "honest and reasonable belief" in his right to possess the land,[90] or that an innocent spouse had "an honest and reasonable belief

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86 894 P.2d 628, 632 (Alaska 1995).

87 81 P.3d 982 (Alaska 2003).

88 *Id.* at 983.

89 *Sharpe v. Trail*, 902 P.2d 304, 308 (Alaska 1995).

90 *Ault v. State*, 688 P. 2d 951, 956 (Alaska 1984).

that the marriage was valid at its inception."[91] For merchants, "Good faith . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[92] The Supreme Court's focus in *Harp* on controversion language and the evidence in possession of the employer or insurer when the controversion is issued, (or, in the case of controversion based on a legal defense, whether the asserted defense is colorable or not implausible), suggests that good faith is objectively demonstrated by the controversion and evidence offered in its support rather than the subjective belief of the person who wrote the controversion.

A finding of bad faith, on the other hand, requires an inquiry into the subjective motives of the author.[93] As the commission explained in *Sourdough Express v. Barron*,

> [b]etween good faith and bad faith, there is a borderland inhabited by honest mistakes, inadvertent processing errors, and petty misunderstandings that may subject the employer to a penalty, but are not the result of bad-faith conduct. Failure to file "in good faith" does not prove that the employer acted in "bad faith." The Supreme Court has had occasion to distinguish between frivolous claims and bad-faith conduct, finding that a claim may be frivolous but not brought in "bad faith." Bad faith conduct implies more than partial or technical insufficiency, error or negligence. An employer may have sufficient evidence that supports controversion of part of the claim, but read the evidence as supporting controversion of the entire claim, may make typographical errors, or have reasonably misunderstood the nature of the employee's claim in framing a controversion.[94]

The commission has cautioned the board that not "every controversion that the board ultimately finds is insufficiently supported, and therefore subject to a *Harp* penalty

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[91] *Batey v. Batey*, 933 P.2d 551, 554 n.4 (Alaska 1997).

[92] *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1224 (Alaska 1992) (citing AS 45.02.103(a)(2)).

[93] This is consistent with other employment contexts, where "to be subjectively unfair, the employer's conduct must actually be motivated by an improper or impermissible objective." *Era Aviation, Inc. v. Seekins*, 973 P.2d 1137, 1141 (Alaska 1999).

[94] Alaska Workers' Comp. App. Comm'n Dec. No. 069, 20-21, 2008 WL 400717 *10 (Feb. 7, 2008).

under AS 23.30.155(e), is filed in bad faith."[95] In *Rockstad v. Chugach Eareckson*, the commission addressed its holding in *Sourdough Express*, explaining that the commission had not equated frivolity with bad faith:

> The commission's emphasis of the word "any" in its two part test of what constitutes a bad faith controversion was intended to convey such a complete absence of legal basis for a controversion that, even with every inference drawn in favor of validity, there is no possibility of mistake, misunderstanding, partial evidentiary support, or other conduct falling in the borderland between bad faith and good faith. A licensed adjuster who files such an utterly frivolous controversion may be presumed to have done so in bad faith without proof of malign motive because the adjuster possesses a state license that (1) requires specialized education, training, and experience and (2) obligates the adjuster to meet certain performance standards related to professional responsibility.[96]

Recently, the commission held in *Kinley's Restaurant & Bar v. Gurnett*[97] that

> . . . an invalid, or ultimately unsuccessful controversion, does not mean that an adjuster must be subject to the penalties of AS 23.30.155(o). A controversion which is frivolous (completely lacking a plausible legal defense or evidence to support a fact-based controversion) or unfair (dishonest, fraudulent, the product of bias or prejudice) is necessarily lacking good faith, but a controversion lacking good faith because, for example, the evidence offered in support of the controversion is based on a mistaken understanding of the claimant's employment status, is not necessarily frivolous or unfair. Therefore, referral under AS 23.30.155(o) may be made only after a separate finding that the controversion was frivolous or it was otherwise unfair.[98]

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[95] *Id*. at 20, *10. *See also Amyot v. Luchini*, 932 P.2d 244, 247 (Alaska 1997) ("Whatever the precise definition, it is clear that innocent misrepresentations do not violate the good faith standard. By definition, the only standard of liability such representations can offend is strict liability.").

[96] Alaska Workers' Comp. App. Comm'n Dec. No. 108, 5, 2009 WL 1354297, *3 (May 11, 2009).

[97] Alaska Workers' Comp. App. Comm'n Dec. No. 121, 2009 WL 4652847 (Nov. 29, 2009).

[98] *Id*. at 16, *8 (footnotes omitted).

Thus, the board here was required to make a two-step analysis of the controversion before concluding that referral to the Division of Insurance or the Commissioner's designee was required under 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.[99]

Here the board found that Dr. Marks's report did not support the controversion of treatment. The board did not decide if the controversion was frivolous or unfair before it moved to the third step of finding that the controversion was the product of bad faith instead of a mistake that would subject the employer to a penalty under AS 23.30.155(e), but not require a referral under AS 23.30.155(o), and produced a finding, binding on the referee, that the author had engaged in bad faith conduct. The board found that the

> paraphrase in the controversion form of the questions posed to Dr. Marks, rather than noting and quoting Dr. Marks' direct answers, was in bad faith, and improperly attributed to Dr. Marks opinions he did not express, and therefore the controversions were in bad faith.[100]

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[99] A controversion that is the product of dishonesty, fraud, bias, or prejudice is necessarily both unfair and issued in bad faith, but is not necessarily frivolous. A frivolous controversion is not necessarily the product of bad faith conduct by the author, as it may be based on an honest, mistaken understanding of fact or law.

[100] *Jason U. Ford,* Bd. Dec. No. 08-0236 at 27.

The board noted that it distinguished *Sourdough Express* because "here we find that there has been 'a design to mislead or deceive another' and therefore bad faith, in the incorrect paraphrasing of Dr. Marks' report."[101]

The board found that the act of paraphrasing Dr. Marks's report (whether fairly or not) was bad faith conduct. The statute does not require controversion notices to contain verbatim quotations from medical reports, any more than it requires employees to quote physician opinions in workers' compensation claims. There is nothing improper in summarizing, referring to, or paraphrasing a physician report – the controversion notice form only requires the issuer to state the *reason* for the controversion, not to quote, or describe in detail, all the evidence giving rise to the reason for controversion. In view of the director-prescribed form that the issuer is required to use by law,[102] and the size of the box provided for stating the grounds on which the right to compensation is controverted, the issuer necessarily will summarize, paraphrase, or refer to by source name and date, the evidence giving rise to the reasons for controversion.[103] The act of paraphrasing or summarizing does not

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[101] *Id.* at 27 n.109 (emphasis omitted).

[102] AS 23.30.155(a).

[103] AS 23.30.155(a) does not require the controversion to quote any medical evidence; it requires only that the controversion state "the type of compensation and all grounds upon which the right to compensation is controverted." AS 23.30.155(a)(5). AS 23.30.095 makes no provision for controversion of medical treatment, but AS 23.30.097(g) separately provides for controversion of a charge for treatment and requires notice of controversion to be given

> [i]f the employer does not plan to make or does not make payment or reimbursement in full as required . . . , the employer shall notify the employee and the employee's health care provider in writing that payment will not be made timely and *the reason for the nonpayment* . . . not later than the date that the payment is due . . . .

Under AS 23.30.097(g), a controversion of medical treatment may be filed after the receipt of the bill for the charge, because payment is due "within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later." AS 23.30.097(d). 8 AAC 45.182(b) provides that "[i]f the law does not support the controversion or if evidence to support the

constitute "bad faith" conduct. Therefore, the board erred in finding that to "paraphrase in the controversion form of the questions posed to Dr. Marks, rather than noting and quoting Dr. Marks' direct answers, was [conduct] in bad faith."[104]

The board separately found that the paraphrase "improperly attributed to Dr. Marks opinions he did not express," and therefore, the controversions were in bad faith.[105] The board explained further in a footnote that because the paraphrase was incorrect, the board found it had been "designed to mislead" and therefore was issued in bad faith.[106] In other words, the board found that the author of the controversion willfully intended to mislead or deceive the board and claimant, because the paraphrase was incorrect.

The board's finding was based on its reading of Dr. Marks's opinion that he "cannot recommend the other modalities [including surgery] at this time"[107] in response to the question:

> . . . please provide your opinion regarding whether or not you feel the following forms of treatment are reasonable and necessary for the process of recovery. Please include in your answer how each form of treatment is (1) unreasonable or unnecessary for the process of recovery, (2) unlikely to be effective, and (3) is not within the realm of medically acceptable treatment options under the particular facts of the case.[108]

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controversion was not in the party's possession, the board will invalidate the controversion . . . ." However, 8 AAC 45.182 does not require a controversion text to refer to specific evidence, to quote from medical reports, or to contain anything more than what AS 23.30.155(a)(1)-(5) requires.

[104] Bd. Dec. No. 08-0236 at 27 (emphasis omitted). The controversion text contains no quotation from the questions put to Dr. Marks. In fact, the questions put to Dr. Marks asked if the treatment was "reasonable" but the controversion used the word "appropriate," which does not have the same meaning. However, the word "appropriate" is a fair use in view of Dr. Marks's opinion that he would not recommend surgery at this time – that is, he did not think it was suitable or proper treatment.

[105] Bd. Dec. No. 08-0236 at 27.

[106] *Id.* at 27 n.109.

[107] R. 0480.

[108] R. 0480.

Dr. Marks also stated he was "hesitant to recommend surgery at this time,"[109] that "the prognosis for a successful surgical outcome is quite guarded . . . I would recommend against surgical treatment at this time"[110] and "it is my opinion that Mr. Ford is not a good surgical candidate at this time, assuming a normal EMG. I cannot predict what sort of effect Mr. Ford's other medication would have on recovery if he were to have surgery."[111]

The controversion text that the board found to have been designed to mislead reads:

> Per EIME report of Richard Marks, M.D. dated 3/18/08 and addendum dated 3/25/08, the work incident was a permanent aggravation of the EE's pre-existing degenerative low back condition. The EE exhibited "very prominent pain behavior" during his examination and Dr. Marks is of the opinion that there is evidence of symptom magnification. Dr. Marks is of the opinion that the EE is not a good surgical candidate and that surgery (L5-S1 hemilaminectomy/discectomy) is not an appropriate or medically necessary treatment. Dr. Marks recommends physical therapy under the supervision of a physiatrist. Dr. Marks recommends tapering off of the pain medication originally prescribed for "right body pain" unrelated to the lumbar injury. The EE is able to return to his job as an administrative clerk II with temporary restrictions of no repetitive bending at the waist, lifting items in excess of 25 lbs repetitively, and that the EE be allowed to change positions as tolerated from seated to standing. The EE is not medically stable and a PPI rating is premature at this time.[112]

The board found that the controversion attributed opinions (plural) to Dr. Marks that he did not express.[113] However, the opinion that "the work incident was a permanent aggravation of the EE's pre-existing degenerative low back condition" is supported by

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109 R. 0479.

110 R. 0479-80.

111 R. 0481.

112 R. 0005.

113 Bd. Dec. No. 08-0236 at 27.

Dr. Marks's report.[114] The observation that "The EE exhibited 'very prominent pain behavior' during his examination" and the opinion that "there is evidence of symptom magnification" is also supported by Dr. Marks's report.[115] The report supports his opinion that "the EE is not a good surgical candidate:"[116] and "that surgery (L5-S1 hemilaminectomy/discectomy) is not an appropriate . . . treatment."[117] The report supports that Dr. Marks recommended "physical therapy under the supervision of a physiatrist"[118] and "tapering off of the pain medication originally prescribed for 'right body pain' unrelated to the lumbar injury."[119] It supports the opinions that "EE is able to return to his job as an administrative clerk II with temporary restrictions,"[120] that "EE is not medically stable"[121] and that "a PPI rating is premature at this time."[122]

Dr. Marks expressed the opinion that he did not believe the employee's condition warranted surgical treatment when he stated that he could not recommend surgery "at this time."[123] The statement of Dr. Marks's opinion "that surgery (L5-S1 hemilaminectomy/discectomy) is not . . . medically necessary treatment" omits Dr. Marks's condition - "at this time" and thus suggests that his opinion was more definitive than Dr. Marks's report would support. However, this is only one opinion in a controversion referring to eight opinions. Drawing all reasonable inferences in favor of a facially valid controversion, the text is an incomplete statement of Dr. Marks's opinion, but it does not, as the board found, attribute to Dr. Marks more than one opinion he did not express.

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114 R. 0478.

115 R. 0475, 0483.

116 R. 0481.

117 R. 0479-80, recommending against surgical treatment.

118 R. 0480.

119 R. 0480-81.

120 R. 0482.

121 *Id.*

122 *Id.*

123 R. 0479-80.

Because the board's conclusion that the controversion was issued in bad faith rests on a finding that the author of the controversion intended to mislead the reader, the board must have examined the motives or beliefs of the author of the controversion.[124] However the board's decision reflects only a conclusion that "the incorrect phrasing" was the product of a "design to mislead." Because the board's conclusion rests on (1) unsupported findings that the controversion author attributed more than one opinion to Dr. Marks that he did not express and paraphrased his opinion by using the questions to Dr. Marks instead of his answers; (2) an error of law that a Notice of Controversion must quote questions and answers instead of paraphrasing or summarizing the opinion; and (3) board failure to identify the author of the controversion or to examine evidence of the author's intent, the board's conclusion that the author of the controversion intended to mislead the reader is not supported by substantial evidence.

The commission concludes the board erred as a matter of law in making a finding of bad faith conduct by the author of the controversion without an examination of the subjective belief of the author.[125] Because the board did not engage in the proper analysis, and made no separate finding that the controversion was either frivolous or unfair, the commission concludes the board erred as a matter of law in directing referral under AS 23.30.155(o) based on a finding of bad faith conduct.

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[124] The controversion notice form does not identify the person who *wrote* the controversion, the form requires that the person who certifies that the original notice form was sent to the employee and submits the notice copy be identified – not the author.

[125] The board need not require proof of malign motive if an utterly frivolous controversion is filed by a licensed adjuster. *Rockstad*, App. Comm'n Dec. No. 108 at 5. An utterly frivolous controversion is one that reflects "a complete absence of legal basis for a controversion that, even with every inference drawn in favor of validity, there is no possibility of mistake, misunderstanding, partial evidentiary support, or other conduct falling in the borderland between bad faith and good faith." *Id*.

b. The board record contains evidence to support a conclusion that the controversion was not a good faith controversion and frivolous within the meaning of AS 23.30.155(o).

While the commission concludes that the board used an improper analysis to reach a decision that the controversion was issued in bad faith, the commission finds that there is sufficient evidence in the record on which the board could have concluded that the controversion of surgical treatment was not a good faith controversion and frivolous within the meaning of AS 23.30.155(o).

AS 23.30.095(a) requires the employer to

> furnish medical, surgical, and other attendance or treatment . . . for the period which the nature of the injury or process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize treatment or care or both as the process of recovery may require.

A claim for medical treatment made in the first two years following the injury must (1) be reasonable and (2) be necessitated by a work-related injury.[126] AS 23.30.095(a) also provides the employee must give notice of his attending physician and AS 23.30.095(c) requires the attending physician or provider to give notice within 14 days of the treatment. The cost and payment of the treatment is governed by AS 23.30.097; the frequency of the treatment is governed by AS 23.30.095(c); and particular forms of treatment are governed by AS 23.30.095(n) and (o).

In *Bockness v. Brown Jug, Inc.*,[127] the Supreme Court held, in a case of a claim for treatment in the first two years following injury, that an employer is only liable for treatment that is reasonable and necessary.[128] The Court held that the employer "presented ample evidence to meet its burden of showing that the treatments Bockness

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126 *Philip Weidner & Assoc., Inc. v. Hibdon,* 989 P.2d 727, 731 (Alaska 1999).

127 980 P.2d 462 (Alaska 1999).

128 *Id.* at 466.

chose were not in fact reasonable or necessary."[129] The Court stated that physician opinions that "'[w]e do not feel further . . . treatment is recommended' because 'it probably is not beneficial,'" that treatments "should be discontinued because they were passive treatments that would not 'help [Bockness] functionally progress,'" and, that the treatments should have been "discontinued after four to six weeks when they did not produce significant gains" constituted substantial evidence that the claimed treatment was not reasonable or necessary.[130]

In *Hibdon,* the Supreme Court noted that it assumed, without deciding, that the presumption of compensability of Hibdon's claim had been overcome by the testimony of Drs. Keane and White, and the burden was on Hibdon to prove her claim.[131] The court stated Hibdon's burden of proof – the elements of her claim - as follows:

> [W]here the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable. If the employee makes this showing, the employer is faced with a heavy burden – the employer must demonstrate to the Board that the treatment is neither reasonable and necessary, nor within the realm of acceptable medical options under the particular facts.[132]

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129 *Id.* at 467.

130 *Id.* at 468.

131 989 P.2d at 732 n.13. The Supreme Court did not cite the evidence that the board found sufficient to overcome the presumption, but it described opinions reported by Drs. Keane and White: in September 1993 that "she should not have surgery at that time because she had not had sufficient conservative treatment nor had diagnostic tests isolated the pain generators," *id.* at 729; in December 1993 that Dr. Keane "recommended against surgical intervention" because he did not believe "the potential risk of surgery in her case justifie[d] the limited chance of potential benefit," *id.*; and, in 1995 that "once again [Drs. Keane and White] expressed the opinion that she did not need surgery." *Id*. at 730.

132 *Id*. at 732.

So, to overcome a presumption in favor of a claim for medical treatment within two years of injury, the employer must produce substantial evidence that the treatment is not reasonable and necessary, or that the treatment is not within the realm of acceptable medical options under the particular facts.

The *Hibdon* Court held that Hibdon had proved her claim and that the board's denial was not based on substantial evidence in the record because the evidence that the board relied on did not contradict the proposition that the treatment she sought was reasonable and necessary.[133] The Court pointed to the testimony by Drs. Keane and White on cross-examination "that fusion surgery often makes sense for patients with a Pars defect, that surgery could potentially benefit Hibdon, and that Dr. Garner's recommended course of treatment was 'within the realm of medically accepted options.'"[134] Evidence that more tests were needed, that Hibdon was unfit for surgery, that if surgery was performed a more extensive procedure would be required, and that considering the risks a conservative treatment regimen was the best option was insufficient to prove that the recommended surgery was not reasonable and necessary.[135]

Because a controversion must be supported by evidence that, if not contradicted, could support denial of the claim, the evidence supporting the State's controversion in this case must be substantial evidence (1) that Dr. Smythies's proposed surgery was not necessitated by a work-related injury; (2) that Dr. Smythies's proposed surgery was not reasonable and necessary; or, (3) that Dr. Smythies's proposed surgery is not within the realm of acceptable medical options under the particular facts. Dr. Marks agreed there is a work-related injury that requires treatment. Dr. Marks did not say the proposed surgery is not within the realm of acceptable medical options. In his strongest statement, Dr. Marks states that the prognosis for [a successful recovery

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133 *Id.* at 733.

134 *Id.* at 732.

135 *Id.* at 733.

with] surgery is *quite guarded* and that *he would recommend against it* at this time.[136] By contrast, in *Bockness*, one physician would not recommend further treatment because "it probably is not beneficial," another that the treatments should be discontinued because they would not "help [Bockness] functionally progress," and a third physician said, looking back, that treatments should have stopped "when they did not produce significant gains."[137] Although the phrase "guarded prognosis" suggests the prospect of a successful outcome is tenuous, a "guarded prognosis" is not equivalent to a "poor prognosis," a term that conveys that the outcome probably will not be successful. Even drawing reasonable inferences in favor of validity, Dr. Marks's recommendation (against surgery) was not based on an opinion that the proposed surgery was not likely to benefit Ford, or probably would not help Ford recover from the work injury. There is a subtle but important distinction between saying that the likelihood of benefit is doubtful or weak, and saying that benefit is unlikely or benefit probably will not result. Therefore, the commission concludes that Dr. Marks's report falls short of the *Bockness* standard for a controversion based on grounds that proposed medical treatment is "not reasonable and necessary."[138]

No other evidence was presented in support of the controversion. No other legal defense to liability for medical treatment was stated in the controversion. Therefore, the controversion is insufficiently supported and is not a good faith controversion. Finally, because the controversion when issued lacked the necessary evidence to support the stated grounds for controversion, it is frivolous within the meaning of

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136 R. 0479-80.

137 980 P.2d 468.

138 980 P.2d at 466. *See also Bailey v. Texas Instruments, Inc.*, 111 P.3d 321, 325 n.10 (Alaska 2005) (medical opinion that claimant "did not need [the claimed treatment], would have sufficed" if the opinion is not contradicted, to allow employer to prevail, and thus enough to support good faith controversion). Dr. Marks's recommendation against surgery, if not conditioned by the phrase "at this time," could fairly have been read to be an opinion that Ford did not need surgery. "At this time," however, suggests Dr. Marks thought Ford might need surgery some time in the undefined future.

AS 23.30.155(o). However, as stated above, a finding that a controversion is frivolous does not mean that it was issued in bad faith.[139]

c. The board referral to the Commissioner should include a finding whether the self-insured employer conduct is implicated in producing the controversion.

AS 23.30.155(o) provides for referral to the division of insurance if "an employer's insurer has frivolously or unfairly controverted compensation due . . . ." The board acknowledged that it made a "patent mistake of fact . . . that recited we would refer this matter to the Director of the Division for consideration for referral to the Director of the Division of Insurance."[140] The board omitted to include the full text of the board's earlier statement:

> We also believe this is an appropriate matter for referral to the Alaska Division of Insurance on the controversion of back surgery, and provide a copy of this order, Dr. Marks' report, and the controversions to the Director of the Division of Workers' Compensation for evaluation of whether to refer to the Division of Insurance *under AS 23.30.155(o)*.[141]

This was not a mistake of fact, it was a mistake of law; that is, the board applied the wrong law. AS 23.30.155(o) does not permit referral of self-insured employers to the Division of Insurance.

8 AAC 45.182(d) provides in part:

> After hearing a party's claim alleging an insurer or self-insured employer frivolously or unfairly controverted compensation due, the board will file a decision and order determining whether an insurer or self-insured employer frivolously or unfairly controverted compensation due. Under this subsection,

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[139] There was partial evidentiary support for the controversion. Distinguishing between an opinion that the surgical prognosis is guarded with a recommendation against surgery on one hand, and an opinion that surgery is not likely to benefit the employee or probably will not benefit the employee on the other hand is difficult. The controversion is not so "utterly frivolous" as to imply malign motive. *Rockstad,* App. Comm'n Dec. No. 108 at 5, 2009 WL 1354297 *3.

[140] *Jason U. Ford*, Bd. Dec. No. 09-0044 at 8-9.

[141] *Jason U. Ford* , Bd. Dec. No. 08-0236 at 30.

> (1) if the board determines an insurer frivolously or unfairly controverted compensation due, the board will provide a copy of the decision and order at the time of filing to the division of insurance for action under AS 23.30.155 (o); or
>
> (2) if the board determines a self-insured employer frivolously or unfairly controverted compensation due, the board will, at the time its decision and order are filed, provide a copy of the decision and order to the commissioner's designee for the self-insured employer records for consideration in its renewal application for self-insurance.

Here, the board failed to make specific findings that the State frivolously or unfairly controverted compensation due. Instead, the board found that the State controverted compensation in bad faith. However, the board failed to identify the employer conduct that resulted in controversion in bad faith, except to conclude that the controversion was designed to mislead the reader.

In order to qualify for a self-insurance certificate, an employer is required to have adjusting facilities within the state, either

> through its own staffed adjusting facilities located within the state or through independent, licensed, resident adjusters with power to effect settlement within the state; for purposes of this paragraph, insurance companies with a certificate of authority from the division of insurance, Department of Commerce, Community, and Economic Development, and with staff adjusters in this state, are considered independent, licensed, resident adjusters.[142]

The board does not license adjusters; adjusters are licensed through the Division of Insurance.[143] Adjusters who are not in "employer staffed facilities" are independent of the employer.

The commissioner's designee does not have the power to affect the adjuster's license, but the employer's "claims facilities and administration" *is* a factor to be

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142 8 AAC 46.010(a)(2).

143 AS 21.27.010 et seq.

considered in determining the ability to self-insure,[144] and the board may revoke an employer's self-insurance certificate for failure to comply with the board's regulations.[145] 8 AAC 45.182(d)(2) requires the referral to be kept "for consideration in [the employer's] renewal application."

Therefore, because only the self-insured employer may be adversely affected by referral under 8 AAC 45.182(d)(2), if claims against a self-insured employer are adjusted by an independent adjuster, rather than the employer's "own staffed adjusting facilities," a referral to the commissioner's designee should note if the board found that employer conduct resulted in the unfair or frivolous controversion, or if the referral is made on the basis of adjuster conduct, or if the board had insufficient evidence to make a determination of responsibility.

d. The board erred by awarding a penalty under AS 23.30.155(e) on medical treatment and failing to award a penalty on temporary total disability compensation due and unpaid.

The Supreme Court held in *Sumner v. Eagle Nest Hotel*, that lack of a good faith controversion alone does not provide a legal basis for imposition of penalty; the compensation on which the penalty is based must also be paid late.[146] As the commission said above, to obtain a penalty under AS 23.30.155(e), the proponent of the penalty must show that the amount payable without an award was not paid within the time provided by statute.

In the case of temporary total disability compensation, payment "becomes due on the 14th day after the employer has knowledge . . . . Subsequent compensation shall be paid in installments, every 14 days . . . ."[147] But, payment of medical charges, excluding prescription charges or transportation, is payable within 30 days *after* the later date when the employer receives the provider's bill or a completed report

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144 8 AAC 46.030(a)(16).

145 8 AAC 46.070(a)(1).

146 894 P.2d 628, 632 (Alaska 1995).

147 AS 23.30.155(b).

(required by AS 23.30.095(c)).[148] Prescription charges are not due until 30 days after the employer receives the "provider's completed report and an itemization of the prescription charges for the employee."[149] Transportation expenses for medical treatment are due "30 days after the employer receives the . . . provider's report and an itemization of the dates, destination, and transportation expenses. . . ."[150]

The board found that Dr. Marks's opinion that Ford could return to work was substantial evidence to support a finding that Ford was not temporarily, totally disabled, and therefore, it found "this was substantial evidence supporting the employer's controversion of TTD benefits from April 9, 2008, until the controversion was withdrawn" June 9, 2008,[151] that is after Ford had his surgery April 18, 2008. The board referred to the Supreme Court's note in *Bailey v. Texas Instruments, Inc.*:

> . . . Bailey argues that Geophysical acted in bad faith when it controverted his claims. But the medical opinion of the independent medical examiner, who expressly stated that Bailey did not need narcotics and benzodiazepines, would have sufficed to allow Geophysical to prevail at a hearing if the opinion remained uncontradicted. The opinion of the independent medical examiner is thus sufficient reason under *Harp*, 831 P.2d at 358, for a good-faith controversion.[152]

The Court's statement that "the medical opinion . . . that Bailey did not need [the claimed treatment], would have sufficed to allow Geophysical to prevail at a hearing if the opinion remained uncontradicted" (and enough for a good faith controversion) was, the board signaled, a proposition different from the board's holding, but sufficiently analogous to lend support.[153]

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148 AS 23.30.097(d).

149 AS 23.30.097(g).

150 *Id*.

151 Bd. Dec. No. 08-0236 at 28.

152 111 P.3d 321, 325 n.10 (Alaska 2005).

153 The board's citation to *Bailey v. Texas Instruments, Inc*. was prefaced with the signal "*Cf*." which, used as an introductory signal, means the cited authority supports a proposition different from the main proposition but sufficiently analogous to

The commission agrees that in *Bailey* the Supreme Court said that responsible medical opinion that a claimant does not need the treatment is enough to support a controversion of the treatment. However, the board's reliance on *Bailey* is confusing. If Dr. Marks's opinion is enough to support a controversion of disability compensation because he believed Ford could return to work and *did not need the treatment that disabled him*, it also must be strong enough to support a controversion of medical benefits. The commission concluded above that Dr. Marks's opinion was not a clear statement that Ford did not need surgery, although it is a clear statement that he could continue to work without it. Therefore, after surgery occurred, Dr. Marks' opinion that he could have continued to work without surgery was no longer sufficient to support a controversion of disability compensation related to the surgery.

The question that is not answered by the board is when the employer (or its adjuster) learned that the employee was temporarily, totally disabled. Ford argues that it was before the surgery, when Dr. Smythies sent the adjuster a note that Ford was "an <u>obvious</u> candidate for surgery now."[154] However, the evidence in the record at hearing is that the employer received a physician report supporting disability after Friday, May 9, 2008, when Ford's attorney mailed the State's adjuster a copy of Dr. Smythies's operative report.[155] Given time to process mail over the weekend[156] and fly the mail to Anchorage for processing and delivery, it is unlikely to have reached the adjuster in Anchorage before Tuesday, May 13, 2008, or Wednesday, May 14, 2008. Compensation would have been due 14 days later, May 28, 2008, but the controversion was not withdrawn until June 9, 2008. Therefore, a late payment penalty on

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lend support. Usually the relevance of the citation will only be clear if it is explained, which is why parenthetical explanations are strongly recommended. *The Bluebook: A Uniform System of Citation* R. 1.2(a), at 47 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

[154] R. 0790.

[155] R. 0541.

[156] The commission notes that in 2008 the US Postal Service processed mail on Saturdays.

compensation was owed from April 18, 2008, until the controversion was withdrawn and timely compensation payments instituted.

As it acknowledged, the board had no evidence that there was a late payment of medical bills or medical transportation costs.[157] Ford testified he did not know if all the medical bills had been submitted to the State's adjusters.[158] He could not identify one bill that was not paid.[159] He had not, at the time of hearing, submitted an itemization of "out of pocket" costs to the State's adjusters.[160] Nonetheless, the board refused to dismiss the claim for a penalty because it found the employer's refusal to release the adjuster records without advance payment "likely impeded" the employee's preparation of evidence for hearing on the late payment penalty claim.[161] However, the person with the best knowledge of his own transportation costs is Ford himself, and Ford admitted he had not submitted an itemization to the adjuster. Ford, either as the patient, or as an insured employee, had direct access to his own medical and billing records. If his employee health coverage, or his wife's employee health coverage, had paid for his treatment, he would have received a copy of the statement of benefits paid. More importantly, if the provider billed the State's workers' compensation adjuster, the provider must, according to AS 23.30.097(e), "submit a copy of the bill to the employee to whom the treatment was provided." Thus, Ford would be informed when the bills had been submitted to the adjuster, either because he sent the adjuster copies or because he was informed by copy when an adjuster was billed directly by his provider.

Ford's ability to discover what bills had not been paid was not impeded because he had direct access to his provider's records as the patient. There is no evidence that a dispute regarding prepayment of the copying charges affected Ford's ability to learn from his own physician's office if the physician had been paid. The board's finding that

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157 Bd. Dec. No. 08-0236 at 29.

158 2008 Hrg. Tr. 35:2-5.

159 *Id.* at 34:23 – 35:2.

160 *Id.* at 33:21 – 34:1.

161 Bd. Dec. No. 08-0236 at 29.

it was "likely" that Ford had been "impeded" by the State is not supported by substantial evidence.

Ford's counsel filed an affidavit of readiness for hearing on the claim for late payment penalty, averring that he had the evidence to proceed to hearing.[162] The requirement that a penalty for late payment under AS 23.30.155(e) be supported by some evidence of late payment was well-established in Alaska law. Ford requested no continuance to obtain evidence of late payment. He acknowledged he had not submitted his accounting of transportation expenses and he knew of no late paid bills. Ford had, or had access to, the information regarding his transportation and medical expenses, the ability to submit the information to the adjuster, direct access to payment information, and any evidence of late payment was within his control.

For similar reasons, the Supreme Court has held that a claimant has the burden to produce evidence of a claim for medical or transportation expenses:

> . . . the presumption of compensability does not free an injured worker from the burden of introducing evidence as to the extent of the injury and the amount of medical expenses. Allocation of this burden to the claimant makes sense because the extent of injury and amount of medical expenses are unique in each case, and the worker often has greatest access to such information. Because medical expenses are not presumed, a claimant has the burden of proving them by a preponderance of the evidence.[163]

For the same reason, the claimant has the burden of producing evidence that the medical expenses he is required to prove have not been paid if he claims a penalty for their late payment.[164]

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[162] R. 0076.

[163] *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 607-08 (Alaska 1999) (footnotes omitted).

[164] Even if the claimant had the benefit of the presumption on a late payment of medical and transportation expenses claim, he must produce "some evidence" in support of it, and it may be overcome. Here, the claimant testified he had not submitted an itemization of expenses and that he could not identify any medical bills that were not paid. If the presumption attached to his claim, it was overcome by this evidence, which eliminates the reasonable possibility that the employer failed to pay transportation expenses timely.

We conclude Ford failed to meet his burden of producing evidence in support of a claim for penalty for late payment of medical expenses or transportation expenses. The board abused its discretion by excusing Ford's failure to produce evidence and remanding with an order to the parties to produce evidence of late payment.[165] The board erred as a matter of law by finding the State liable for a late payment penalty on medical benefits and transportation expenses and by reserving jurisdiction to award Ford the penalty following remand for calculation of the penalty.[166]

e. A remand of the attorney fee award is required.

In *Fred Meyer v. Updike*, the commission held it was error to "conditionally deny" a claim.[167] When the board finds an employer liable on a claim, awards compensation or benefits on a claim, or denies a claim, it is making a final decision on the claim. The commission held that the "board may reconsider, or modify, its decision as provided by statute, but it may not leave a claim in an indeterminate state forever by appending 'at this time' or other such conditional language" to the board's order on the claim.[168] Here

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[165] If evidence of late payment had been produced, and the board awarded a penalty for late payment, the board could remand to take evidence on which to base the calculation of the penalty due. However, in this case the evidence before the board was that by Aug. 18, 2008, *only one* bill was unpaid: a bill from a nurse practitioner, Monica Nelson, (received July 21, 2008, and approved the next day), who was notified Aug. 6, 2008, that she had omitted her federal employer identification number so that payment could not be processed. R. 0102, 0105-06. The board complained that the employer failed to submit "a single, comprehensive filing that shows: (1) date of receipt of billings for medical services; (2) date of receipt of medical records to support the billing; and (3) date of payment of the medical billing by the employer." Bd. Dec. No. 08-0236 at 14. However, the board did not cite any statute or regulation that requires such a filing. This comment suggests the board put the burden on the employer to disprove a bare accusation, instead of on the employee to present some evidence of late payment of medical expenses.

[166] Dismissal of Ford's claim for a penalty on late-paid medical expenses would not affect the provider's right to file a claim if the provider had not received notice of Ford's claim. *See Barrington v. Alaska Commc'ns Sys. Group, Inc.*, 198 P.3d 1122 (Alaska 1998).

[167] Alaska Workers' Comp. App. Comm'n Dec. No. 120, 9-10 (Oct. 29, 2009).

[168] *Id.* at 10.

the board denied an award of attorney fees and legal costs under AS 23.30.145(b) but reserved jurisdiction to do so if the employer filed a "subsequent controversion and other wise dispute[d] the entitlement to medical or other future benefits, or even [made] a claim for retroactive offset for overpayments."[169] It then "decline[d] to award attorneys fees under AS 23.30.145(b) at this time."[170]

In *Lewis-Walunga v. Municipality of Anchorage*,[171] the commission discussed the Supreme Court's decision in *Harnish Group, Inc. v. Moore,* which reaffirmed the distinction between the authority to award fees under AS 23.30.145(a) and AS 23.30.145(b).[172] The commission said that

> [t]he Supreme Court's holding is enlightening because it turns on whether the employer filed a controversion or controverted in fact after the claim was filed. Because it had not, the board could not award a fee under AS 23.30.145(a). Conduct that could be resistance of payment prior to the filing of a claim was not sufficient to establish controversion in fact of a claim. It follows that the act of controverting a claim, formally or in fact, is not equivalent to otherwise resisting payment.[173]

We conclude the board erred in refusing to make a final award of attorney fees under AS 23.30.145(a) and to consider the evidence produced, and argument made, by Ford in favor of a fee exceeding the statutory minimum under AS 23.30.145(a). The board also erred by conditioning its award of fees and imposing on the employer the risk that a future controversion or a legal recoupment of overpayment would subject it to a future award of attorney fees under AS 23.30.145(b).

The State filed a controversion before Ford filed his claim, and the controversion was later withdrawn. The State also filed a timely answer to Ford's claim, which, as to certain benefits, it maintained the controversion. If a formal amended controversion was not filed after the claim, the "Board needs to look at the employer's answer to a

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169 Bd. Dec. No. 08-0236 at 31.

170 *Id.* at 32.

171 Alaska Workers' Comp. App. Comm'n Dec. No. 123, 5-7 (Dec. 28, 2009).

172 160 P.3d 146, 152 (Alaska 2007).

173 App. Comm'n Dec. No. 123 at 7.

claim for benefits and its actions after the claim is filed to determine whether the employer has controverted in fact the employee's claim for benefits."[174]

Finally, the board failed to consider if Ford's attorney was entitled to an award of a fee that exceeds the minimum fee on ongoing compensation. An award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the board to consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." 8 AAC 45.180(b) requires an attorney requesting a fee greater than the statutory minimum under AS 23.30.145(a) to file a request and affidavit. It also provides that "If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee." Although the board did not find the fee request and affidavit did not comply with 8 AAC 45.180(b), the board declined without explanation to "reach the question of the reasonableness of the work performed on those issues on which the employee has prevailed."[175]

The result of the board's decision is that the employee's claim for attorney fees is left in an indeterminate state. A claimant is entitled to a decision on a claim, and if the claimant files an affidavit of readiness to proceed, and does not request a further continuance to accomplish discovery, the board may not indefinitely deprive the claimant of a final decision. Delaying decisions as the board has done here deprives claimants of the "opportunity to be heard and for their arguments and evidence to be fairly considered"[176] because their arguments and evidence grow stale and may be rendered irrelevant by the passage of time, and their opportunity to be heard is meaningless if no decision is given. Here the board had all the information it needed to decide if the employee was entitled to an award of attorney fees. Therefore, a remand is necessary because the board failed to decide the employee's claim for attorney fees.

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174 *Harnish Group*, 160 P.3d at 151 (citations omitted).

175 Bd. Dec. No. 08-0236 at 31, n.118.

176 AS 23.30.001(4).

f. The board exceeded its authority by ordering the State to provide discovery at no charge to State employees.

The board decided the State's petition seeking review of the board designee's order on Ford's petitions for a protective order and for an order that the State produce discovery at no cost to Ford, without, the State argues, giving the State notice that it was going to decide the State's petition. Ford argues that the State cannot complain of the board's error because it invited the error. The State also challenges the merits of the board's decision to uphold the order on legal costs. The commission addresses the merits of the board's decision, without deciding the procedural challenge.

The board's designee's decision on the legal costs was:

> Finally, the employer asserts that the Civil Rules 79(f) and 8 AAC 45.180 allows the employer to charge the employee for discovery production. This rule and regulation state that the prevailing party is allowed to recover costs. The Board designee finds the employer cannot charge the employee for providing properly requested discovery.[177]

The board distinguished as "outdated the analysis in older board decisions that concluded that in certain circumstances a party could condition its cooperative production of requested documents on advance payment."[178] The board stated that its rule "initially imposes the reproduction cost on the producing party."[179] It affirmed the board's order "on the basis that the employer was legally obligated to provide a copy of those medical records [that may be in the adjuster file] to the employee, at no cost, under AS 23.30.095(h) and our regulations."[180]

AS 23.30.145 provides that an employee may recover his "legal costs." It does not provide that the prevailing party, if it is an employer, may recover his legal costs. Costs of duplication are included in recoverable legal costs under 8 AAC 45.180(g)(15). Thus, the board erred as a matter of law in holding that it could impose "initial" costs of

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177 R. 0264.

178 Bd. Dec. No. 08-0236 at 35.

179 *Id.*

180 *Id.* at 36.

production on the employer because the employer may recover them if the employer prevails against the employee.

While the State must provide medical records to Ford at no charge under AS 23.30.095(h), this duty is a shared duty – Ford had an obligation to serve copies of his medical records on the State as well. And, while the duty to file and serve *medical records* continues during the pendency of the proceeding, the duty under subsection .095(h) does not extend to providing more than one copy of the same record at no charge. Because the board did not find that the State had failed to provide its medical records with a medical summary under AS 23.30.095(h), the reliance on the authority of subsection .095(h) to direct the State to provide a copy of the adjuster's file to Ford at no charge was error.[181]

In AS 23.30.107, the legislature established that an employee shall provide information releases to the employer. As a result, the employee is spared the initial costs of obtaining copies of medical and rehabilitation documents and then providing copies to the employer.[182] Thus, the employee is shielded to some extent from the initial expense of producing relevant records to the employer, which, as a plaintiff in a civil action, he would have to bear. Because AS 23.30.145 does not allow the board to award legal costs against unsuccessful claimants, (unlike the authority to award costs to successful defendants under the Civil Rules), requiring an employer to provide additional discovery at no charge, with no prospect of recovery of costs, is not fair, especially where the employee made no claim that he was indigent.

The legislature has not established that the State has an obligation to provide discovery of its records at no charge to litigants in workers' compensation cases. For example, AS 40.25.122 provides, referring to litigation disclosure of public records, that public records remain public records subject to disclosure and copying under AS 40.25, even

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[181] Because the commission decides that the board erred on the merits, the commission does not decide the appellant's procedural challenge to the board's decision on appellee's discovery petitions.

[182] AS 23.30.107(a).

> if the record is used for, included in, or relevant to litigation, . . . involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with the rules of procedure applicable in a court or an administrative adjudication. In this section, "involved in litigation" means a party to litigation or representing a party to litigation, including obtaining public records for the party.

While many workers' compensation records are not public records, AS 23.30.107(b), the exemption of state records sought in litigation disclosure reflects a reluctance to subject public agencies, as litigants, to a greater obligation than private parties.

2 AAC 96.360(a) requires all state agencies to charge a standard unit fee for copies and 2 AAC 96.360(c) requires that the copies be paid for in advance unless excused. Thus, while the State's records must be disclosed in the manner provided for by the board in administrative adjudication, where the board's regulation is silent as to prepayment of charges, the general State regulation (which also applies to the board) requiring prepayment must be allowed to continue in effect.

Finally, the commission finds clear error by the board designee in denying the request for a release of employment records because Ford had not requested reemployment benefits. Ford was injured in 2007, after the 2005 amendments to AS 23.30.041 had come into effect. Ford was not required to request reemployment benefits, so the absence of an employee request for reemployment benefits was not material. By July 17, 2008, the date of the prehearing conference on Ford's protective order, Ford was had been totally disabled for 90 consecutive days; therefore, a reemployment eligibility evaluation was mandated by AS 23.30.041(c). The employment record release was relevant to the history that Ford gives the specialist and the State's response to any recommendation by the specialist. Therefore, because the board based its decision affirming the grant of the protective order on a clear mistake of law, the board's decision affirming the order must be reversed.

g. Board error regarding relevancy of the adjuster notes is harmless in view of this decision.

Recently, in *Smallwood v. Central Peninsula General Hospital, Inc.,*[183] the Supreme Court addressed the authority of an appellate court over the litigation of a case on appeal:

> Appellate courts have "supervision and control" of proceedings following the filing of a notice of appeal. "Absent an express remand order, the superior court cannot then modify any 'matters directly or necessarily involved in the matter under review,' although the superior court retains jurisdiction over collateral matters."[184]

The commission's jurisdiction to hear an appeal from a board decision and to review all "discretionary actions, findings of fact, and conclusions of law" of the board necessitates supervision and control of matters appealed to the commission. However, the power of the board to modify its decision within one year of a decision was expressly granted by the legislature.[185] The legislature directed the commission to decide appeals on "the record made before the board, a transcript or recording of the proceedings before the board, and oral argument and written briefs . . . new or additional evidence may not be received with respect to the appeal."[186] For that reason, the commission will not accept new or additional evidence bearing on the appeal. Only the board has the power to receive new evidence on a petition for modification. Therefore, if new evidence is produced to show the board made a mistake of fact that is material to an issue in the decision on appeal, the proper procedure is to obtain a remand from the commission to permit the board to consider the petition for modification. As the board noted, in this case the commission refused to admit the evidence and directed the party to seek modification before the board.

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183 ____ P.3d _____, S-12832 Slip Op. No. 6466, 5 (Alaska, April 2, 2010).

184 *Id.* at 5.

185 AS 23.30.130.

186 AS 23.30.128.

On appeal, Ford argues that the board erred in ruling that the adjuster's notes were not relevant. While the board did not abuse its discretion in denying modification because the evidence did not establish a mistake of fact, was not newly discovered, and presented no evidence of a change of condition, on a claim for a penalty on late-paid TTD, the adjuster's notes would be relevant to establish the date of the adjuster's knowledge of Ford's disability. However, in view of the commission's decision, the appeal of refusal to modify the board's decision is moot.

4. Conclusion.

The commission concludes the board erred because the board lacked substantial evidence to support a finding of bad faith as to the controversion of back surgery. The board's finding of bad faith in Alaska Workers' Compensation Board Decision No. 08-0263, Order paragraph 1 and Order paragraph 2, and Alaska Workers' Compensation Board Decision No. 09-0044, Order paragraph 4, is REVERSED. Because the board did not engage in the proper analysis, and made no separate finding that the controversion was either frivolous or unfair, the commission concludes the board erred as a matter of law in directing referral under AS 23.30.155(o). However, because the commission concludes that the controversion was frivolous, the commission AFFIRMS Order paragraph 1, Decision No. 08-0263, and Order paragraph 4, Decision No. 09-0044, in part. The commission REMANDS this case to the board with instructions to make further findings and to amend its referral to the Commissioner's designee as modified in the board's Decision No. 09-0044 in light of this decision.

The commission REVERSES the board's Order paragraph 2, Decision No. 08-0263. The commission REMANDS this case to the board with instructions to enter an order dismissing Ford's claim for late payment penalty on medical expenses and transportation. The board's Order paragraph 6, Decision No. 08-0263, remanding for proceedings to calculate a late penalty, provide joinder notice, and setting a prehearing conference is REVERSED without prejudice to third parties.

The commission REVERSES the board's Order paragraphs number 4 and 5, Decision No. 08-0263, affirming the board designee's discovery orders. The

commission VACATES the board's Order paragraph 7, Decision No. 08-0263, and REMANDS to the board to decide the appellee's claim for attorney fees in light of this decision.

Date: *9 April 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair *pro tempore*

APPEAL PROCEDURES

This is a final decision and order on this appeal of the board's decisions finding the employer liable for penalties under AS 23.30.155(e) on medical benefits, denying penalties under AS 23.30.155(e) on compensation paid late to Mr. Ford, affirming discovery orders on appeal, awarding a minimum attorney fee to Mr. Ford, referring the State to the designee of the Commissioner of Labor and Workforce Development under AS 23.30.155(o), and refusing to modify its decision and admit evidence. The effect of this decision is that the commission reversed part of the board's decision finding bad faith, reversed the denial of penalty on disability compensation, reversed the board's award of penalty on medical benefits, reversed the board's decision on appeal of the discovery orders, affirmed part of the decision referring the employer to the designee on other grounds, vacated the award of attorney fees, and remanded (sent back) the case to the board to dismiss a claim for penalties on medical benefits and transportation without prejudice to third parties and to re-decide the attorney fee claim. The commission did not retain jurisdiction. This decision becomes final on the 30th day after the commission mails or otherwise distributes this decision, unless proceedings to reconsider it or seek Supreme Court review are instituted. See the clerk's box below for the date of distribution.

Because the commission remanded a significant part of this case for further action that requires the board to re-decide part of the case, the Supreme Court might not accept an appeal. However, the commission has not retained jurisdiction, so the matter is closed in the commission, and the Court may consider this a final, appealable decision.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the

commission, as provided by the Alaska Rules of Appellate Procedure. The commission and the board are not parties to the appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review under Appellate Rules. If you believe grounds for review exist, you should file your petition for review within 10 days after the date this decision was distributed.

You may wish to consider consulting with legal counsel before filing a petition for review or an appeal. If you wish to appeal or petition for review 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

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier.

RECONSIDERATION

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

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. 133 issued in the matter of *State, Dept. of Education v. Ford,* AWCAC Appeal No. 09-004, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on April 9, 2010.

Date: *April 20, 2010*

Signed
B. Ward, Appeals Commission Clerk