Alaska Workers' Compensation Appeals Commission

M-K Rivers and ACE Indemnity Insurance Co., Appellants, vs. Willard L. Harris, Appellee.	Final Decision Decision No. 147 March 4, 2011 AWCAC Appeal No. 09-027 AWCB Decision No. 09-0176 AWCB Case No. 198102824

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 09-0176, issued at Anchorage on November 24, 2009, by southcentral panel members William J. Soule, Chair, Robert Weel, Member for Industry, Patricia Vollendorf, Member for Labor.

Appearances: Robert J. Bredesen, Russell, Wagg, Gabbert & Budzinski, P.C., for appellants, M-K Rivers and ACE Indemnity Insurance Co.; Mark C. Choate, Choate Law Firm, LLC, for appellee, Willard L. Harris.

Commission Proceedings: Appeal filed December 8, 2009; briefing completed November 12, 2010; oral argument held December 9, 2010.

Appeals Commissioners: Jim Robison, Stephen T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellee, Willard L. Harris (Harris), while employed as a teamster by appellant, M-K Rivers, was injured in a rollover accident off the Richardson Highway in 1976 that left him paraplegic. This appeal involves primarily medically-related disputes between Harris, M-K Rivers, and its workers' compensation carrier, appellant, ACE Indemnity Insurance Co. (collectively M-K Rivers). The specific issues presented are whether the Alaska Workers' Compensation Board (board) 1) erred in finding M-K Rivers' controversions of A) a Clinitron bed, and B) treatment for Harris's diabetes, hypertension, and sleep apnea, were unfair, frivolous, or in bad faith, entitling Harris to

penalties and interest; 2) erred in prohibiting M-K Rivers from controverting possible future claims for A) diabetes treatment, and B) attendance at a non-medical fitness facility; 3) erred in ordering M-K Rivers to pay for A) occupational therapy, B) an orthotic device, and C) a resistance exercise device; 4) erred in finding the costs of an air conditioning system and the electrical expenses to operate it compensable; and 5) erred in its rulings on awards of attorney fees.[1] For the reasons set forth below, the commission affirms the board in part, reverses the board in part, and remands the attorney fees award to Mr. Choate, Harris's counsel, to the board for review in light of this decision.

2. Factual background and proceedings.

Harris was twenty-two years old when he was injured in a rollover accident on October 8, 1976.[2] The spinal cord injuries Harris suffered left him paraplegic and bound to a wheelchair.[3] As a result, Harris has had extensive ongoing medical requirements. Initially, M-K Rivers paid him workers' compensation benefits, and no litigated disputes arose between the parties.[4]

Harris settled personal injury claims against third parties for a total amount in excess of $1 million.[5] The payment of benefits by M-K Rivers was interrupted for over 10 years while Harris used the settlement proceeds to cover his needs.[6]

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[1] *See Willard L. Harris v. M-K Rivers, et al.*, Alaska Workers' Comp. Bd. Dec. No. 09-0176 (Nov. 24, 2009) (*Harris*).

[2] *See* Appellants' Exc. 001.

[3] *See id.*; *see also Harris*, Bd. Dec. No. 09-0176 at 4.

[4] *See* Appellants' Exc. 005.

[5] *See* Appellants' Exc. 005-06. The exact amount of one of the settlements is unknown. Harris did not provide M-K Rivers with a copy of the settlement agreement or seek its approval of the settlement. *See* AS 23.30.015(g) and (h).

[6] *See* Appellants' Exc. 005-07.

On February 6, 1991, Harris filed a claim for medical costs, permanent total disability (PTD), and other benefits.[7] This claim was resolved through a partial settlement agreement, filed with and approved by the board on August 16, 1991.[8] The agreement provided, among its terms, that M-K Rivers would begin payment of PTD benefits as of July 12, 1991.[9]

On August 28, 1991, Harris filed a second claim, primarily seeking payment for home attendant care services.[10] Eventually, the claim would include a request for a vehicle with accessibility modifications.[11] On January 14, 1992, Harris filed a third claim, the purpose of which was to obtain a compensation rate adjustment.[12] The parties settled these claims in a Partial Compromise and Release (C&R) that was filed with the board on September 2, 1993, and approved by the board on September 7, 1993.[13]

Harris submitted a fourth claim, dated October 1, 1993, in which he sought to have M-K Rivers purchase a handicap accessible house for him.[14] A fifth claim, dated October 22, 1993, was filed with the board, seeking medical equipment including a wheelchair and occupational therapy table.[15] These claims were settled in a Partial C&R that was approved by the board on April 17, 1996.[16] This C&R provided in part for the

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7 *See* Appellants' Exc. 002-03.

8 *See id.* at 004-12.

9 *See id.* at 008.

10 *See id.* at 013-14.

11 *See id.* at 020.

12 *See id.* at 015-16.

13 *See id.* at 017-24.

14 *See id.* at 028-29.

15 *See id.* at 030-31.

16 *See id.* at 032-42.

settlement of "all past, present, or future disputes between the parties with respect to all housing/home/dwelling/accommodations related expenses of any kind[.]"[17]

A sixth claim was filed on April 28, 1997.[18] In this claim, Harris sought coverage for his diabetes and a daily increase in home attendant care hours.[19] The parties stipulated to a settlement of this claim on May 29, 1998.[20] The stipulation included a recital that Harris's diabetes was compensable and M-K Rivers would pay for past and continuing medical treatment for his diabetes.[21]

Patti Mackay (Mackay) has been the adjuster on Harris's workers' compensation file since 1998.[22] In February 2005, she issued a controversion in which she denied, among other things, reimbursement for a central air conditioner that Harris purchased.[23] In 2006, Mackay arranged for an employer's medical evaluation (EME) by physiatrist Nicole Chitnis, M.D., after Mackay noticed an increase in Harris's medical treatment.[24] In her report, Dr. Chitnis concluded that Harris had long-term relationships with his medical providers whose treatment was appropriate.[25] However, Dr. Chitnis questioned certain aspects of Harris's health care regimen, such as the frequency of his acupuncture treatments.[26] She also specifically noted that Harris had stopped using a Clinitron bed and had switched to a Flap Chair bed.[27]

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17 Appellants' Exc. 037.

18 *See id.* at 047-48.

19 *See id.*

20 *See id.* at 049-51.

21 *See id.* at 049.

22 *See* Dec. 23, 2009, Hr'g Tr. 257:10-14.

23 *See* Appellants' Exc. 052.

24 *See* Dec. 23, 2009, Hr'g Tr. 273:21–274:7.

25 *See* Appellants' Exc. 066.

26 *See id.* at 064-65.

27 *See id.* at 064.

On February 9, 2007, Mackay issued a controversion which denied medical benefits that Dr. Chitnis had regarded as excessive or unnecessary and denied air conditioning on the grounds that it was a housing expense that had been settled previously.[28] Thereafter, a prescription dated February 18, 2007, for a Clinitron bed on a three-month trial basis[29] was presented to M-K Rivers and controverted on March 19, 2007.[30] A prehearing conference was held on April 26, 2007, at which the controversion of the Clinitron bed and other benefits were discussed.[31]

M-K Rivers received a letter dated May 17, 2007, addressed to "To Whom It May Concern," and signed by Andrew Ross, M.D., Harris's primary physician.[32] The letter begins: "[The f]ollowing is a list of medical prescriptions Willard Harris Jr. will require for the rest of his life."[33] The letter goes on to list as "medical prescriptions," by category, Harris's requirements in terms of physical therapy, personal training, respiratory therapy, occupational therapy, clinical nutrition, and nutritional supplements.[34] Elsewhere, the letter states: "Mr. Harris also requires the following medical expenses guaranteed."[35] There follows a list of "medical expenses" he "requires." By category, they are: medical, service care hours, administrative costs, transportation, energy bills for heating and cooling, and medical personal care.[36] Among Harris's requirements in the medical category were "[t]he Clinitron bed and any other bed therapy that is required for the rest of his life without considerations of cost

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28 *See* Appellants' Exc. 070-71.

29 *See id.* at 072.

30 *See id.* at 073.

31 *See id.* at 074-75.

32 *See id.* at 076-80.

33 *Id.* at 076.

34 *See id.* at 076-78.

35 *Id.* at 078.

36 *See id.* at 078-80.

which is justified by physicians and not the carrier."[37] As was later revealed, Harris authored this letter.[38]

On June 1, 2007, Harris filed a workers' compensation claim in which he took issue with the controversions dated February 9, 2007, and March 19, 2007. He also sought benefits in accordance with the categories listed under medical prescriptions and medical expenses in the May 17, 2007, letter he authored.[39] On June 27, 2007, M-K Rivers filed a controversion and an Answer to Harris's claim, in which it denied the benefits Harris was seeking that were inconsistent with the EME report provided by Dr. Chitnis.[40] In the Answer and an addendum to the controversion, benefits for Harris's diabetes, hypertension, and sleep apnea were also denied.[41] At that time, counsel for M-K Rivers made a written request for the make and model of Clinitron bed that had been prescribed by Dr. Ross.[42]

The parties, through respective counsel, attended a prehearing conference on September 20, 2007. The prehearing conference summary indicates that M-K Rivers was asserting defenses designated in its February 9, 2007, controversion, and its June 27, 2007, controversion and Answer.[43] The summary also specifically identifies the Clinitron bed as an issue.[44]

As the parties prepared the claim for a hearing before the board, prehearing conferences were held on April 1, and April 7, 2008.[45] At the latter prehearing, the

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37 Appellants' Exc. 078.

38 *See id.* at 116.

39 *See id.* at 081-82.

40 *See id.* at 083-89.

41 *See id.* at 084 and 087-88.

42 *See id.* at 101. Six months later, on December 11, 2007, M-K Rivers filed a petition to compel that information. *See id.* at 095-96.

43 *See* Appellants' Exc. 091.

44 *See id.*

45 *See id.* at 130-33.

Clinitron bed was deleted as an issue.[46] Another prehearing conference took place on March 17, 2009.[47] At that prehearing, the Clinitron bed that had been requested by Harris was replaced by a request for an Ortho Hillrom bed.[48] There were prehearing conferences on April 3, May 1, and June 11, 2009.[49] The controversion of the Clinitron bed was not otherwise referenced in any of the prehearing conference summaries.[50] The denial of benefits for diabetes, hypertension, and sleep apnea, which first appeared in the June 27, 2007, controversion and Answer, continued to be identified as an employer defense in subsequent prehearing conference summaries.[51]

The board held a hearing on July 2, 2009, and issued its decision on November 24, 2009.[52] Of relevance in this appeal are the board's rulings 1) that Harris is entitled to penalties with respect to certain controversions; 2) that M-K Rivers is prohibited from controverting possible future claims for diabetes treatment and non-medical fitness facility attendance; 3) that occupational therapy, an orthotic device, and a resistance exercise device are compensable; 4) that the costs of an air conditioning system and the electrical expenses to operate it are compensable; and 5) on attorney fees and costs. M-K Rivers took issue with several of the board's rulings and timely appealed to the commission.

3. Standard of Review.

Pursuant to the provisions of AS 23.30.128(b), the commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the record as a whole. "Substantial evidence is such relevant evidence as a reasonable

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46 *See* Appellants' Exc. 132.

47 *See id.* at 134-37.

48 *See id.* at 134.

49 *See id.* at 138-40, 143-46, and 155-58.

50 *See id.*

51 *See id.*

52 *See Harris*, Bd. Dec. No. 09-0176 at 1.

mind might accept as adequate to support a conclusion."[53] "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."[54] The commission exercises its independent judgment in reviewing questions of law or procedure.[55]

4. Discussion.

a. Applicable law.

The presumption of compensability applies to every element of a factual determination relative to a workers' compensation claim.[56] Under AS 23.30.120(a)(1),[57] benefits sought by an injured worker are presumed to be compensable.[58] To attach the presumption of compensability, employees must first establish a "preliminary link" between their injury and their employment.[59] If they do so, this presumption may be overcome when the employer presents substantial evidence that the injury was not work-related.[60] Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility

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[53] *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 456 (Alaska 1997)) (internal quotation marks omitted).

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

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

[56] *See Burke v. Houston Nana, L.L.C.*, 222 P.3d 851, 861 (Alaska 2010).

[57] AS 23.30.120(a)(1) provides that "[i]n a proceeding for the enforcement of a claim for compensation . . . it is presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of [AS 23.30]."

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

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

[60] *See, e.g., Tolbert*, 973 P.2d at 611 (explaining that to rebut the presumption "an employer must present substantial evidence that either '(1) provides an alternative explanation which, if accepted, would *exclude* work-related factors as a substantial cause of the disability; or (2) directly eliminates *any reasonable possibility*

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of the parties and witnesses is not examined at this point.[61] If the board finds that the employer's evidence is sufficient, then the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence.[62] This means that the employee must "induce a belief" in the minds of the board members that the facts he or she is asserting are probably true.[63] At this point, the board weighs the evidence, determines what inferences to draw from the evidence and considers credibility. The aforementioned "presumption analysis does not apply to every possible issue in a workers' compensation case."[64]

b. No penalties are owed on the controversion of a Clinitron bed or the controversion of treatment for Harris's diabetes, hypertension, and sleep apnea.

The board ruled that Harris is entitled to a penalty, under AS 23.30.155(e), because the March 19, 2007, controversion[65] of Harris's prescription for a Clinitron bed was made in bad faith.[66] On appeal, M-K Rivers contends that the prehearing conference summaries, which control the issues to be addressed at hearing, indicated that there was no longer a dispute between the parties in this regard.[67] Second, it

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that employment was a factor in causing the disability.'") (italics in original, footnote omitted); *See Miller v. ITT Arctic Servs.*, 577 P.2d 1044, 1046 (Alaska 1978).

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

62 *See Miller*, 577 P.2d at 1049.

63 *See Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

64 *Burke*, 222 P.3d at 861 (citing *Rockney v. Boslough Constr. Co*, 115 P.3d 1240, 1244 (Alaska 2005) that held presumption analysis was "inapplicable when evaluating a reemployment plan because the parties agreed that the employee's claim was covered by the provisions of the workers' compensation statute.").

65 *See* Appellants' Exc. 073.

66 *See Harris*, Bd. Dec. No. 09-0176 at 56. AS 23.30.155(e) provides in relevant part: "If any installment of compensation payable without an award is not paid within seven days after it becomes due, . . . there shall be added to the unpaid installment an amount equal to 25 percent of the installment."

67 *See* Appellants' Br. 21-22.

argues that no penalties under AS 23.30.155(e) are due because no compensation was payable.[68] Third, it argues its controversion of the Clintron bed was not in bad faith.[69]

Whether the prehearing conference summaries operated to exclude at hearing consideration of all issues involving the Clinitron bed presents a question of law or procedure to which the commission applies its independent judgment. Pursuant to board regulation, 8 AAC 45.070(g), the prehearing conference summary "governs the issues and the course of the hearing." The regulation does not set forth a mere procedural or technical requirement; it serves a due process function.[70]

The April 26, 2007, prehearing conference summary indicated that the March 19, 2007, controversion of the Clinitron bed was discussed by the parties.[71] On June 1, 2007, a workers' compensation claim was filed on behalf of Harris that indicated, among other things, that: 1) the March 19, 2007, controversion was a reason for filing the claim; and 2) a claim was being made for unfair or frivolous controversion.[72] In an Answer dated June 27, 2007, M-K Rivers denied the claim for unfair or frivolous controversion.[73] A prehearing conference summary dated September 20, 2007, listed both the Clinitron bed and unfair and frivolous controversion as issues.[74] Prehearing conferences took place on April 1, and April 7, 2008. The summary of the first prehearing conference reflected that the Clinitron bed and unfair and frivolous controversion were issues.[75] The summary of the latter prehearing conference

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68 *See* Appellants' Br. 23-24.

69 *See id.* at 26-28.

70 *See Alcan Elec. & Eng'g, Inc. v. Redi-Electric, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 112, 9-10 (July 1, 2009).

71 *See* Appellants' Exc. 074.

72 *See id.* at 081-82.

73 *See id.* at 086.

74 *See id.* at 091.

75 *See id.* at 130.

indicated that the Clinitron bed was no longer an issue,[76] having been crossed out. Unfair and frivolous controversion remained an issue.[77] The summary of the prehearing conference held on March 17, 2009, confirmed that the Clinitron bed had been eliminated as an issue. By then, Harris was requesting an Ortho Hillrom bed.[78] However, that summary indicated that unfair and frivolous controversion was still an issue.[79]

The record reflects that the prescription for a Clinitron bed was no longer an issue at the hearing on July 2, 2009. The same cannot be said for the issue of whether M-K Rivers' earlier controversion of the Clinitron bed was unfair, frivolous, or made in bad faith. Procedurally, on the record before us, it appears that this issue had been preserved for hearing. Nevertheless, because Harris withdrew his claim for the Clinitron bed, the question of whether the controversion of that claim was in bad faith, frivolous, or unfair is moot. Even if the controversion was in bad faith, unfair, or frivolous,[80] that

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[76] *See* Appellants' Exc. 132.

[77] *See id.*

[78] *See id.* at 134.

[79] *See id.*

[80] Although we do not decide whether M-K Rivers filed a bad-faith controversion, we note that a lack of good faith does not necessarily mean the controversion was filed in bad faith. "For a controversion notice 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 [b]oard would find that the claimant is not entitled to benefits." *Harp v. Arco Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion . . . , invocation of penalty provisions is improper." *Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37, 42 (Alaska 1974).

Moreover, the commission has concluded that finding a controversion was not made in good faith does not necessarily mean that the controversion was in bad faith. *Sourdough Express, Inc. v. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069, 20-21 (February 7, 2008) (observing "[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

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does not warrant the imposition of a penalty by itself; the compensation must have been unpaid for "seven days after it becomes due."[81] Unless controverted, the employer "shall reimburse an employee's prescription charges . . . within 30 days after the employer receives the health care provider's completed report and an itemization of prescription charges for the employee."[82] The prescription for the Clinitron bed is in the record and it was listed on a medical summary in July 2007.[83] Furthermore, M-K Rivers argues that the prescription was inadequate because it did not specify the make and

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bad-faith conduct."). Rather the test for bad faith is "[i]f, after drawing all permissible inferences from the evidence in favor of a facially valid formal controversion, the board finds that it lacks *any* legal basis or that it was *designed* to mislead or deceive the employee," the controversion is in bad faith. *Id.* at 21-22 (citations omitted, emphasis in original). A bad-faith controversion, as distinguished from one that is merely frivolous or unfair, fails to trigger the running of the two-year period during which a claimant must request a hearing under AS 23.30.110(c). *See id*. at 22.

The types of controversions that result in penalties under AS 23.30.155(e) and (f) are those timely filed, but filed in bad faith, frivolous, or unfair, thus resulting in late payment; or good-faith controversions filed late or not filed at all. Thus, if the board should find a controversion was not in bad faith, it must still analyze whether the controversion was frivolous or unfair or a late-filed good-faith controversion. *See id.* at 20 (noting subsection .155(e) provides an exception to the penalty upon an employer's showing "that owing to conditions over which the employer had no control" the payment was late); *See also State of Alaska, Dep't of Education v. Ford*, Alaska Workers' Comp. App. Comm'n Dec. No. 133, 18 (April 9, 2010).

In addition, reporting the employer's insurer to the Division of Insurance is a separate duty of the board not triggered in every case where penalties are due, but rather only in cases where the board finds the employer's insurer has "frivolously or unfairly controverted compensation due[.]" *See* AS 23.30.155(o); *see also Mayflower Contract Servs., Inc. v. Redgrave*, Alaska Workers' Comp. App. Comm'n Dec. No. 141, 14 (December 14, 2010); *see also Ford*, App. Comm'n Dec. No. 133 at 18; *see also Kinley's Restaurant & Bar v. Gurnett*, Alaska Workers' Comp. App. Comm'n Dec. No. 121, 16 (November 24, 2009).

[81] *See* AS 23.30.155(e); *see also Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 632 (Alaska 1995); *see also Redgrave*, App. Comm'n Dec. No. 141 at 14-16; *see also Ford,* App. Comm'n Dec. No. 133 at 17-18.

[82] AS 23.30.097(g). *See also* 8 AAC 45.082(d) (requiring a completed report on form 07-6102 before reimbursement is required).

[83] *See* Appellants' Exc. 072, 090.

model for the proposed Clinitron bed, and that such information was never provided despite its discovery request.[84] Therefore, without the proper documentation, the employer was not required to pay for the Clinitron bed.[85] Eventually, Harris withdrew his claim for that bed. The board's penalty order is consequently based on "the value of a Clinitron bed as of the controversion date,"[86] rather than on an expense actually incurred. We conclude that because there is no compensation owing, much less a late payment, no penalties can be assessed under subsection .155(e).

Turning to the controversion of medical treatment for Harris's diabetes, hypertension, and sleep apnea, AS 23.30.097(d) states: "An employer shall pay an employee's bills for medical treatment . . . within 30 days after the date that the employer receives the provider's bill[.]" The board held that Harris "is entitled to a §155(e) penalty . . . on any hypertension and sleep apnea treatments due and owing as of the date of its controversion and on any not timely paid through the date [M-K Rivers] withdrew its controversion."[87] It also ruled he was entitled to a subsection .155(f) penalty on the value of diabetes treatments not timely paid up to the date M-K Rivers withdrew its controversion.[88] In addition, the board ordered M-K Rivers to pay interest, pursuant to AS 23.30.155(p),[89] on medical bills that were presented for

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[84] *See* Appellants' Br. 26; *see also* Appellants' Exc. 101.

[85] *See Williams v. Abood*, 53 P.3d 134, 145-46 (Alaska 2002) (holding employer does not have to take action on a medical bill until a completed report is received under 8 AAC 45.082(d)).

[86] *Harris*, Bd. Dec. No. 09-0176 at 56.

[87] *Id.*

[88] *See id.* at 56-57. *See* n.55, *supra* and AS 23.30.155(f), which provides in pertinent part: "If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment."

[89] AS 23.30.155(p) states in part: "An employer shall pay interest on compensation that is not paid when due."

payment and not timely paid.[90] These rulings involve legal issues to which the commission applies its independent judgment.

M-K Rivers acknowledges that the controversion of treatment for diabetes, hypertension, and sleep apnea was a mistake.[91] However, it maintains that, having never acted on the controversion and never refused to pay for treatment for those conditions, there was no conduct on its part warranting a penalty.[92] Harris does not directly dispute this contention; instead, the gist of his argument appears to be that the controversion had a detrimental effect on his seeking necessary medical treatment for his diabetes, hypertension, and sleep apnea.

> The prospective effect of a controversion (in preventing medical treatment by refusing to authorize it) must be sanctioned when done in bad faith, irrespective of whether medical bills were generated. [M-K Rivers] suggests that the only conduct upon which a sanction could be entered is if a medical bill (for treatment received) remains unpaid.[93]

It is understandable that a controversion might have a detrimental effect on a claimant obtaining the compensation that is controverted. Nevertheless, the Alaska Supreme Court has explicitly rejected the argument that bad faith warrants imposing a penalty regardless of the promptness of payment.[94]

Timeliness matters because AS 23.30.155(e) and (f), from which the board derived the authority to assess penalties against M-K Rivers, provide for the imposition of penalties against a carrier when compensation "is not paid" within a certain number

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[90] *See Harris,* Bd. Dec. No. 09-0176 at 57.

[91] *See* Appellants' Br. 11.

[92] "No evidence was presented that the 'diabetes, hypertension. . . and sleep apnea' clause [of the controversion] ever resulted in any interruption of Mr. Harris'[s] treatment, or that adjuster Mackay ever stopped paying for such treatment." Appellants' Br. 11-12.

[93] Appellee's Br. 10.

[94] *Sumner*, 894 P.2d at 632.

of days after it becomes due.[95] Ordinarily, in terms of the payment for medical care, medical bills would be presented to the carrier for payment, at which time, payment "becomes due" and must be paid within a specified number of days[96] in order to avoid penalties or interest. Here, however, as M-K Rivers argues,[97] the record does not reflect that there were any medical bills for Harris's diabetes, hypertension, or sleep apnea treatment that were presented for payment and not paid.

We conclude that no penalties can be imposed under subsections .155(e) and (f) because no bills were presented for payment, and we deny and reverse the board's rulings with respect to penalties on the controversions of the Clinitron bed and medical treatment for diabetes, hypertension, and sleep apnea. The commission need not address whether M-K Rivers' controversion of hypertension, sleep apnea, and diabetes treatment was in bad faith, frivolous or unfair, because the issue is moot.

c. The board erred in prohibiting M-K Rivers from controverting possible future claims for diabetes treatment and non-medical fitness facility attendance.

In a section of its decision and order, as a question of law, the board analyzed whether M-K Rivers could unilaterally controvert future claims by Harris for diabetes treatment, and attendance at a non-medical fitness facility.[98] The board declined to enter a blanket order preventing M-K Rivers from unilaterally controverting *all* future

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[95] Subsection .155(e) penalties are calculated against compensation payable without an award, whereas, penalties under subsection .155(f) are calculated against compensation payable under the terms of an award. Because the compensability of Harris's diabetes treatment was a subject of a May 29, 1998, stipulation between the parties, *see* Appellants' Exc. 049-50, compensation for that treatment is payable as though awarded. *See* AS 23.30.012 (providing board-approved compromises and releases are enforceable as compensation orders; here, no compromise and release was necessary because M-K Rivers accepted liability and Harris did not waive any benefits in the stipulation).

[96] *See* AS 23.30.097(d), 8 AAC 45.082(d), *Williams*, 53 P.3d at 145-46.

[97] *See* Appellants' Br. 22-24.

[98] *See Harris*, Bd. Dec. No. 09-0176 at 43-44.

benefits, no legal authority for that proposition having been brought to its attention.[99] Otherwise, without citation to any legal authority, the board found that because of the 1998 stipulation, M-K Rivers "may not unilaterally controvert or terminate diabetes treatment . . . or [Harris's] attendance at a non-medical fitness facility, without first filing a petition seeking relief."[100] We apply our independent judgment to this legal question.

In the commission's view, this issue is controlled by the supreme court's decision in *Summers v. Korobkin Construction*.[101] In *Summers*, the central issue was whether the board erred in declining to rule on whether the employee had a compensable claim. Summers sought a board hearing even though his employer had paid for his outstanding medical bills. His doctor was recommending surgery and Summers was concerned that workers' compensation would not pay for it because his employer had never acknowledged the compensability of Summers' claim or waived any of its defenses. The employer argued the board should not hear the case because the bills had been paid.[102] The supreme court held that "a worker in Summers' position, who has been receiving treatment for an injury which he or she claims occurred in the course of employment, is entitled to a hearing and prospective determination on whether his or her injury is compensable."[103] After noting that Korobkin had advanced numerous defenses to Summers' claim, the court reasoned that if Summers prevailed at hearing on the issue of the compensability of his claim, "Korobkin will still be able to controvert Summers' claim at a future hearing, if the grounds for the controversion arise after the initial hearing."[104]

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99 *See Harris*, Bd. Dec. No. 09-0176 at 43.

100 *Id.*

101 814 P.2d 1369 (Alaska 1991).

102 *See id.* at 1370.

103 *Id.* at 1372-73 (footnote omitted).

104 *Id.* at 1372 (citation omitted).

Here, Harris prevailed at the July 2, 2009, hearing on the issues of the continued compensability of his diabetes treatment and attendance at a non-medical fitness facility.[105] Moreover, M-K Rivers claims it "never intended to deny treatment for diabetes or for access to a non-medical fitness facility."[106] Nevertheless, in accordance with the holding in *Summers*, we conclude that M-K Rivers may controvert diabetes treatment and attendance at a non-medical fitness facility in the future, on grounds that arise subsequent to July 2, 2009, the date of the hearing in this matter.[107] In the stipulation, M-K Rivers acknowledged only that Harris's claim for diabetes treatment was related to his work injury and his attendance at a non-medical fitness facility was reasonable and necessary, but M-K Rivers implicitly reserved all other defenses under the Alaska Workers' Compensation Act (Act).[108] We therefore reverse the board to the extent that its order appeared to erroneously foreclose M-K Rivers from asserting any

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[105] *See Harris,* Bd. Dec. No. 09-0176 at 43.

[106] Appellants' Br. 32.

[107] Harris apparently does not disagree that M-K Rivers may issue controversions of diabetes treatment and access to the non-medical fitness facility in the future if based on defenses not waived in the stipulation. Instead, Harris argues that all the board decided was that M-K Rivers could not assert the waived defenses without first filing a petition seeking relief from the stipulation. *See* Appellee's Br. 10-11.

[108] *See* Appellants' Exc. 049-50. The stipulation states that the employer and insurer will "pay for past and continuing diabetes treatment and care *pursuant to the Alaska Workers' Compensation Act.*" (emphasis added). *Id.* at 049-50. Thus, because the Act provides defenses, other than a lack of work-relatedness, M-K Rivers could assert these defenses if appropriate circumstances arise, such as if it disputed whether a particular diabetes treatment was reasonable and necessary. Similarly, in terms of the non-medical fitness facility attendance, the employer and insurer "ha[ve] stipulated and agreed that such care is appropriate, reasonable and necessary *pursuant to the Alaska Workers' Compensation Act*." (emphasis added). *Id.* at 050. In the stipulation, M-K Rivers accepted that attendance at a non-medical fitness facility was reasonable and appropriate but left open the possibility that it could contest the reasonableness of the charges which a particular facility may impose or other defenses under the Act. *See id.*

defense to diabetes treatment and attendance at a non-medical fitness facility without first petitioning for relief from the 1998 stipulation.

d. The board did not err in finding occupational therapy, an orthotic device, and a resistance exercise device to be compensable.

Applying the presumption of compensability analysis, the board found that occupational therapy, an orthotic device, and a resistance exercise device were compensable and ordered M-K Rivers to provide them to Harris.[109] In each respect, it ruled that the presumption had attached and was not rebutted, but had it been rebutted, Harris had proven compensability by a preponderance of the evidence.[110] We concur.

At the July 2, 2009, hearing, Harris's primary physician, Andrew Ross, M.D., testified that Harris needed occupational therapy.[111] Dr. Ross also endorsed the orthotic device that was recommended to Harris by a clinic at Stanford, to help with his sleep apnea.[112] The board also noted[113] that Parvez Fatteh, M.D., in his deposition, recommended resistance exercises and equipment in one form or another for Harris. These physicians' testimony persuaded the board that Harris had satisfied the presumption analysis and met his burden of proof by a preponderance of the evidence that the occupational therapy, an orthotic device, and a resistance exercise device, were compensable. While the evidence relied on by the board for compensability might have been more compelling, in the absence of persuasive rebuttal evidence, we affirm the board's ruling that occupational therapy, an orthotic device, and a resistance exercise device, are compensable.

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109 *See Harris,* Bd. Dec. No. 09-0176 at 46, 47-48, and 53-54.

110 *See id.*

111 *See* Dec. 23, 2009, Hr'g Tr. 135.

112 *See id.* at 140-41.

113 *See Harris,* Bd. Dec. No. 09-0176 at 17-18.

M-K Rivers does not argue that it presented substantial evidence to rebut the presumption. Instead, it contends that the board could not, on the one hand, enter a blanket order prohibiting it from controverting future benefits, and on the other, enter a prospective order that occupational therapy, an orthotic device, and a resistance exercise device, are compensable.[114] According to M-K Rivers, the prospective effect of these board rulings deprived it of its due process rights to contest them.[115] The commission does not have jurisdiction to decide issues of constitutional law,[116] but we conclude other dispositive grounds exist.

We perceive a difference between an order prohibiting future controversions and an order for the compensability of future benefits. This case is analogous to *Summers*, in which the supreme court permitted the board to prospectively decide whether a claim for surgery was compensable, even though no expenses had been incurred.[117] Here, the board decided occupational therapy, an orthotic device, and a resistance exercise device were compensable. We note that M-K Rivers will still be able to controvert Harris's claims, as long as the grounds for the controversion arise after the board's hearing on July 2, 2009.[118]

M-K Rivers attempts to distinguish *Summers* from Harris's circumstances on the grounds that in *Summers*, the claimant had a prescription. First, it seems unlikely that Summers submitted a prescription or doctor's order for surgery; the board rejected hearing his case in part because there was "an absence of a current dispute," and "an absence of a current course of medical treatment."[119] Second, even assuming Summers did file a prescription, we believe this distinction from Harris's case is

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[114] *See* Appellants' Br. 28-32.

[115] *See id.*; *see also Summers*, 814 P.2d at 1372-73.

[116] *See Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007) (footnote omitted).

[117] *See Summers*, 814 P.2d at 1372.

[118] *See id.*; *see also* AS 23.30.130.

[119] *Summers,* 814 P.2d at 1370.

meaningless. Part of the court's rationale for permitting prospective compensability rulings was that "[i]njured workers must weigh many variables before deciding whether to pursue a certain course of medical treatment . . . . A salient factor in many cases will be whether the indicated treatment is compensable [under the Act]."[120] Harris similarly wanted the board's ruling on compensability because he was "looking for some security" that his medical expenses would be covered under the Act.[121] Therefore, the commission concludes that to seek a compensability ruling under *Summers*, it is enough that Harris's doctors have recommended the orthotic device and the resistance exercise machine, and testified to his ongoing need for occupational therapy.

Thus, the commission affirms the board's rulings that the orthotic device, resistance exercise machine, and occupational therapy are compensable.

e. The board did not err in finding the costs of an air conditioning system and the electrical expenses to operate it compensable.

M-K Rivers disputed Harris's claim that air conditioning and its operating costs were compensable on the basis of the Partial C&R that was approved by the board in April 1996, which provided in part for the settlement of "all housing/home/dwelling/ accommodations related expenses of any kind[.]"[122] Harris argued that, in his physical circumstance, air conditioning was a medical expense.[123] Ultimately, the board ordered M-K Rivers to 1) pay the cost of a central air conditioning system, but not the cost of its installation; and 2) pay the difference in Harris's electrical bills attributable to air conditioning.[124]

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120 *Summers,* 814 P.2d at 1372.

121 *See* Dec. 23, 2009, Hr'g Tr. 64:10-20.

122 Appellants' Exc. 037.

123 *See* Appellee's Br. 12.

124 *See Harris*, Bd. Dec. No. 09-0176 at 62.

In terms of the law, a C&R is interpreted in the same manner as any other contract.[125] To the extent they are not overridden by statute, common law principles of contract formation and rescission apply to C&Rs.[126] The Alaska Supreme Court has held that the intent of contracting parties is a factual issue.[127] The intent of the parties when forming a C&R is reviewed under the substantial evidence standard.[128] The board correctly noted that its task on the issue of whether air conditioning was a housing expense or a medical expense was to interpret the parties' intent relative to the above-quoted provision of the C&R.[129]

The board noted that at hearing, the parties did not provide additional evidence as to their intent with respect to the C&R. Instead, their intent was expressed in the agreement.[130] The C&R in question states in part: "This Compromise and Release is intended to partially resolve medical claims for injuries or aggravations to [Harris's] spinal cord injury. Specifically, this agreement will resolve pending disputes over electric/motorized wheelchairs, housing related expenses of any kind, occupational tables or evaluations, and attorney fees and costs."[131] The C&R also provides that it was intended to settle "all claims and disputes between the parties related to . . . all past, present or future housing/dwelling expenses, including modifications (interior or exterior), purchases, rentals, evaluations, or housing space related expenses of any kind . . . ."[132] In the "Dispute" section of the C&R, Harris's position on his house was that he needed

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125 *See Williams,* 53 P.3d at 139.

126 *See Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093 (Alaska 2008).

127 *See Schmidt v. Lashley,* 627 P.2d 201, 203 n.4 (Alaska 1981).

128 *See Williams,* 53 P.3d at 139.

129 *See Harris,* Bd. Dec. No. 09-0176 at 48-49.

130 *See id.* at 49.

131 Appellants' Exc. 033.

132 *Id.*

> modifications to make it a safe environment, including ramp and sidewalk repair, emergency fire/earthquake escape system, additional storage for medical supplies and equipment, modification of bathroom and kitchen for personal access on his own, and a ceiling mounted grab bar, modifications in the bedroom including a significant addition, and modifications of doorways and hallways. In the alternative he asserts that he is entitled to a new, larger residence for easy accessibility in a wheelchair.[133]

The key to the board's analysis of the parties' intent was a finding that, based on the language in the C&R, the parties were not specifically "disputing . . . [any] future claim for or entitlement to costs for purchasing an air conditioner or electricity to operate air conditioning or heating systems *as medical expenses*."[134] Moreover, as the board noted, the C&R specifically reserved Harris's right to claim future medical benefits that were not otherwise specifically waived.[135] Thus, the board concluded that if an air conditioner can be properly considered a medical expense, the C&R did not waive it.[136] Based on the testimony of Yenjean Hwang, M.D., the board found that, because of his spinal cord injury, Harris would have difficulty regulating his body temperature, making it medically necessary to maintain the ambient temperature in his environment with air conditioning.[137] Dr. Hwang's evidence sufficed, as far as the board was concerned, to support its decision that the cost of air conditioning was compensable as a medical expense.

We agree and affirm the board's rulings with respect to air conditioning and the cost to operate it and its denial of the cost of its installation. Ordinarily, home air conditioning and related expenses are housing expenses. However, as a result of his

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133 Appellants' Exc. 035.

134 *Harris,* Bd. Dec. No. 09-0176 at 50 (italics added).

135 *See id.;* Appellants' Exc. 038 (stating "[t]he parties agree that the employee's entitlement, if any, to future medical benefits under the . . . Act (other than for home related expenses, electric/motorized wheelchairs, and occupational therapy tables) is not waived by the terms of this agreement . . . .").

136 *See Harris,* Bd. Dec. No. 09-0176 at 50.

137 *See id.* at 18; *see also* Dec. 23, 2009, Hr'g Tr. 97:6-22.

paraplegia and related medical conditions, Harris's circumstances are extraordinary. In his case, air conditioning is a compensable medical expense.

f. We reverse in part and remand in part the board's awards of attorney fees.

There are two issues with respect to the board's order relative to attorney fees: 1) whether Harris was entitled to reimbursement of fees he paid a California attorney who assisted him; and 2) whether Harris's Alaska counsel, Mr. Choate, was entitled to an award of full fees. As for the first, AS 23.30.260(a)(1) prohibits receipt of a fee for representation or advice with respect to a claim unless it is approved by the board. Although we are reluctant to make a ruling that causes Harris to bear the brunt of the California attorney's inappropriate acceptance of an unapproved fee, we conclude that the board erred, and reverse its attorney fees ruling in this respect. The board should have denied Harris's request for reimbursement of attorney fees. As for the second, we remand to the board its award of fees to Mr. Choate for review in light of this decision.

5. Conclusion.

For the reasons stated, the commission reverses the board's decision in part and affirms the decision in part. We remand the award of attorney fees to Mr. Choate to the board.

Date: *4 March 2011* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirmed the board's decision in part, reversed the board's decision in part, and remanded the

attorney fees award to Mr. Choate to the board. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

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

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

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days of this decision being distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the Final Decision No. 147 issued in the matter of *M-K Rivers v. Harris,* AWCAC Appeal No. 09-027, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 4, 2011.

Date: *March 8, 2011*

Signed
B. Ward, Appeals Commission Clerk