ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

DALE D. KING, Employee, Claimant, v. UTILITY TECHNOLOGIES, INC., Employer, and LIBERTY NORTHWEST INSURANCE CO., Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 200909645 AWCB Decision No. 13-0110 Filed with AWCB Anchorage, Alaska on September 6, 2013

Dale D. King's claim for medical costs, specifically preauthorization and payment for prescription medications, unfair or frivolous controversion, penalty, interest, attorney fees and costs, was heard on June 6, 2013 at Anchorage, Alaska, a date selected on April 17, 2013. Attorney Keenan Powell represented Dale D. King ("Employee"), who appeared and testified. Attorney Rebecca Holdiman-Miller represented Utility Technologies, Inc. and its insurer Liberty Mutual (collectively, "Employer"). Insurance adjuster Madeleine Rush also testified in person. The record closed when the panel completed its deliberations on June 10, 2013.

ISSUES

Employee contends he is entitled to an order affirming his continuing entitlement to medications prescribed for his chronic low back injury by his providers at Alaska Spine Institute. Employer contends it has a right to examine, question, and require medical documentation for each and every prescription Employee presents to a pharmacy, even if this delays Employee's ability to fill the

prescription. Employer contends Employee can always pay for the prescription and seek reimbursement from Employer, which then has 30 day within which to either reimburse or controvert benefits.

1. *Is Employee entitled to continuing medical care in the form of prescription pain and muscle relaxant medications?*
2. *Is Employee entitled to have his prescriptions filled upon presentment to the pharmacy, or may he be required to prepay those expenses and thereafter seek reimbursement from Employer?*

Employee contends Employer's refusal to authorize payment for prescription medications when a valid prescription was presented to the pharmacy on each of four occasions: May 21, 2012, July 2, 2012, November 2, 2012 and January 4, 2013, was a controversion in fact for which Employer lacked sufficient evidence, and thus each controversion was unfair or frivolous. Employer asserts its failure to authorize payment for the prescriptions when presented was not a controversion. Employer contends it has 30 days within which to pay or controvert, in each instance it ultimately approved payment, and Employee was able to fill each prescription within five to seven days.

3. *Was Employer's refusal to authorize payment for prescription medication on presentment of a valid prescription a controversion in fact?*

Employee contends he is entitled to penalty and interest for Employer's delay in authorizing payment for his prescription medications. Employee further contends Employer's insurer should be referred to the State of Alaska, Department of Commerce and Economic Development, Division of Insurance, for investigation for a pattern of unfair claim settlement practices under AS 21.36.125. Employer contends no basis exists for penalty, interest or referral to the Division of Insurance.

4. *Is Employee entitled to penalty and interest for Employer's delayed authorization for prescription medications?*
5. *Should Employer's insurer be referred to the Division of Insurance for investigation for a pattern of unfair claim settlement practices?*

Employee contends that in order to obtain his prescriptions where Employer refused to authorize payment, his attorney's intervention was required, his attorney provided valuable services, and he is

entitled to an award of attorney fees and costs for his attorney's efforts. He further contends the evidence supports an award of double attorney fees. Employer contends Employee's claims are without merit, and no award of fees or costs is due.

6. *Is Employee entitled to an award of attorney fees and costs? If so, in what amount?*

FINDINGS OF FACT

The following recitation of facts is limited to those necessary to address the issues presented. A preponderance of evidence establishes the following relevant findings of fact and factual conclusions:

1. On April 27, 2009, at age 32, Employee injured his back in the course and scope of his employment as an operating engineer. (Report of Injury, June 22, 2009; Partial Settlement Agreement, January 2, 2013, at 1).

2. On July 13, 2009 Employer controverted all benefits, alleging a failure of timely notice under AS 23.30.100. (Controversion Notice, dated July 9, 2009).

3. On July 16, 2009, Employee filed a workers' compensation claim (WCC or claim) for temporary total disability benefits (TTD), permanent partial impairment benefits (PPI), medical and associated transportation costs, penalty, interest, unfair or frivolous controversion, attorney fees and costs. (WCC, July 16, 2009).

4. On August 7, 2009, Employer controverted all benefits, incorporating its earlier controversion notice and further denying TTD, PPI and medical costs, contending the substantial cause of Employee's need for medical care and disability was a preexisting condition. (Controversion Notice, dated August 5, 2009).

5. On October 19, 2009, at Employer's request, Employee was seen by Timothy Borman, D.O., osteopathic orthopedic surgeon, for an independent medical evaluation (EME). Dr. Borman diagnosed 1) prior existing lumbar spine degenerative disc disease; 2) herniated nucleus pulposus to the left at the L5-S1 disc, due to the April 27, 2009 work event; and 3) left S1 radiculopathy due to the April 27, 2009 work event. (EME Report; Settlement Agreement, December 28, 2012, at 2).

6. On December 2, 2009, Employer accepted the injury's compensability and began paying Employee TTD from November 9, 2009. (Compensation Report, dated December 19, 2009; experience, observation, inferences therefrom).

7. Employer issued Employee a pharmacy card, similar to a health insurance coverage card but for prescription medicines only, in order to fill his prescription medications. (King; Rush; experience, observation, judgment and inferences therefrom).

8. On December 30, 2009, James Eule, M.D., of Orthopedic Physicians Anchorage (OPA), performed a left L5-S1 microdiscectomy. (Operative Report).

9. On January 15, 2010, the parties filed a partial Compromise & Release Agreement (C & R) resolving all past due benefits. Employer withdrew pending controversions, formally accepted compensability of Employee's low back injury, and preauthorized further back surgery. All future benefits remained open. (C & R, January 15, 2010, at 2 - 4).

10. On March 12, 2010, Dr. Eule performed a second microdiscectomy. (*Id.* at 3).

11. On November 5, 2010, Dr. Eule performed an anterior lumbar interbody fusion at L5-S1, and an L4-L5 disc replacement arthroplasty. (*Id.* at 4). Dr. Eule prescribed Nucynta, a pain medication, on November 22, 2010. (Medical Summary filed May 23, 2012; OPA "Dale King Medications" list; experience).

12. On October 24, 2011, Employee was referred to Alaska Spine Institute (ASI) for chronic pain management. (Patient Referral from OPA to ASI, October 24, 2011, Medical Summary filed June 15, 2012).

13. On October 28, 2011, Employee was seen by ASI physiatrist Shawn Johnston, M.D. Employee's allergies to hydrocodone (Vicodin) and morphine-based pain relievers were noted. Employee's medications at that time were Lyrica, Nucynta, and Flexeril, a prescription muscle relaxant. The plan was to discontinue Lyrica, continue Flexeril, and work on reducing the Nucynta. Dr. Johnston wrote a new 30-day prescription for Nucynta, 100 mg, up to six per day, quantity 180. Employee was to return in four to six weeks, sooner if symptoms worsened. (Chart note, Dr. Johnston, October 28, 2011; Nucynta prescription, October 28, 2011; Medical records, ASI, continuing; experience).

14. Nucynta, the brand name pharmaceutical for the pain relief chemical tapentadol, is not available in generic form. (King; Experience).

15. To date, Employee remains under Dr. Johnston's care at ASI, and is regularly seen by either Dr. Johnston or Shawna Wilson, ANP-C, FNP. (King; Medical records, various). He has a "pain contract" with ASI which provides, among other things, he will use only one pharmacy, Walgreen's at Northern Lights and Gambell in Anchorage, to fill his pain medication prescriptions. (ASI

Medication Management Agreement, October 28, 2011). Employer knows of the pain contract, having filed a copy of it on a June 15, 2012 medical summary. (Medical summary, June 15, 2012; Pain contract; observation, judgment, facts of the case and inferences therefrom).

16. On November 3, 2011, at Employer's request, Employee was again seen for a follow up EME with Dr. Borman. Dr. Borman assessed 1) prior existing lumbar spine degenerative disc disease; 2) herniated nucleus pulposus to the left at the L5-S1 disc due to the April 27, 2009 work event; 3) status post left-sided L5-S1 discectomy for herniated L5-S1 disc, 12/30/09, due to the work injury; 4) status post decompression at the L5-S1 interspace, 5/12/09, due to the work injury; 5) left S1 radiculopathy, persistent, due to the work injury; 6) status post anterior lumbar interbody fusion at L5-S1 due to the work injury; and 7) status post L4-L5 disc replacement arthroplasty due to the work injury. Dr. Borman concluded the April 27, 2009 work event was the substantial cause of Employee's continuing lumbar spine symptoms and need for treatment, and the treatment he was receiving was reasonable and medically necessary. He assessed Employee with a 17% PPI, which Employee began receiving in biweekly installments beginning November 4, 2011. (EME Report, November 3, 2011, at 8, 10-11; Compensation Report, December 1, 2011).

17. Dr. Borman further opined Employee "will need monthly treatment for pain control for the rest of his life," and "monthly treatment to help adjust his medications." Dr. Borman concluded the April 27, 2009 work injury was the substantial cause of Employee's need for monthly treatment and medical management for pain control for the rest of his life. (EME Report, November 3, 2011).

18. Dr. Borman's EME report was addressed to Alicia Aros, at Liberty Northwest, Employer's workers' compensation carrier, and was received on November 8, 2011. (EME Report contained in Employer's June 15, 2012 Medical Summary, bearing insurer's receipted date stamp).

19. The cost for a fifteen day supply of Nucynta exceeds $400.00. (King). The cost for a 30 day supply exceeds $800.00. (Inference).

20. A November 11, 2011 ASI handwritten chart note states: "WC will only cover up to $500 per Rx, told pt we'd Rx 2 wk supply at a time." (Chart note, ASI, November 11, 2011, contained in Medical Summary filed June 15, 2011).

21. Dr. Johnston thereafter wrote Nucynta prescriptions at approximately semi-monthly intervals, on November 17, 2011, December 2, 2011, December 15, 2011, and December 28, 2011. The first three of these prescriptions were written by Dr. Johnston. The December 28, 2011 prescription was written by another ASI provider in Dr. Johnston's absence. (Prescriptions, various

dates; Dr. Johnston June 4, 2012 response to Employer May 25, 2012 inquiry; experience, observation, judgment, and inferences therefrom).

22. Dr. Johnston changed Employee's muscle relaxant medication from Flexeril to Zanaflex. These prescriptions were written monthly. (ASI chart notes; Zanaflex prescriptions; Dr. Johnston June 4, 2012 response to Employer May 25, 2012 inquiry).

23. Employee receives the generic equivalent, tizanadine, for the Zanaflex prescriptions. (King). The parties used the brand and generic terms for this medication interchangeably. This decision will do the same. (Observation).

24. On December 2, 2011, Employee returned to Dr. Johnston reporting continuing cramping in his left leg. Epidural steroid injection was discussed, and on December 19, 2011 was performed. (Chart note, December 2, 2011; Operative Report, December 19, 2011).

25. Dr. Johnston continued providing Nucynta prescriptions at semi-monthly intervals. (Nucynta prescriptions, January 13, 2012, January 27, 2012, February 10, 2012, etc.). Zanaflex prescriptions continued to be written monthly. (Zanaflex prescriptions; Dr. Johnston June 4, 2012 response to Employer May 25, 2012 inquiry).

26. On February 24, 2012, Employee returned to Dr. Johnston reporting the injection did not provide much relief. Lumbar medial branch blocks to address possible facet-mediated pain, and traction, were discussed as possible procedures to provide pain relief. Employee preferred to hold off on further procedures and continue with his current medication regimen. Employee was to follow up in 12 to 14 weeks, sooner if his symptoms worsened. Dr. Johnston provided another 15 day prescription for Nucynta, 100 mg, quantity 90, not to exceed six per day. (Chart note, February 24, 2012; Nucynta prescription, February 24, 2012).

27. On May 3, 2012, Employee reported increased pain for a few weeks, he was using the maximum dose of Nucynta, getting little sleep due to pain, with near constant right leg cramping and spasm. He received another Zanaflex prescription on this date. (Chart note, Zanaflex prescription, May 3, 2013).

28. Dr. Johnston continued providing Nucynta prescriptions semi-monthly, and Zanaflex monthly. (Nucynta prescriptions, May 4, 2012, May 18, 2012 etc.; Zanaflex prescriptions; Dr. Johnston June 4, 2012 response to Employer May 25, 2012 inquiry).

29. On or about May 21, 2012, Employee presented Dr. Johnston's May 18, 2012 Nucynta prescription to the Walgreen's pharmacist. The pharmacist told Employee the insurer refused to

authorize payment for the prescription until further information was obtained from his physician. Employer has never provided Employee with a direct or written explanation for its delay filling this prescription. (King; record; experience, judgment, observation, facts of the case and inferences thereon).

30. It took between five to seven days for Employer to provide the pharmacy authorization Employee to obtain the prescribed medication on this occasion. (King; Rush). This was not the first occasion Employer delayed approval for a valid prescription medication written by Employee's treating physician. Employee was at one time taking Cymbalta for pain. Because Employer's authorization for his Cymbalta prescriptions was unreliable, was delayed on multiple occasions, and the side effects Employee experienced from missing a single day dosing were intolerable, he asked his doctor to prescribe an alternative medication. (King).

31. In response to Employer's refusal to authorize payment for the Nucynta on May 21, 2012, Employee filed a claim for prescription medicine costs, penalty, interest, unfair or frivolous controversion, attorney fees and costs. (WCC, filed May 21, 2012).

32. Employer conceded Employee's Nucynta prescription was not authorized for payment or filled when presented on May 21, 2012. It does not dispute it took Employee from five to seven days to obtain his prescription on this occasion. (Employer's Hearing Brief; Rush).

33. Employee was a credible witness. (Experience, observation, judgment, facts of the case and inferences therefrom).

34. On May 23, 2012, Christine James, "WC Unit Leader," a Liberty Northwest representative, sent a letter to Dr. Johnston notifying him Employee's claim remained open for medical benefits for his April 27, 2009 low back injury, and requesting information concerning Employee's current medications, their fill frequency, the diagnosis, and the prescribing physician. (Letter from Christine James, WC Unit Leader, Liberty Northwest to Dr. Johnston, May 23, 2012).

35. On May 25, 2012, on follow up with Dr. Johnston, Employee reported ongoing symptoms in his back and leg. Dr. Johnston noted Employee had not responded well to an epidural injection, was not a candidate for further surgery, the current medication regimen would continue, and Employee should return in four to six weeks, sooner if his symptoms worsened. (Chart note, May 25, 2012).

36. On June 4, 2012, Dr. Johnston responded to the insurer's inquiry. He noted Employee's medications were Nucynta semi-monthly, and Zanaflex monthly, both prescriptions for Employee's lower back and leg pain. Dr. Johnston wrote that although he was the prescribing physician:

> "*Please Note, in Dr. Johnston's absence, one of our other providers may sign for RXs, this doesn't indicate they've taken over any care, feel free to call with any ?s regarding this, the denial of pt's last RX caused pt significant discomfort." (Emphasis in original).

Replying to the adjuster's questions concerning Mr. King's ongoing medical treatment plan and whether treatment was curative, Dr. Johnston stated: "No curative care. Ongoing home exercise + medications." (Dr. Johnston June 4, 2012 response to Employer May 25, 2012 inquiry).

37. Employee is receiving palliative care for chronic debilitating pain. (*Id.*; *See also* Dr. Borman EME report, November 3, 2011; Judgment, experience, observation, facts of the case and inferences therefrom).

38. Treatment for Employee's chronic debilitating pain through pain and muscle relaxant medications, including prescription of Nucynta and Zanaflex, is reasonable and necessary. (*Id.*).

39. Dr. Johnston continued providing Nucynta prescriptions semi-monthly and Zanaflex monthly. (*Id.*; Nucynta prescriptions, June 4, 2012, June 15, 2012, etc.).

40. On June 29, 2012, Employee returned to ASI and was seen by ANP Wilson. Employee reported he continued having stabbing pain in his low back with referral to his right buttock and posterior aspect of the leg to the mid-thigh, and aching pain in the posterior calf and lateral foot accompanied by cramping. His symptoms were less severe with his medications, and he was having no problematic side effects. ANP Wilson refilled Employee's Nucynta and Zanaflex prescriptions "unchanged." Employee was to return in four to six weeks. (Chart note, June 29, 2012; Nucynta prescription, June 29, 2012, written by ANP Wilson).

41. On or about July 2, 2012, Employee presented a Zanaflex prescription to the Walgreen's pharmacist. The pharmacist informed Employee an insurer representative refused to authorize the prescription because Employee had exceeded his lifetime entitlement to Zanaflex. Employer never provided Employee with a direct or written explanation for its delay filling this prescription. (King; record; experience, judgment, observation, facts of the case and inferences thereon).

42. Employer does not dispute it refused to authorize Employee's Zanaflex prescription on presentment on this occasion, nor does it dispute Employee's testimony its agent told the pharmacist

he had exceeded his lifetime entitlement to this medication. (Employer Hearing Brief, Employer argument at hearing).

43. Employer conceded there is no lifetime limitation on Employee's entitlement to Zanaflex. (Rush).

44. On July 9, 2012, counsel for Employee wrote to counsel for Employer requesting the names of the adjusters responsible for denying payment for Nucynta on May 21, 2012, and for tizanidine (Zanaflex) on July 2, 2012. (Letter from Keenan Powell to Rebecca Holdiman-Miller, July 9, 2012).

45. On July 19, 2012, in response to Employer's refusal to pay for tizanidine on July 2, 2012, Employee filed another claim for prescription medicine costs, penalty, interest, unfair or frivolous controversion, attorney fees and costs. (WCC, July 19, 2012).

46. Dr. Johnston continued providing Nucynta prescriptions semi-monthly, and Zanaflex prescriptions monthly. (Nucynta prescriptions, July 19, 2012, August 2, 2012; Zanaflex prescriptions).

47. On August 7, 2012, Employee returned to ASI as scheduled. He was seen by ANP Wilson, who noted: "He also reports he continues to have difficulty having coverage of his medications from the insurance company. Evidently they are not covering anything with my signature despite the fact that I work in combination with Dr. Johnston." She noted she refilled Employee's Zanaflex "unchanged," and will continue him on Nucynta. This chart note corroborates Employee's testimony that his prescriptions were delayed on other occasions than the four at issue here. This chart note, as all of ASI's previous chart notes, states it was sent to "WC," presumably to Liberty Northwest for payment. (Chart note, August 7, 2012; Zanaflex prescription, August 7, 2012; experience, observation, judgment, and inference therefrom; 8 AAC 45.082(d)).

48. On August 13, 2012, counsel for Employee wrote again to Employer's counsel requesting the names of the adjusters responsible for denying Nucynta and tizanidine prescriptions on May 21, 2012 and July 2, 2012. (Letter from Keenan Powell to Rebecca Holdiman-Miller, August 13, 2012). Counsel has never received responses to her July 9 or August 13, 2012 letters or inquiry. (Counsel representation at hearing).

49. Dr. Johnston continued providing Nucynta prescriptions semi-monthly, and Zanaflex monthly. (Nucynta prescriptions, August 17, 2012, August 31, 2012, September 14, 2012, October 2, 2012, October 18, 2012 and November 2, 2012; Zanaflex prescriptions).

50. On November 2, 2012, Employee presented Dr. Johnston's November 2, 2012 Nucynta prescription to the Walgreen's pharmacist. Employee testified credibly the pharmacist informed him insurance had denied payment for the prescription because it "needed prior approval." Employer has never provided Employee with a direct or written explanation for its delay filling this prescription. (King; record; experience, judgment, observation, facts of the case and inferences thereon).

51. Employer utilizes a third party vendor, Progressive Medical (PM), to review and approve or refuse authorization for pharmacy charges upon presentment of a prescription, apparently even when the insurer-issued pharmacy card is presented. (Rush; observation and inferences therefrom).

52. Ms. Rush was not the assigned adjuster when the May 21, 2012 and July 2, 2012, prescriptions were refused. She testified she did not know who was adjusting the claim on May 21, 2012, but the supervisory examiner on July 2, 2012 was Christine James. Ms. Rush was the adjuster when PM refused authorization for the November 2, 2012 Nucynta prescription. (Rush).

53. Ms. Rush testified she was contacted by PM on November 2, 2012, whether by phone or electronically is unknown, seeking approval to authorize Employee's Nucynta prescription. She testified her notes reflect she provided that approval and directed PM to fill Employee's Nucynta prescriptions "ongoing" on November 2, 2012. She did not state when on November 2, 2012 she was contacted by PM, when on November 2 she provided the approval PM sought, when or whether on November 2 PM contacted Walgreen's to provide the authorization, when or whether Employee was contacted and informed his prescription had been authorized, or when Employee was ultimately able to obtain it. Ms. Rush testified delays in providing approval occur when it is requested near a weekend, in which case the prescription may not be processed until the next work day. November 2, 2012 was a Friday. There is no substantial evidence Employee was able to obtain his Nucynta prescription on November 2, 2012. (Rush; Judgment, experience, observation, facts of the case and inferences therefrom).

54. Employer does not dispute it failed to fill Employee's November 2, 2012 Nucynta prescription on presentment to the pharmacy. (Rush; Employer Hearing Brief).

55. On December 31, 2012, following mediation, the parties filed a "Settlement Agreement" resolving reemployment benefits and all indemnity benefits, with the exception of permanent total disability (PTD). Medical benefits also remained open. (Settlement Agreement, December 31, 2012).

56. Dr. Johnston continued providing Nucynta and Zanaflex prescriptions for Employee. (ASI chart notes).

57. On January 4, 2013, when Employee presented another Nucynta prescription to the Walgreen's pharmacist, it too was denied, apparently because it was signed by an ASI provider other than Dr. Johnston. (King; Rush).

58. Employer has never provided Employee with a direct or written explanation for its delay filling this prescription. (Record; experience, judgment, observation, facts of the case and inferences thereon).

59. Following Employee's inability to fill his Nucynta prescription when presented on January 4, 2013, counsel for Employee emailed Employer's counsel notifying her the problems filling prescriptions continued. Employer's counsel contacted Ms. Rush. Ms. Rush testified she then provided PM the necessary approval, and again directed PM to fill Employee's Nucynta prescriptions "ongoing." She did not explain why PM denied the prescription on presentment when she instructed them to authorize the Nucynta prescription "ongoing" on November 2, 2012. She did not state when on January 4, 2013 she contacted by PM, whether or when she provided the approval PM sought on January 4, 2013, whether or when on January 4, 2013 PM contacted Walgreen's to authorize the Nucynta, when or whether Employee was contacted and informed his prescription had been authorized, or when Employee was ultimately able to obtain it. Like November 2, 2012, January 4, 2013 was also a Friday. There is no substantial evidence Employee was able to obtain his Nucynta prescription on January 4, 2013. (Rush; Emails between Ms. Powell and Ms. Holdiman-Miller, January 4, 2013Judgment, experience, observation, facts of the case and inferences therefrom).

60. Ms. Rush testified all delayed prescriptions would have been authorized within five to seven days. She has again directed PM to process Employee's prescriptions upon presentment on a continuing basis. She gave no reason why she did not so instruct PM when she was first apprised of the problem on November 2, 2012, or why previous adjusters did not similarly instruct PM. (Rush).

61. Employer has never contended its delay filling prescriptions was justified in order to substantiate a need for name brand rather than generic medication. (Record; King; Rush; Employer argument at hearing).

62. Repeatedly in the medical records in Employer's possession were references to Employee's allergies to hydrocodone and morphine-based pain relievers. (*See*, *i.e.*, Employer Medical Summaries, filed June 15, 2012 and July 17, 2012).

63. Dr. Johnston has continued providing Nucynta prescriptions at two week intervals, and Zanaflex prescriptions monthly. (Nucynta prescriptions, March 1, 2013, March 18, 2013, March 29, 2013, April 17, 2013; Zanaflex prescriptions).

64. On each of the four documented dates Employer refused to authorize payment for Employee's prescription medicines: May 21, 2012, July 2, 2012, November 2, 2012 and January 4, 2013, it had Dr. Borman's November 3, 2011 EME report opining Employee would need monthly medication management for pain control for the rest of his life, as well as ASI chart notes reflecting Employee's continuing need for and Dr. Johnston's continuing prescription of Nucynta and Zanaflex. (Finding of Fact 17, 18; Medical summaries, May 23, 2012, June 15, 2012, July 16, 2012, November 21, 2012 and December 4, 2012). On three of the dates Employer delayed payment for Employee's prescription medications: July 2, 2012, November 2, 2012 and January 4, 2013, Employer had Dr. Johnston's June 4, 2012 response to Employer's May 25, 2012 inquiry, stating Employee's ongoing treatment plan consisted of prescription medication management, with Nucynta written semi-monthly, Zanaflex monthly, and instructing Employer to anticipate and honor prescriptions written by other ASI providers in Dr. Johnston's absence. (Judgment, observation, facts of the case and inferences therefrom).

65. Employer's failures to authorize payment for Employee's prescription medications upon presentment of valid prescriptions on May 21, 2012, July 2, 2012, November 2, 2012 and January 4, 2013, constitute controversions in fact of Employee's continuing entitlement to medical benefits in the form of pain and muscle relaxant medications for his compensable work injury. (Judgment, experience, facts of the case).

66. Employer had no evidence to support any of its four controversions in fact. All four controversions were frivolous. (*Id.*; record).

67. Employer does not dispute it refused to authorize Employee's prescriptions on presentment to the designated pharmacy on May 21, 2012, July 2, 2012, November 2, 2012 and January 4, 2013. Employer contends its delays were justified because a claimant's medical condition is an evolving process, and although certain medications were prescribed in the past does not mean they continue to be prescribed or remain necessary. Employer contends it has a right to investigate and require

documentation prior to payment for medical care, its only obligation to Employee is to reimburse him his out of pocket costs for prescription medication, and it has 30 days from receiving proper documentation in which to do so. (Rush; Employer Hearing Brief, Employer argument at hearing).

68. Employer never identified what additional "documentation" or it required on each of the occasions it refused to authorize payment for Employee's prescriptions on presentment. (Record; observation).

69. At an April 17, 2013 prehearing conference, Employee's claim for prescription medication, unfair or frivolous controversion, penalty, interest, attorney fees and costs was set for oral hearing on June 6, 2013 over the objection of Employer. Employer reiterated its assertion the Act only requires an employer to reimburse an employee for prescription medication an employee pays out of pocket. (Prehearing conference summary, April 17, 2013).

70. On May 29, 2013, counsel for Employer wrote to Employee's counsel:

> As you know, the hearing on Mr. King's prescription cost issue is fast approaching . . . As you know, my clients are unable to agree to your demand for preauthorization of payment within 24 hours of contact by a pharmacy.
>
> The Act and case law is (sic) clear that preauthorization is not required. Instead, medical bills must either be paid or controverted within thirty days after receipt of documentation. Further, the provision of a prescription card for a claimant's use is not a "benefit" under the Act.
>
> Therefore, if we are unable to resolve this issue and avoid litigation before the Board, then my clients will discontinue the prescription card, in which case Mr. King can seek reimbursement of his prescription costs after the fact as provided by the Act.

(Letter from Ms. Holdiman-Miller to Ms. Powell, May 29, 2013).

71. Employer's refusal to promptly authorize Employee's prescription medications on May 21, 2012, July 2, 2102, November 2, 2012 and January 4, 2013, was entirely without factual or legal basis, was thus utterly frivolous and thereby made in bad faith. (Analysis at 31-34).

72. Adjuster Rush testified credibly she did not authorize nor have prior knowledge of counsel's May 29, 2013 letter or its threat to discontinue Employee's prescription card, nor was it Employer's intention to revoke Employee's card for pursuing his rights under the Act. She testified she could not speak to her counsel's motivation in sending the May 29, 2013 letter. (Rush).

73. Employee filed an affidavit of attorney fees at a rate of $325.00 per hour, for paralegal costs at $160.00 per hour, and billable costs of $46.82, for a total fee and cost award of $9,846.32. (Affidavit of Attorney Fees, May 30, 2013).

74. At hearing Employee's counsel supplemented her affidavit of attorney fees to include an additional 3.4 hours of attorney time to prepare for, travel to and from, and attend this hearing. (Counsel representation at hearing). Employer did not contest the attorney or paralegal hourly rates charged, time spent or the costs billed. (Record).

75. Employee's counsel is an experienced litigator, and has specialized in workers' compensation matters on behalf of injured workers for many years. (Experience).

76. Employee's counsel contends she is entitled to "double fees" because she was required to turn down other income-producing work in order to represent Employee. (Counsel representation at hearing).

PRINCIPLES OF LAW

> **AS 01.10.040. Words and phrases . . .** (a) Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those which have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning . . .

The term 'or' is used in a statute disjunctively unless there is clear legislative intent to the contrary. IA Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 21:14, at 181–82 (7th ed.) *State v. Greenpeace, Inc.*, 187 P.3d 499, 510, fn 26 (Alaska 2008).

> **AS 23.30.001. Intent of the legislature and construction of chapter**.
> It is the intent of the legislature that
> 1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> 2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute; . . .

The Alaska Workers' Compensation Act (Act) has a liberal humanitarian purpose, *Burgess Construction Co. v. Lindley*, 504 P.2d 1023, 1025 (Alaska 1972); to provide workers with a simple and speedy remedy to compensate them for work related injuries. *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987); *Hewing v. Peter Kiewit & Sons*,

586 P.2d 182 (Alaska 1978). The Act is read liberally to effectuate its beneficent purposes. *Hood v. State of Alaska*, 574 P.2d 811, 815 (Alaska 1978); *S. L. W. v. Alaska Workmen's Compensation Board*, 490 P.2d 42, 43 (Alaska 1971).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
> (h) The department . . . shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Rogers & Babler* at 533-534.

An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (2009).

> **AS 23.30.008. Powers and duties of the commission.** (a) The commission shall be the exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter in those matters that have been appealed to the commission, except for an appeal to the Alaska Supreme Court. . . Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. . . . When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for

> medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .
>
> **AS 23.30.012. Agreements in regard to claims.** (a) . . . the employer and the employee . . . have the right to reach an agreement in regard to a claim for injury . . . under this chapter . . . [A]n agreement filed with the division . . . is enforceable as a compensation order.
>
> **AS 23.30.045. Employer's liability for compensation.**
> (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 - 23.30.215….
>
> **AS 23.30.095. Medical treatments, services, and examinations.**
> (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the 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 continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a physician to provide all medical and related benefits.
> . . . .

Under the Act, an employer shall furnish an employee injured at work any medical treatment "which the nature of the injury or process of recovery requires" within the first two years of the injury. The medical treatment must be "reasonable and necessitated" by the work-related injury. Thus, when the board reviews an injured employee's claim for medical treatment made within two years of an indisputably work-related injury, "its review is limited to whether the treatment sought is reasonable and necessary." *Philip Weidner & Associates v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999). But when the board examines a claim for continued treatment beyond two years from date of injury, it is "not limited to deciding if the treatment is reasonable and necessary." *Voorhees Concrete Cutting v. Kenneth Monzulla,* AWCAC Decision No. 68, February 4, 2008, at fn. 45. Rather, the board has "discretion to authorize 'indicated' medical treatment 'as the process of recovery may require,'" (*Hibdon at 731),* and "latitude to choose among reasonable alternatives." *Monzulla* at fn. 45. The "process of recovery" language includes awards of

medical benefits for purely palliative care where it is established such care promotes the employee's recovery from individual attacks caused by a chronic condition. *Municipality of Anchorage v. Carter*, 818 P.2d at 665-666. Medical benefits includes supplying medicines which the nature of the injury or process of recovery may require. AS 23.30.095(a).

Injured workers must weigh many variables when deciding whether to pursue a certain course of medical or related treatment. An important treatment consideration in many cases is whether a physician's recommended treatment is compensable under the Act. *Summers v. Korobkin*, 814 P.2d 1369, 1372 (Alaska 1991). An injured worker is entitled to a prospective determination of a treatment's compensability. *Id.* at 1373-1374.

Effective November 7, 2005, AS 23.30.095 was amended, *inter alia*, to add subsection (o), which eliminated employer liability for palliative care after the date of medical stability unless the palliative care is "reasonable and necessary" (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain. Consistent with and for the purpose of effectuating AS 23.30.095(o), AS 23.30.395 was amended to add definitions for the terms "chronic debilitating pain" and "palliative care:"

> (9) "chronic debilitating pain" means pain that is of more than six months duration and that is of sufficient severity that it significantly restricts the employee's ability to perform the activities of daily living;
> . . .
> (28)"palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition; . . .
>
> **AS 23.30.097 Fees for medical treatment and services.**
> . . .
> (f) An employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter.

AS 23.30.097(f) prohibits an employer from requiring an employee to pay and wait for reimbursement. *Barrington v. ACS Group, Inc.* AWCAC Decision No. 30 (February 12, 2007). AS 23.30.097(f) is the means by which the employer's obligation to furnish medical treatment

under AS 23.30.045, AS 23.30.095(a) and AS 23.30.155(a) is satisfied. Prompt payment directly to the provider is required if an employer is liable to an employee. *Id.*

> **AS 23.30.120. Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
> (1) the claim comes within the provisions of this chapter.
> (2) notice of the claim has been given;
> . . .

Under AS 23.30.120, an injured worker is afforded a presumption the benefits he or she seeks are compensable. The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including claims for medical benefits and for continuing care. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991).

Application of the presumption to determine the compensability of a claim for benefits involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, the claimant must adduce "some" "minimal," relevant evidence establishing a "preliminary link" between the disability and employment, or between a work-related injury and the existence of disability, to support the claim. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to raise the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this stage in the analysis. *Resler v. Universal Services Inc*., 778 P.2d 1146, 1148-49 (Alaska 1989). If there is such relevant evidence at this threshold step, the presumption attaches to the claim. If the presumption is raised and not rebutted, the claimant need produce no further evidence and the claimant prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997).

If the employee establishes the preliminary link, then "if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing

the [need for medical treatment], etc., the presumption is rebutted." *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) at 7. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fireman's Fund Am. Ins. Companies v. Gomes*, 544 P.2d 1013, 1015 (Alaska 1976). Whether evidence rises to the level of "substantial" is a legal question. *Id*. Because the employer's evidence is considered by itself and not weighed at this step, credibility is not examined at this point. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985). Credibility questions and weight given the parties' evidence are deferred until after it is determined the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051 (Alaska 1994); *Wolfer*, 693 P.2d at 869.

Once the employer has successfully rebutted the presumption of compensability,

> [the presumption] drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable. *Runstrom*, AWCAC at 8.

The presumption of compensability continues during the course of an injured worker's recovery from injury and disability. *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991). Once an employee is disabled, the law presumes the employee's disability continues until the employer produces substantial evidence to the contrary. *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567, 573(Alaska 2012) (citing *Grove v. Alaska Constr. & Erectors*, 938 P.2d 454, 458 (Alaska 1997) and *Bailey v. Litwin Corp*., 713 P.2d 249, 254 (Alaska 1986)).

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's finding of credibility is binding in any review of the board's factual findings. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. AS 23.30.128; *See, e.g., Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska

2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005).

> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

"[A]ttorney's fees in workers' compensation cases should be *fully* compensatory and reasonable, in order that injured workers have competent counsel available to them." *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993)(italics in original).

While a controversion is required for the board to award fees, the Alaska Supreme Court takes a broad reading of the term "controverted," and has held a "controversion in fact" can occur in the absence of a formal notice of controversion. *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978). A controversion in fact occurs when the employer takes some action in opposition to an employee's request for benefits. *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 151-52 (Alaska 2007); *Wien Air Alaska. v. Arant*, 592 P.2d 352, 364-65 (Alaska 1979). Fees may be awarded under AS 23.30.145(b) where an employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. *Moore* at 150. Where a controversion in fact occurs, ". . . if the claimant has hired an attorney in successful

prosecution of his claim, AS 23.30.145(b) entitles him to reasonable attorney's fees in addition to any added compensation that is awarded to him." *Bradley v. Mercer*, 563 P.2d 880, 881 (Alaska 1977).

When an employer controverts a benefit and the employee has to file a claim to recover benefits, subsequent payments, though voluntary, are equivalent to a Board award, because the efforts of the employee's counsel were instrumental to inducing it. *Childs* at 1184.

In determining a reasonable fee under AS 23.30.145(b), the board is required to consider the contingent nature of the work for an employee in workers' compensation cases, the nature, length and complexity of the services performed, the resistance of the employer or carrier, and the benefits resulting from the services performed, *Wise Mech. Contractors v, Bignell*, 718 P.2d 971, 973, 975 (Alaska 1986).

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating
>
> > (1) that the right of the employee to compensation is controverted;
> > (2) the name of the employee;
> > (3) the name of the employer;
> > (4) the date of the alleged injury or death; and
> > (5) the type of compensation and all grounds upon which the right to compensation is controverted.
>
> . . .
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of it. This amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid. . . .

Employers have a right to defend against claims of liability. Alaska Const., art. I sec. 7. Employers also have a statutory duty to adjust workers' compensation claims promptly, fairly

and equitably. AS 21.36.010 *et seq.*; 3 AAC 26.010 - .300. An employer must begin paying benefits within 14 days after receiving knowledge of an employee's injury, and continue paying all benefits claimed, unless or until it formally controverts liability. *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska 1987). Section 155(e) gives employers a direct financial interest in making timely benefit payments. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). It has long been recognized §155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). An employee is also entitled to penalties on compensation due if compensation is not properly controverted by the employer. *Williams v. Abood*, 53 P.3d 134, 145 (Alaska 2002). Medical benefits are considered "compensation" for the purpose of AS 23.30.155 penalties. *Id.* at 145. If an employer does not file a formal controversion notice, nor pays compensation due, §155 imposes a penalty. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992).

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp*, 831 P.2d at 358. "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 Board would find that the claimant is not entitled to benefits." *Harp*, 831 P.2d at 358 (citation omitted). Evidence in an employer's possession "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id.* If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155. *Id*. at 359.

In 1988, after the facts giving rise to the Court's decision in *Harp*,[1] the legislature amended AS 23.30.155 to add subsection (o), which provides:

> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

[1] The Supreme Court's decision in *Harp* involved a 1987 work injury to which AS 23.30.155(o), added with the 1988 amendments to the Act, did not apply.

In three decisions: *Sourdough Express, Inc. v. Barron,* AWCAC Decision No. 06-0304, at 20-21 (February 7, 2008), *State of Alaska v. Ford*, AWCAC Decision No. 133, at 37-38 (April 9, 2010), and *Mayflower Contract Services, Inc. v. Redgrave*, AWCAC Decision No. 141 (December 14, 2010), the Alaska Workers Compensation Appeals Commission devised a three step analysis for determining whether a controversion is frivolous or unfair or made in "bad faith," and whether referral to the division of insurance is appropriate 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 into the motives or belief of the controversion author.

The third step of the test is designed to separate an invalid controversion that only merits a penalty from one that also merits a referral to the division of insurance. The Commission defines a "bad faith" controversion meriting referral to the division of insurance as one where, "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." *Barron* at 21-22. (Italics in original). "Proof of malign motive" is not required for referral to the division of insurance. *Rockstad v. Chugach Eareckson*, AWCAC Decision No. 108, at 3 (May 11, 2009).

> "A controversion based upon a legal defense . . . or that a current medical opinion was required is a "good faith" controversion (the first step of the analysis) if it is objectively "not legally implausible" or consists of "colorable legal arguments . . . based in part on undisputed facts[;] it is frivolous (the second step of the analysis) if it is "completely lacking" in plausibility. It may be found to be subjectively in bad faith (the third step of the analysis), if it is "utterly frivolous," that is, has "such a complete absence of legal basis . . . that . . . there is no possibility of mistake, misunderstanding . . . or other conduct falling in the borderland between bad faith and good faith." *Redgrave* at 16 (citations omitted).

The Commission instructed, "a licensed adjuster who files 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. *Rockstad* at 3.

"In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." But when nonpayment results from "bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *State of Alaska v. Ford*, AWCAC Decision No. 133 (April 9, 2010) (citations omitted).

The filing of a notice of controversion is not a prerequisite for a finding of unfair or frivolous controversion. *Tweden v. United Parcel Service*, AWCB Decision No. 03-0153 (July 3, 2003). *Tweden* noted the Court's rationale in *Houston* "when it ruled that formal controversions are not required for awards of attorney fees under AS 23.30.145(a) - which allows attorneys to be compensated only when a claim has been 'controverted.' The Court stated:

> To require that a formal notice of controversion be filed as a prerequisite to an award of the statutory minimum attorney fees would serve no purpose that we are able to perceive. It would be a pure and simple elevation of form over substance because the nature of the hearing, the pre-hearing discovery proceedings, and the work required of the claimant's attorney are all unaffected by the existence or not of a formal notice of controversion when there is a controversion in fact.

The Board has followed this rule when reviewing cases under AS 23.30.155(o). It is now well settled that, for purposes of a referral to the division of insurance under AS 23.30.155(o), 'controversions' need not be formal or written controversions. *Tweden* (quoting *Houston* and citing *Smith v. Arctic Curriers*, AWCB Decision No. 00-0136 (July 7, 2000) and *Sutch v. Showboat*, AWCB Decision No. 99-0249 (December 8, 1999)). "The general rationale for these cases is that an employer who fails to pay or formally controvert an employee's claim should not be shielded from a referral to the Division of Insurance by its own negligent or intentional refusal to controvert." *Id.*

> **8 AAC 45.082. Medical treatment.** (a) The employer's obligation to furnish medical treatment under AS 23.30.095 extends only to medical and dental services furnished by providers, unless otherwise ordered by the board after a hearing or consented to by the employer. The board will not order the employer

to pay expenses incurred by an employee without the approval required by this subsection.

(b) In this section "provider" means any person or facility as defined in AS 47.08.140 and licensed under AS 08 to furnish medical or dental services, and includes an out-of-state person or facility that meets the requirements of this section and is otherwise qualified to be licensed under AS 08.

…

(2) . . . If an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician. . . .

(d) Medical bills for an employee's treatment are due and payable within 30 days after the date the employer received the medical provider's bill and a completed report on form 07-6102. Unless the employer controverts the prescription charges or transportation expenses, an employer shall reimburse an employee's prescription charges . . . within 30 days after the employer received the medical provider's completed report on form 07-6102 and an itemization of the prescription numbers or an itemization of the dates of travel, destination, and transportation expenses for each date of travel. If the employer controverts

(1) a medical bill or if the medical bill is not paid in full as billed, the employer shall notify the employee and medical provider in writing the reasons for not paying all or a part of the bill or the reason for delay in payment within 30 days after receipt of the bill and completed report on form 07-6102;

(2) a prescription or transportation expense reimbursement request in full, the employer shall notify the employee in writing the reason for not paying all or a part of the request or the reason for delay within the time allowed in this section in which to make payment; if the employer makes a partial payment, the employer shall also itemize in writing the prescription or transportation expense requests not paid. . . .

. . .

8 AAC 45.182. Controversion. (a) To controvert a claim the employer shall file form 07-6105 in accordance with AS 23.30.155(a) and shall serve a copy of the notice of controversion upon all parties in accordance with 8 AAC 45.060.

(b) if a claim is controverted . . . the board will, upon request under AS 23.30.110 and 8 AAC 45.070, determine if the …grounds for controversion are supported by the law or the evidence in the controverting party's possession at the time the controversion was filed. If the law does not support the controversion or if evidence to support the controversion was not in the party's possession, the board

> will invalidate the controversion, and will award additional compensation under AS 23.30.155(e).
> . . .
> (d) 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…

ANALYSIS

1. Is Employee entitled to continuing medical care in the form of prescription pain and muscle relaxant medications?

Employee suffered a compensable back injury while working for Employer. After multiple lumbar surgeries, his continuing treatment is palliative, consisting of prescription pain and muscle relaxant medications. It will continue for his lifetime. On at least four occasions since Employer accepted compensability for Employee's low back injury, Employer has failed to promptly authorize payment for prescription medications when Employee presented the prescription to the pharmacy. Employee contends he needs and is entitled to continuing, uninterrupted care in the form of prescribed pain and muscle relaxant medications. Employer contends it need not authorize payment for medications upon Employee's presentment of prescriptions from his doctors since his condition and medical needs may change. Employee seeks a determination that he is entitled to continuing, uninterrupted care through preauthorized prescription pain and muscle relaxant medications.

The presumption of compensability continues during the course of an injured worker's recovery from injury and disability, and until the employer produces substantial evidence to the contrary. *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567, 573 (Alaska 2012); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991). The presumption of compensability applies to claims for continuing care. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991).

Employee raised the presumption he continues to need prescription pain and muscle relaxant medications through his credible testimony, and through the medical records of treating physicians Drs. Eule and Johnston. Employee is allergic to hydrocodone and morphine derived pain

medicines. Dr. Eule first prescribed the pain medication Nucynta on November 22, 2010. Since October 28, 2011, Dr. Johnston has continued the Nucynta, and added a muscle relaxant, now tizanidine (generic for Zanaflex). Due to Nucynta's high cost, currently greater than $400 for a 15-day supply; and Employer's apparent $500 limitation on any single prescription,[2] Employee must obtain a new 15-day prescription from his physician and present it to his pharmacist every two weeks. To control his pain, Employee uses the maximum daily number of pills prescribed, six, and finishes his 15-day supply of 90 tablets every 15 days. Thus, when he presents the next semi-monthly Nucynta prescription to the pharmacy, he will need it filled the very day of presentment, or the next day at the very latest, in order to control his pain. Through his testimony and the medical records of Drs. Eule and Johnston, Employee has raised the presumption of compensability for continuing, uninterrupted care through preauthorized prescription pain and muscle relaxant medications.

At the second stage of the presumption analysis, the burden shifts to Employer to rebut the presumption Employee is entitled to continuing, uninterrupted care through prescription pain and muscle relaxant medications. Employer presented no rebuttal evidence of any kind. On the contrary, Employer's medical expert, Dr. Borman, concurring with Employee's treating providers, opined Employee's continuing need for prescription pain and muscle relaxant medication was caused by the work injury, would require monthly physician visits for pain control and medication management, and treatment was expected to last his lifetime. Employer failed to rebut the presumption of continuing care in the form of pain and muscle relaxant medications. Employee prevails on the raised and unrebutted presumption. Employee has proven by a preponderance of evidence he is entitled to continuing, uninterrupted care in the form of preauthorized prescription pain and muscle relaxant medications, currently Nucynta and tizanidine.

2. Is Employee entitled to have his prescriptions filled upon presentment to the pharmacy, or may he be required to prepay those expenses and thereafter seek reimbursement from Employer?

[2] Because Employee did not object to Employer's $500 limitation on payment for a single prescription, the propriety of such a limitation under the Act is not addressed here.

Employee contends the continuing compensability of his prescription medications obligates Employer to preauthorize payment for those medications so no delays occur at the time he presents his prescriptions to the pharmacist. Employer contends the prescription card it issued him was a courtesy it can revoke at any time, and its only obligation is to reimburse Employee for out of pocket prescription costs, or controvert payment, within 30 days of receiving proper documentation.

The law requires an employer to pay compensation due, including medical care, "*promptly*" and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by filing a notice on a form prescribed by the director. AS 23.30.155(a). An employer must continue paying all benefits claimed, unless or until it formally controverts liability. *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska 1987).

Here, under the terms of the parties' January 15, 2010 C & R, Employer accepted compensability of Employee's low back injury, withdrew all prior controversions, and agreed to continue paying Employee's medical expenses. The parties' C & R is an enforceable compensation order. AS 23.30.012(a). Employee's treatment plan consists of prescription pain and muscle relaxant medication managed through monthly physician visits. His pain medication is reviewed and prescriptions rewritten every two weeks; every four weeks for his muscle relaxant medication. Employer's own physician, Dr. Borman, endorsed this treatment plan in November, 2011, and opined it will continue for Employee's lifetime. Employer has never controverted payment for Employee's prescription medications on a form prescribed by the director. Accordingly, the law requires Employer to continue providing Employee's prescription medications promptly. "Promptly" is defined as "on time," "without delay," "punctually," *Webster's II University Dictionary*, Riverside Publishing Company (1994). Given Employee's entitlement to continuing, uninterrupted care for pain control, under the facts in this case, providing Employee's prescription medicines "promptly" means on the day the prescription is presented at the pharmacy.

Employer's argument it was justified to delay authorizing payment for Employee's prescriptions because it is entitled to investigate and obtain proper documentation for each prescription presented, under the facts here, is without merit. On each of the four occasions Employer delayed

authorization for Employee's prescription medications, it had all necessary documentation and was obligated to promptly authorize those prescriptions for payment.

Just six months before Employer's May 21, 2012 payment delay, EME physician Dr. Borman notified Employer that Employee's ongoing treatment plan, consisting of pain medications managed through monthly physician visits, was reasonable, necessary and would last his lifetime. Evident from the ASI chart notes Employer was regularly receiving, Dr. Borman's opinion was consistent with the care Dr. Johnston was providing.

In June, 2012, replying to Employer's specific inquiry, Dr. Johnston recapped for Employer, reiterating Employee's continuing treatment consisted of semi-monthly Nucynta prescriptions and monthly Zanaflex prescriptions. He instructed Employer that in his absence valid prescriptions would be written by ASI providers. He informed Employer its previous delay filling Employee's Nucynta prescriptions caused him significant discomfort. Despite having thorough and undisputed documentation supporting the Nucynta and Zanaflex prescriptions presented on May 21, 2012, July 2, 2012, November 2, 2012 and January 4, 2013, Employer failed to promptly authorize payment to the pharmacy for Employee's prescriptions, interrupting the continuing care it owed Employee.

Notwithstanding Employer's argument to the contrary, the law is crystal clear: "An employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter." AS 23.30.097(f). It is the means by which the employer's obligation to furnish medical treatment to an injured employee is satisfied. *Barrington v. ACS Group, Inc.*, AWCAC Decision No. 30 (February 12, 2007). And if the plain language of the statute were not clear enough, interpreting AS 23.30.097(f), the Commission has explicitly held an employer may not require an employee to pay out of pocket and wait for reimbursement. *Id.* Where, as here, Employer is liable for promptly providing Employee with the prescription medications he needs, preauthorization, and thereafter prompt payment directly to the pharmacist, is required.

Employer's reliance on 8 AAC 45.082(d) for its assertion its only obligation is to reimburse Employee for out of pocket prescription costs, conflates its obligation to provide medical care to injured employees, with its obligation to promptly pay providers. The subsection does *not* relieve

an employer from its obligation to provide medical care, including authorizing payment for compensable prescription medications on presentment to the pharmacist. It does *not* require an employee to pay out of pocket for his prescription medicines and thereafter seek reimbursement. Indeed, as previously noted, the law explicitly forbids it. Regulations do not trump statutes, the Commission or the Alaska Supreme Court. Regulation 8 AAC 45.082(d) merely informs that should an employee elect to pay out of pocket for a prescription and thereafter seeks reimbursement, the employer has 30 days from receiving a copy of the bill and the prescribing physician's notes, within which to controvert or reimburse. Those are not the facts here.

Here, Employee's injury was compensable, his treatment through pain medications undisputed. Employer was obligated to authorize Employee's Nucynta and tizanadine prescriptions on presentment. Employer had no justification for delaying payment for Employee's prescription medications on May 21, 2012, July 2, 2012, November 2, 2012 or January 4, 2013. Although Employer has never contended its delay filling Employee's Nucynta prescription was warranted in order for it to obtain written justification for a name brand over a generic medication, the medical records substantiating Employee's allergies to hydrocodone and morphine-based pain relievers provided any necessary justification.

Neither the legislature, nor the board when it enacted 8 AAC 45.082(d,) expected Employee to advance more than $800 per month for his Nucynta prescriptions, then wait 30 days for reimbursement. If Employer's interpretation of the regulation was correct, many injured workers, like Employee, unable to afford compensable prescriptions, would be denied the very benefits the Act bestows, a result wholly at odds with the beneficent purpose of the Act, and its intent to ensure the quick, efficient, fair, and predictable delivery of medical benefits to injured workers at a reasonable cost to employers.

Employee is entitled to have his prescriptions filled upon presentment to the pharmacy. He may not be required to prepay those expenses and seek reimbursement from Employer.

3. Was Employer's refusal to authorize payment for prescription medication on presentment of a valid prescription a controversion in fact?

The Alaska Supreme Court takes a broad reading of the term "controverted," and holds a "controversion in fact" occurs when an employer resists payment of benefits but does not file a formal notice of controversy. *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978).

On at least four occasions, May 21, 2012, July 2, 2012, November 2, 2012, and January 4, 2013, without filing a formal controversion notice, Employer resisted and delayed payment for Employee's fully documented, compensable prescription medications. Employer's actions on each of those four occasions constituted a controversion in fact.

4. Is Employee entitled to penalty and interest for Employer's delayed authorization for prescription medications?

Under *Harp*, an employer's controversion of benefits must be filed "in good faith" to protect the employer from a penalty under AS 23.30.155(e). *Harp* at 358. For a controversion to be made 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." *Id.* If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155. *Id*. at 359.

Here, on each of the four occasions Employer denied payment for Employee's prescription medications, Employer, or its agent PM, gave four different reasons for its refusal. First, on May 21, 2012, Employee was told his Nucynta prescription could not be filled until further documentation was obtained from his physician. Yet Employer had been regularly receiving Dr. Johnston's chart notes reflecting prescriptions for Nucynta, had been regularly authorizing those prescriptions, and Employer's own physician had recently endorsed this treatment regimen. Employer's controversion in fact on May 21, 2012 was not supported by sufficient evidence and was therefore invalid under *Harp*.

On July 12, 2012, Employee was told he had exceeded his lifetime limit for Zanaflex. Ms. Rush conceded there is no lifetime limit on Zanaflex. Employer's July 12, 2012 controversion in fact was not supported by sufficient evidence and was invalid under *Harp*.

On November 2, 2012, Employee was told his prescription could not be filled because "prior approval" was needed. Again, Employer had all of the documentation necessary to immediately authorize Employee's prescription on November 2, 2012 but failed to do so. Its controversion in fact on November 2, 2012 was thereby invalid under *Harp*.

Finally, on January 4, 2013, Employee was told the prescription was denied because it was not signed by Dr. Johnston. Yet Dr. Johnston had specifically notified Employer in a written response to Employer's own inquiry that prescriptions written by other ASI providers in his absence should be honored, and its previous failure to do so caused Employee significant discomfort. Furthermore, 8 AAC 45.082(b)(2) provides that where an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician. On January 4, 2013, Employer lacked sufficient evidence to deny Employee's prescription, and its controversion in fact was invalid.

Under AS 23.30.155(e), invalid controversions require imposition of a 25% penalty paid directly to the recipient to whom the unpaid installment was to be paid. Because Employer's controversions in fact were all invalid, had Employee paid for his prescription medications and thereafter sought reimbursement, he would be entitled to a penalty calculated at 25% of his out of pocket costs for the four prescriptions controverted. However, since Employee did not pay for the prescriptions when Employer denied payment, instead going without and filing claims for those benefits, he is not entitled to a late payment penalty. Similarly, he is not entitled to interest on sums not paid.

5. Should Employer's insurer be referred to the Division of Insurance for investigation for a pattern of unfair claim settlement practices?

Another provision of Section 155 provides additional recourse in the event an employer frivolously or unfairly controverts benefits. Since the events giving rise to the Supreme Court's decision in *Harp*, the legislature amended AS 23.30.155 to add subsection (o). This subsection requires the director of the division of workers' compensation to promptly notify the division of insurance if the board determines an insurer has frivolously or unfairly controverted compensation due under the Act. Upon receiving notice from the director, the division of insurance must investigate and determine if the insurer committed an unfair claim settlement practice under AS 21.36.125.

According to the Commission, determining whether a controversion is frivolous or unfair for purposes of a Sec. 155(o) referral to the division of insurance involves its own three step analysis:

> 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 into the motives or belief of the controversion author.

Mayflower Contract Services, Inc. v. Redgrave, AWCAC Decision No. 09-0188 (December 14, 2010) (citing *State of Alaska v. Ford,* AWCAC Decision No. 133, at 37-38 (April 9, 2010)).

The third step of the test is designed to separate an invalid controversion that only merits a monetary penalty from one that also merits referral to the division of insurance because it was issued with "no possibility of mistake, misunderstanding or other conduct falling in the borderland between good faith and bad faith." *Mayflower Contract Services, Inc. v. Redgrave,* AWCAC Decision No. 09-0188), at 16 (December 14, 2010).

Here, on each of the four occasions Employer failed to timely authorize payment for Employee's prescription medications, Employer, through insurer or its agent VPM, gave a different reason for the denial: (1) On May 21, 2012, Employee was told further documentation from his

physician was needed; (2) On July 2, 2012, he was told he had exceeded his lifetime limit for Zanaflex; (3) On November 2, 2012, Employee was told "prior approval" was needed; (4) On January 4, 2013, he was told the prescription could not be filled because it was not by Dr. Johnston directly. As more fully set forth above, none of the four reasons given for refusing payment for Employee's prescription medications upon presentment was supported by sufficient evidence. Under *Harp*, all four of the controversions in fact would be considered "made in bad faith and . . . therefore invalid." *Harp* at 358.

However, according to the Commission's three part controversion analysis for purposes of a Sec. 155(o) referral to the division of insurance, our finding in each instance that none of Employer's four controversions was supported by sufficient evidence allows only a finding Employer's controversions were not in "good faith," thereby triggering the second inquiry in the three-prong analysis: were the controversions frivolous or unfair? If the controversion lacks the evidence to support a fact-based controversion or lacks a plausible legal defense, it is "frivolous." If it is the product of dishonesty, fraud, bias, or prejudice it is "unfair." [3] *Redgrave* at 16. Here, on each of the four occasions Employer delayed Employee's prescription medications, Employer lacked factual evidence to support the controversion. Indeed, the undisputed facts, and black letter law, supported Employee's continuing entitlement to the medications prescribed by his treating physicians. Employer's defense, that its only obligation for Employee's prescription medications was to reimburse him for his out of pocket payment for prescribed medications, is wholly lacking in legal merit. Employee suffered a compensable injury. The undisputed treatment regimen is a lifetime of pain medicine and management. This was acknowledged in the parties' January 15, 2010 C & R, approved upon filing and enforceable as a board order. Employer's obligation thereafter was to promptly authorize Employee's medication prescriptions on presentment, or formally controvert on a form provided by the Director. AS 23.30.155(a). Employer did neither. The law is clear: An employer may not require an employee to pay for compensable medical expenses and wait for reimbursement. AS 23.30.097(f); *Barrington*. Employer's position it could in fact do so is legally indefensible. Under the second prong of the Commission's analysis, Employer's four controversions were frivolous.

[3] There is no evidence suggesting the insurer's actions were the product of dishonesty, fraud, bias, or prejudice.

According to the plain language contained in AS 23.30.155(o), where the board finds Employer's controversion "frivolous *or* unfair," the director is commanded to promptly notify the division of insurance. Thus, where, as here, the board found Employer's refusal to promptly authorize Employee's prescription medications lacked any plausible foundation rendering it frivolous, the disjunctive language in Sec. 155(o) would suggest the director must notify the division of insurance.

The Commission, however, requires a further, additional finding of "bad faith," before the Director may refer an insurer to the division of insurance under Sec. 155(o). The Commission defines a "bad faith" controversion meriting referral to the division of insurance as one where, "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." *Barron* at 21-22. (Italics in original). "Proof of malign motive" is not required for a bad faith finding and referral to the division of insurance. *Rockstad v. Chugach Eareckson,* AWCAC Decision No. 108, at 3 (May 11, 2009). The Commission instructs that an insurer's controversion "may be found to be subjectively in bad faith . . . if it is 'utterly frivolous,' that is, has 'such a complete absence of legal basis . . . that. . . there is no possibility of mistake, misunderstanding, . . . or other conduct falling in the borderland between bad faith and good faith.'" *Redgrave* at 16. Indeed, the Commission has instructed, "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. *Rockstad* at 3.

Here, Employee suffered a compensable injury. His undisputed treatment regimen was prescription medications for his lifetime. Compensability for prescription medications was ordered with the parties' January 15, 2010 C & R filing. At the time of each controversion in fact Employer had all of the information necessary to support prompt authorization and payment for Employee's prescription medications. Employer's refusal to promptly authorize Employee's prescription medications on May 21, 2012, July 2, 2102, November 2, 2012 and January 4, 2013, was entirely without factual basis, and its contention Employee was required to pay for his

prescriptions and seek reimbursement lacks any plausible legal basis. Employer's controversions in fact were thereby "utterly frivolous" and thus made in bad faith. *Redgrave* at 16. The Director will be instructed Employer's insurer engaged in frivolous controversion, and the insurer will be referred to the division of insurance to determine if its representatives committed an unfair claim settlement practice under AS 21.36.125.

6. Is Employee entitled to an award of attorney fees and costs? If so, in what amount?

Employer resisted Employee's requests for prompt payment and preauthorization for prescription medications. He retained counsel who successfully obtained a valuable benefit for him, namely an order requiring continuing authorization for prescribed pain and muscle relaxant medications. Employee is entitled to a fee and cost award under AS 23.30.145(b).

In making fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on behalf of the employee, and the benefits resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings, and fully but reasonably compensate attorneys, commensurate with their experience, for services performed on issues for which the employee prevails.

Employee's counsel has been practicing law in Alaska for 30 years, and is an experienced litigator. She has specialized in the area of workers' compensation law on behalf of injured workers for several years. She provided a verified attorney fee itemization billing at $325.00 per hour, and paralegal fee itemization at $160.00 per hour. Counsel supplemented this affidavit at the hearing, detailing an additional 3.4 hours of attorney time to prepare for, travel to and from, and attend this hearing. Counsel seeks an award of actual attorney and paralegal fees totaling $10,904.50, and further requests the actual fee award be doubled because she turned away other work in order to provide services to Employee. Employee's cost bill totaled $46.82. Counsel has not requested additional statutory attorney fees under AS 23.30.145(a) on the cost of Employee's future prescription medication costs.

Counsel has previously been awarded attorney fees at the rate of $325.00 per hour based on her level of experience representing claimant's in work injury cases. *Carter v. Anchorage Daily News,*

AWCB Decision No. 13-0050 (May 10, 2013); *Guinard v. Tatonduk Outfitters*, AWCB Decision No. 13-0017 (April 26, 2013). Employer does not contest counsel's hourly rate for either attorney or paralegal services, the time expended, or any of the itemized costs. It does object to an award of double fees.

Based on Employee's counsel's efforts and success in this case, her years of experience, the contingent nature of workers' compensation cases, recent awards to her and to attorneys similarly situated, an hourly rate of $325.00 for attorney time spent is reasonable here, as are the itemized costs, including paralegal fees. Her argument for double fees is unpersuasive. Employee is entitled to an award of actual fees and costs totaling $10,951.32.

CONCLUSIONS OF LAW

1. Employee is entitled to continuing, uninterrupted care in the form of preauthorized prescription pain and muscle relaxant medications.
2. Employee is entitled to have his prescriptions filled upon presentment to the pharmacy.
3. Employer's refusal to authorize payment for prescription medications upon presentment of valid prescriptions on the four dates identified constituted controversions in fact.
4. Employee is not entitled to penalty or interest on Employer's delayed authorization for prescription medications.
5. Employer's controversions were utterly frivolous and merit referral to the Division of Insurance for investigation for a pattern of unfair claim settlement practices under AS 21.30.125.
6. Employee is entitled to an award of attorney fees and costs totaling $10,951.32.

ORDER

1. Employee's claim seeking preauthorization for prescription pain and muscle relaxant medications is GRANTED. Employer shall preauthorize payment for medications prescribed for Employee's chronic back and leg pain, including Nucynta and Zanaflex, by Employee's providers at ASI, including physicians, Nurse Practitioners and Physician's Assistants, to ensure the prescriptions are filled promptly upon presentment.

2. Employee's claim for unfair or frivolous controversion is GRANTED. Employer's insurer, Liberty Northwest, and its adjusting personnel, will be referred to the Division of Insurance for investigation for a pattern of unfair claim settlement practices under AS 21.36.125.
3. Employee's claim for a monetary penalty or for interest for Employer's delay authorizing payment for his prescription medications is DENIED.
4. Employee's claim for actual attorney fees and costs is GRANTED. Employer shall pay Employee the sum of $10,951.32.
5. Employee's request for an award doubling actual attorney fees incurred is DENIED.

Dated at Anchorage, Alaska on September 6, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Linda M. Cerro,
Designated Chairperson

Patricia Vollendorf, Member

CONCURRENCE AND DISSENT OF MEMBER KESTER

I concur with my colleagues and conclude, under the facts in this case, Employee is entitled to continuing uninterrupted medical care in the form of prescription pain and muscle relaxant medications. However, under 8 AAC 45.082(d), Employer has a right to review each prescription for appropriate documentation and then approve the medical care. Employee is entitled to have his medication prescriptions promptly filled under the terms of 8 AAC 45.082(d). I agree Employer's delay filling those prescriptions on two occasions, May 21, 2012 and July 2, 2012, constituted controversions in fact. I concur Employee is not entitled to penalty or interest on the ultimate cost of the prescriptions because he did not pay for them and thereafter seek reimbursement. I also agree an award of twice the attorney fees incurred is unjustified.

However, because I believe substantial evidence exists that the insurer authorized Employee's prescriptions promptly, *i.e.* within 24 hours of presentment, on November 2, 2012 and January 4, 2013, I disagree Employer's delay in authorizing prescriptions on those occasions constitute controversions in fact.

I believe none of the four instances in question in which the prescriptions were filled the same day as presented and no more than seven days after presented to the pharmacy constitute bad faith controversions meriting notice to the director for referral to the division of insurance for investigation for a pattern of unfair claim settlement practices under AS 21.36.125. Employers have a duty to promptly pay claims. They also have a right, indeed a duty, to investigate all claims for benefits, and to require appropriate documentation to justify payment of any claim for benefits. That balancing of rights and duties has been codified at 8 AAC 45.082(d), which allows an Employer time within which to investigate and obtain necessary documentation to substantiate payment, and 30 days thereafter to pay providers or controvert payment.

Employers' right to investigate is not waived because they provide an employee with a prescription card. Even given Employee's entitlement to continuing, uninterrupted care for pain control, under the facts in this case, providing Employee's prescription medicines "promptly" does not necessarily mean on the day the prescription is presented at the pharmacy. Alaska Workers' Compensation

regulations do not provide a procedure for prescription cards; however, providing an employee the benefit of such a card should not abrogate an employer's right to ensure prescription medications, including narcotics, are being properly prescribed to an injured worker. Nor should a prescription card nullify an employer's right to determine within 30 days it had the proper documentation and was obligated to authorize payment of the prescriptions. Until regulations governing prescription card procedure, including authorization for prescriptions, are adopted and effective, 8 AAC 45.082(d) must be followed. It allows payment 30 days after the carrier receives the medical provider's report and an itemization of the prescription numbers. If an employer does controvert a prescription reimbursement request, the employer must notify the employee in writing "the reason for not paying all or a part of the request or the reason for delay within" 30 days of receipt of the physician's report and itemization of prescription numbers.

According to the undisputed testimony, all of Employee's prescriptions were authorized for payment within five to seven days, well within the timeframe the regulations allows. Employer in this case had a legal basis to review the documentation on each of the four occasions to determine Employee was still being prescribed the medication. There have been no less than four adjusters assigned to this case. Each adjuster must be allowed time to familiarize themselves with the facts of the case, and approve payment of prescription medication without risking referral to the division of insurance for frivolous or unfair controversion. None of the four occasions at issue: neither Employer's May 21, 2012 and July 2, 2012 controversions in fact, nor the briefer delays on November 2, 2012 and January 4, 2013, were without legal basis; Employer did not fail to promptly authorize payment to the pharmacy for Employee's prescriptions as it was done within 30 days of review of the necessary documentation, and the duty of continuing care owed Employee was not interrupted. Thus the "controversions in fact" on the first two occasions were neither frivolous nor made in bad faith and do not justify notice to the division director for referral to the division of insurance. Clearly, because the prescriptions were approved, and paid for with the prescription card on the same day, on November 2, 2012 and January 4, 2013, there was no delay. Employer promptly authorized the pharmacy to fill the prescriptions, and Employer's duty of continuing care was not interrupted. Authorization and payment of the prescriptions on November 2, 2012 and January 4, 2013, was prompt. Because there was no

delay, there were no "controversions in fact." Referral to the division of insurance for frivolous controversions or controversions in bad faith is not justified.

Applying the AWCAC's *Ford* analysis, to be frivolous, it must first be determined if the controversion lacked a plausible legal defense or lacked the evidence to support a fact-based controversion. Here the majority finds a controversion in fact, but there is no reason why the analysis for a controversion or controversion in fact should be different. In this case, Employer does assert a plausible legal defense: it is not required to pay until 30 days after receipt of the medical provider's report and an itemization of the prescription numbers. Employer did not controvert Employee's prescription. Instead it approved payment no later than seven days from the request, and on two occasions on the same day as the request. Employer did not need to notify Employee in writing "the reason for not paying all or a part of the request or the reason for delay within" 30 days of receipt of the physician's report and itemization of prescription numbers because after conducting review of the documentation, it approved the prescription on all four occasions. The two occasions which constitute "controversions in fact" were done in good faith.

Finally, because I believe Employee has only prevailed on half of the issues presented, I would award only one-half of the fees and costs claimed: $5,475.66.

DATED at Anchorage, Alaska this 6th day of September, 2013.

David Kester, Member

If compensation is payable under the terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation is awarded, but not paid within 30 days of this decision, the person to whom the compensation is payable may, within one year after the default of payment, request from the board a supplementary order of default.

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the Board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the Board are parties to an appeal. If a request for reconsideration of this final decision is timely filed with the Board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied because the Board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

RECONSIDERATION

A party may ask the Board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the Board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the Board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of DALE D. KING employee / applicant; v. UTILITY TECHNOLOGIES INC., employer ; LIBERTY MUTUAL INSURANCE CO., insurer / defendants; Case No. 200909645; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties this 6th day of September, 2013.

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Kimberly Weaver, Clerk