ALASKA WORKERS' COMPENSATION BOARD

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

OVILA LAVALLEE, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201415155
BUCHER GLASS INC, Employer,	)	AWCB Decision No. 16-0055
and	)	Filed with AWCB Fairbanks, Alaska On July 8, 2016
GRANITE STATE INS. CO., Insurer, Defendants.	)	

Ovila Lavallee's October 13, 2015 claim was heard on April 21, 2016 in Fairbanks, Alaska. This hearing date was selected on December 29, 2015. Attorney Robert Beconovich appeared and represented Ovila Lavallee (Employee). Employee's wife, Kim Lavallee, appeared and testified on his behalf. Attorney Krista Schwarting appeared and represented Bucher Glass, Inc., and Granite State Insurance Company (Employer). Employer's adjuster, Chad Saunders, appeared and testified on its behalf. The record closed at the hearing's conclusion on April 21, 2016.

ISSUES

1) Did Employer unfairly or frivolously controvert Employee's benefits?

Employee contends Employer failed to meet its obligations under the parties' C&R agreement and a plethora of medical bills remain unpaid, including those for his catheters, aquatherapy, compression stockings, prescription medications, as well as his pain management provider. He

points to Employer's promise in the agreement to pay his past medical bills within 30 days, and contends his waiver of penalties was predicated on Employer's payments within the time specified. Employee also contends he has still not been provided a modified van, which was prescribed by Craig Hospital on November 11, 2014. Employee is seeking penalty, both on his own behalf, and on behalf of unpaid medical providers. He contends the penalty statute is a bright line rule, and it does not provide for any discretion to forgive late payments.

Employer contends most the medical bills cited by Employee were timely paid, but acknowledges some were not. It also contends it has been unable to provide the modified van because of difficulties in obtaining the requisite modifications in Fairbanks. Employer contends the "triggering" event for its obligation to pay is presentation of a bill; and a statement, quote or appraisal is not a bill. It contends, when a bill for the van was finally presented, it was paid in three days. Employer does not dispute Employee's ability to seek penalty on behalf of unpaid providers; however, it denies penalty is owned on the modified van. Employer further contends, to the extent Employee is seeking penalty on benefits that existed at the time of the parties' C&R, those penalties were waived by the express language of the agreement.

2) Is Employee entitled to penalty?

Employee claimed interest on his unpaid medical bills, but at the hearing's conclusion, he waived his claim for interest.

Employer's contentions with respect to interest are the same as those pertaining to penalty, set forth above.

3) Should interest be awarded?

Employee seeks an award of attorney's fees and costs. In response to Employer's objection to block billing, Employee contends he does not understand the term "block billing," or Employer's objection to it.

Employer contends there has been no controversions, actual or in fact, on which to base an award of attorney's fees and costs under AS 23.30.145(a), and denies it resisted payment of benefits such that an award of fees and costs could be awarded under AS 23.30.145(b). It also objects to Employee's "block billing" of attorney time; however, it did not request any specific remedy.

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

FINDINGS OF FACT

The following facts and factual conclusions are either agreed upon by the parties or established by a preponderance of the evidence:

1) On September 9, 2014, Employee was crushed under four large glass panes that weighed in excess of a thousand pounds while working as a glass manufacturer. He experienced injuries to his spine, ribs and left leg. He was taken by the Fairbanks Fire Department to Fairbanks Memorial Hospital. At the time of transport, Employee had no sensation below the waist and was diagnosed with a T12-L1 dislocation and spinal cord injury and a comminuted fracture of the left leg. Computed tomography (CT) scans were taken of the cervical spine and head, and these were read as normal. A CT scan of the abdomen and pelvis showed a complex fracture at Tl2-Ll with compromise of the spinal canal and multiple left-sided rib fractures. A lumbar spine CT showed a complex burst fracture at L1 impacting the spinal canal, as well as smaller fractures at L2 and L4. The initial assessment from the Fairbanks Memorial Hospital Emergency room was "Tl2-Ll flexion distraction injury with complete paraplegia but incomplete loss of right lower extremity sensation; without other obvious sacral sparing." (Compromise and Release Agreement, August 28, 2015).

2) On September 10, 2014, Employee underwent surgery consisting of a T10 to L3 posterior thoracolumbar stabilization and arthrodesis and decompression of T12 and L1. The operative report reflects:

> T10 to L3 posterior thoracolumbar stabilization andarthrodesis including Tl 2-L l fracture realignment and reduction and arthrodesis using inter transverse on lay auto graft as well as "BMP and Trinity stem cell." At operation, traumatic injury to paraspinal muscles in the region of the fracture was noted with some problematic oozing of blood from the "hamburgerized" muscle. Pedicle screw fixation was placed at T10, Tl1, and Tl2 on the right side, and T10 and Tl1 on the left side with construct spanning to L1, L2, and L3 on the right side and L2 and

> L3 on the left side. The left Tl2 pedicle was too traumatized to be incorporated into the construct. Adequate decompression of the spinal cord was verified, and there were no other complications. At the same time an open fracture of his left leg was debrided and fixed by way of an intramedullary nail.

(*Id*.).

3) Employee began a course of limited physical and occupational therapy while still in the hospital. (*Id*.).

4) Employer accepted Employee's injury as compensable and began paying compensation. (Secondary Report of Injury, September 23, 2014).

5) On September 22, 2014, Employee was transferred to Craig Hospital in Colorado for further treatment and rehabilitation. His intake assessment was the same as in Fairbanks; "ASIA Impairment Scale A, sensory and motor complete right-sided L3 sensory; left-sided L3 sensory; right-sided LI motor; left-sided LI motor paraplegia related to the work accident." Further, when Employee arrived at Craig Hospital, it was noted that his medical history was remarkable only for borderline diabetes. In addition to the orthopedic diagnoses, he was diagnosed with neurogenic bowel and bladder, the latter of which required catheterization. Employee was further diagnosed with depression and anxiety. (Compromise and Release Agreement, August 28, 2015).

6) On September 24, 20I4, Employee's left leg brace was changed for increased mobilization and it was recommended he start weightbearing exercises. (*Id*.).

7) On September 29, 2014, Employee underwent a CT scan of the thoracic and lumbar spines that showed postsurgical changes but no acute abnormalities except small subligamentous disc protrusions. (*Id*.).

8) On November 10, 2014, Mark Johansen, M.D., conducted a driving evaluation. While the employee was able to drive, Dr. Johansen prescribed motor vehicle modifications, including hand controls, a steering device, a wheelchair lift, a transfer seat base, a remote start, a backup camera and wheelchair tie down tracks. It was further prescribed that the vehicle be either a GMC Savanah or a Chevrolet Express van with four-wheel or all-wheel drive. (*Id*.).

9) On November 20, 2014, Craig Hospital discharged Employee to return to Fairbanks. It was recommended he return for a comprehensive re-evaluation in six months. (*Id.*).

10) Employee established treatment with David Witham, M.D., when he returned to Fairbanks. Dr. Witham evaluated Employee on November 26, 2014 and recommended surgery to remove

the proximal screws in the tibial nail. Employee also initiated treatment with Gabe Schuldt, M.D., for medication management. Dr. Schuldt referred Employee for physical and occupational therapy and noted he would refill Employee's medications but the goal was ultimately to reduce the amount Employee needed. Dr. Schuldt also referred Employee to a pain management specialist in the Fairbanks area to deal with his complex pain issues. (*Id*.).

11) On December 24, 2014, Employee complained of ongoing back pain and Dr. Schuldt recommended he return to Dr. Jensen. Dr. Schuldt also prescribed aquatherapy and authored a letter recommending Employee's wife be paid for her work as his personal care assistant (PCA). Dr. Schuldt noted Employee needed assistance with activities of daily living, including driving him to appointments, medication management and toileting. He recommended Employee have paid PCA assistance eight hours per day, seven days per week. Employer stipulated to pay for these services. (*Id*.).

12) In late December 2014, the parties stipulated to Employee's eligibility for reemployment benefits. The Board subsequently issued its eligibility decision on December 30, 2014, and Employee elected to undergo the retraining process. (*Id*.).

13) On January 15, 2015, Dr. Jensen re-evaluated Employee and noted his condition was stable but with pain management issues. Dr. Jensen recommended an interval CT scan and increased aquatherapy. (*Id*.).

14) On January 20, 2015, Dr. Witham re-evaluated Employee and recommended updated left leg x-rays to determine whether further surgery was appropriate. (*Id*.).

15) On January 23, 2015, Employee underwent a lumbar CT that showed extensive degenerative and post-operative changes. He also underwent left leg x-rays, which showed a segmented left fibular fracture without definite callus formation. The x-rays also showed a subacute left fibula fracture with moderate soft tissue swelling. (*Id*.).

16) On May 1, 2015, Dr. Schuldt authored a letter recommending PCA hours be increased to twelve per day. (*Id*.).

17) On June 2, 2015, Sean Green, M.D., and Thomas Toal, M.D., evaluated Employee for an employer's medical evaluation (EME). Drs. Green and Toal opined Employee's conditions were not yet medically stable and ongoing medical treatment was needed. They opined Employee's selected vocational goal was appropriate; however, they were concerned about his ability to work on a full-time basis due to incontinence. Drs. Green and Toal also opined Employee was

currently permanently and totally disabled (PTD), although it was possible he could re-enter the workforce if his pain and bowel complaints improved. (*Id*.).

18) Based on the June 2, 2015 EME report, Employer converted Employee's disability benefits to PTD benefits. The adjuster subsequently instructed the rehabilitation specialist to discontinue retraining efforts based on the determination Employee is currently permanently and totally disabled. (*Id*.).

19) Employee is confined to a wheelchair as a result of his work injuries. (*Id*.).

20) The parties entered into a partial C&R agreement settling disputes pertaining to unpaid medical bills and the modified van prescribed by Craig Hospital. In relevant part, the C&R provides:

> In order to resolve all disputes between the parties with respect to the following issues: 1) past penalty, 2) past interest, 3) past PTD benefits and 4) unfair and/or frivolous controversion, the employer and carrier/adjuster will pay to the employee the amount of THIRTY THOUSAND AND NO/100 DOLLARS ($30,000.00) for full consideration thereof. The employee accepts such compromise amount in full and final settlement with respect to the following issues: 1) past penalty, 2) past interest, 3) past PTD benefits and 4) unfair and/or frivolous controversion, to which the employee might be presently owed or to which the employee might become entitled at any time in the future pursuant to the terms of the Alaska Worker's [sic] Compensation Act.
>
> The employer and carrier/adjuster agree to pay outstanding medical bills within 30 days of the approval date of this Partial Compromise and Release. This agreement forecloses all past and future claims for penalty, interest and unfair/frivolous controversion on all medical bills incurred to date.
>
> Payments due to the employee pursuant to the terms of this agreement, as well as attorney fees and costs pursuant to the agreement, shall be made within fourteen days of the distribution of the approved Compromise and Release.
>
> Finally, the employer and carrier/adjuster agree to purchase the van prescribed by Craig Hospital. Once the van is purchased and provided, the employee will return the rental van. This agreement forecloses all past and future claims for penalty, interest and unfair/frivolous controversion on the provision of the modified van.

(*Id*.).

21) On August 28, 2015, the parties' C&R was approved. (*Id*.).

22) Employer continues to pay compensation to Employee. (Annual Report, May 6, 2016).

23) Subsequent to the C&R's approval, disputes arose between the parties concerning the payment of medical bills and provision of the modified van. (Employee's Claim, October 13, 2015).

24) On October 13, 2015, Employee filed his instant claim, seeking a finding of unfair frivolous controversions, PTD from September 9, 2014 continuing, medical benefits and related transportation costs, penalty, interest and attorney's fees and costs. (*Id*.).

25) After filing his claim, Employee also filed 14 notices of intent to rely that included an assortment of medical bills. (Record).

26) On November 2, 2015, Employer answered Employee's October 13, 2015 claim, denying it had controverted Employee's medical benefits, either in writing, or in-fact; and contending it was continuing to timely pay his medical bills as they are received. (Employer's Answer, November 2, 2016).

27) Employer has not served any controversion notices for this injury. (Record; observations).

28) On April 21, 2016, as a preliminary matter, Employee clarified PTD benefits were not an issue for the hearing. At the hearing's conclusion, he also clarified he was just seeking penalty and would waive his claim for interest on late-paid benefits. (Record).

29) At hearing, Mrs. Levallee testified she has been married to Employee for 34 and one-half years, possesses certified nursing attendant credentials and serves as Employee's personal care attendant. A modified van was prescribed for Employee in November 2014. She obtained estimates for the van, and modifications from Interior Mobility, which totaled $78,904, and those estimates were filed on a Notice of Intent to Rely (NIR) on March 31, 2015. Before Employee secured counsel, Mrs. Levallee was transferring Employee to their family car by hand. Later Employer provided a van with a lift, but that van does not meet his needs. Out-of-pocket expenses for weights purchased for Employee, which was filed on a March 10, 2015 NIR, remain unreimbursed. Mrs. Levallee does not know whether bills from Employee's pain management provider, which were filled on a NIR on October 19, 2016, have been paid. Out-of-pocket expenses for compression stockings from Interior Medical Supply, and filed on a NIR on October 21, 2015, have not been paid. Additionally, Employee has been incontinent since the work injury and has no bladder or bowel control. She goes once per month to obtain necessary supplies for Employee's incontinence, such as catheters, bibs, gloves and wipes, from Home Medical on College Road, and Home Medical tells her bills totaling over $15,000, and filed on a

NIR on January 12, 2016, are not paid. Employee also had an incident where he fell out of his wheelchair and hit his head. "There was blood all over." Bills from this incident have not been paid. Employee also participates in aquatherapy, which helps him with "kicking out his legs." Mrs. Levallee has received bills from Employee's aquatherapy at Hometown Physical Therapy that have not been paid. Those bills were submitted on a NIR on February 4, 2016. Mrs. Levallee thinks bills from Fairbanks Memorial Hospital, filed on a NIR and totaling over $207,000, were paid at some point, but does not know when. On cross examination, Mrs. Lavallee testified she was originally hoping the van could be purchased in Fairbanks for ease of obtaining servicing. She was also hoping it could be modified in Fairbanks. In the meantime, Employer's insurer has provided Employee with a rental van, and Eilif Oleson is helping them obtain the permanent van. Mrs. Levallee "knows" the bill for Employee's weights has not been paid. She does not know whether Employee's pain management provider has been paid. Mrs. Levallee "knows" the bill for Employee's compression stockings has not been paid. She also reiterated, Home Medical tells her its bills have not been paid. (Mrs. Levallee).

30) Mrs. Levallee was generally credible, though she may have been understandably confused on the payment status of Employee's numerous medical bills. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

31) The estimate Mrs. Levallee obtained for the van includes a base price for the van and additional prices for modifications, including a price for a "Quigley 4x4 Conversion." (Employee's NIR, March 31, 2015).

32) The Quigley Motor Company is located in Manchester Pennsylvania and provides four-wheel-drive conversions for full sized vans. (http://www.quigley4x4.com/About-Us/Quigley-Story, last accessed on June 16, 2016). Vehicles with Quigley conversions are ordered through factory dealerships. Quigley informs potential customers the lead time for a one of its 4x4 conversions is typically 30-45 days after the receipt of the vehicle at its location. Quigley also denies it has control over when the vehicle will be shipping to its location, or after the vehicle is on a "ship-thru" status. (http://www.quigley4x4.com/Technical-Center/FAQ, last accessed on June 16, 2016).

33) At hearing, Chad Saunders testified he has 11 years' experience working as an adjuster directly for insurance companies, and now he works for third-party claims adjusters. He has 16 years' experience, overall. Mr. Saunders reviews bills and supporting documentation to

determine an insurer's obligation to pay. There is a difference between an invoice and a coded bill for medical services. An invoice is supporting documentation, and when he receives an invoice, he will send it back to the provider to obtain a coded bill. If bills get sent to an insurance company without supporting documentation, it slows the payment process down, because they get sent back. Medical supplies are different than medical services. Medical supplies are paid at invoice cost plus 10 percent; therefore, the carrier needs an invoice to pay for medical supplies. Mr. Saunders has reviewed the NIR's filed by Employee. There have been no late time loss payments. Mr. Saunders received the Employee's March 9, 2015 NIR for the weights from Play It Again Sports on March 17, 2015, and forwarded it to the insurance carrier, who reimbursed Employee's expense on March 25 2015, in a combined payment with medical transportation. Mr. Saunders received Employee's October 21, 2015 NIR for compression stockings from Interior Medical Supply and paid the bill sometime between October 22, 2015 and October 26, 2015. He confirmed Employee does not have an outstanding balance at Hometown Physical Therapy, but did find five dates of service, which were not timely paid. Mr. Saunders received this bill on December 21, 2015, and paid it on February 9, 2016, and has recommended the carrier pay a penalty. He found Employee's catheter supplies at Banner Health [Home Medical] had been underpaid for three dates of service, and not paid at all for a fourth. Mr. Saunders recalls, at one point, he had an issue with Banner sending bills, and not invoices, for medical supplies. He has not received anything from Banner for dates of service after December 30, 2015. Some bills were "balance forward statements," so when he received some of the NIRs, those bills had already been paid. With respect to the modified van, Mrs. Lavallee had requested the van be purchased in Fairbanks, and either Employee or Employee's attorney proposed it be modified in Fairbanks by Interior Mobility. The van was chosen in June of 2015, but a van was not immediately available. Shannon McGee advised the manufacturer only made 4,000 of them that year, and then van production was cut back to manufacture more of the popular Chevy Colorado pickup trucks. Therefore, a van was hard to find. Two orders were placed for the van, and eventually, a van was set aside for Employee. He was in frequent contact with the dealership. Employer had no control over the availability of the van. The document provided by Mrs. Levallee in March of 2015 was a quote, not a bill. Mr. Saunders received the invoice for the van on October 7, 2015, and paid it on October 9, 2015. The van arrived at the dealer on October 6, 2015, and it spent the last three months of 2015 at Interior

Mobility. On January 7, 2016, Mr. Saunders was notified of problems with the modifications that occurred when Interior Mobility misread the prescription for the front driver and passenger transfer seats. It requested authorizations to order a new passenger seat and to pay storage charges. At this point, Mr. Saunders reached out to "Lee" to see if there was any way he could step in to help out with the van. Mr. Saunders became very frustrated with Interior Mobility, who assured him everything was fine and it could handle the order. Mr. Saunders knew he needed to do something, and he was able "get [the van] away from" Interior Mobility, although it held the van "hostage" for a bit. Lee's company made some payments to get Interior Mobility to release the van, and get it to Anchorage, where modifications could be performed that met Craig's specifications. Mr. Saunders makes sure Employee's bills get sent to the carrier, and he has had a lot of conversations with Employee's medical providers. He believes he has acted in good faith in Employee's case. Thus far, the carrier has paid $1.03 million dollars in medical bills for Employee, and $16,820, or .017 percent, were not timely paid or underpaid. On cross-examination, Mr. Saunders testified he received the prescription for van modifications on November, 17, 2014, and immediately sent it to the carrier with his recommendation to modify Employee's vehicle or get Employee a vehicle that could be modified. Employee had a 2002 GMC pickup. The carrier's provider does not perform modifications to vehicles over 10 years old, or to pickup trucks. "Direct EME" handles insurer's procurement of durable medical equipment, and from November through February, was looking into getting a van, but could not locate one in Fairbanks. It then started looking at national vendors and provided its first quote in February of 2015. Mr. Saunders was also having conversations about the van with the Fairbanks dealer, who sent him some documentation in May, which he forwarded to the insurer. The insurer authorized purchasing the van locally, but at that point, the 2015 model van was no longer made. The availability of a van was discussed through June of 2015. Van modifications were also discussed and Mr. Saunders learned the prescribed modifications were not compatible with the 2016 model year van. The Fairbanks dealer was still looking for a van in August of 2015. In June of 2015, the insurer had agreed to buy a van from the dealership. When asked to detail the $16,820 that was either late paid or underpaid, Mr. Saunders clarified: $13,119.76 is outstanding from Banner Home Health from August 21, 2015 through December 30, 2015. On August 10, 2015, Northern Lights Pain Management billed $210, and $169.98 was paid. Regarding the October 19, 2015 NIR, two dates of service were not paid timely: July 14, 2015

and August 10, 2015. Mr. Saunders received the bill for aqua-therapy with five dates of service, totaling $1,800, on December 21, 2015. He approved the bill and sent it to insurer, who paid $1,530 on February 9, 2016. Regarding the compression stockings for $90 from Interior Medical Supply, Employee was reimbursed between sometime October 22, 2015 and October 26, 2015, and the reimbursement was not bundled with other amounts. The bill for Fairbanks Memorial lab work required "quite a few" phone calls. Urology charges were not believed to be work related; therefore, Employer was never billed. Mr. Saunders received the bill on November 16, 2015, and paid it on December 6, 2015. Insurer paid Craig Hospital and Swedish Hospital directly. Regarding Employee's October 19, 2015 NIR for $2,500 from Swedish, he talked with "Deloris," and determined that bill involved a disputed payment for services in Colorado. Specifically, the issue was which state's fee schedule applied. Mr. Saunders has never heard back from Swedish Hospital since talking with them on October 28, 2015. Many providers have a policy of sending out "balance forward" statements. He does not know if the bill from Swedish has been paid. Insurer agreed to purchase the van on June 15, 2015. Mr. Saunders was presented with a $61,992 invoice on October 7, 2015, and paid it on October 10, 2015. Employee's March 31, 2015 NIR for a van, and modifications, totaled $78,000. He worked with Shannon McGee, Fleet Manager, as well as her successor, to obtain a van for Employee. On redirect examination, Mr. Saunders testified it "probably would have gone faster" if efforts had not been made to provide a van from Fairbanks. He also explained some providers combine multiple dates of service on a single bill. The carrier did make payments on the bill from Swedish Hospital, but the unpaid portion involved the dispute. (Mr. Saunders).

34) Employee objected to Mr. Saunders testifying as to his belief whether or not he has adjusted Employee's claim in good faith on the basis of relevancy. The hearing chair overruled the objection. (Record).

35) Employer objected to Employee asking Mr. Saunders his opinion concerning whether or not Mrs. Levallee transferring Employee by hand into their family vehicle was a "dangerous and risky proposition." The hearing chair sustained Employer's objection. (*Id*.).

36) Employer objected to Employee asking Mr. Saunders if he had any concerns about Employee or his wife being injured while Employee's wife was transferring Employee into their family vehicle by hand. The hearing chair overruled the objection. (*Id*.).

37) Mr. Saunders was credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

38) At hearing, Eilif Olesen testified he is Vice President of Managed Care Ancillary Services (MCAS). They provide goods and services through the United States for injured workers, including transportation, home health care, custom mobility, home and vehicle modifications, linguistics, "basically, everything except pharmaceuticals." Mr. Olesen is involved in providing services for Employee's claim. He facilitated providing a rental van for Employee while the van purchase was being arranged. He was working through a division of AIG called, Direct EME, and put in a quote for a van, but it was cancelled about a month later, presumable because he did not win the bid. Mr. Saunders wanted to get Employee's van as soon as possible and asked him for his help because the vendor was "at a standstill on it," and the van was in storage. Alaska Mobility in Anchorage picked up the van from Interior Mobility on March 13, 2016. The van's conversions were in "poor shape." Pieces were missing that were still on order. There were problems with the hand controls, and the risers for the seats were the wrong type and did not fit the box under the seat. The seat lift was installed correctly, but it was not backed with wood. Other prescription items were also not done. It took them a couple of weeks to really dig into the van and come up with a scope of work and quote, which he sent to Mr. Saunders, who replied, authorizing the scope of work, within three hours of his email. The goal was to provide what Craig had prescribed. He sent his quote to Mr. Saunders on March 30, 2016, and the quote was authorized on April 4, 2016. Regarding the status of the van now, everything is ordered. Two transfer seats have been ordered and Alaska Mobility is in the process of cutting plywood. Two power mirrors are not on the van, but Alaska Mobility is bringing the van to the dealership today to see about having them installed there so as not to void the warranty. He estimates the van should be ready in one month. Interior Mobility refused to release the van to Mr. Olesen until he paid for a seat and storage fees, totaling about $5,000. Mr. Olesen paid Interior Mobility the $5,000 as a "pass through," just so he could get the van to Anchorage for the work to be completed. Interior Mobility caused a delay to the van being provided to Employee. Mr. Olesen thinks they "might have been in a little over their head on this vehicle." Mr. Saunders has worked cooperatively with him to move the process forward and has been quick and responsive. (Mr. Olesen).

39) Employee entered a standing objection to Mr. Olesen's testimony based on relevance. The hearing chair overruled Employee's objection. (Record).

40) Employee objected to Mr. Olesen opining on whether or not Interior Mobility caused any delay in the van being provided to Employee. The hearing chair overruled Employee's objection. (*Id*.).

41) Mr. Olesen was credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

42) On April 15, 2016, Employee filed an affidavit of attorney's fees, paralegal fees and costs, which show Employee's attorney worked for 44.4 hours at a rate $400 per hour for a total of $17,760. Employee's paralegal worked 0.3 hours at a rate of $175 per hour for a total of $52.50. Employee claimed no costs. The combined total of Employee's fees was $17,812.50. (Employee affidavit, April 15, 2016).

43) Employee's April 15, 2016 affidavit contains extensive line item entries setting forth multiple activities, such as "Telephone conference with Kim Levallee; Memo to file; Telephone conference with Kim Levallee; Review radiology report; Memo to file," for which Employee claimed 0.6 hours; and "Telephone conference with Kim Levallee (extensive) re SSA setoff and overpayment numbers; Memo to file; Review and annotate medical reports from Craig Hospital; Draft and edit EEMS," for which he claimed 2.4 hours of attorney time. (*Id*.; observations).

44) On April 21, 2016, Employee filed a supplemental affidavit of attorney's fees, paralegal fees and costs, which show Employee's attorney worked for 55.7 hours at a rate $400 per hour for a total of $22,680. Employee's paralegal worked 0.3 hours at a rate of $175 per hour for a total of $52.50. Employee claimed no costs. The combined total of Employee's fees was $22,732.50. (Employee affidavit, April 21, 2016).

45) Employee's April 21, 2016 supplemental affidavit contains additional line item entries setting forth multiple activities, such as "Email to Schwarting; Draft and edit discovery demand; Memo to file; Telephone conference with AWCB; Telephone conference with client; Hearing preparation; Memo to file," for which he claimed 2.4 hours of attorney time. It also shows 17 telephone consultations with Mrs. Levallee, but fails to state the purpose or substance of these conversations. (*Id*.).

46) Line item entries from Employee's April 21, 2016 supplemental affidavit that can be fairly attributed to this decision include references to "NIR," "medical bills," "claim," "van status,"

emails and telephone conferences with "Schwarting," "Craig Hospital statements," "answer," "Griffen & Smith," "Banner Health Equipment bills," "Chad Saunders," "prehearing conference summary," "Hearing," and "witness list." These line item entries total 34.0 hours of attorney time, and 0.3 hours of paralegal time. (*Id.*; experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
> . . . .
>
> (3) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.
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> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
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> (h) . . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .
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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 or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter . . . . Otherwise, the agreement is void for any purpose. 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. . . .

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." *Sea Hawk Seafoods, Inc. v. City of Valdez*, 282 P.3d 359; 364 (Alaska 2012).

The Alaska Supreme Court has recognized the doctrine of impossibility in contract law since 1964. *Merl F. Thompson v. State*, 396 P.2d 76 (Alaska 1964).

> The true distinction is not between difficulty and impossibility. As has been seen, a man may contract to do what is impossible, as well as what is difficult. The important question is whether an unanticipated circumstance, the risk of which should not fairly be thrown upon the promisor, has made performance of the promise vitally different from what was reasonably to be expected.

Id. at 79 (quoting 6 Williston, Contracts §1931-79, note 7, at 5511 (rev. ed. 1938). *See also Northern Corporation v. Chugach Electric Association*, 518 P.2d 76; 82 (Alaska 1974) (*Northern Corporation I*) (Commercial impracticability justified regarding the contract as impossible to perform), *vacated on other grounds*, 523 P.2d 1243; 1246 (1974) (*Northern Corporation II*) (party impliedly warranted a method of performance in the same manner as if it

had unilaterally established the specification at the time the contract was entered); *City of Valdez v. Valdez Development Co.*, 523; 182 P.2d 177; (Alaska 1974).

The Restatement (Second) of Contracts (1981) further provides:

> **§ 265 Discharge by Supervening Frustration.** Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.
>
> **§ 266 Existing Impracticability or Frustration.**
>
> (1) Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.
>
> (2) Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.
>
> **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. . . .
>
> **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.

> **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. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the

> proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

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 generally 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.

Filing a controversion exposes an insurer to an attorney's fee award. *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 242 (Alaska 1997). An injured worker is entitled to reasonable attorney fees on issues prevailed upon. *Id*. at 241. Where an insurer resists payment, thus creating the need for legal assistance, the insurer is required to pay the attorney's fees relating to the unsuccessfully controverted portion of the claim. *Id*. Although attorney's fees should be fully compensatory so injured workers have competent counsel available to them, this does not mean an attorney automatically gets full, actual fees. *Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002). It is reasonable to award an employee half his attorney's fees when he does not prevail on all the issues raised by his claim. *Id*. at 147-148; *Bouse* at 242.

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, *see also Circle De Lumber v. Humphrey*, 130 P.3d 941 (Alaska 2006) (affirming award of attorney's fees based on 35 percent of award). 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.* Attorney's fees awarded under subsection (a) have also been based on a percentage of actual fees claimed, taking into account issues on which a claimant did not prevail. *Soyoung Turner v. Aloha BBQ Grill*, AWCB Decision No. 16-0031 (April 19, 2016).

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 v. Copper Valley Electric Assoc.*, 860 P.2d 1184, 1190 (Alaska 1993). To recover fees under AS 23.30.145(b), an employee must succeed on the claim itself, not a collateral issue. *Childs* at 1193. "Prevailing party status [for civil Rule 82] does not automatically follow if the party receives an affirmative recovery but rather is based on which party prevails on the main issues." *Adamson v. University of Alaska*, 819 P.2d 886 (Alaska 1991)

Attorney fees and costs will be awarded for work expended on the issue decided. *McKinney v. Cordova*, AWCB Decision No. 05-0129 (May 13, 2005); *McCain v. Nana Regional Corp.*, AWCB Decision No. 11-0025 (March 4, 2011).

Block billing is the practice of consolidating multiple tasks in a single billing entry and stating the total number of hours billed for the entire block. Morrision, "Different Interpretations of Block Billing," *Law Department Management*, February 23, 2008. It is widely disapproved because it allows a lawyer to conceal the time spent on each task and prevents a determination of whether those individual tasks were performed within a reasonable amount of time. Phillips, "Reviewing a Law Firm's Billing Practices," *The Professional Lawyer*, Fall 2001, p. 11-12).

Attorney Morrison provides the following examples of a range of block billings:

> Block billed (awful): Draft email to opposing counsel re schedule for Morrison deposition; legal research on preliminary injunction factors, draft legal section of PI opposition; work on invalidity claim chart for Lemmelson reference. 8.7 hours.
>
> Task billed (better): Draft email to opposing counsel re schedule for Morrison deposition (3.4 hours); legal research on preliminary injunction factors (0.4 hours), draft legal section of PI opposition (0.4 hours); analyze factual record in light of same (0.5 hours); work on invalidity claim chart for Lemmelson reference (4 hours).
>
> "Clumped" task billed (better still): Draft email to opposing counsel re schedule for Morrison deposition (3.4 hours); legal research on preliminary injunction factors, draft legal section of PI opposition, analyze factual record in light of same (1.3 hours); work on invalidity claim chart for Lemmelson reference (4 hours).

Id. As he points out, these examples show how block billing can make unreasonable amounts of time - 3.4 hours on an email for a discrete issue, impossible to detect.

> **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.
> . . . .
>
> (e) If any installment of compensation payable *without an award* is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
>
> (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).

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*.

In *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014), the Alaska Supreme Court interpreted when benefits come "due" under the Act's penalty section. Harris had suffered a spinal cord injury in a motor vehicle accident, was confined to a wheelchair and required complex medical care, including specialized beds costing over $50,000 to prevent bed sores. Harris' physician prescribed such a bed, and the employer controverted it. Harris then filed a claim alleging the employer's controversion was unfair or frivolous. After a hearing, the Board decided the employer's controversion was issued in bad faith and assessed a penalty on the bed. The Alaska Workers' Compensation Appeals Commission reversed the Board on the basis a bill for the bed had not been presented for payment.

The Alaska Supreme Court examined several cases from other jurisdictions:

> Courts from other states have imposed a penalty when an employer's action delayed prescribed medical care. The Louisiana Court of Appeal held that a penalty should be imposed on an insurer when its decision to have prescriptions filled by a mail order pharmacy resulted in a delay in delivery of the prescribed drugs. . . . The court held that the employer "effectively denied [the employee] the drugs needed for his compensable injury by denying the timely availability of those prescription drugs" and remanded the case for imposition of a penalty.
>
> The Pennsylvania Commonwealth Court upheld the imposition of a penalty against an employer when an employee was unable to obtain her prescription medication after the employer's insurer cancelled her prescription card without explanation. The court decided that a penalty could be imposed even though the employee had not presented a bill for reimbursement because the employer had set up a system for her to get the medication and then unilaterally terminated it.
>
> The most closely analogous case to the present case is also from Pennsylvania. The Pennsylvania Commonwealth Court decided that a penalty was appropriate

> when an insurer refused to pre-certify back surgery and failed to file a "[utilization review] determination petition" prior to its refusal. . . . Calling the employer's argument "disingenuous," the court disagreed because the insurer's "own action effectively prevented Claimant from receiving the recommended treatment in the first place"; it thus upheld the penalty.

Id. at 519-20 (citations omitted) (emphasis added).

The Supreme Court reasoned a rule that a penalty can be imposed only when a bill is presented for payment could prevent an injured worker from ever receiving treatment because the injured worker might not be able to afford the treatment on his own. Such a rule could also result in an insurer never being penalized for a controversion because and there would never be a bill to present for payment in the first place. *Id*. at 520. *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). The Court concluded, under the Alaska Workers' Compensation system, payments "due" are appropriately characterized as "payable immediately or on demand," not "owed as a debt"; and "[m]edical benefits become due for the purposes of controversions and penalties when the employer has notice they have been prescribed by a doctor." *Id*. at 519-20.

Previous 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* also 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. *Baker v. Prowest Contractors, LLC*, AWCB Decision No 15-0069 (June 16, 2015), relied on both *Rambo* and *Applebee* to conclude the employee had standing to seek penalties on behalf of his providers.

The legislature chose a bright-line rule when it adopted the penalty provision at AS 23.30.155(f), and "[t]here is no discretion to excuse a late payment, no matter how blameless the insurer may be." *American Intern. Group v. Carriere*, 2 P.3d 1222; 1225 (Alaska 2000) (holding, when an

employee requests stop payment of a settlement check, an insurer's payment obligation "springs up again," triggering a new payment deadline). Meanwhile, numerous board decisions have long decided the language of subsection 155(f) is mandatory. *Short v. John Cabot Trading Co.*, AWCB Decision No. 98-0037 (February 25, 1998); *Peterson v. Goentzel Builders, Inc.*, AWCB No. 509425 (May 12, 1989); *Bennett v. Matanuska Maid, Inc.*, AWCB No. 204896 (March 22, 1988); *but see Smith v. Kenai Auto*, AWCB No. 8617782 (December 15, 1989) (hearing chair dissenting) (excusing $24,000 penalty because the employer used a wrong address of its insurer in its C&R agreement); *Bellinger v. Universal Services, Inc.*, AWCB No. 810014 (January 22, 1981) (excusing penalty when board staff sent order for lump sum payment to wrong address).

> We have repeatedly concluded that we have no authority to excuse the penalty on a late payment under an award no matter how appealing the reasons for late payment may be. [Citation omitted]. Unlike the AS 23.30.155(e) late-payment-without-an-award penalty, subsection 155(f) provides no conditions under which a late-payment-under-an-award penalty may be excused.

Peterson at 2 (citing *Stockley v. Noble Mechanical*, AWCB No. 870304 at 2 (November 27, 1987); *Harbison v. Polygon Enterprises*, AWCB No. 860244 at 3 (August 26, 1986).

The Alaska Supreme Court has 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); *Childs* at 1191. It also awarded interest prior to the Workers' Compensation Act providing for it. *Moretz v. O'Neill Investigations*, 783 P.2d 764; 765 (Alaska 1989). 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 45.082. 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.
> . . . .

Payment for "medical devices" becomes due 30 days after an employer receives a bill and a completed report. *Voorhees Concrete Cutting v. Monzulla*, AWCAC Decision No. 07-012 (February 4, 2008) at 6. "This is the date of presentment; it starts the payment clock running." Presentment is complete when an employer has both documents in hand. *Id*.; *accord Williams* at 146 (holding payment due date does not start to run until receipt of a completed report).

> **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 45.120. Evidence.**
> . . . .
>
> (b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. . . .
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not

sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .
. . . .

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 45.182. 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) Did Employer unfairly or frivolously controvert Employee's benefits?

Employer initially accepted Employee's injury as compensable, and it presently continues to pay Employee compensation. Employer has not served any controversion notices in this case, and it did not deny its liability for benefits when it answered Employee's claim. Nevertheless, Employee points to numerous, alleged, unpaid medical bills, as well as the absence of the prescribed van, and contends these facts evidence Employer's resistance to providing him the agreed upon benefits set forth in the parties' C&R.

Employee was generally mistaken with respect to his medical bills. Although Mr. Saunders was able to identify scant instances, among the many alleged, where a couple of Employee's numerous providers had either been late-paid or underpaid, the vast majority of Employee's medical bills were timely paid. Furthermore, with respect to the comparatively few that were not, Mr. Saunders provided credible and understandable explanations. He routinely deals with various documents including, bills, invoices and balance forward statements, each with their own import. He promptly forwards Employee's medical bills to the carrier to be paid. He has had "a lot" of conversations with Employee's medical providers, and has had to address problems such as urology charges that were not forwarded to Employer because the provider did not think they were work related, and payments that were disputed by Swedish Hospital because it contended a different state's workers' compensation fee schedule should apply. Managing Employee's medical care is undoubtedly a complex task. So, too, is adjusting his benefits. To date, Employer has provided well over $1 million dollars in medical benefits to Employee, and of that amount, only 0.017 percent involved late payments or underpayments. These limited instances were just as Employer contends, simply the result of "copious" billing in a complex case, and are in no way indicative of a continuing resistance to paying Employee's benefits. *Moore*.

Employee concluded Employer was resisting providing him with the van because he did not receive the van as soon as he would have liked. However, the passage of time alone does not automatically translate to Employer resistance. Employer's actions must be examined, and when one does so, it is difficult to identify any resistance. *Id*. Contrary to Employee's contention, the record shows Mr. Saunders not only put forth considerable effort to provide Employee with the van, but also did so while trying to accommodate Employee's own, personal, preferences for the van to be both purchased, and modified, in Fairbanks. Since there has been no identifiable Employer resistance, there has been no controversions-in-fact. *Shirley*; *Arant*. Since there was no controversions-in-fact, there could not have been an unfair or frivolous controversion, AS 23.30.155(o); *Moore*.

2) Is Employee entitled to penalty?

The parties entered into a C&R agreement whereby Employer agreed to "pay outstanding medical bills within 30 days," and to "purchase the van described by Craig Hospital." Their agreement was approved on August 28, 2015, and the terms of that agreement became an "award of the board." AS 23.30.012(b). Unlike its counterpart at AS 23.30.155(e), which provides for penalty on untimely payments without an award, AS 23.30.155(f), providing for penalty on untimely payments with an award, does not contain language expressly granting the board authority to excuse untimely payments due to circumstances beyond an employer's control. Consequently, for many decades now, board decisions have interpreted the penalty provision at §155(f) as mandatory, regardless of the circumstances. *Short*; *Peterson*; *Bennett*. More recently, the Alaska Supreme Court also concluded "[t]here is no discretion to excuse late payment no matter how blameless the insurer may be." *Carriere*. Therefore, regardless of how laudable Messrs. Saunders' and Olesen's efforts might have been to provide Employee with a modified van, and regardless of whether the alleged delay was caused by Interior Mobility's inability to perform the prescribed modifications, or Employee's personal preferences to have the van purchased and modified in Fairbanks, those circumstances cannot be used here to excuse untimely payment under AS 23.30.155(f). *Id*.

Circumstances beyond its control is but one of Employer's defenses to a penalty in this instance. It also contends the "triggering" event for its obligation to pay is presentation of a bill, and it has yet to be presented with a bill. Initially, it might appear *Harris*, which held "[m]edical benefits become due for the purposes of controversions and penalties when the employer has notice they have been prescribed by a doctor," would be adversely dispositive of Employer's defense. However, while certain fungible medical benefits such as prescription medications, compression stockings and catheters, might be readily provided on demand, here the prescribed van is no ordinary medical benefit.

Once completed, the prescribed van will be one-of-a-kind, wholly customized motor vehicle. It is not an off-the-shelf item that can simply be purchased in a single transaction. Providing the prescribed van in this case is akin to a manufacturing process or construction project, and requires contracting with numerous dealers, contractors and vendors for the procurement of materials and services. Like any project, it is performed in stages. The prescribed van did not exist at the time Mr. Saunder's was presented with the prescription, and it could not have been provided in a single event. Based on the credible testimony of Messrs. Sanders and Olesen, there are two identifiable points in time when Employer's payment obligations could have arisen: 1) once a Quigley conversion van was available for purchase, and 2) upon completion of the prescribed modifications by a contractor.

Unlike the settlement checks in *Peterson* and *Bennett*, or the benefit award in *Short*; prior to presentment of an invoice for the van on October 7, 2015, there was simply no one, or nothing, for Employer to pay, regardless of the existence of a bill or Employer's willingness to do so. Neither is this a situation, like in *Harris*, where the employer controverted a bed in bad faith, and since the employee likely could not afford the out-of-pocket costs for a $50,000 bed, a bill might never be generated for the employer to pay in the first place. The decisions from other jurisdictions examined by Court in *Harris* all involved some action by the employer that delayed the delivery of benefits to the employee. Those are not facts here. To the contrary, the record shows Employer and Employee worked together in mutual cooperation to obtain the prescribed benefit, and Mr. Saunders made every effort to not only provide Employee with the van, but also do so while accommodating Employee's own, personal, preferences.

A settlement agreement is a contract and is subject to interpretation as other contracts. *Williams*. The primary goal of contract interpretation is to give effect to the parties' reasonable expectations. *Reeder*. The undisputed facts show there were two reasons why Employee was not provided with the van as quickly as he would have liked. The first reason was the commercial unavailability of a van. The second reason was Interior Mobility's inability to perform the prescribed modifications. At the time of the C&R, both parties' expressly contemplated the "purchase" of a van, but such a purchase proved to be commercially impossible. Consequently, under the contract law doctrine of impossibility, a penalty will not be ordered on the van. *Northern Corporation I*.

Similarly, the parties expressly contemplated Employer providing "the van described by Craig Hospital," which they understood was a van that would require modifications. Although it is unclear from the record at what point the parties chose Interior Mobility to perform the modifications, at some point, they did, and at that point, Interior Mobility's ability to perform the modifications became a "basic assumption" of the contract. Restatement (Second) of Contracts, §265 ("supervening frustration"), §266 ("existing impracticality"). Under either scenario, the doctrine of impossibility again applies, and a penalty will not be awarded on the van. *Id*.

Meanwhile, Mr. Saunders candidly identified $16,820 in bills at hearing that were either, late-paid, or under paid, but Employer contends, to the extent Employee is seeking penalties on benefits that existed at the time of the parties' C&R agreement, those penalties were waived by the express language of the agreement. On the other hand, Employee points to language in the agreement where Employer's promises to pay past medical bills within 30 days and contends, since it did not, penalties may now be imposed.

The parties' agreement settled numerous disputes between them, including "*past* penalty . . . which the employee might be presently owed or to which the employee might become entitled at any time in the *future*." It further explains, "This agreement forecloses all *past and future* claims for penalty . . . on all medical bills incurred to date." Certainly, the "past" and "future" language in the agreement is awkward and provides both parties room for argument. However, it is

thought the most reasonable interpretation of this language is an acknowledgement that, at the time, Employee could have ultimately be entitled to a penalty for *past* benefits, paid late in the *past*, but his entitlement would only arise after a *future* hearing where he was awarded the penalty.

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. *Haile*. Otherwise, a carrier could make promises to pay medical benefits and then breach them at will. *Childs* at 1192. Under Employer's interpretation, it is unknown what incentive Employer would have had to pay Employee's past medical bills at all, let alone within 30 days following the effective date of the agreement without the availability of penalties. Additionally, payment of Employee's past medical bills within 30 days was part of the consideration for him compromising his potential entitlement to penalties on those bills. Furthermore, prior to the effective date of the agreement, Employer was voluntarily paying benefits without an award. However, when the agreement became effective, it became an "award of the board." Therefore, any previous obligations Employer may have had under the Act were compromised in favor of it assuming new obligations under the parties' agreement. It is under this new set of obligations that Employee now seeks a penalty. *Baker v. Pro West Contractors*, AWCB Decision No. 15-0069 (June 16, 2015) (rejecting the employer's contention the employee was seeking "additional" benefits after waiving penalty in a C&R, then later seeking imposition of penalty when the employer did not pay medical bills pursuant to the parties' agreement). Although Employee may have waived penalties on past medical bills, he did not waive penalty for Employer's future contractual breaches. Therefore, a penalty will be ordered on all late-paid or underpaid bills identified by Mr. Saunders, regardless of whether or not they were initially incurred prior to the effective date of the settlement. AS 23.30.155(f).

4) Should interest be awarded?

The late payments and underpayments identified by Mr. Saunder's involve medical bills from Employee's providers; therefore, penalties awarded by this decision will be payable to them. AS 23.30.155(e). Although Employee waived his entitlement to an award of interest at the conclusion of the hearing, it is unknown on what basis he could do so on behalf of his providers.

Barrington; 8 AAC 45.142(b)(3)(C). Given the Alaska Supreme Court has consistently required interest awards as a matter of course, and given the Court was awarding interest prior to the Act provided for such an award, the Court considers interest an essential economic component of the workers' compensation scheme. *Moretz*. Therefore, based on the same analysis for penalty set forth above, interest will be awarded to Employee's providers as well.

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

At the hearing's conclusion, Employer objected to Employee block billing of his attorney time; however, it did not request any specific remedy. Employee contends he does not understand the term "block billing," or Employer's objection to it. Block billing is the practice of consolidating multiple tasks in a single billing entry and stating the total number of hours billed for the entire block. *Morrison*. The practice is widely disapproved because it allows a lawyer to conceal the time spent on each task and prevents a determination of whether those individual tasks were performed within a reasonable time. *Phillips*. Workers' compensation hearings should be fair to both parties, and since employers can be obliged to pay employees' attorney's fees under the Act, they should also be permitted a fair opportunity to review, and object to, an employee's claimed legal fees. AS 23.30.001(3). For this reason, Employee is encouraged to avoid block billing in future fee affidavits.

Employee's fee affidavits present other difficulties as well. Although his claim initially listed numerous issues, the record shows it was essentially a claim for penalties. Many of Employee's billing entries were clearly unrelated to the award here, such as "Research setoff calculations," "review radiology report," and an "extensive" conversation with Mrs. Levallee on "SSA setoff and overpayment numbers." Meanwhile, others do not contain sufficient detail to tell whether they were related to the award here, or not. For example, Employee's affidavit lists no less than 17 telephone consultations with Mrs. Levallee, but fails to state the purpose or substance of these conversations. While it is not doubted each of those telephone conversations were somehow related to Employee's entitlement to benefits under the Act, it cannot be discerned which telephone conferences may have been related to an entitlement to penalties. Therefore, Employee is also encouraged to provide greater specificity in future fee affidavits, and to utilize either "task" billing, or "clumped" billing, methods. Nevertheless, Employee has a legitimate

interest in his medical bills being timely paid, and this decision awards a penalty ad interest to his providers. *Rambo*; *Applebee*; *Baker*. Therefore, Employee's attorney has provided bona fide legal services and, notwithstanding a lack of controversions or Employer resistance, an award of attorney's fees is warranted. AS 23.30.145(a).

Based on the candid and credible testimony of Mr. Saunders, this decision awards $4,205 ($16,830 x 0.25) in penalties plus interest to Employee's providers. Meanwhile, Employee claims $22,732.50 in attorney's fees. The nature, length and complexity of the professional services performed on Employee's behalf in this case were not great. *Bignell*; *Lewis-Walunga*. The award here simply resulted from Employee's attorney filing a claim, copying vast numbers of medical bills, filing them on serial NIRs, and then waiting for Mr. Saunders to investigate and see which bills might have been unpaid, late-paid, or underpaid. Based on the number of NIRs filed, Employee was generally unsuccessful in his attempts to secure penalties, and the results obtained required little legal expertise or work. It was only Mr. Saunders' diligent and, no doubt time consuming, investigation that uncovered the late-paid and underpaid bills identified at hearing.

On the other hand, attorneys' fees awards should ensure competent counsel is available to injured workers, especially in cases such as this, where there is a legitimate legal interest to be protected, but protection of that interest may result in a relatively modest award of penalties and interest. *Bignell*. Line item entries from Employee's April 21, 2016 supplemental affidavit that can be fairly attributed to this decision total 34.0 hours of attorney time, and 0.3 hours of paralegal time. At Employee's billed hourly rates, to which Employer did not object, those times translate into $13,600 in attorney's fees, and $52.50 in paralegal costs. However, based on the considerations set forth in the preceding paragraph, Employee's attorney's fees will be reduced 40 percent. Therefore, Employee will be awarded $8160 in attorney's fees, and all his paralegal costs, for a total of $8,212.50 in fees and costs. *Turner*.

CONCLUSIONS OF LAW

1) Employer did not unfairly or frivolously controvert Employee's benefits.

2) Employee is entitled to penalty on the $16,820 in late-paid and underpaid bills identified by Mr. Saunders at hearing.
3) Interest should be awarded as a matter of course.
4) Employee is entitled to $8,212.50 in legal fees and costs.

ORDERS

1) Employee's October 13, 2015 claim is granted in part.
2) Employer shall pay penalty to the providers on the $16,820 in late-paid and underpaid bills identified by Mr. Saunders at hearing.
3) Employer shall pay interest to the providers on the late-paid and underpaid amounts identified by Mr. Saunders at hearing.
4) Employer shall pay to Employee's attorney $8,212.50 in legal fees and costs.

Dated in Fairbanks, Alaska on July 8, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Jacob Howdeshell, 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 OVILA LAVALLEE, employee / claimant; v. BUCHER GLASS, INC., employer; GRANITE STATE INS. CO., insurer / defendants; Case No. 201415155; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on June 28, 2016

/s/
Jennifer Desrosiers, Office Assistant