ALASKA WORKERS' COMPENSATION BOARD

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

JEREMY BAKER, Employee, Claimant, v. PRO WEST CONTRACTORS L.L.C., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201401790 AWCB Decision No. 15-0069 Filed with AWCB Fairbanks, Alaska on June 16, 2015

Jeremy Baker's (Employee) October 2, 2014 claim was heard in Fairbanks, Alaska on March 19, 2015, a date selected on March 2, 2015. Attorney Kennan Powell appeared and represented Employee, who also appeared and testified on his own behalf. Attorney Rebecca Holdiman Miller appeared telephonically and represented Prowest Contractors (Employer) and its insurer. Non-attorney representative Kimberly Stever appeared and represented medical provider claimant Alaska Surgery Center. The board panel was unable to reach a majority decision at the conclusion of the hearing so the record was held open for further deliberations and to determine whether additional briefing would be required from the parties. The record closed at the conclusion of final deliberations on April 30, 2015.

ISSUES

Employee contends he entered into a settlement agreement with Employer on August 28, 2014, whereby Employer agreed to hold him harmless for his past medical costs. He contends the

agreement's "hold harmless" language means Employer accepted the responsibility for paying his medical bills, but instead of paying the bills as agreed, Employer ignored them, and as a result, he has been receiving dun letters and his providers have turned him over to collections. Employee contends Employer's failure to timely pay medical bills was a breach of the parties' agreement, and he now seeks an order compelling Employer to pay his outstanding medical bills.

Employer contends no terms in the agreement are a promise to pay Employee's medical bills, and neither does the agreement state it would pay his medical bills in a specific timeframe. It contends the agreement's "hold harmless" language allows it to either, pay Employee's medical bills, negotiate them or litigate them with Employee's providers. Employer denies Employee's contention it ignored the medical bills and contends the agreement expressly reserved its right to negotiate with Employee's providers, which is what it has been doing. Employer also contends the agreement expressly left its controversions in place and reserved its right to contest liability directly with Employee's providers. Therefore, because its controversions are in place, and because the board has never determined the compensability of Employee's medical care, Employer contends it cannot be ordered to now pay those costs. It requests Employee's claim be denied.

1) Was Employee entitled to payment of his past medical costs under the parties' August 28, 2014 Compromise and Release Agreement?

Employee contends he gave Employer more than 30 days to pay the medical bills after the settlement agreement, but then Employee started getting dun letters again, so he filed the instant claim seeking an order compelling payment. He contends he notified his providers of his instant claim and advised them of their ability to file claims seeking payment of medical costs, but Alaska Surgery Center was the only provider who elected to file a claim. Employee contends he has standing to claim penalty on behalf of his providers because his case is similar to *Rambo v. Veco*, AWCB Decision No. 11-0167 (November 23, 2011), and because it would be an "extraordinary waste" to join all providers to his claim. Employee also contends a penalty is appropriate in this case because of the number of providers that were "stiffed." Relying on *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014), Employee contends his medical bills were due when Employer had notice of prescribed treatment, and were payable on demand. He

contends, just as in *Harris*, he served Employer with his medical bills, and none of them were timely paid. Additionally, Employee makes clear he seeks a penalty on all the bills, not just those that remain unpaid presently.

Employer denies penalty is due on numerous bases. It contends both penalties and interest were settled under the parties' C&R agreement, so Employee cannot claim them now. Employer contends Employee lacks standing to claim penalty on behalf of his providers because no entry of appearance has been filed for him to represent their interests and there is a possible conflict of interest between himself and his providers. As previously stated, Employer contends no terms in the agreement are a promise to pay, and neither does the agreement state Employer will pay Employee's medical bills within a specific timeframe. It contends if Employee wanted Employer to pay his medical bills within a certain timeframe, he should have negotiated those terms, but did not. Employer also denies the 30 day timeframe under AS 23.30.097(d) applies in this case because the parties' agreement took their dispute "outside the Act," and any attempt to impose the Act's requirements after the fact would have a chilling effect on settlements. Also as previously stated, Employer contends penalty is not appropriate since the compensability of Employee's medical care remains controverted and was never decided.

Alaska Surgery Center contends it made many calls to Employer's insurer and six weeks after Employee filed his most recent claim, Employer's insurer finally paid its bill. It contends waiting one year and nine months after service for payment is unfair to providers and it seeks both penalty and interest. Alaska Surgery Center contends, not only would an award of penalty and interest be fair, but also contends it would serve as a deterrent to future late payments.

2) Are Employee's medical providers entitled to penalty?

Prior to filing the instant claim, Employee contends Employer "simply failed" to pay his medical bills, which amounted to a controversion-in-fact, and its notice of controversion was not in good faith, as Employer was aware of its legal responsibility to timely pay benefits under the Act. He contends Employer was "on notice" of a "bunch of treatment and bills," and the parties even agreed to settle for statutory attorney's fees based on those bills. Employee contends Employer interprets its hold harmless agreement to mean "whenever it gets around to it," so Employer's

post-claim controversion was also not in good faith since its obligation to pay medical bills was "obviously not open-ended." Employee contends both controversions were frivolous because they lacked any plausible legal defense and seeks a referral to the Division of Insurance to deter "this type of behavior" in the future.

Employer denies it unfairly or frivolously controverted benefits. It contends Employee delayed giving notice of his injury for more than six months and one of his treating physicians opined his delay in giving notice increased the medical costs in this case. Therefore, Employer contends it properly controverted benefits based on its notice defense initially, and the parties' agreement left those controversions in place. It contends Employee is now seeking "additional" medical benefits, interest and penalties for a claim the parties had already settled, and further contends controverting the instant claim was "well within the intent and clear language" of the parties' agreement.

3) Did Employer unfairly or frivolously controvert benefits?

The parties' contentions are the same with respect to interest as they are with respect to penalty and are set forth above.

4) Are Employee's providers entitled to interest?

Employee contends Employer resisted payment of medical costs by simply not paying them before he filed the instant claim, and by controverting payment after he filed his claim. He seeks an award of reasonable attorney fees and costs.

Employer contends Employee entered into a full and final settlement of his former claim and his instant claim is nothing more than an attempt to renegotiate and add language to the settlement agreement. Because the parties' settlement agreement is final, it contends Employee is not entitled to any additional compensation, and as a result, is not entitled to any post-settlement attorney's fees and costs.

5) Is Employee entitled to attorney's fees and costs?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On January 21, 2014, Employee reported he was injured in mid-June 2013, while working for Employer as a carpenter in Nome, Alaska. At the time of injury, Employee reported he was working with a screw gun, which slipped and punctured his left thumb through the fingernail. (Incident Claims and Reporting System (ICERS), Injury Illness Information; Report of Occupational Injury or Illness, January 21, 2014).

2) Employee contends he treated his wound at the time of injury by squeezing his thumb, forcing red blood out, and wrapping his thumb with electrical tape. He further contends his thumb healed and later re-opened again, so he repeated the "treatment" while he was still in Nome. (Employee Hearing Brief, February 23, 2015).

3) Employee subsequently developed a serve infection, osteomyelitis, which required surgical removal of infected bone and repeated intravenous (IV) infusion therapy treatments administered through a peripherally inserted central catheter (PICC) line. (Parker report, October 14, 2013; Kornmesser report, January 23, 2014; Alaska Surgery Operative Report, January 23, 2014; Providence Infusion Center reports, January 23, 2014 to March 7, 2014).

4) On January 27, 2014, Employee filed a claim *pro se* seeking medical costs only. His stated reason for filing the claim was: "Filing claim because injury is going to [sic] surgery and I cannot afford medical costs out of pocket. And to receive reimbursement of medical cost already incurred." (Employee's Claim, January 21, 2014).

5) On February 21, 2014, Employer answered Employee's claim and controverted medical benefits, contending Employee's claim was barred under AS 23.30.100 for Employee's failure to give timely notice of injury, AS 23.30.105, for Employee's failure to timely file a claim, or AS 23.30.110(c), for Employee's failure to timely request a hearing. (Employer's Answer, February 21, 2014; Controversion Notice; February 21, 2014).

6) On March 27, 2014, Employee's attorney filed an amended claim seeking temporary total disability (TTD) from October 13, 2013 through March 24, 2014; medical and transportation costs; penalty; interest; a finding of unfair or frivolous controversion and attorney's fees and costs. (Employee's Claim, March 25, 2014).

7) Appended to Employee's March 25, 2014 claim is a certificate of service that includes copies of medical bills from the Urgent Care of Lake Lucille, Alaska Emergency Medicine, Alaska

Regional Hospital, Alaska Surgery Center, Chugach Anesthesia, Orthopedic Physicians Anchorage, and Providence Health Services and Lab Corp, as well as prescription receipts from Fred Meyer Pharmacy and Bernie's Pharmacy. (Employee's certificate of Service, March 25, 2014).

8) On April 16, 2014, Employee served Employer with medical bills from Alaska Emergency Medicine Associates, Providence Hospital and Alaska Radiology Associates. (Employee's Certificate of Service, April 16, 2014).

9) On April 21, 2014, Employer answered Employee's March 25, 2014 claim and controverted all benefits sought, contending the claim was barred under AS 23.30.100, AS 23.30.105 or AS 23.30.110(c). (Employer's Answer; April 21, 2014; Controversion Notice; April 21, 2014).

10) On April 24, 2014, Employee served Employer with medical bills from Benjamin Wesley, M.D., and Chugach Anesthesia, as well as an "account financial history" from Orthopedic Physicians Anchorage and an explanation of charges from Providence Hospital. (Employee's Certificate of Service, April 24, 2014).

11) At a June 2, 2014 prehearing conference, the parties agreed to set Employee's March 25, 2014 claim for hearing on August 28, 2014. (Prehearing Conference Summary, June 2, 2014).

12) On June 4, 2014, Employee served Employer with bills from Alaska Regional Hospital and Alaska Emergency Medicine Associates. (Employee's Certificate of Service, June 4, 2014).

13) On June 25, 2014, Employee served Employer with medical bills from Orthopedic Physicians Anchorage, Alaska Emergency Medicine Associates, Benjamin Westley, M.D., Alaska Radiology Associates, Providence Hospital and explanations of charges from Providence Hospital. (Employee's Certificate of Service, June 25, 2014).

14) On July 9, 2014, Employee served Employer with a medical bill from Chugach Anesthesia. (Employee's Certificate of Service, July 9, 2014).

15) On July 29, 2014, Employee served Employer with medical bills from Providence Hospital, Orthopedic Physicians Anchorage and Chugach Anesthesia. (Employee's Certificate of Service, July 29, 2014).

16) On August 8, 2014, one of Employee's providers, Alaska Surgery Center, filed a claim seeking medical costs. (Alaska Surgery Center Claim, August 5, 2014).

17) On August 12, 2014, Employee served Employer with medical bills from Orthopedic Physicians Anchorage and Providence Hospital. (Employee's Certificate of Service, August 12, 2014).

18) On August 28, 2014, the parties filed a compromise and release (C&R) agreement, which had been drafted by Employer. The C&R agreement did not require board approval and was effective when filed. (C&R Agreement, August 26, 2014; observations; Alaska Workers' Compensation Board letter, September 10, 2014).

19) The relevant portions of the C&R agreement state:

> . . . .
>
> DISPUTE
>
> A bona fide dispute exists between the parties. It is the position of the employee that [he] injured his left thumb in the course and scope of his employment, which resulted in the need for medical treatment for which the employer should be liable.
>
> On the other hand, it is the position of the employer that the employee did not timely report an injury as required under the Act, and this failure to properly report resulted in extreme prejudice to the employer, rendering the employer not responsible for the resulting medical treatment.
>
> COMPROMISE AND RELEASE
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> 1.
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> To resolve all disputes among the parties with respect to past medical and related transportation benefits, compensation rate, compensation for disability (whether the same be temporary total, temporary partial, permanent partial impairment, or permanent total), penalties, interest, reemployment benefits, AS 23.30.041(k) benefits, and AS 23.30.041(g) job dislocation, the employer will agree to hold the employee harmless with regard to all past left thumb medical bills incurred from June 15, 2013, through March 18, 2014. Further, the employer will reimburse the employee $1,783.04 for out of pocket medical expenses.
>
> Except as provided below, the employee agrees to accept this amount in full and final settlement and discharge of all obligations, payments, benefits, and compensation which might be presently due or might become due to the employee at any time in the future under the Alaska Workers' Compensation Act.
>
> The parties agree that the issue of future medical treatment remains disputed, with each party reserving the right to file a future claim and/or file a controversion

based upon the new or existing evidence/defenses. The parties further agree that the employer's controversions of February 21, 2014, and April 21, 2014, remain in place at the time of the filing of this Agreement. Finally, the parties agree that, with regard to future medical treatment and/or expenses, the statute of limitations for filing a claim is tolled by this Agreement.

2.

Relative to past medical costs relating to the employee's injury and incurred through the date of approval of this Agreement, the parties agree that the employee shall not be responsible for these costs, as the employer will agree to hold the employee harmless against any claim or request for reimbursement from a medical provider relating to payment. The employer reserves its right to rely on new or existing defenses and reserves the right to negotiate with any providers/lien holders. The parties agree that any medical providers who provided treatment need not be notified of this settlement, or joined to this settlement, as per Barrington v. ACS, 198 P.3d 1122 (Alaska 2008). The employer preserves the right to contest liability directly with the medical provider relative to any as yet unknown or unbilled treatment administered through the date of approval of this Agreement, including any treatment for which the provider has not supplied appropriate documentation to the employer and the Board as per AS 23.30.095, AS 23.30.097, 8 AAC 45.082 and 8 AAC 45.086, should any medical provider file a claim for payment, and this Agreement does not waive any right a medical provider may have to seek payment for treatment administered through the date of approval of this Agreement. Notwithstanding, the parties agree that the employee's entitlement, if any, to past incurred medical costs through the date of this Agreement/ including prescription and transportation costs, is waived by the terms of this Agreement.

The parties agree that the employee's entitlement, if any, to future medical and related transportation benefits under the Alaska Workers' Compensation Act is not waived by the terms of this Agreement and that the right of the employer to contest liability for medical and related transportation benefits is also not waived by the terms of this Agreement, as described above.

. . . .

6.

Upon filing of this Settlement Agreement under AS 23.30.012(a) and upon payment as specified under this Agreement, this Settlement Agreement shall be enforceable and shall forever discharge the liability of the employer to the employee and to his heirs, beneficiaries, executors and assigns, for all compensation and other benefits arising out of or in any way connected with the injuries, illnesses, symptoms, or conditions referred to in the Introduction which might now be due or might become due in the future under the Alaska Workers'

> Compensation Act, excepting only: medical and related transportation benefits as outlined above.
>
> By signing this Settlement Agreement, the employee acknowledges his intent to release the employer from any and all liability under the Alaska Workers' Compensation Act for all claims, unless expressly excepted in this Agreement, arising out of or in any way connected with the injuries, illnesses, symptoms, or conditions referred to in the Introduction.
>
> The parties recognize that the employee's injuries and disabilities are or may be continuing and progressive in nature and that the nature and extent of the injuries and resulting disabilities may not be fully known at this time. Nevertheless, the employee, relying on his own judgment and not on any representations made by the employer or by the employer's agents, has decided that it is in his best interest to settle all claims under the Alaska Workers' Compensation Act in accordance with the terms of this Agreement, including claims arising out of or in any way connected with any known or as yet undiscovered injuries, disabilities, or damages associated with the injuries, illnesses, symptoms, or conditions referred to in the Introduction. To this end, the parties mutually waive any right they may have to set aside this Settlement Agreement, based upon any mistake of law or upon any changed condition or circumstance. Further, the parties agree that the payments made and the claims released under this Agreement shall be final and binding, regardless of any change in the law or change in the interpretation of the law governing the parties' rights and responsibilities under the Alaska Workers' Compensation Act.
> . . . .

(C&R Agreement, August 26, 2014).

20) The C&R agreement was signed by Employee, his attorney and Employer's attorney. It was not signed by a representative from Alaska Surgery Center. (*Id*.; observations).

21) On August 28, 2014, the parties filed a stipulation for attorney's fees, which states Employee's attorney collected medical records and billings from Employee's providers and filed them with the board. She also corresponded with "a number of" Employee's providers regarding the legality of dunning Employee, and filed consumer protection complaint against one of the providers. It further provides:

> As a result of the efforts of the [Employee's attorney], the Employer has agreed to assume the responsibility for all medical costs and hold the Employee harmless thereon and further pay the Employee the sum of $1,783.04 for out of pocket medical expenses. The total value of medical benefits which the Employer is assuming exceeds $103,000. . . . Further the Employer agrees to pay [Employee's attorney] $10,600 in costs and fees.

(Attorney fee stipulation, August 26, 2014).

22) On October 6, 2014, Employee filed a claim seeking medical and transportation costs, penalty, interest a finding of unfair or frivolous controversion and attorney's fees and costs. Employee's reason for filing the claim was: "Insurer's failure to pay providers. Compromise and Release was effective 8/28/14." (Employee's Claim, October 2, 2014).

23) On October 14, 2014, Employee served Employer with a September 24, 2014 medical bill from Orthopedic Physicians Anchorage. (Employee's Certificate of Service, October, 2014).

24) On October 28, 2014, Employer answered Employee's October 2, 2014 claim, denying all claimed benefits and setting for the following defense:

> The August 28, 2014, Compromise and Release Agreement at page 7 states '…the employer will agree to hold the employee harmless with regard to all past left thumb medical bills incurred from June 15, 2013, through March 18, 2014.' The employer did not agree to a time for payment to providers; rather, the employee was held harmless relative to the past medical bills. The employer has not violated the terms of the Agreement….

(Employer's Answer, October 28, 2014).

25) On October 29, 2014, Employer controverted Employee's October 2, 2014 claim on the same basis set forth in its October 28, 2014 Answer. (Controversion Notice, October 29, 2014).

26) On November 10, 2014, Employee served Employer with an October 14, 2014 dun letter from Medicredit on behalf of Alaska Regional Hospital. (Employee's Certificate of Service, November 10, 2014).

27) On November 13, 2014, Employee served Employer with a November 4, 2014 medical bill from Providence Hospital, and an October 29, 2014 medical bill from Orthopedic Physicians Anchorage. (Employee's Certificate of Service, November 13, 2014).

28) On December 2, 2014, a prehearing conference was held on Employee's October 2, 2014 claim. The summary states: "It is Employee's position there are past outstanding medical bills that need to be paid in accordance with the C&R." (Prehearing Conference Summary, December 2, 2014).

29) On December 10, 2014, Employee served Employer with a November 20, 2014 medical bill from Benjamin Westley, M.D. (Employee's Certificate of Service, December 10, 2014).

30) On December 31, 2014, Employee served Employer with a December 4, 2014 bill and a December 6, 2014 "final notice" from Orthopedic Physicians Anchorage, a December 6, 2014 bill and a December 6, 2014 "final notice" from Providence Hospital, as well as numerous explanations of charges, for many dates of service, from Providence Hospital; and explanations from Employer's insurer denying payment of Providence's bills. Employer denials contain the following explanation of its code description: "The compensability of this workers' compensation claim has been denied by the employer or payer." (Employee's Certificates of Service, December 31, 2014).

31) As of January 27, 2015, Employee contends medical bills from Benjamin Westley, M.D., Chugach Anesthesia, Alaska Surgery Center, Labcorp, Alaska Emergency and Medicine and Alaska Radiology have been have been paid in full, but without penalty. He also contends some, but not all, of the charges from Orthopedic Physicians Anchorage were paid. (Employee's Hearing Brief, February 23, 2015).

32) On January 29, 2015, Employee served Employer with additional explanations from its insurer denying payments to Orthopedic Physicians Anchorage. (Employee's Certificate of Service, January 29, 2015).

33) On February 25, 2015, Employee filed an affidavit of attorney's fees and costs, which contains an itemized statement that shows 24.8 hours of work billed at rates of $180 per hour for paralegal time, and $360 per hour for attorney time, for total fees of $7,884.00. It also lists $706.53 in costs, for a total grand total of $8,590.53 in fees and costs. Employee's counsel points out her work involved contacting providers after Employee informed her he was being dunned for his medical bills, obtaining documentation of outstanding bills, and filing and serving the bills. She contacted providers who were threatening collections and warned them a claim had been filed and advised them attempts to collect from Employee would result in a consumer protection complaint. (Employee's Affidavit of Fees and Costs, February 20, 2015).

34) At a March 2, 2015 prehearing conference, a March 19, 2015 hearing date was set on both Employee's October 2, 2014 claim and Alaska Surgery Center's August 8, 2014 claim. Employee clarified he was seeking medical costs for unpaid bills from Providence Hospital, Medicredit and Orthopedic Associates Anchorage. He was also seeking penalties and interest for all providers, not just those that remained unpaid, as well as a finding of unfair or frivolous

controversion and attorney's fees and costs. Alaska Surgery Center contended it had been paid, but was now seeking penalties and interests. (Prehearing Conference Summary, March 2, 2015).

35) On March 12, 2015, Employer filed its hearing brief. Attached as an exhibit is a fax cover sheet to Providence Health Services, dated February 23, 2015, which Employer contends demonstrates it was negotiating with Employee's providers. The cover sheet appears to have been stamped ""DECLINED," and a date of "2-23-15" is written underneath the stamp. It also indicates two pages were transmitted by fax on February 23, 2015. (Employer's Hearing Brief, March 10, 2015, Ex. 2; observations).

36) Employee testified as follows at hearing: He understood the parties' agreement was for Employer to pay his past medical bills. Employee has received dun letters and "final notices" for his medical bills. Alaska Regional has placed his account in collections with Medicredit. Employee has concerns about his mortgage, credit and being sued as a result of his unpaid medical bills. He has stopped receiving bills now and has forwarded all bills received to Employer's insurer. Employee filed his claim to force the payment of bills. On cross-examination, Employee testified he advised his medical providers of the parties' agreement and directed them to contact Employer's insurer. Employee acknowledged receiving a letter from Employer's insurer directing him to refer all claims for medical payments to it, but then he received more bills and sent them to his attorney. His understanding was Employer's insurer would pay his past medical bills. (Baker).

37) Employee was credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

38) In response to questioning by the panel at hearing, the parties made the following contentions at hearing: Employer contends "hold harmless" means to absolve from responsibility for liability. Employee contends "hold harmless" means Employer would pay the bills, and pay them on time, and the bills became due when the parties agreement was effective. Employer denies "hold harmless" means it would pay the bills, but rather contends it means it would take responsibility for paying the bills away from Employee. Employer denies the parties agreement states or implies the providers would be paid; Employee contends payment can be implied from the parties' agreement. Employee contends the parties cannot abrogate an insurer's obligation to pay a penalty on late-paid benefits under AS 23.30.155(e); Employer contends the providers' bills never came due because its controversions were in place. Employer denies the agreement

settled the issue of compensability with Employee; Employee contends the agreement did settle compensability and further contends Employer should have joined the providers. With respect to AS 23.30.097(f), which states that an employee may not be required to pay a fee or charge for medical treatment provided under the Act, Employer contends the agreement serves as the functional equivalent of that statute. Citing, *Bockus v. First Student Services*, AWCAC Decision No. 14-0040 (December 3, 2014), Employer further contends the application of that statute first requires a finding of compensability by the board. Employee contends §097(f) is just a piece of paper he can waive at collectors, but does not prevent providers from attempting to collect from him. Regarding *Barrington v. Alaska Communications Systems,* 198 P.3d 1122 (Alaska 2008), Employer contends that decision stands for the proposition providers cannot be left without a way to pursue payment and contends the agreement in this case does not do that. Employee contends *Barrington* stands for the proposition, if providers are not given notice of a settlement, the employee can pursue payment on their behalf, and this is what Employee is doing. Employer denies providers' absence in this claim effects their ability to protect their interests because they still have a right to pursue payment. Employee contends providers' absence does affect their ability to protect their interests so he filled the instant claim. Both parties agree Employee had a "unity of interest" with his providers and was able to adequately protect them leading up to the agreement. Employer denies the agreement required it to protect Employee's interest, its own interest and providers' interests. It contends Employer "is not required to wear all these hats." Employee contends Employer does have conflicting interests: to pay Employee's medical bills as soon as possible on one hand, and not defending Employee until he gets sued on the other hand. Both parties deny the parties are potentially exposed to inconsistent legal obligations under the terms of the agreement. Both parties agree Employee's providers are not necessary parties that need to be joined. Employer expressed no opinion when asked if Employee's providers' service were reasonable and necessary or related to Employee's work injury. Employer denies the 30 day provision at AS 23.30.097(d) applies to the agreement as a board order. It contends such a provision should have been a negotiated term, and further contends it did not agree to pay the providers outright. Employer contends settlement agreements are intended to take parties' disputes "outside the Act," and any effort to enforce specific statutory requirements not expressly mentioned in the agreement would have a chilling effect on settlements. Employee contends §097(d) does apply to the agreement since there is no express language excluding it. Both

parties deny AS 23.30.012(a), which states the agreement discharges Employer's liability for compensation, conflicts with Employer's ongoing duty to indemnify Employee, because medical costs are not compensation. Employee contends Orthopedic Physicians Anchorage and Providence Hospital are still owed money. Employer contends "hold harmless" means it can negotiate the bills, but it also means Employee should not be concerned with creditors, dun letters, etc. Employer contends settlement agreements are common law agreements and the parties can agree to terms that outside the Act. Neither party seeks to set aside their agreement, but rather both parties call for its enforcement. (Record).

39) On March 23, 2015, Employee filed a supplemental affidavit of attorney's fees and costs, which contains an itemized statement that shows nine hours of attorney time, billed at a rate of $360 per hour, for total fees of $3,240. It also shows and $28.65 in costs, for a grand total of $3,268.65 of fees and costs in addition to his February 20, 2015 affidavit. Total fees and costs for both Employees' affidavits amount to $11,859.18. (Employee's Affidavit of Fees and Costs, March 20, 2015).

40) Employer has not objected to Employee's attorney's fees and costs. (Record).

41) Deciding the issues presented in this case was significantly more challenging than other workers' compensation cases and required multiple deliberations. (Experience).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
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> (b) The commissioner shall act as chair and executive officer of the board and chair of each panel. . . . The commissioner may designate hearing officers to serve as chairs of panels for hearing claims.
> . . . .
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> (h) The department shall adopt rules for all panels . . . and shall adopt regulations to carry out the provisions of this chapter. The department may by regulation

> provide for procedural, discovery, or stipulated matters to be heard and decided by the commissioner or a hearing officer designated to represent the commissioner rather than a panel. . . . 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." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

The workers' compensation board has limited jurisdiction and can only adjudicate in the context of a workers' compensation case. *Alaska Public Interest Research Group v. State*, 167 P.3d 27; 36 (Alaska 2007). Delegation to an administrative agency is upheld as long as the administrative tribunal stays within the bounds of its authority. *Id*. The Alaska Supreme Court has recognized the Board may be required to apply equitable or common law principles in a specific case, *id*., and has explicitly held the Board has authority to invoke equitable principles to prevent an employer from asserting statutory rights, *Wausau Insurance Companies v. Van Biene*, 847 P.2d 584; 588 (Alaska 1993).

An implied waiver arises where the course of conduct pursued evidences an intention to waive a right, or is inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party. *Id*. To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver. *Id*. (citing *Milne v. Anderson*, 576 P.2d 109 (Alaska 1978). The elements of estoppel are: assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice. *Id*. (citing *Jamison v. Consolidated Utilities*, 576 P.2d 97; 102 (Alaska 1978).

> **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 the need for medical treatment of an Employee if the disability . . . 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 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 the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . 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 . . . 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 the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .
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> **AS 23.30.012. Agreements in regard to claims.** (a) At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee . . . have the right to reach an agreement in regard to a claim for injury . . . under this chapter, but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. . . . Except as provided in (b) of this section, an agreement filed with the division discharges the liability of the employer for the compensation . . . and is enforceable as a compensation order . . . .
>
> (b) The agreement shall be reviewed by a panel of the board if the claimant or beneficiary is not represented by an attorney licensed to practice in this state, the beneficiary is a minor or incompetent, or the claimant is waiving future medical benefits. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation . . . . The agreement shall be approved by the board only when the terms conform to the provisions of this chapter . . . .

The parties' right to settle claims under AS 23.30.012 is limited to claims that arise under the Workers' Compensation Act (Act). *Reeder v. Municipality of Anchorage*, AWCAC Decision No. 116 (September 28, 2009). The Board's authority to approve a settlement agreement under AS 23.30.012, and thereby confer upon it the status of a board order or award, may be invoked only if the agreement settles claims that may be raised under the Act. *Id*. An employee's right to a record of payments was not a claim for compensation that was waived in the settlement agreement because it was not a "benefit" that was "due" as of the date of the settlement agreement. The employee's right to the record of payments was not "due" until he sought it. *Id*.

Healthcare providers do not need to be notified of settlements or joined as parties in all circumstances. But, when a settlement is intended to pay for or compromise past medical expenses without requiring payment directly to the providers, the board must provide notice and

an opportunity to be heard to providers whose claims will be extinguished by the settlement. *Barrington v. Alaska Communications Systems Group, Inc.*, 198 P.3d 1122; 1133 (Alaska 2008).

A settlement agreement is a contract and is subject to interpretation as other contracts. *Williams v. Abood*, 53 P.3d 134; 144 (Alaska 2002) (*citing Cameron v. Beard*, 864 P.2d 538; 545 (Alaska 1993)); *followed in Reeder*. The primary goal of contract interpretation is to give effect to the parties' reasonable expectations. *Reeder*. To the extent they are not overridden by statute, common law principles of contract formation and rescission apply to settlement agreements. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079; 1093 (Alaska 2008); *applied in Hugo Rosales v. Icicle Seafoods*, AWCAC Decision No. 163 (July 11, 2012). A valid contract requires "an offer encompassing all the essential terms, unequivocal acceptance by the offeree, consideration, and an intent to be bound." *E.g. Sea Hawk Seafoods, Inc. v. City of Valdez*, 282 P.3d 359; 364 (Alaska 2012).

In *Nichols v. Napolilli*, 29 P.3d 242 (Alaska 2001), the Alaska Supreme Court decided whether an employee could bring a breach of contract action against her employer for failing to provide workers' compensation insurance. The Court's analysis in *Nichols* focused heavily on both common law and administrative remedies, with the Court noting "[t]he purpose for awarding damages for a breach of contract is to put the injured party in as good a position as that party would have been had the contract been fully performed." *Id*. at 250 (citation omitted). The Court then went on to compare the results for the employee using both contract and administrative remedies:

> The remedies established by the Alaska Workers' Compensation Act are the only available remedies for an employer's failure to provide workers' compensation benefits. Moreover, there would be no contractual breach if there were no statutory requirement to provide workers' compensation. . . . Thus, the contract remedy for a breach of the obligation to provide workers' compensation insurance would place the worker in the same position as if the employer had provided the required insurance or benefits. The worker would be entitled to compensation for lost wages and medical expenses, as well as vocational rehabilitation benefits.
>
> An Alaska Workers' Compensation Board proceeding results in determination of compensation owed to the employee according to the Act. As this is the amount the employee would have received if workers' compensation insurance or benefits

> had been provided by the employer, it would also represent the complete contract remedy for an employer's failure to provide workers' compensation insurance or benefits. Thus, an administrative action achieves the same result as would a breach of contract action. . . .

Id. at 250. *Nichols* also prefaced the foregoing analysis the following statement:

> We have recognized that "[i]n substituting certainty of compensation for the hazards of litigation of work-related injuries, it is too clear to require discussion that the [A]ct was intended to comprehend and govern all the interacting relations of employee, fellow employee and employer." (citation omitted). Therefore, the remedies offered by the workers' compensation statute supercede any common law remedies outside of the statutory scheme.

Id. at 248. Ultimately, the Court concluded, because the employee's breach of contract claims relied upon duties created by the Act, and because the Act provides an adequate remedy for that breach, the employee could not maintain a separate breach of contract action against her employer, but rather her remedies lay either in tort, or under the Alaska Workers' Compensation Act. *Id*. at 251; 254.

Hold harmless agreements are "contracts by which one party (the indemnitor) assumes the liability to *pay* damages imposed by law upon the other party (the indemnitee)." *Olympic, Inc. v. Providence Wash. Ins. Co.*, 648 P.2d 1008 (Alaska 1982) (quoting 2 R. Long, Law of Liability Insurance §10.17A, at 10-28) (emphasis added). The obligation of an indemnity has been defined as "the obligation resting on one party to make good a loss or damage another has incurred." *Fairbanks North Star Borough v. Roen Design Associates, Inc.*, 727 P.2d 758; 761 (Alaska 1986) (*citing E.L. White, Inc. v. City of Huntington Beach*, 21 Cal.3d 497, 579 P.2d 505; 510) (emphasis added). A contractual indemnity clause is interpreted so as to effectuate the intent of the parties. *Id*. (citing *Cook v. Southern Pacific Transp. Co*., 50 Or.App 547, 623 P.3d 1125, 1128). Indemnity provisions, when they appear in agreements having a primary purpose other than indemnity itself, are viewed as realistic attempts to allocate business risks among the parties and should be given a reasonable construction. *Id.* (citations omitted). Like other contracts, indemnity agreements are usually to be interpreted according to the plain meaning of the language employed, where such meaning is unambiguously expressed. *Id*. Where the language used is ambiguous in the context of the entire contract, it must be interpreted in light of

the surrounding circumstances and the situation of the parties so as to effectuate the parties' intent. *Id*. If thereafter doubts remain, they are generally resolved against the party which drafted the contract. *Id*.

At least one Board decision has interpreted a stipulation for an employer to "hold harmless" an employee as an order pay benefits. *Stormie Innes v. Vend, Inc.*, AWCB Decision No. 10-0005 (January 4, 2010).

American Jurisprudence provides the following explanations of "indemnity" and "indemnification":

> Stated simply, indemnity is an obligation by one party to make another whole for a loss that the other party has incurred. In general, indemnity is a form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. Indemnification is a form of restitution. Indemnity in its most basic sense means reimbursement and may lie when one party discharges a liability which another rightfully should have assumed, and it is based on the principle that everyone is responsible for his or her own wrongdoing, and if another person has been compelled to pay a judgment which ought to have been paid by the wrongdoer, then the loss should be shifted to the party whose negligence or tortious act caused the loss. It should be noted that the term "indemnity" encompasses any duty to pay for another's loss or damage and is not limited to reimbursement of a third-party claim.
>
> **Definition:**
> Under a contract for indemnification, one party (the indemnitor) promises to hold another party (the indemnitee) harmless for loss or damage of some kind, and the indemnitor promises to indemnify the indemnitee against liability of the indemnitee to a third person, or against loss resulting from the liability.

41 Am. Jur. 2d *Indemnity* §1 (citations omitted).

> The indemnity principle underlies the insurance contract; insurance can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guarantee against loss or damage. While the concept of indemnity is central to any definition of an insurance contract, a promise to indemnify, by itself, is not enough. One party, for consideration, must agree to indemnify or guarantee another party against a loss, or specified risks, or as otherwise stated, one must undertake to indemnify another against loss, damage, or liability arising from an unknown or contingent event. Moreover, generally, apart from life, health, and accident insurance policies, the essential

> feature of policies of insurance is that of indemnity to the insured.
>
> An indemnity agreement is a specialized form of contract which is distinguishable from a liability insurance policy; an indemnitor is not liable under an indemnity agreement until the indemnitee actually makes payment or sustains loss.

41 Am. Jur. 2d *Indemnification* §3 (citations omitted).

Black's Law Dictionary provides the following definitions:

> ***Indemnify***: **1.** To reimburse (another) for a loss suffered because of a third party's or one one's act or default; HOLD HARMLESS. **2.** To promise to reimburse (another) for such loss. **3.** To give (another) security against such a loss.
>
> ***Hold harmless***: To absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY.
>
> ***Indemnity***: **1.** A duty to make good any loss, damage, or liability incurred by another. **2.** The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. **3.** Reimbursement or compensation for loss, damage, or liability in tort . . . .
>
> ***Indemnity clause***: A contractual provision in which one party agrees to answer for any unspecified liability or harm that the other party might incur.
>
> ***Indemnity contract***: A contract by which the promisor agrees to reimburse a promise for some loss irrespective of a third person's liability.
>
> ***Harm***: Injury, loss, damage; material or tangible detriment.
>
> ***Loss***: An undesirable outcome of a risk; the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way.
>
> ***Damage***: Of or relating to monetary compensation for loss or injury to a person or property.
>
> ***Liability***: **1.** The quality or state of being legally obligated or accountable . . . ; **2.** A financial or pecuniary obligation.
>
> ***Reimbursement***: **1.** Repayment; **2.** Indemnification.

Brian Garner, Black's Law Dictionary (9th ed. 2009).

> **AS 23.30.030. Required policy provisions.** A policy of a company insuring the payment of compensation under this chapter is considered to contain the provisions set out in this section.
> . . . .
>
> (4) The insurer will promptly pay to the person entitled to them the benefits conferred by this chapter, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . awarded or agreed upon under this chapter. The obligation of the insurer is not affected by a default of the insured employer after the injury, or by default in giving a notice required by this policy. The policy is a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . , and is enforceable in the name of that person. The insurer shall provide claims facilities through its own staffed adjusting facilities located within the state, or by independent, licensed, resident adjusters with power to effect settlement within the state.
> . . . .

Under AS 23.230.030(4), employers are directly liable to healthcare providers for treatment of work-related injuries, *Sherrod v. Municipality of Anchorage*, 803 P.2d 874; 875 (Alaska 1990). The statute also authorizes healthcare providers to file claims in their own behalves. *Barrington* at 1127.

> **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 . . . 23.30.095 . . . .
>
> **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 . . . .
>
> (c) A claim for medical or surgical treatment, or treatment requiring continuing and multiple treatments of a similar nature, is not valid and enforceable against the employer unless, within 14 days following treatment, the physician or health care provider giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee. . . .

> **AS 23.30.097. Fees for medical treatment and services.**
> . . . .
>
> (d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later.
> . . . .
>
> (f) An employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter.
> . . . .
>
> **AS 23.30.100. Notice of injury or death.** Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.
> . . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
>
> > (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
> >
> > (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
> >
> > (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

An employee must provide formal written notice to his or her employer within 30 days of an injury in order to be eligible for workers' compensation. *Cogger v. Anchor House*, 936 P.2d 157; 160 (1997) (citation omitted). For fairness reasons, the Alaska Supreme Court has applied a reasonableness standard where the 30-day period begins to run when "by reasonable care and diligence it is discoverable and apparent that a compensable injury had been sustained." *Id*. (citation omitted). The 30-day period can begin no earlier than when a compensable event first occurs, such as visiting the emergency room and incurring medical costs. *Id*. However, it is not necessary for a claimant to fully diagnose his or her injury for the 30-day period to begin. *Id*. An employee's untimely notice is not a bar when the employer had actual knowledge of the employee's injury and that knowledge was not so untimely as to be prejudicial. *Id*. at 162-63.

> **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 . . . .

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Therefore, an injured worker is afforded a presumption all the benefits she seeks are compensable. *Id.* Medical benefits including continuing care are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question." A finding reasonable persons would find employment was a cause of the employee's disability and impose liability is, "as are all subjective determinations, the most difficult to support." *Rogers & Babler*, 533-34. However, there is also no reason to suppose Board members who so find are either irrational or arbitrary. *Id.* at 534. That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." *Id*.

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, Employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id.* Employee need only adduce "some," minimal relevant evidence (*Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987)) establishing a "preliminary link" between the "claim" and the employment. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). The witnesses' credibility is of no concern in this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, in claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. AS 23.30.010(a). In *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011), the Alaska Workers' Compensation Appeals Commission (Commission) set out how to apply the presumption analysis for claims arising after November 5, 2005. An employer can rebut the presumption with substantial evidence a cause other than employment played a greater role is causing the disability and is not required to rule out employment as a factor in causing the disability. *Id.* at 7. "If the employer rebuts the presumption, it 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." *Id.* at 8.

"Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). Employer's evidence is viewed in isolation, without regard to Employee's evidence. *Id.* at 1055. Therefore, credibility questions and weight accorded Employer's evidence are deferred until after it is decided if Employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller v. ITT Services*, 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **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 legislative history of AS 23.30.122 states the intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation Act." *De Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013). The Alaska Workers' Compensation Appeals Commission is required to accept the board's credibility determinations. *Id.* The Alaska Supreme Court defers to board's credibility determinations. *Id.* If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, it may rely on one opinion and not the other. *Id.* at 147. The board may choose not to rely on its own expert. *Id.*

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

The board has broad statutory authority in conducting its investigations and hearings. *Tolson v. City of Petersburg*, AWCB Decision No. 08-0149 (August 22, 2008); *De Rosario v. Chenenga Lodging*, AWCB Decision No. 10-0123 (July 16, 2010). AS 23.30.135 gives the workers' compensation board wide latitude in making its investigations and in conducting its hearings, and authorizes it to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. *Cook v. Alaska Workmen's Compensation Board*, 476 P.2d 29 (Alaska 1970).

> **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. . . .
>
> (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.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in-fact, is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-153.

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are also considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975.

When an employee files a claim to recover controverted benefits, subsequent payments, though voluntary, are the equivalent of a board award, and attorney's fees may be awarded where the efforts of counsel were instrumental in inducing the payments. *Childs* at 1190.

The statute at AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009) at 5. A fee award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the board to consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." *Id.*

> **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. . . .

> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . . .
>
> (f) If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment. The additional amount shall be paid at the same time as, but in addition to, the compensation, unless review of the compensation order making the award as provided under AS 23.30.008 and an interlocutory injunction staying payments is allowed by the court. The additional amount shall be paid directly to the recipient to whom the unpaid compensation was to be paid.
> . . . .
>
> (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.
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.
> . . . .

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). If an employer neither controverts employee's right to compensation, nor pays compensation due, §155 imposes a penalty. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

Medical benefits are "compensation" for purposes of statutory penalty. *Willaims v. Abood* at 145; *Childs v. Copper Valley Elec. Assn'n*, 860 P.2d 1184; 1192 (Alaska 1993); see also *Williams v. Safeway Stores*, 525 P.2d 1087, 1092, n.6 (Alaska 1974) (remarking the statutory definitions for "compensation" and "medical and related benefits" are mutually exclusive, but other sections of the Workers' Compensation Act "use the word 'compensation' so that the only reasonable reading of the word would include medical benefits."); *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014) (holding the Act permits imposition of penalty where a medical benefit has been prescribed but not yet paid).

The Alaska Supreme Court has taken a broad reading of the term "controverted," and has held a "controversion in fact" can occur when an employer did not file a formal notice of controversy. *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978). A controversion-in-fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation, *Shirley v. Underwater Construction, Inc.*, 884 P.2d 156; 159 (Alaska 1994), or when an employer consistently denies and litigates its obligation to pay an increase in benefits. *Wien Air Alaska v. Arant*, 592 P.2d 352 (Alaska 1979). An employer does not have unilateral authority to terminate an employee's benefits. *Shirley*. To determine whether there has been a controversion-in-fact, an employer's answer to a claim for benefits and its actions after the claim is filed must be examined. *Harnish Group, Inc. v. Moore*, 160 P.3d 146; 152 (Alaska 2007). Resistance before the filing of a claim cannot serve as a basis for a controversion-in-fact. *Id*. For there to be a controversion in fact, an employer must take some action in opposition to a claim after it is filed. *Id*.

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp*, 831 P.2d at 358. "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, at 8 (April 9, 2010) (citations omitted). "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 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.

The Alaska Workers Compensation Appeals Commission held in *Ford*, and reiterated in *Mayflower Contract Services, Inc. v. Redgrave*, AWCAC Decision No. 09-0188 (December 14, 2010), the requisite analysis to determine whether a controversion is frivolous or unfair 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.

Id. Redgrave also added clarification to the three-part test under the *Ford*:

> A controversion based upon a legal defense (such as that AS 23.30.095(a) barred the claim, or that a current medical opinion was required) is a "good faith" controversion (the first step of the analysis) if it is objectively "not legally implausible" or consists of "colorable legal arguments … based in part on undisputed facts;]" (citation omitted), it is frivolous (the second step of the analysis) if it is "completely lacking" in plausibility, (citation omitted). 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. (citation omitted).

Redgrave at 16.

The third step, the subjective inquiry, is necessary because an invalid controversion that results in a penalty under AS 23.30.155(e) doesn't necessarily subject an employer to a referral under AS 23.30.155(o). *Sourdough Express, Inc. v. Barron,* AWCAC Decision No. 06-0304, at 20-21 (February 7, 2008). This inquiry acknowledges there is a "borderland" between good faith and bad faith where a controversion may be filed and later found invalid because of honest mistakes, inadvertent processing errors, partial or technical insufficiency, error, negligence, and petty or reasonable misunderstandings. *Id.* Therefore, 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 Director because it was issued with "no possibility of mistake, misunderstanding or other conduct falling in the borderland between good faith and bad faith." *Redgrave* at 16. However, "proof of malign motive" is not required for referral. *Rockstad v. Chugach Eareckson,* AWCAC Decision No. 108, at 3 (May 11, 2009).

In *Harris v. M-K Rivers*, No. 6876, Slip Op. at 15-18 (March 14, 2014), the Alaska Supreme Court interpreted when benefits come "due" under the Act's penalty section. Noting medical care can be critical to an employee's health, it concluded the statute permitted imposition of a penalty on a medical benefit that had been prescribed but was not yet paid. *Id*. at 17. (*But see Bockus v. First Student Services*, AWCAC Decision No. 14-0040 (December 3, 2014) (holding employers are not required to preauthorize prescribed surgery because AS 23.30.097(d) prescribes medical bills must be paid within 30 days of receipt). In arriving at its holding, *Harris* referenced the Act's public policy objectives:

> The Alaska Workers' Compensation Act sets up a system in which payments are made without need of Board intervention unless a dispute arises. If the employer disputes payment, it is required to file a timely controversion notice. The purpose of the act is "to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers ... subject to [it]." The workers' compensation system also recognizes that it is appropriate to require an employer, who gets the benefit of protection from tort liability by participating in the system, to bear the cost of a worker's injury, rather than impose that cost on the general public. Under this compensation system, payments "due" under the act are more appropriately characterized as "[p]ayable immediately or on demand," not "owed as a debt."

Harris at 518-19. Since medical treatment is a "core benefit" in the workers' compensation system, the board has also recognized public policy objectives of ensuring timely payments to medical providers:

> Experience shows medical providers who provide services to injured workers in workers' compensation claims like to be paid promptly. Some medical providers refuse to continue treating injured workers unless and until their outstanding bills for medical services to the patient are paid. Employee has a similar personal interest in ensuring his medical providers are paid quickly. His interest relates to his desire for continuing or future medical care from providers not concerned about tardy payments. As a public policy matter, consistently late medical payments, or a need for a medical provider to litigate with an insurer to obtain payment or a penalty on late payments, could have a chilling effect on a provider's willingness to treat Employee, or injured workers in general. Medical providers, willing to treat injured workers, are a vital part of the workers' compensation system. The law intends this system as a simple and summary way to adjudicate claims, and as a quick, efficient fair and predictable way to provide medical and other benefits at a reasonable cost to employers. Allowing injured workers to bring claims for payment of their medical providers' bills and penalties on late bills further that legislative intent by keeping the system simple.

Rambo v. Veco, Inc., AWCB Decision No. 11-0167 (November 23, 2011).

At least two board decisions have concluded an employee has standing to claim statutory penalty on providers' behalves when out-of-pocket medical costs have been paid. *Rambo*; *Applebee v. United Airlines Corp.,* AWCB Decision No. 200712269 (April 24, 2013). In addition to the employees' ability to obtain reimbursement from their providers for their out-of-pocket medical costs, *Rambo* cited the employee's interest in continuing ability to receive medical care, *id*. at 18, 19, and *Applebee* cited the employee's interest in "maintaining a good relationship" with her providers, as basis for their conclusions, *id*. at 9.

The courts have consistently instructed the board to award interest for the time-value of money, as a matter of course. *See Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984); *Harp v. Arco Alaska, Inc.*, 831 P.2d 352 (Alaska 1994); *Childs* at 1191. For injuries which occurred on or after July 1, 2000, AS 23.30.155(p) and 8 AAC 45.142 require payment of interest at a statutory rate, as provided at AS 09.30.070(a), from the date at which each installment of compensation is due.

8 AAC 45.040. Parties. (a) Except for a deceased employee's dependent or a rehabilitation specialist appointed by the administrator or chosen by an employee in accordance with AS 23.30.041, a person other than the employee filing a claim shall join the injured employee as a party.

(b) Except for a rehabilitation specialist appointed by the administrator or chosen by the employee in accordance with AS 23.30.041, a person who files a claim must first prove a compensable injury to be eligible for benefits, or the opposing party must stipulate to or admit facts from which the board can find the employee's injury is compensable.

(c) Any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party.

(d) Any person against whom a right to relief may exist should be joined as a party.

. . . .

(f) Proceedings to join a person are begun by

(1) a party filing with the board a petition to join the person and serving a copy of the petition, in accordance with 8 AAC 45.060, on the person to be joined and the other parties; or

(2) the board or designee serving a notice to join on all parties and the person to be joined.

(g) A petition or a notice to join must state the person will be joined as a party unless, within 20 days after service of the petition or notice, the person or a party files an objection with the board and serves the objection on all parties. If the petition or notice to join does not conform to this section, the person will not be joined.

. . . .

(j) In determining whether to join a person, the board or designee will consider

(1) whether a timely objection was filed in accordance with (h) of this section;

(2) whether the person's presence is necessary for complete relief and due process among the parties;

(3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations;

> (4) whether a claim was filed against the person by the employee; and
>
> (5) if a claim was not filed as described in (4) of this subsection, whether a defense to a claim, if filed by the employee, would bar the claim.
> . . . .

The board may have some discretion in whether or not to join a party, buts its discretion is not absolute. *Barrington* at 1128. Proceedings to join a person are begun either by a party filing a petition to join the person or by the board serving a notice to join the person. *Id*. The Alaska Supreme Court stated the following concerning joining healthcare providers to employees' claims:

> In a workers' compensation case, there is often a unity of interest between the employee and her physicians. The employee wants benefits, including future medical benefits, and will present provider's past bills to the board so it can order payment. . . . In most cases, joinder of all physicians who have provided treatment would be 'a spectacularly wasteful expenditure of resources and effort.' But in some cases the interests of the employee and the healthcare provider differ sufficiently that the employee is adverse to a medical provider or cannot adequately represent the provider's interest."

Id. at 1129-30.

An employee's health insurer does not waive its right to reimbursement from an employer for payments made on the employee's behalf for his work-related injuries by opposing claimant's petition to join it as a party. *Sherrod* at 875. Absent an explicit waiver of a health insurer's claim for reimbursement, an employee remains an "interested party" in a dispute because he remains potentially liable to the health insurer for payments made necessary by his work-related injuries, and it was error for the board to deny employee's petition to join the health insurer as a party. *Id*. at 875-76.

> **8 AAC 45.082. Medical treatment.**
> . . . .
>
> (d) Medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill … and a completed report in accordance with 8 AAC 45.086(a)…. 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 no later than 30 days after receipt of the bill … and completed report in accordance with 8 AAC 45.086(a);
> . . . .

(e) A written treatment plan under AS 23.30.095 is required for payment of services provided on an outpatient basis for an injury that occurs on or after July 1, 1988….

(h) An employee or employer may choose to pay for a course of treatments that exceeds the frequency standards in (f) of this section even though payment is not required by the board or by AS 23.30.095.
. . . .

8 AAC 45.086. Physician's reports. (a) A provider who renders medical or dental services under the Act shall serve a report on the employer no later than 14 days after each service. . . .

(b) The board will, in its discretion, deny a provider's claim of payment for medical or dental services if the provider fails to comply with this section.
. . . .

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. . . . If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

(b) The employer shall pay the interest
. . . .

> (3) on late-paid medical benefits to
> . . . .
>
> > (C) to the provider if the medical benefits have not been paid.

8 AAC 45.160. Agreed Settlements.
. . . .

(b) All settlement agreements must be submitted in writing to the board, must be signed by all parties to the action and their attorneys or representatives, if any, and must be accompanied by form 07-6117.

(c) Every agreed settlement must conform strictly to the requirements of AS 23.30.012 and, in addition, must
. . . .

(4) state in detail the parties' respective claims;
. . . .

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 . . . on other grounds, the board will, upon request under AS 23.30.110 and 8 AAC 45.070, determine if the other grounds for controversion are supported by the law or by 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. Under this subsection,

(1) if the board determines an insurer frivolously or unfairly controverted compensation due, the board will provide a copy of the decision and order at the time of filing to the director for action under AS 23.30.155(o); or

(2) if the board determines a self-insured employer frivolously or unfairly controverted compensation due, the board will, at the time its decision and order are filed, provide a copy of the decision and order to the commissioner's designee for consideration in the self-insured employer's renewal application for self-insurance.

(e) For purposes of this section, the term "compensation due," and for purposes of AS 23.30.155(o), the term "compensation due under this chapter," are terms that mean the benefits sought by the employee, including but not limited to disability, medical, and reemployment benefits, and whether paid or unpaid at the time the controversion was filed.

ANALYSIS

1) Was Employee entitled to payment of his past medical costs under the parties' August 28, 2014 Compromise and Release Agreement?

This is a factual question involving a benefit under the Act to which the presumption of compensability applies. AS 23.30.120; *Meek*. Employee raises the presumption of compensability with parties' agreement, where Employer agreed to hold Employee harmless for his medical bills and reimburse him for $1,783.04 in out-of-pocket medical costs; and with the parties' attorney fee stipulation, which states Employer will assume responsibility for Employee's medical costs as well as pay Employee statutory attorney's fees based on the amount of his medical bills. *Wolfer*. When viewed in isolation, Employer rebuts the presumption by pointing to other language in the agreement that leaves its controversions in place and reserves its right to negotiate and litigate liability for Employee's medical costs directly with his providers. *Miller*. Employee is required to prove by a preponderance of the evidence was entitled to payment of his medical costs under the parties' agreement. *Koons*.

a) Did the parties have a settlement contract?

As a preliminary matter of course, it will be initially determined if the parties entered into a valid contract. On August 28, 2014, the parties filed a C&R agreement, which had been signed by Employee, his attorney and Employer's attorney on behalf of Employer and its insurer. The agreement provided Employer would "hold the employee harmless" for his past medical bills and pay him $1,783.04 for his out-of-pocket medical expenses. It also states Employee would "release the employer from any and all liability under the Alaska Workers' Compensation Act for all claims" other than those excepted. Employer made an offer encompassing all the essential terms. Employee unequivocally accepted those terms. Employer's promise to pay Employee's out-of-pocket medical costs and hold him harmless for other past medical costs, and Employee's promise to waive past medical costs under his claim, are consideration. The parties' signatures evince their intent to be bound. The parties entered into a valid contract. *Sea Hawk Seafoods, Inc*. Their settlement agreement, which did not require board approval, became effective when it was filed on August 28, 2014, and is enforceable as a compensation order. AS 23.30.012.

b) What issue did the parties compromise or settle with their agreement?

Under the circumstances presented, and given the lengthy analysis that follows, maintaining an understanding of the primary issue settled between the parties will be of vital importance to the resolution of remaining issues between them. As required under 8 AAC 45.160(c)(4), the settlement agreement sets forth the dispute between the parties. Employee contended he "injured his left thumb in the course and scope of his employment, which resulted in his need for medical treatment for which the employer should be liable." Employer contended Employee did not timely report the injury, which resulted in "extreme prejudice to the employer, rendering the employer not liable for the resulting medical treatment."

The agreement then states it was intended to resolve "all disputes among the parties with respect to past medical and related transportation benefits," and addresses both past medical costs and future medical costs in alternating paragraphs. First, Employer agreed to hold Employee harmless "for all past left thumb medical bills" and reimburse Employee for out-of-pocket medical expenses. Then, the parties agreed that the issue of future medical treatment remains disputed, and they agreed Employer's February 21, 2014, and April 21, 2014, controversions would remain in place. Finally, returning to the issue of past medical benefits, the parties' agreement provides: "[r]elative to past medical costs . . . employee shall not be responsible for these costs, as the employer will agree to hold the employee harmless against any claim or request for reimbursement from a medical provider relating to payment."

Settlement agreements in workers' compensation cases are commonly referred to compromise and release (C&R) agreements. Black's defines "compromise" as an agreement between two or more persons to settle *matters in dispute* between them; or an agreement for the settlement of a real or supposed claim in which *each party surrenders something* in concession to the other." Meanwhile, it defines "release" as the act of *giving up a right or claim* to the person it could have been enforced." Here, as a concession to Employee, Employer surrendered its right, as expressed in its controversions, to contest Employee's entitlement to his past medical benefits based on its late notice defense. In other words, it gave up a right or a defense that could have been potentially enforced. Meanwhile, as a concession to Employer, Employee surrendered the

portion of his claim seeking past medical benefits under the Act. In other words, he gave up a claim that could have been potentially enforced. As is clearly expressed in the parties' agreement, what the parties compromised, at least between themselves, was their respective positions on the issue of past medical benefits.

(c) Did the settlement agreement the parties contemplated require joinder of Employee's providers?

The agreement states the "parties agree that any medical providers who provided treatment need not be notified of this settlement, or joined to this settlement." At hearing, the parties reiterated their continuing belief it was not necessary to notify or join Employee's providers in this case. However, the parties' settlement agreement left critical ambiguities remaining under AS 23.30.097(f) that gave rise to the current dispute. That statute provides employee may not be required to pay for medical treatment "provided under this chapter." *Id*. Employer correctly points out, under the terms of the settlement agreement, the board has never decided the issue of compensability, which remains controverted, at least with respect to Employee's providers. This situation is not unlike the posture of the case in *Barrington*, where the issue of compensability was not clearly resolved at settlement. *Id*. at 1131.

The regulation governing parties to a claim provides "any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party." 8 AAC 45.040(c). As in *Barrington*, the issue of whether or not medical services were "provided under this chapter" is of vital importance in this case. If Employee's medical treatment was compensable, then Employee's providers would be prohibited under §.097(f) from collecting from him, as they have been attempting to do, and instead they would have a "right to relief" from Employer. Thus, where an employer agrees to hold an employee harmless for his medical bills, and the compensability of medical bills has not been determined, the providers should be joined as parties, since, as this case amply demonstrates, their presence is necessary "for complete relief and due process among the parties." 8 AAC 45.040(j)(2).

A similar conclusion is also reached under 8 AAC 45.040(d), which provides "[a]ny person against whom a right to relief may exist should be joined as a party." The settlement agreement

attempts to preserve Employer's notice defense, which if valid, would relieve it from liability for Employee's medical bills. Since Employer was asserting a potential right to relief against Employee's providers, it is either required to join them, or should have agreed to some settlement other than holding Employee harmless while simultaneously reserving its rights to litigate notice with his providers. *Id.*

Furthermore, the regulations also contemplate joining a person when a "person's absence may affect the person's ability to protect an interest." 8 AAC 45.040(j)(3). In workers' compensation cases, there is often a unity of interest between the employee and his physicians. But in some cases, the interests of the employee and the healthcare provider differ sufficiently that the employee is adverse to a medical provider or cannot adequately represent the provider's interest. *Barrington* at 1129-30. Here, providers' attempts to collect from Employee demonstrate he was unable to adequately protect their interests in this matter. Employee's providers' interests clearly lie in getting paid. But, as Employer correctly points out, that may not be the agreement Employee negotiated. Instead, he negotiated an agreement appears to absolve himself of any responsibility for paying the bills, and not one that expressly secured payments to his providers, let alone one that expressly secured payment to his providers within a timeframe agreeable to them. Hence, in addition to 8 AAC 45.040(c); 8 AAC 45.040(j)(2) and 8 AAC 45.040(d), the parties' agreement also necessitated joinder of Employee's providers under AAC 45.040(j)(3).

Moreover, 8 AAC 45.040(j)(3) also contemplates joining a person when a person's absence "subjects a party to a substantial risk of incurring inconsistent obligations." At hearing, both parties contended their agreement presented no such risk. However, it is unknown how Employer could possibly "hold the employee harmless" for his past medical expenses and simultaneously contend it is not liable for them either, because Employee did not provide it with sufficient notice. Here, there was not only a substantial risk of a party incurring inconsistent obligations, the parties' agreement, by its very terms, imposed them. Therefore, the parties' agreement again necessitated joinder of Employee's providers under latter part of 8 AAC 45.040(j)(3), as well.

As the current dispute amply demonstrates, Employee's providers were required to be joined because: 1) they had a right to relief, either from Employer under the Act if Employee's medical treatment was compensable, or from Employee in civil court if his medical treatment was not compensable; 2) Employee did not adequately represent their interests; and 3) their absence obviously affected their ability to protect their interests given that the parties' settlement agreement omitted terms essential to a determination of their rights now. *Barrington* at 1128. Had the parties joined the providers in this case, their claims would have been joined to Employee's, they would have been parties, and they would have had to consent to settlement that affected their interests before it was filed. *Id*. at 1128-29. It is difficult to imagine Employee's providers, who have a demonstrated aversion to litigation that will be discussed in greater detail below, approving a settlement that did not provide for them being paid, but only purported to relieve Employee from any obligation to pay, and preserved Employer's right to further litigate with them. The providers' participation in litigation, or at least their participation in structuring the settlement agreement in advance of its filing, would have brought infinitely greater clarity to Employer's "hold harmless" obligation, ensured the payment of medical bills within a time certain and obviated the need for this very litigation now.

(d) Should Employee's providers be joined now?

This analysis must also address a practical reality of the Act. There is no doubt providers have the ability to file claims on their own behalf. *Barrington* at 1127 (citing AS 23.30.030(4)). However, medical providers are a vital part of the workers' compensation system and experience shows providers have little appetite for the additional burden of litigation merely to secure payment for services already rendered. *Rambo*. This case further illustrates that which experience has already shown. Employee notified his numerous providers of their ability to file claims for payment, yet none did; and only Alaska Surgery Center had filed a claim prior to settlement. The present situation is identical to the same practical reality the Court faced in *Sherrod*, where a necessary party was unwilling to participate in litigation. In that case, the employee's private health insurer did not waive a claim for reimbursement against him yet, at the same time, neither did it want to incur "unnecessary" legal expenses in litigating its claim as a possible equitable subrogee of the healthcare providers it had paid. In fashioning its remedy, the Court did not somehow attempt to compel the insurer's participation in litigation, nor did it

conclude the insurer had somehow waived, or should be somehow estopped from asserting, its claim for reimbursement; but rather, simply held, in the absence of an express waiver, the board should join the insurer and proceed to determine whether Employee's medical costs were compensable under the Act, with or without the insurer's participation. *Id*. at 876.

However, the primary goal of contract interpretation is to give effect to the parties' reasonable expectations. *Reeder*. Unlike in *Sherrod*, here, neither party sought joinder of Employee's providers prior to settlement, nor do the parties contend their presence is necessary for a determination of their rights now. Furthermore, neither party seeks to have their agreement set aside, but rather each now call for its enforcement. Therefore, since setting aside the parties' agreement, joining Employee's providers and ordering a determination on the merits of Employer's defense would be contrary to the parties' intent of a "full and final" settlement in this matter, it will not be ordered. *Reeder*.

(e) Was Employer's promise to hold Employee harmless a promise to pay his medical bills?

A settlement agreement is a contract and is subject to interpretation as other contracts. *Williams*. Central to the parties' current dispute are the differing meanings each attaches to "hold harmless." Employee contends it means Employer would pay his medical bills and it would pay them on time. Employer denies "hold harmless" means it would pay the bills, but rather contends it means it would take responsibility for paying the bills away from Employee. Under its interpretation, Employer contends it could pay the bills, negotiate the bills or litigate them with the providers. Employer further contends no frame for its performance is stated in the agreement, and also contends time frames set forth under the Act do not apply, either.

Like other contracts, indemnity agreements are usually to be interpreted according to the plain meaning of the language employed, where such meaning is unambiguously expressed. *Roen Design* Associates. Where the language used is ambiguous in the context of the entire contract, it must be interpreted in light of the surrounding circumstances and the situation of the parties so as to effectuate the parties' intent. *Id*. If thereafter doubts remain, they are generally resolved against the party that drafted the contract. *Id*.

The terms "hold harmless" and "indemnify" can be used interchangeably. Black's Law Dictionary defines "hold harmless" to mean absolve from any responsibility for damage or other liability, then refers the reader to "indemnify." It defines "indemnify" to mean reimburse another for a loss because of a default, then refers the reader back to "hold harmless." Meanwhile, American Jurisprudence states, under a contract for indemnification, one party promises to hold another party harmless for loss or damage. As can be seen, the dictionary definition of "hold harmless" is far from unambiguous in the context of a workers' compensation settlement agreement. The difficulty of interpretation arises because "hold harmless" and "indemnity" are conceptual terms describing the underlying principle of insurance contract. Neither term prescribes an exact course of performance. 41 Am. Jur. 2d *Indemnification* §3.

Fortunately, for purposes of interpretation, the Alaska Supreme Court has stated "[h]old harmless agreements are 'contracts by which one party (the indemnitor) assumes the liability to *pay* damages imposed by law upon the other party (the indemnitee).'" *Olympic*. Furthermore, at least one board decision has equated a stipulation to hold harmless to an order to pay. *Stormie Innes*. Moreover, although the dictionary definitions of "hold harmless" and "indemnify" do not immediately provide a plain meaning, cross referencing words used in those definitions - words such as "reimburse," "loss," "damage," and "liability," yield additional definitions that contain words such as "material detriment," "diminution of value," "monetary compensation," "repayment," and "financial or pecuniary obligation," which all connote payment.

Employer, who drafted the agreement, points to portions of it that expressly reserved for itself the right to rely on new or existing defenses, and to negotiate and contest liability directly with medical providers, as evidence the parties did not necessarily intend for it to immediately pay Employee's medical bills. Just as Employer contends, such reservations are clearly stated in the agreement. On the other hand, the agreement contains equally specific language that states "the parties agree that the employee shall not be responsible for [his past medical bills] since the employer will . . . hold the employee harmless against any . . . request for *reimbursement* from a medical provider relating to *payment*." In exchange for Employer paying Employee $1,783.04 in out-of-pocket medical expenses and assuming responsibility his medical bills, Employee agreed

to accept "this *amount* in full and final settlement." Finally, the parties agreed "*payments* made and the claims released under this Agreement shall be final and binding." Therefore, although the meaning of "hold harmless" is ambiguous in isolation, in the context of the entire agreement, it is sufficiently plain Employer was to hold Employee harmless from his medical bills by paying them. In the event such is not sufficiently plain, this decision will also examine the meaning of hold harmless in light of the surrounding circumstances and the parties' situation under *Roen Design Associates*.

Employer contends it was prejudiced because Employee's untimely notice of injury resulted in increased medical costs. It contends the parties' agreement left its controversions, in place, and further contends controverting Employee's claim was "well within the intent and clear language" of the parties' agreement. However, late notice of injury does not automatically bar a claim. AS 23.30.100(d). Here, Employee might not have been required to report the injury until he sought treatment for it, or his claim might not be barred if Employer had actual knowledge of the injury. *Cogger*.

Whether or not these exceptions apply to the notice of injury requirement in this case is immediately unknown. However, for whatever reasons of its own, Employer decided to compromise its defense and assume responsibility for Employee's past medical bills. And while Employer is correct, the issue of compensability was never decided under §.097(f), as in *Barrington*, Employer's acquiescence to a settlement, where it agreed to assume responsibility for Employee's medical bills and pay him $1,783.04 in out-of-pocket medical expenses, can be construed as deciding Employee had a covered injury, for there was no other reason for Employer to pay some or all of his medical benefits. *Id*. at 1131.

Incident to the parties' settlement, Employee's attorney was also paid statutory attorney's fees based on the amount of his medical bills. Furthermore, Employee's initial claim, which he filed *pro se*, clearly states: "Filing claim because injury is going to [sic] surgery and I cannot afford medical costs out of pocket. And to receive reimbursement of medical cost already incurred." The agreement also shows Employee waived his potential rights to other benefits, such as time loss, reemployment and PPI benefits just to resolve his medical bills. But the most persuasive

evidence of the parties' intent comes in the form of their attorney fee stipulation, which states "the Employer has agreed to assume the responsibility for all medical costs." Therefore, surrounding circumstances and the parties' situation also indicate Employer's promise to hold Employee harmless from his medical bills was a promise to pay them.

Ultimately, settlement agreements can only arise out of parties' rights under the Act, and the board's authority over settlements is limited to claims that may be raised under it. *Reeder*. Nowhere does the Act impose a statutory duty on employers to "hold the employee harmless" for medical bills, it simply requires them to pay those bills. AS 23.30.010; AS 23.30.015; AS 23.30.030; AS 23.30.045; AS 23.30.050; AS 23.30.055; AS 23.30.060; AS 23.30.075; AS 23.30.082; AS 23.30.095; AS 23.30.097; AS 23.30.130; AS 23.30.155; AS 23.30.170. Even if any doubts remained at this point, they would be resolved against Employer. *Roen Design Associates*. Employer's promise to hold Employee harmless from his medical bills was a promise to pay them.

(f) When did Employer's performance come "due" under the agreement?

So far as it is known, the issue of when an employer's performance comes due under an agreement where the employer agrees to hold the employee harmless for his medical bills, and the compensability of those medical bills was never determined, is one of first impression. Employer cites *Bockus* and contends any obligation it may have had to pay Employee's medical bills never came due under AS 23.30.097(d) because the compensability of those bills was never decided. Employee disagrees. He cites *Harris* and contends the parties' agreement settled his medical bills and thereafter they were payable on demand. Both *Bockus* and *Harris* involved workers who were unable to receive prescribed treatment ahead of some conditional event. However, here, the issue is not Employee's inability to receive treatment ahead of time, but rather, who should pay for it after the fact. Therefore, neither *Bockus*, nor *Harris*, is directly applicable in the instant circumstances.

The agreement provides: "The employer reserves its right to rely on new or existing defenses and reserves the right to negotiate with any providers/lien holders." As events subsequent to the agreement demonstrate, Employer was clearly hoping its notice defense and the specter of

litigation would cause Employee's litigation-adverse providers to either give-up on seeking payment or agree to negotiated reductions on their billed amounts. Assuming for a moment Employer's contentions are correct, that it could negotiate or litigate with the providers, and its performance was not due at any particular point in time, it still had an obligation to act at some point. Employer's promise to "hold harmless" Employee were not idle words - they were consideration upon which the parties' agreement was made. Employee is correct in his contentions Employer's obligation to perform was "obviously not open-ended," and it could not simply postpone its performance until "whenever it [got] around to it." The longer Employer held out for a better deal, the more likely it was some "harm" would come to Employee.

Black's defines "harm" as an injury loss, or damage; and "loss" as an undesirable outcome of a risk. Certainly, receiving dun letters, final notices and being turned over to collections after entering into a settlement agreement in good faith, where Employer had promised to hold Employee harmless from these bills, were undesirable outcomes for Employee, which resulted from the risk Employer assumed in its efforts to get a better deal. The collections notices sent to Employee following settlement evidence Employer's multiple breaches of its contractual duty to "absolve" Employee for any responsibility for his bills. Since it has been decided Employer's promise to hold Employee harmless from his medical bills was a promise to pay them, and since Employer's acquiescence to a settlement, where it agreed to assume responsibility for Employee's medical bills and pay him $1,783.04 in out-of-pocket medical expenses, can be fairly interpreted as an acknowledgement of compensability, determining when Employer's performance came due under the parties' agreement is a rather straight forward affair that does not require an analysis drawing inferential support from either *Bockus* or *Harris*.

As determined at the outset, what the parties settled between themselves was the issue of Employee's past medical benefits. Their settlement agreement did not require board approval, became effective when it was filed on August 28, 2014, and is enforceable as a compensation order. AS 23.30.012. Compensation payable under the terms of an award is dues within 14 days. AS 23.30.155(f). Here, "the only reasonable reading of the word ["compensation"] would include medical benefits." *Williams v. Safeway Stores*. Therefore, at the point the parties' agreement was filed, Employer had an obligation to step into Employee's shoes and "make good

on" his medical bills, *i.e.* pay them, *Olympic*, within 14 days pursuant to the order, AS 23.30.155(f).

Although Employer contends statutory deadlines do not apply here because the parties' agreement took their dispute "outside the Act," "it is all too clear to require discussion that the [A]ct was intended to comprehend and govern all the interacting relations of employee, fellow employee and employer." *Nichols*. Settlement agreements can only arise out of parties' rights under the Act, and the board's authority over settlements is limited to claims that may be raised under it. *Reeder*. When an agreement requires board approval, it may only be approved "when the terms conform to the provisions in this chapter." AS 23.30.012(b).

Employer also contends, if Employee wanted Employer to pay his medical bills paid within a certain timeframe, he should have negotiated those terms in the agreement. However, the opposite is true, and like the injured worker's ability to get a compensation report after settlement in *Reeder*, here Employee's right to be held harmless from his medical bills within the statutory timeframe set forth in the Act was neither a benefit, nor procedure, he had waived under the terms of the agreement. Therefore, the 14-day period provided for under §155(f) does apply to Employer's performance in this matter. If Employer had wanted time beyond the statutory period, such an extension should have been a term expressly set forth in the agreement it wrote. *Reeder*.

> *(g) To what extent could Employer negotiate or litigate with Employee's providers as an alternative to payment?*

Employer contends, under the terms of the agreement, it had several methods at its disposal by which it could hold Employer harmless. It contends it could either, pay Employee's medical bills, negotiate them or litigate its liability with Employee's providers. Although no infirmities are immediately apparent with the notion of Employer negotiating with Employee's providers following settlement, neither is there substantial evidence it did so. The single exhibit Employer produced as evidence of negotiation consists of a fax cover sheet with no settlement offer attached. The only thing evidenced by that document is Employer sent Providence a fax cover sheet on the date shown – six months after settlement, and five months after Employee filed his

claim seeking enforcement of the settlement. Nevertheless, even if Employer did negotiate with Employee's providers following settlement, and unless the providers were willing to forgive the entire amount of Employee's indebtedness, which they clearly were not, negotiation would have still ultimately required payment of some amount.

Employer's purported ability to litigate liability with Employee's providers is considerably more problematic than its ability to negotiate with them. The agreement provides: "The employer preserves the right to contest liability directly with the medical provider . . . *should any medical provider file a claim for payment*." The only provider who had filed a claim was Alaska Surgery Center. Thus, under the plain language of the agreement, Employer's ability to litigate its notice defense following settlement was limited to Alaska Surgery Center only, unless it joined others as parties. The agreement did not, without joinder, entitle Employer to litigate with each and every provider as it seems to contend. The same is true with respect to Employer's ability to contest liability for "any treatment for which the provider has not supplied appropriate documentation to the employer and the Board per AS 23.30.095, AS 23.30.097, 8 AAC 45.082 and 8 AAC 45.086." The agreement, by its own terms, did not preserve Employer's ability to require physician's reports and challenge the reasonableness or necessity of any medical treatment from any provider other than Alaska Surgery Center, unless it joined them as parties as well.

Similar to Employer's negotiation efforts, the record does not show Employer made any effort to litigate with Employee's providers either. It filed no petitions to join them, and even if it had, it is entirely unknown how Employer could assume liability for Employee's medical bills, which it had done under the terms the parties' agreement, and simultaneously deny any liability on them during litigation with Employee's providers. As pointed out above, the agreement, which Employer drafted, imposed such contradictory obligations upon it that its purported ability to litigate with Employee's providers after settlement was illusory. The terms of the agreement did not effectively preserve Employer's ability to litigate with Employee's providers following settlement.

To the extent they existed at all, Employer's abilities to negotiate and litigate with Employee's providers were not, as Employer contends, alternatives to payment. Rather, they were contractually retained statutory rights incidental to its obligation to pay. Both the language of the agreement and Employer's conduct suggest these rights were merely mechanisms, which Employer reserved for itself when drafting the agreement, it could use as leverage to further mitigate liability it had already knowingly and voluntarily assumed.

The Alaska Supreme Court has recognized the board has equitable authority to prevent a party from asserting its statutory rights. *Wausau*. An implied waiver arises where neglect to insist upon the right results in prejudice to another party. To prove an implied waiver of a legal right, there must be acts amounting to an estoppel by the party whose conduct is to be construed as a waiver. *Id*. (citing *Milne v. Anderson*, 576 P.2d 109 (Alaska 1978). The elements of estoppel are: assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice. *Id*. (citing *Jamison v. Consolidated Utilities*, 576 P.2d 97; 102 (Alaska 1978).

Here, Employer promised to hold Employee harmless for his medical bills, and further agreed he would not be responsible for them. It reserved for itself the right to negotiate and litigate with Employee's providers based on its notice defense, and to also obtain physician's reports from them. Since the parties' agreement had the effect of a compensation order, Employee reasonably relied on Employer to use the rights it had reserved for itself to absolve him from any responsibility for his medical bills. However, after Employer failed to join the providers or negotiate a resolution to Employee's medical bills, the providers undertook collections efforts against Employee. Being subjected to collections efforts on debts, which Employer had assumed liability for, damaged Employee's legal rights under the agreement absolving him of reasonability for the bills. Therefore, because of its failure to negotiate or litigate a timely resolution of Employee's medical bills, Employer should now be estopped from asserting its notice defense under AS 23.30.100 and from requiring "appropriate documentation . . . per AS 23.30.095, AS 23.30.097, 8 AAC 45.082 and 8 AAC 45.086."

Similarly, the failure to furnish physician's reports may be excused when it is "in the interest of justice" to do so. AS 23.30.097(c); *see also* 8 AAC 45.086(b) (granting the board discretion to deny payment of medical costs in cases where a provider fails to file a physician's report). Given the harm Employee suffered as a result of Employer's failure make good on his medical bills, and given that the parties had intended to arrive at a "full and final" settlement, it is in the interest of justice to excuse Employee's providers who might have failed to furnish a physician's report for treatment so that the current dispute can be quickly, fairly and efficiently resolved. AS 23.30.001(1); AS 23.30.135(a). This course of action is also appropriate under the circumstances because the record shows Employee was diligently serving his medical bills on Employer prior to settlement, therefore Employer was fully aware of the extent of liability it was assuming in the parties' settlement.

Failure to give notice of injury may also be excused when the employer had knowledge of the injury and it is determined the employer was not prejudiced by employee's failure to give notice. AS 23.30.100(d)(3). At some point prior to its February 21, 2014 answer and controversion, Employer acquired knowledge of Employee's injury and asserted its notice defense. Later, when Employer decided to compromise its defense and absolve Employee from any responsibility for his medical bills, it voluntarily assumed whatever prejudice the delay in notice and treatment had caused it, and its notice defense was now only potentially useful to mitigate its liability to Employee's providers. However, as a result of Employer's failure to exercise the rights it reserved for itself against the providers, it has now been determined Employer is now estopped from asserting them. Moreover, since it has also been decided joining Employee's providers at this point would violate the parties' intent, there is no longer any party against whom Employer could even assert the defense. Furthermore, as a practical matter, after contractually assuming liability for Employee's medical bills, Employer cannot now litigate with Employee's providers somehow contending it is not liable for them. At this point in time, since Employer has already voluntarily assumed Employer whatever prejudice the delay in notice and treatment might have caused it, and since there is no party against whom it can even assert the defense, it is not prejudiced by any potential delay in giving notice and any failure to give timely notice will now be excused. *Id*.

(h) What is an appropriate remedy?

The purpose for awarding damages for a breach of contract is to put the injured party in as good as position as that party would have been had the contract been fully performed. *Nichols*. In this case, the parties agreed Employer would "hold the employee harmless" from his medical bills, or in other words, pay them. However, it failed to timely pay at least some of the providers. Employer's purported alternative courses of action, such as negotiation, also failed to adequately absolve Employee from responsibility for the medical bills and his providers undertook efforts to collect from him. Employer exhausted its time to negotiate a better deal with the providers, and under the express terms of the agreement, its ability to litigate with providers, if any, was limited unless it joined them, which it never did. Moreover, the above analysis demonstrates the providers should have been joined prior to the parties entering a "hold harmless" agreement, which would have obviated any need for litigation subsequent to the agreement, either between Employer and Employee's providers, or between Employer and Employee, such as here. At this stage of the proceedings, the quickest, fairest, simplest, and most summary and efficient administrative remedy available that would afford Employee a "complete contract remedy," and put him in as good as position as that party would have been had the contract been fully performed, is for Employer to now pay his unpaid medical bills. *Id.*; *Olympic*; AS 23.30.001(1); AS 23.30.005(h); AS 23.30.135(a).

2) Are Employee's medical providers entitled to penalty?

Employee contends he served Employer with his medical bills, those bills were due when Employer had notice his treatment had been prescribed, and none of his bills were timely paid. He seeks penalty and interest on behalf of all his providers who were not timely paid, not just those which remain presently unpaid. Alaska Surgery Center contends its bill was not timely paid and seeks an award of penalty and interest based on fairness and as a deterrent to future late payments. Employer opposes penalty on numerous basis set forth above.

As a preliminary issue, Employer contends Employee lacks standing to claim penalty on behalf of his providers because no entry of appearance has been filed for him to represent their interests, and there is a possible conflict of interest between himself and his providers. It did not elaborate

on what the conflict of interest might be, nor is one immediately apparent. At least two board decisions from the southern district have ordered penalty in cases where the injured workers stood to be reimbursed out-of-pocket medical expenses from their providers after the providers were paid. *Rambo*; *Applebee*. In addition to the employees' ability to obtain reimbursement from their providers for their out-of-pocket medical costs, *Rambo* cited the employee's interest in continuing ability to receive medical care, and *Applebee* cited the employee's interest in "maintaining a good relationship" with her providers, as basis for their conclusions.

Although here Employee does not stand to gain additional reimbursements of out-of-pocket medical costs once his providers are paid as in *Rambo* and *Applebee*, the ability to receive medical care is a "core benefit" under the Act. *Rambo*. Therefore, Employee, like all injured workers, has an interest in his continuing ability to receive medical care and in maintaining a good relationship with his providers. In addition to these interests, it is thought allowing an employee to claim penalty on behalf of his providers serves important public policy goals, as well. *Harris* at 518-19; *Childs* at 1192; *Rambo* at 18. The penalty provision of the Act has been long been recognized as an incentive for the insurance carrier to timely pay an employee the compensation due. *E.g. Haile*. "Otherwise, a carrier could make promises to pay medical benefits and then breach them at will, as apparently occurred here." *Childs* at 1192. Employee has standing to claim penalty on behalf of his providers.

As other preliminary issues, Employer contends Employee is now seeking "additional" benefits and further contends Employee cannot recover penalties and interest because these were issues Employee expressly waived under the parties' agreement. Employee's October 2, 2014 claim states the reason he was filing it was "Insurer's failure to pay providers. Compromise and Release was effective 8/28/14." The summary from the very first prehearing conference also states "[i]t is Employee's position there are past outstanding medical bills that need to be paid in accordance with the C&R." Therefore, the record shows Employee's claim was not one seeking additional benefits after settlement, but rather was one that merely sought enforcement of the parties' agreement, and his claim was understood as such by the designee at the beginning of litigation.

With respect to the issues of penalty and interest being settled, the parties' agreement states, "[t]o resolve all disputes among the parties with respect to . . . penalties, interest . . . the employer will agree to hold the employee harmless with regard to all past left thumb medical bills." Therefore, under the plain language of the agreement, Employee's waiver of interest and penalties was dependent on Employer holding him harmless from his medical bills, which it did not. Furthermore, the Alaska Supreme Court also addressed this issue in *Williams*, and concluded what was waived in that case was penalties and interest prior to the date of settlement. *Id.* at 145. Therefore, Employees' current claim seeking penalty and interest remains viable.

Employers must begin to timely pay benefits after receiving knowledge of an employee's injury and continue paying all claimed benefits, unless or until it controverts liability. *Suh.* Medical benefits are considered "compensation" for the purpose of AS 23.30.155. *Williams*; *Childs*; *Harris*. It has long been recognized AS 23.30.155(e) provides penalties when employers fail to pay compensation when due. *Haile.* An employee is also entitled to penalties on compensation due if compensation is not properly controverted by the employer. *Williams*. However, a good faith controversion protects an employer from penalty. *Harp*.

Employee contends there were two post-settlement controversions. In addition to Employer's October 29, 2014 notice of controversion, he also contends Employer not paying his medical bills after the settlement agreement constituted a controversion-in-fact. Employee contends both controversions were in bad faith because Employer was aware of its responsibility to pay his medical bills in a timely manner, and both controversions were frivolous because they lacked any plausible legal defense. He seeks a referral to the Division of Insurance to deter "this type of behavior" in the future.

For there to be a controversion in fact, an employer must take some action in opposition to a claim after it is filed. *Harnish Group*. Resistance before the filing of a claim cannot serve as a basis for a controversion in fact. *Id.* However, it is also recognized that an employer's resistance to paying benefits can be of a continuing nature. *Id.* In such a case, Employer's answer to Employee's claim for benefits, and its actions after a claim is filed, must be examined to determine whether there was a controversion-in-fact. *Id.* A controversion-in-fact can occur

when an employer does not "unqualifiedly accept" an employee's claim for compensation, *Shirley*, or when an employer consistently denies and litigates its obligation to pay benefits, *Arant*.

Here, the parties filed their "hold harmless" settlement agreement on August 28, 2014; and Employee filed his claim seeking enforcement of the settlement agreement, which he thought provided for payment of his medical bills, on October 6, 2014. Employer answered Employee's claim on October 28, 2014, contending it had agreed to hold Employee harmless for his medical bills, but had never agreed to a timeframe for paying them, and denied it had violated the parties' agreement. Employer also controverted the following day on the same basis set forth in its answer. Thereafter, according to Employee, Employer paid some of the bills in full, partially paid others, and some bills were not paid at all, such as Providence.

As the above chronology shows, Employer's resistance was of a continuing nature following the filing of Employee's claim. It did not "unqualifiedly accept" Employee's claim for enforcement of the agreement, and it consistently denied and litigated its obligation to pay benefits. Employer's continuing resistance was a controversion-in-fact as Employee alleges. *Harnish*; *Shirley*; *Arant*.

A controversion notice must be filed "in good faith" to protect an employer from penalty. *Harp*. "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." *Id.* Evidence in 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 required. *Id.*

At the time of Employer's October 28, 2014 answer, and its October 29, 2014 controversion, the evidence in Employer's possession included the settlement agreement, which it had written, and

the collections notices being sent to Employee. Employer's reason for controverting was: "The employer did not agree to a time for payment to providers; rather, the employee was held harmless relative to the past medical bills. The employer has not violated the terms of the Agreement." First, this decision again rejects the notion Employer never had to perform under the agreement merely because the agreement did not state a timeframe for its performance. Second, as demonstrated by the collection notices, clearly Employer had not held Employee harmless, and just as clearly it had violated the terms of the agreement. As discussed above, even if Employer genuinely thought it still had opportunity to negotiate and litigate with the providers, there is no evidence it attempted to do either. Employer has offered no evidence that, even when viewed in isolation, would show Employee was not entitled to the benefit of the bargain – that he be held harmless from the bills. Therefore, Employer's controversions were in bad faith and penalty will be imposed.

Alaska Surgery Center is to be commended for its participation in the adjudications process. It understood its remedy lay within the workers' compensation system and apparently did not attempt to collect from Employee while his claim was being adjudicated. Its contention a penalty is appropriate as a deterrent to future late payments is persuasive, and based on the rational articulated above, penalty will be imposed on any portion of Alaska Surgery Center's bill that remained unpaid more than 14 days after settlement. AS 23.30.155(f). As for Employee's other providers, the record shows Employee served Employer with collections notices he had received from Medicredit on behalf of Alaska Regional Hospital, Providence Hospital, Benjamin Wesley, M.D., and Orthopedic Physicians of Anchorage. He also sets forth a list of providers he contends were paid, unpaid, or partially paid, as of January 27, 2015, in its brief. However, the record does not precisely show what each of Employee's providers were paid, when they were paid, or whether they were paid in full. Nevertheless, penalty will also be imposed on any portion of medical bills from Employee's other providers that remained unpaid more than 14 days past settlement. *Id*.

3) Did Employer unfairly or frivolously controvert benefits?

The law prohibits unfair claims settlement practices, which includes unfair or frivolous controversions under the Act. AS 23.30.155(o) (citing AS 21.36.125). The three-part test for an

unfair or frivolous controversion amounting to an unfair settlement practice was first set forth in *Ford*. First, it must be determined if Employer's controversion was in "good faith." This decision has already determined Employer's ongoing resistance and post-claim controversion were not in good faith. Second, it must be determined if the controversion was frivolous or unfair. If the controversion lacks a plausible legal defense or lacks the evidence to support a fact-based controversion, it is frivolous. Here, Employer's controversion was frivolous because, as mentioned above, Employer was in possession of the collections notices that clearly demonstrated it had failed in its duty to absolve Employee of any responsibility for his medical bills.

The third step requires a subjective inquiry into the motives or belief of the controversion's author and is necessary because an invalid controversion that results in a penalty under AS 23.30.155(e) doesn't necessarily subject an employer to a referral under AS 23.30.155(o). *Barron*. A controversion meriting referral requires such a complete absence of legal basis that there is no possibility of mistake or misunderstanding. *Redgrave*. This inquiry acknowledges there is a "borderland" between good faith and bad faith where a controversion may be filed and later found invalid because of honest mistakes, inadvertent processing errors, partial or technical insufficiency, error, negligence, and petty or reasonable misunderstandings. *Barron.*

In this case, it cannot be said Employer's positions completely lacked legal basis. For examples, under the term of the parties' agreement, Employer's controversions from Employee's initial claim purportedly survived settlement and remained in force, at least against Employee's providers. Additionally, even though it had been decided they were not alternatives to payment, the agreement does, as Employer points out, contain reservations of rights to negotiate and litigate with Employee's providers following settlement. So far as it is known, many of the issues presented are ones of first impression. Deciding them was significantly more challenging than in other workers' compensation cases and required multiple deliberations. Since the parties' current dispute arose out of interpretive differences involving novel and complex legal issues, this is not an appropriate case for referral. *Barron*; *Redgrave*.

4) Are Employee's providers entitled to interest?

The law provides for an award of interest to compensate for the time value of money. AS 23.30.155(p). For the reasons set forth above, Employee's providers are entitled to interest on medical costs awarded, to be calculated as set forth above.

5. Is Employee entitled to attorney's fees and costs?

Employee seeks an award of attorney's fees and costs. Here, Employer resisted paying making good on Employee's medical bills and litigated its responsibility to do so. Employee retained counsel whose work involved contacting providers after Employee informed her he was being dunned for his medical bills, obtaining documentation of outstanding bills, and filing and serving the bills. She contacted providers who were threatening collections and warned them a claim had been filed and advised them attempts to collect from Employee would result in a consumer protection complaint. Employee's counsel successfully litigated Employer's contractual duty to make good on Employees' medical bills. Thus, Employee is entitled to reasonable attorney's fee and costs under AS 23.30.145(b).

In making attorney's fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on the employee's behalf, 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. *Bignell*.

Employee's counsel is an experienced litigator and has represented injured employees in workers' compensation cases for many years. Employer controverted payment of Employee's medical bills and continued to deny its obligation to pay them throughout litigation, which necessitated a hearing on the merits of Employee's case. Litigation in this case has involved complex issues involving both the Act and contract law. Additionally, given these complexities and the lack of precedent on numerous issues presented, the final outcome of litigation was not certain.

Employee's counsel provided affidavits of attorney's fees and costs, which show she worked for 33.8 hours, billed at rates of $180 for paralegal time and $360 per hour for attorney time, for a grand total of $11,124 in fees. Her total costs were $735.18. Employer has not objected to these fees. Employee is therefore entitled fees and costs in an amount of $11,859.18.

CONCLUSIONS OF LAW

1) Employee was entitled to payment of his past medical costs under the parties' August 28, 2014 Compromise and Release Agreement.
2) Employee's medical providers are entitled to penalty.
3) Employer's controversions were frivolous, but they do not merit referral to the Division of Insurance.
4) Employee's providers are entitled to interest.
5) Employee is entitled to $11,859.18 in attorney's fees and costs.

ORDERS

1) Employer is estopped from asserting its notice defense under AS 23.30.100 and from requiring Employee's providers to provide documentation pursuant to AS 23.30.095, AS 23.30.097, 8 AAC 45.082 and 8 AAC 45.086.
2) Any potential failure by a medical provider to furnish documentation under AS 23.30.095(c) is excused.
3) Any potential failure by Employee to provide timely notice of injury under AS 23.30.100 is excused.
4) Employer shall pay Employee's past medical costs under the parties' August 28, 2014 settlement agreement.
5) Employer shall penalty as set forth above.
6) Employer shall pay interest as set forth above.
7) Employer shall pay Employee attorney's fees and costs as set forth above.

Dated in Fairbanks, Alaska on June 16, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Jacob Howdeshell, Member

/s/_____
Robert **W**eel, Member

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

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. 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 due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the 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 ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of JEREMY BAKER, employee / claimant; v. PRO WEST CONTRACTORS L.L.C., employer; LIBERTY NORTHWEST INSURANCE CORP., insurer / defendants; Case No. 201401790; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served by postage pre-paid 1st Class Mail on the parties on June 16, 2015.

/s/_____
Darren R. Lawson, Technician