ALASKA WORKERS' COMPENSATION BOARD

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

MICHAEL REGO, Employee, and DAL ENTERPRISES, L.L.C., Claimant, v. UNIVERSITY OF ALASKA, Self-Insured Employer, Defendant.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201605303 AWCB Decision No. 20-0005 Filed with AWCB Fairbanks, Alaska on February 5, 2020

DAL Enterprises, LLC's December 13, 2018 claim was heard in Fairbanks, Alaska on July 11, 2019, a date selected on May 27, 2019. A February 8, 2019 hearing request gave rise to this hearing. Attorney John Franich appeared and represented DAL Enterprises, LLC (Claimant). Attorney Jeffrey Holloway appeared and represented University of Alaska (Employer). Daniel LaBrosse of DAL Enterprises, LLC appeared in person and testified on behalf of DAL Enterprises, LLC. Senior Claims Adjuster Daisy Saffir of the University of Alaska appeared telephonically and testified on Employer's behalf. The record closed after deliberations on July 11, 2019.

ISSUES

Claimant contends Employer failed to pay submitted invoices. It contends Employer's requests for clarifications of the invoices were overreaching since its invoices complied with AS

23.30.041(m), and any conflict between that statute and 8 AAC 45.445 must be resolved in favor of the statute since a regulation cannot "override" a statute. Claimant seeks payment of its invoices.

Employer contends it is reasonable to inquire about billing details, particularly to audit for reasonableness and compliance with 8 AAC 45.500(b) and 8 AAC 45.445. It contends AS 23.30.041(m) is a vague statute and 8 AAC 45.445 merely provides clarifying instruction on how to comply with it, so there is no conflict between the two. Employer contends Claimant's invoices are vague and ambiguous, and do not contain the level of detail provided by other rehabilitation specialists in Alaska. Employer further contends that time billed was excessive, particularly during periods when little or no work remained to be done on the eligibility evaluation. It specifically points to entries listing two individuals performing work at the same time, failure to identify individuals performing work by name, and extensive entries for "records review" and "action planning" without further clarifying information. Employer requests Claimant's claim for payment be denied.

1) Is Claimant entitled to payment of its invoices?

Claimant seeks penalty and interest on the basis Employer did not timely pay or controvert its invoices.

Employer contends the regulation's provision that non-compliant invoices "will not be processed for payment" is akin to a medical invoice lacking information necessary for payment, such as dates of service or CPT codes, being submitted under AS 23.30.097 and 8 AAC 45.082. It contends, since such an invoice is not valid and payable, a controversion is not required for nonpayment because the payment does not come "due" until it is compliant. Employer contends penalty and interest should not be awarded.

2) Is Claimant entitled to a penalty and interest?

Claimant did not file a hearing brief and did not specifically address the issue of unfair or frivolous controversion during argument at hearing. It is presumed Claimant's request stems from

contentions set forth in its claim, where it wrote Employer should have at least paid uncontested portions of its submitted invoices and its failure to do so is an unfair claim settlement practice under AS 21.36.125.

Employer contends that 8 AAC 45.500(b) does not require it to pay uncontested portions of Claimant's invoice. It opposes a finding of unfair or frivolous controversion.

3) Did Employer unfairly or frivolously controvert Claimant's invoices?

Claimant contends he was aided by the services of his attorney and he seeks an award of fees and costs.

Employer contends, since Claimant is not entitled to payment of its invoices, neither is he entitled to attorney fees.

4) Is Claimant entitled to attorney fees and costs?

FINDINGS OF FACT

A preponderance of the evidences establishes the following facts and factual conclusions:

1) On April 4, 2016, Employee reported injuring his knee while working for Employer. (First Report of Injury, April 6, 2016).

2) As a result of his work injury, Employee was off work for 90 days. (Employer's Notice, July 7, 2016).

3) On July 12, 2016, Claimant was assigned as Employee's rehabilitation specialist to conduct a reemployment benefits eligibility evaluation. (Charles letter, July 12, 2016).

4) On August 24, 2016, the Reemployment Benefits Section reminded Claimant eligibility evaluations are to be completed within 30 days under the Act and encouraged Claimant to either submit the evaluation or request an extension. (Charles letter, August 24, 2016).

5) On August 31, 2016, Claimant submitted an eligibility evaluation report for Employee, which explained:

> The [Employee's] treating physician, Dr. Cary Keller has not yet completed our paperwork, including answering the question of whether the claimant will have a ratable PPI rating at the time of medical stability. Therefore, [Claimant] cannot determine whether the [Employee] will be eligible for reemployment benefits under AS 23.30.041(f)(4) criteria at this time.

Claimant requested additional time to gather necessary medical documentation in order to complete the eligibility evaluation. (Labrosse report, August 31, 2016).

6) On September 9, 2016, Employer received Invoice No. 21280 from Claimant for $3,188.38, which included line item activity descriptions for "Action planning," "Case file review," "Documentation preparations" and "Records Review." It identified individuals who performed the activity by initials, rather than by name, such as "DL," "DL/PS" and "DL/PLP." The invoice shows "DL/PS" met with Employee on July 19, 2016, and "DL" made a phone call to Employee on July 15, 2016 and on August 31, 2016. The minimum increment billed was .25 hour. Employer approved the invoice for payment. (Employer's Hearing Evidence 016).

7) On October 12, 2016, the Reemployment Benefits Administrator's (RBA) designee communicated numerous instructions to Claimant regarding completion of the eligibility evaluation report. She expected Claimant to be diligent and resourceful in following-up with Employee's physician and suggested calling the doctor or meeting with the doctor in person might "yield a more timely response as opposed to just taking a wait and see approach." (Charles letter, October 12, 2016).

8) On October 27, 2016, Claimant submitted an updated eligibility evaluation report for Employee, which explained:

> [Claimant] has made contact with the employer about the possibility of alternative or regular work available for the claimant at this place of employment. The employer stated that she gave the [Employee] light duty modified work until he was released by his treating physician to return to full duty. PA Hendrix did release the [Employee] to full duty as of October 3, 2016, even though she continues to refuse to complete our JA's, sending mixed signals. [Claimant] can not [sic] yet determine if [Employee] is eligible or not for reemployment benefits under AS 23.30.041(f)(1) criteria at this time since a formal SCOTDOT Job analysis has not been completed by his treating physician yet.

(LaBrosse report, October 27, 2016).

9) On November 1, 2016, Employer received Claimant's October 26, 2016, Invoice No. 21290, for $1,380.04, which included line item activity descriptions for "Action planning," "Case file

review," "Documentation preparations" and "Records Review." It identified individuals who performed the activity by initials, rather than by name, such as "DL" and "DL/PS." The minimum increment billed was .25 hour. The invoice included activity between October 14 and October 27, 2016. (Employer's Hearing Evidence 002).

10) On November 3, 2016, Claimant submitted an addendum to his eligibility evaluation report, which explained:

> [Claimant] ca[n] make a recommendation on [Employee's] eligibility according to AS 23.30.041 at this time. He recommends that [Employee] is not eligible for reemployment benefits at this time.
>
> On November 1, 2016, PA Hendrix released [Employee] to all four of the JA's covering his ten years of work, although she previously did predict a PPI rating at the time of medical stability.

(LaBrosse Addendum, November 3, 2016).

11) On November 8, 2016, Employer emailed Claimant:

> Not sure if you received these already, but I received the attached response to the job descriptions from Sportsmedicine; they've released [Employee] to all jobs.
>
> Also, we received the 10/26 invoice and my manager had some questions she asked me to follow up with you about.
>
> 1) Who is 'PS' and what are her credentials?
> 2) What dates did you specifically meet with Mr. Rego?
> 3) The job descriptions were listed as being selected on 8/2 by both you and PS, what did she do v. what did you do?
> 4) What records were reviewed on 10/15?
> 5) What medical records were reviewed on 10/25 v. the ones reviewed in July?
> 6) What specifically was done re: 'action planning' as listed?
>
> We appreciate if you could modify your invoices to reflect what work you are specifically doing and what work 'PS' is specifically doing. We also appreciate you emailing a copy of 'PS''s credentials.

(Employer's Hearing Evidence 032). That same day, Claimant replied:

> Our final report went out on 11/5/16 and you should be getting that any day now. As for your detailed questions on our invoice please tell your supervisor that if we take the time to respond to this there will be another invoice coming to cover the time that is required to answer these detailed questions. As it is there is more detail

> on your invoices now then (sic) any other invoices that we send to all the other adjusters / employers that we work with. I am more then (sic) confident that I can defend my invoice if it goes to the AWCB hearing for review, which is where this may end up. Pam has a MEd in Special Ed and she is CDMS, Certified Disability Management Services, which makes her more then (sic) qualified to work with me on these WC claims. I would like to close our file on this case now but if you insist on us answering these questions there will be additional charges involved.

(Employer's Hearing Evidence 033-034).

12) On November 10, 2016, Employer received Invoice No. 21295, dated November 5, 2016, from Claimant for $1,129.04, which included line item activity descriptions for "Action planning," "Case file review," "Documentation preparations" and "Records Review." It identified individuals who performed the activity by initials, rather than by name, such as "DL" and "DL/PS." The minimum increment billed was .25 hour. The invoice included activity between October 28 and November 4, 2016. (Employer's Hearing Evidence 003).

13) On November 21, 2016, Employer wrote Claimant, noting recent receipt of its report addendum and requesting additional information regarding its invoices:

> In order that we may consider your service invoice numbers 21290 and 21295 for payment, we will need a breakdown of some of the professional service charges. Many of the charges have multiple initials listed in the activity description. Please provide an itemization of the charges in accordance with 8 AAC 45.500(b):
>
> '(b) An itemized billing statement must reflect, for each activity, the date of service, the activity performed, the name of the individual who performed the activity, and the fee charged for the activity. The original billing statement shall be submitted to the employer for payment and copied to the employee. Billing statements not in compliance with this subsection will not be processed for payment.'
>
> Please itemize the charges for 'DL,' 'PLP,' 'ST' and 'PS' separately for each individual who performed activities in this case to include the specific activity performed. . . .

(Saffir letter, November 21, 2016).

14) On December 6, 2016, Claimant replied to Employer's November 21, 2016 letter, asserting its compliance with 8 AAC 45.500(b), and stating "[Claimant] has complied with this regulation as the individual who performed this activity is stated. It does not state that more than one name can/cannot be considered." Claimant then cited AS 23.30.041(m):

> '(m) Only a rehabilitation specialist may accept case assignments as a case manager and sign eligibility determinations and reemployment plans. A person who is not a rehabilitation specialist may perform rehabilitation casework if the work is performed under the direct supervision of a rehabilitation specialist employed in the same firm and location.'

It continued:

> Please note that the initials 'DL' accompany other initials 'PLP', 'ST', and 'PS' to indicate compliance with the above regulation, § 23.30.041(m). ('DL' indicates Daniel LaBrosse, the rehabilitation specialist; all other initials indicate individuals performing activities under direct supervision of Daniel LaBrosse). In moving forward, as to eliminate any confusion regarding activities performed, all invoice activity stated will be accompanied by the initials of the individual performing the activity only and a statement referencing § 23.30.041(m) will be noted on the footer of each invoice as follows:
>
> '[Claimant] provides service in compliance with § 23.30.041(m). All services billed are performed by a rehabilitation specialist or under the direct supervision of a rehabilitation specialist.'
>
> A copy of invoice number 21290 and 21295 have been included to reflect these changes. Please note the invoice date will not be changed, as we were in full compliance and the Net 30 Terms still apply.

(LaBrosse letter, December 6, 2016). Along with its letter, Claimant included its Invoices Nos. 21290 and 21295, in a different format than previously. Both invoices provided for terms "Net 30," and continued to be dated October 26, 2016, and November 5, 2016, respectively. Line item activity descriptions that previously contained pairs of initials, now only set forth individual initials, such as "DL," "PS," "PLP" and "ST." The invoices also included the following footer: "[Claimant] provides service in compliance with § 23.30.041(m). All services billed are performed by a rehabilitation specialist or under the direct supervision of a rehabilitation specialist." The line item activity descriptions and amounts billed were identical to its previous invoices, but each line item activity description did not set forth a date for the activity. (Employer Hearing Evidence, 006-009; observations).

15) On December 7, 2016, the RBA designee found Employee not eligible for reemployment benefits based on Claimant's November 3, 2016 report. (Helgeson letter, December 7, 2016).

16) On December 21, 2016 Employer wrote to Claimant acknowledging receipt of the December 6, 2016 letter and revised invoices, and listing information it still required to pay the invoices:

> In order that we may consider your revised service invoice numbers 21290 and 21295 for payment, 8 AAC 45.500(b) requires the date of service for each activity, and the name of the individual who performed the activity (it is unclear who 'PLP', 'PS' and 'ST' are and where they are located). We appreciate that you did break down the charges by individual initials, but the names are not provided. The revised billing did not reflect the date of service or the name of the person who performed the activity.
>
> Please provide an itemization of the charges in accordance with 8 AAC 45.500(b):
>
> '(b) An itemized billing statement must reflect, for each activity, the date of service, the activity performed, the name of the individual who performed the activity, and the fee charged for the activity. The original billing statement shall be submitted to the employer for payment and copied to the employee. Billing statements not in compliance with this subsection will not be processed for payment.'
>
> Your prior invoice number 21280 dated 9/2/2016 also did not contain the specifics as required under 8 AAC 45.500(b) and we appreciate you providing that information as well so we can verify work done under 8 AAC 45.445.

(Saffir letter, December 21, 2016).

17) On January 10, 2017, Claimant wrote to Employer apologizing for the invoices sent with its December 6, 2016 correspondence. It noted it had been transitioning to a new record keeping program, and explained its "customized format did not manage to cross over," and as a result, the service dates of each activity were mistakenly omitted. Claimant contended AS 23.30.041(m) "does not state that more than one name can/cannot be considered," and further contended its invoices "indicate all persons that performed service activities." Claimant continued:

> [Claimant] would also like to note that ALL persons working on activities, work directly with [Claimant]. For example, when the activity indicates Pamela Sprout and [Claimant] next to 'Meeting with [Employee],' that is to reflect that both persons performed that activity and both were present with [Employee].

It again sent revised Invoices Nos. 21290 and 21295, which provided for terms "Net 30," and continued to be dated October 26, 2016 and November 5, 2016, respectively. The invoices now included dates for line item activity descriptions. Numerous line item activity descriptions set forth two names, such as "Pamela Sprout/Dan LaBrosse," and "Sharon Thomas/Dan LaBrosse," as the name of the individual that performed the activity. (LaBrosse letter, January 10, 2017; Employer's Hearing Evidence, 019-022).

18) On February 17, 2017, Claimant sent "PAST DUE REMINDER" to Employer, requesting immediate remittance "to avoid collections for non-payment." It contended, "we have not received payment for invoice number **21295** dated **11/05/2016** in the amount of **$1,129.04**," and alleged the invoice was "more than **70 days past due**." The reminder also included a footer that stated:

> Please remember, our terms are Net 30 and any unpaid amount exceeding 60 days past the due date is subject to be sent to an outside collection agency and/or an attorney and will result in the customer's liability for all collection fees, attorney fees, interest and all costs associated with the collection of any past due amount.

(LaBrosse letter, February 17, 2017 (emphasis in original)).

19) On March 21, 2017, Employer noted receipt of the January 10, 2017 and February 17, 2017 letters, and detailed for Claimant the information it still required:

> We appreciate that you did now list the names of the people that worked in conjunction with you however, without their credentials we are unable to assess if they meet the criteria of AS 23.30.041(m) and 8 AAC 45.445. Further, because in many of the itemized tasks there are multiple people listed and you indicate that both people 'were present', we are unable to assess whether those activities to be performed only by the certified rehabilitation counselor per 8 AAC 45.445 have also been met. Having two people listed on the same activity does not allow us to identify which individual performed the activity.

Employer's letter then requested itemized charges in accordance with 8 AAC 45.500(b), and again quoted that subsection. (Saffir letter, March 21, 2017).

20) On March 31, 2017, Claimant responded to Employer's March 21, 2017 letter:

> [Claimant] has fully complied with the regulations of Alaska Workers' Compensation Laws and Regulations Annotated handbook and has made all efforts to satisfy your requests in our prior correspondence. §23.30.041(m) states,
>
> > '(m) Only a rehabilitation specialist may accept case assignments as a case manager and sign eligibility determinations and reemployment plans. A person who is not a rehabilitation specialist may perform rehabilitation casework if the work is performed under the direct supervision of a rehabilitation specialist employed in the same firm and location.'
>
> RS LaBrosse is the only individual to accept case assignments for [Claimant]. RS LaBrosse is also the only individual to act as case manager and sign eligibility determinations and reemployment plans. All other individuals listed in prior correspondence, perform rehabilitation casework under the direct supervision of

> RS LaBrosse. All individuals listed in prior correspondence are under the direct supervision of RS LaBrosse and casework is performed at the office of [Claimant] located at 1901 Sanduri Avenue Fairbanks, Alaska 99709. Therefore, [Claimant] is in compliance with § 23.30.041(m).
>
> Please note that all activities listed under 8 AAC 45.445 were performed by RS LaBrosse and therefore [Claimant] is in compliance with 8 AAC 45.445.
>
> [Claimant] also recognizes that all correspondence received was also forwarded to the RBA (Reemployment Benefits Administration). [Claimant] would like to remind you that the RBA has made a determination on this case based on the work performed by [Claimant] and has since closed this case. Because the work performed by [Claimant] has been completed and has been in compliance with the Alaska Workers' Compensation Laws and Regulations, and payment has not been remitted after several attempts to collect, [Claimant] will have no choice but to file a claim with the Alaska Workers' Compensation Board.
>
> Please note, our terms are Net 30 and because the unpaid amounts exceed more than 60 days past the due date, it is subject to be sent to an outside collection agency and/or an attorney and will result in the customer's liability for all collection fees, attorney fees, interest and all costs associated with the collection of any past due amount.

(LaBrosse latter, March 31, 2017).

21) On April 17, 2017, Employer responded to Claimant's March 31, 2017 correspondence:

> We appreciate your confirmation that all activities listed under 8 AAC 45.445 were performed by RS LaBrosse. However, as indicated in our prior correspondence, your invoicing and correspondence shows multiple people 'were present' or participated in an activity, and since the activities are not itemized we are unable to assess whether those activities to be performed only by the certified rehabilitation counselor per 8 AA 45.445 were done so. Again, having two people, not the individual, listed on the same activity does not allow us to identify which individual performed the activity listed so we can review for compliance under 8 AAC 45.445.
>
> For example service invoice #21290 reflects on 10/20/16, 'Action planning Pamela Sprout/Dan LaBrosse' should list what work each individual did. Two line items specifying what work Ms. Sprout did and what work Mr. LaBrosse did in regard to action planning would allow the University to review those charges for conformity under 8 AAC 45.445.
>
> Example:
> '10/20/16: selection of appropriate job titles, Dan LaBrosse, .50 hours = $92.50'
> '10/20/2016: faxed job titles to physician, Pamela Sprout, .25 hours = $46.25'

> Please provide an itemization of the charges in accordance with 8 AAC 45.500(b):
> . . . .
>
> Please be aware that the University has already issued payment of $3,188.38 to DAL Enterprises for your initial invoicing that did not comply with 8 AAC 45.500(b) in anticipation that it was an oversight and would be corrected in additional invoicing as requested.
>
> Again, your prior invoices and revised invoices do not conform to the requirements [of] 8 AAC 45.500(b). For example, you indicate on invoice #21280, 'Meeting with claimant DL/PS'.
>
> Please itemize all charges to indicate who exactly met with Mr. Rego and what specific work that individual did for which you are charging the same hourly rate. We appreciate you providing that information as well so we can verify work done under 8 AAC 45.445.

(Employer letter, April 17, 2017).

22) Employer never controverted Claimant's invoices. (Observations).

23) On December 13, 2018, Attorney John Franich entered his appearance for Claimant and filed a claim on its behalf, seeking payment of its invoices. Claimant's stated reason for filing its claim was, "Payment is overdue. ER's failure to pay even the undisputed portions of invoices is an unfair claim settlement practice under AS 21.35.125." Claimant also sought a finding of unfair or frivolous controversion, attorney's fees and costs, penalty and interest. (Entry of Appearance, December 13, 2018; Claim, December 13, 2018).

24) On January 4, 2019, Employer answered Employee's December 13, 2018 claim, denying payment on Claimant's invoices were due because they not in compliance with 8 AAC 45.500(b). It also denied penalty and interest were due on the basis no benefits were due and contended no attorney fees were due either. (Employer's answer, January 4, 2019).

25) Employee averred that he never met with Dan LaBrosse, nor did he ever speak with Mr. LaBrosse by telephone. Employee received one telephone call from a woman at Claimant's office, who called to set up his initial appointment. Employee's initial interview for his evaluation was held at the Noel Wein library in Fairbanks, Alaska on July 19, 2019. The evaluation was conducted only by a woman. The total time for the July 19, 2019 meeting was approximately twenty minutes. (Employee's affidavit, April 2019; Employer Hearing Evidence 001-002).

26) Claimant did not file evidence, a witness list or a hearing brief prior to the hearing. (Observations).

27) Employer referred to billing entries with pairs of initials, or pairs of names, as "group billing, and it offered the following example from one of Claimant's revised invoices:

> For example, on revised invoice 21295, served on January 10, 2017, does the entry on November 3, 2016, "Eligibility evaluation report preparation Pamela Sprout/Dan LaBrosse 0.5" mean that both worked on the report together for 30 minutes, or does it mean that each person worked on the report, performing the same tasks for 15 minutes each, meaning that the entry was double billed? And how is this different from the very next entry, "Report preparation and review Dan LaBrosse 0.5"? The entries, as they are so indicated, make it impossible to answer these questions.

(Employer's Hearing Brief, July 3, 2019).

28) Claimant emphasized AS 23.30.041(m) only requires rehabilitation specialists to accept case assignments as case manager and sign eligibility determinations and reemployment plans. Claimant also acknowledged it failed to file an affidavit of attorney fees and costs in advance of hearing and stated it was "stuck" with attorney fees under AS 23.30.145(a). (Claimant's hearing arguments).

29) Mr. LaBrosse testified Employer had questions about who was performing work because earlier versions of Claimant's invoices contained two sets of initials. Employer specifically questioned who his assistant was and what her qualifications were. Mr. LaBrosse did not feel these questions were appropriate since he was overseeing her work. The initials "PS" on the invoices are Pamela Sprout, and the initials "PLP" are Paris Purcell. He and Ms. Sprout usually work as a team, with him supervising Ms. Sprout, and their time is billed as one person. Mr. LaBrosse thought Employer asking questions about who did what on the invoices was overreaching. (LaBrosse).

30) Pamela Sprout and Paris Purcell are not certified rehabilitation counselors and they are not on the Workers' Compensation Division's referral list. (*Id.*).

31) Mr. LaBrosse spoke to Employee by telephone on July 15, 2016, and also met with him at the library. He had two, back-to-back, intake appointments that day at the library, so Pam Sprout started the intake appointment with Employee to gather information. Mr. LaBrosse spoke with Employee after he was through with his other appointment. He is aware of Employee's affidavit and he thinks Employee is lying about never having spoken to him because his employer "put him

up to it." Mr. LaBrosse thinks Employee's statement that the intake appointment only lasted 20 minutes is "total bologna." (*Id*.).

32) Mr. Labrosse's demeanor markedly changed upon being questioned about Employee's affidavit. He appeared and sounded agitated, and stated, "This was an open and shut case that did not require a lot of my time." "[Employee] wanted to go to work . . . the State accepted that, and he went back to work." (Experience, observations; inferences drawn therefrom; LaBrosse).

33) Mr. LaBrosse keeps "very detailed" case notes from which he prepares his invoices. (*Id*.).

34) Mr. LaBrosse worked on preparing his March 31, 2017 letter to Employer, which indicated he was the person who performed the activities listed under 8 AAC 45.445. (*Id*.).

35) At the time of the invoices at issue, .25 was Mr. LaBrosse's minimum billing increment, but he "goes .15 sometimes if [a task] is really short." (*Id*.).

36) "Action planning," on Claimant's invoices means figuring out how to solve a problem. If someone receiving an invoice from Claimant wants to know what "action planning" means, they can ask. Employer did not ask for clarification regarding "action planning," "they just discounted the entire invoice." (*Id*.).

37) Upon being questioned on Employer's November 8, 2016 email, Mr. LaBrosse acknowledged Employer did ask him what "action planning" meant, and his demeanor markedly changed. He appeared and sounded agitated, and stated, "Yeah, and I'm also noting that . . . this email is dated 11/8/2016 which is beyond the date of the invoices so this was . . . extra time that I'm not getting paid for." He also stated, "Well this was after this whole case was closed. I don't know why they're coming back after the case was closed when I can't bill anything." (LaBrosse; experience, observations and inferences drawn therefrom).

38) Mr. LaBrosse acknowledged his November 8, 2016 email response to Employer's email that same day, where he threatened to send an invoice for time he spent responding to Employer's inquiries about his invoices. (*Id*.).

39) Mr. LaBrosse felt Employer's April 17, 2017 inquiry regarding "action planning" was "overreaching," "inappropriate" and "intrusive." He stated he has "submitted thousands of invoices just like this and [he's] never had anyone say [he's] not providing enough detail." Mr. LaBrosse has been putting the same "categories" on his invoices for the last ten years. He has had the workers' compensation board look at his invoice categories before, and his categories have never been a problem. (*Id*.). Mr. LaBrosse "responded three times with three letters and [he]

continued to get questions like this that [he] thought were inappropriate, so [he] quit responding." (*Id*.).

40) Mr. LaBrosse never explained what "action planning" means to Employer. (*Id*.).

41) Mr. LaBrosse learned Employee had returned to work in October 2016. At that time, Mr. LaBrosse was still required to do his job analysis. It was a "big problem" that Employee had a full duty release to return to work but he could not recognize it because there was no job analysis release. That was why "action planning" was required 11 times in twenty-two days. "Action planning" was also required because the RBA wrote Mr. LaBrosse and instructed him to undertake certain actions. (*Id*.).

42) Claimant's Invoices Nos. 21290 and 21295 show, from October 15, 2016 through November 3, 2016, "Action planning" was undertaken nine times. The last line item entry for action planning was on November 3, 3016, which reads: "Action planning x 3." Time billed for that entry was .75 hours. The remainder of the line item entries for "Action planning," were billed for .25 hours each. (Observations).

43) Between October and early November 2016, Mr. LaBrosse was waiting for Employee's doctor to review job descriptions. He was unable to identify what records he reviewed on October 15, 2016. Mr. LaBrosse was unable to recall what records he reviewed on October 24, October 25, or October 26, 2016. It would have been physically impossible for him to type a description of the records he reviewed into the invoice. (LaBrosse).

44) Employer did not offer to pay undisputed portions of the submitted invoices. (*Id*.).

45) For reasons explained in this decision's analysis, Mr. LaBrosse is not credible. (Experience, judgment, observations and inferences drawn therefrom).

46) Employer's adjuster, Daisy Saffir, testified Employee's eligibility determination was not complicated. Total invoices received from Claimant amounted to $5,700, which was extremely high considering it was a relatively simple evaluation with Employee having returned to work at full duty before the eligibility evaluation was completed. (Saffir).

47) Employer provided bills it received from another vocational rehabilitation specialist who had conducted eligibility evaluations in three other cases for Employer under similar circumstances. Those billings totaled $2,004.50, $1,007.00 and $2,821.50. (*Id*.; Employer's Hearing Evidence 004-045).

48) Ms. Saffir reviews incoming invoices and approves them before Employer will issue payment. Part of her job is to review medical, legal and nurse case manager bills for reasonableness and accuracy, but she did not "audit" Claimant's initial Invoice No. 21280. After approving that invoice for payment, she asked Employee about his experience with Claimant. Employee related that he had not met Dan LaBrosse, had never spoken to a man, and that he only spoke with a woman. This raised concerns to Ms. Saffir regarding 8 AAC 45.445. (Saffir).

49) Ms. Saffir asked Claimant clarifying questions so she could audit its invoices for compliance. She questions invoices regularly and did not believe her questions were unreasonable. Ms. Saffir did not know who 'PS' and 'PLP' were from Claimant's invoices. The two invoices at issue did not explain why action planning was needed nine times in a few days, considering Employee had returned to full duty work during that timeframe. The only activity pending between October 15 and November 2, 2016 was for Employee's doctor to sign off on the submitted job descriptions. (*Id*.)

50) Claimant's first invoice, which Employer paid, did not have the names listed on the billing entries and she never objected to Claimant's billing increments. (*Id*.)

51) Ms. Saffir thought Employee had returned to full duty around October 3, 2016. On November 1, 2016, she learned Employee's treating physician had not replied to queries regarding job descriptions and she re-faxed the October 24, 2106 job descriptions to the treating physician. That information was documented as being returned from the doctor on November 8, 2016. (*Id*.)

52) Ms. Saffir did not know what "action planning" would have needed to be done October 29, 2016 on a file that was "essentially done." (Testimony of Daisy Saffir, Hearing July 11, 2019).

53) Claimant has previously filed more than one claim regarding unpaid invoices. *Strong v. Fairbanks Memorial Hospital*, AWCB Decision No. 12-0004 (January 6, 2012); *Jeffrey T. Smith v. State of Alaska*, AWCB Decision No. 13-0037 (April 1, 2013). In *Strong*, Employer contended it was reasonable to inquire about billing details since Claimant's invoices were vague and ambiguous, and did not contain the level of detail provided by other similar service providers. Examples included entries stating "administrative activities" without any further detail; entries for "vocational research" after the reemployment plan had already been approved; and time entries for telephoning or emailing an attorney when Employee was unrepresented. (*Strong*). In *Smith*, Employer contended Claimant's billings were excessive. Employer also objected to paying for

preparation of a medical summary when neither Employer nor the RBA had requested a summary, and the plan at issue was under medical suspension. (*Smith*).

54) Claimant has previously been instructed to specifically name the individual who performed each activity in its invoices. (*Strong*).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . .
>
> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) The department shall adopt rules . . . and procedures for the periodic selection, retention, and removal of . . . rehabilitation specialists . . . and shall adopt regulations to carry out the provisions of this chapter . . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute.

The board may base its decisions not only on direct testimony 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 Alaska Supreme Court will presume an agency's regulation is valid and place the burden of proving otherwise on the challenging party. *Grunert v. State*, 109 P.3d 924, 928-29 (Alaska 2005). It will uphold the regulation as long as it is consistent with and reasonably necessary to implement the statutes authorizing its adoption. *Id*. at 929.

AS 23.30.041. Rehabilitation and reemployment of injured workers.

. . . .

(b) The administrator shall

. . . .

(2) recommend regulations for adoption by the board that establish performance and reporting criteria for rehabilitation specialists;

(3) enforce the quality and effectiveness of reemployment benefits provided for under this section;

(4) review on an annual basis the performance of rehabilitation specialists to determine continued eligibility for delivery of rehabilitation services;

. . . .

(e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" for

(1) the employee's job at the time of injury; or

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."

. . . .

(m) Only a rehabilitation specialist may accept case assignments as a case manager and sign eligibility determinations and reemployment plans. A person who is not a rehabilitation specialist may perform rehabilitation casework if the work is performed under the direct supervision of a rehabilitation specialist employed in the same firm and location.

. . . .

Konecky v. Camco Wireline, 920 P.2d 277, 283 (Alaska 1996), involved an employee who argued against the strict application of the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Directory of Occupational Titles* (SCODDOT) in determining his

eligibility for reemployment benefits. The Alaska Supreme Court evaluated the legislative intent for statutory changes in 1988, which included adoption of *SCODDOT* job descriptions, and found that the legislature intended:

> 1) to *create a less expensive system* with fewer employees participating in it; 2) to *reduce the use of vocational rehabilitation as a litigation tool;* 3) to encourage the use of vocational rehabilitation services for employees 'most likely to benefit and who truly desire and need them'; [and] 4) to speed up the vocational rehabilitation process in the expectation of producing more successful outcomes.

Id. at 283 (citation omitted) (emphasis in original). In rejecting the employee's arguments, the Court concluded:

> These circumstances, however, cannot overcome the clear language of the statute. The legislature's language is plain, and demands that reemployment benefits eligibility be determined by *SCODDOT* job descriptions. . . . The statute's plain language was apparently intended to minimize or avoid prolonged and expensive disputes about eligibility for reemployment benefits by inflexibly relying on the Department of Labor's extensive occupational directory and job analysis. In doing so, the legislature may have been acting in accordance with its expressed intention to reduce costs to employers and reduce litigation.

Id. at 282.

> **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 . . . 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. . . . When a claim is made for a course of treatment requiring continuing and multiple treatments of a similar nature, in addition to the notice, the physician or health care provider shall furnish a written treatment plan if the course of treatment will require more frequent outpatient visits than the standard treatment frequency for the nature and degree of the injury and the type of treatments. The treatment plan shall be furnished to the employee and the employer within 14 days after treatment begins. The treatment plan must include objectives, modalities, frequency of treatments, and reasons for the frequency of treatments. *If*

> *the treatment plan is not furnished as required under this subsection, neither the employer nor the employee may be required to pay for treatments that exceed the frequency standard.* The board shall adopt regulations establishing standards for frequency of treatment.
> . . . .

(Emphasis added.) The date an employer has both a completed physician's report and a medical bill in hand "starts the payment clock running" for purposes of penalty. *Voorhees Concrete Cutting v. Monzulla*, AWCAC Appeal No. 07-012 (February 4, 2008) at 6.

The law requires a doctor to submit a treatment plan to the employer if treatment exceeds the statutorily mandated treatment frequencies. *Hale v. Anchorage School Dist.*, 922 P.2d 268 (Alaska 1996). An employer's decision to controvert is not relevant to the application of the frequency standards. *Grove v. Alaska Const. and Erectors*, 948 P.2d 454; 457 (Alaska 1997). To hold otherwise would place the burden on the employer to object to medical treatments if they exceeded the statutory standard. *Id*. "The statute is clear that it is the employee's health care provider who must take steps if the statutory frequency of that treatment is exceeded." *Id*.; *accord Burke v. Houston NANA, L.L.C.*, 222 P.3d 851; 860-61 (Alaska 2010) (rejecting argument that the employer has the burden of objecting to the frequency of medical treatments).

> **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 . . . 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 . . . is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual finding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001; 1008 (Alaska 2009).

> **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 by 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. Chenega Lodging*, AWCB Decision No. 10-0123 (July 16, 2010).

> **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. . . .

Subsection (a) authorizes the award of attorney fees as a percentage of the amount of benefits awarded to a claimant when an employer controverts a claim. *Harnish Group, Inc. v. Moore*, 160 P.3d 146; 150 (Alaska 2007).

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim the employer must file a notice, on a form prescribed by the director . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due . . . there shall be added to the unpaid installment an amount equal to 25 percent of the installment.
> . . . .
>
> (h) The board may upon its own initiative at any time in a case in which . . . where right to compensation is controverted, or where payments of compensation have been . . . suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been . . . suspended . . . take the further action which it considers will properly protect the rights of all parties.

> . . . .
>
> (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. . . .

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). A controversion in fact also occurs when an employer does not file a notice of controversion but denies liability for benefits in its answer to a claim. *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007).

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.

> **AS 23.30.395. Definitions.**
> . . . .
>
> (12) "compensation" means the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter . . . .

Unpaid rehabilitation specialists' fees are "compensation" subject to penalty. *Smith v. State of Alaska*, AWCB Decision No. 13-0037 (April 1, 2013).

AS 21.36.125. Unfair Claim Settlement Practices. (a) A person may not commit any of the following acts or practices:

. . . .

(6) fail to attempt in good faith to make prompt and equitable settlement of claims in which liability is reasonably clear . . . .

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 . . . .

8 AAC 45.440. Removal of rehabilitation specialists.

. . . .

(b) The administrator may disqualify a rehabilitation specialist from providing services under AS 23.30.041 for

. . . .

(8) fraudulent billing or reporting by the rehabilitation specialists;

. . . .

8 AAC 45.445. Activities to be performed only by the certified rehabilitation specialist. For purposes of AS 23.30.041(m), only the certified rehabilitation specialist assigned to a case may perform the following activities:

(1) Acting as the primary contact for the employee and for the employer or insurer;
(2) Conducting the interviews with the employee and employer;
(3) Selecting appropriate job titles in accordance with 8 AAC 45.525(a)(2);
(4) Determining whether specific vocational preparation has been met and which job titles are submitted to a physician;
(5) Meeting with the physician;
(6) Evaluating physician responses;
(7) Evaluating an employer's offer of alternative employment;
(8) Evaluating previous rehabilitation and dislocation benefits in prior claims;
(9) Making a recommendation regarding the employee's eligibility;
(10) Selecting the occupational goal, method of training, and specific training provider for a reemployment benefits plan;
(11) Providing vocational guidance and counseling;
(12) Reviewing and signing all reports and accompanying forms.

> **8 AAC 45.500. Reporting requirements**
> . . . .
>
> (b) An itemized billing statement must reflect, for each activity, the date of service, the activity performed, the name of the individual who performed the activity, and the fee charged for the activity. The original billing statement shall be submitted to the employer for payment and copied to the employee. Billing statements not in compliance with this subsection will not be processed for payment.

The regulation at 8 AAC 45.500 became effective on July 20, 1997. LexisNexis, Alaska Workers' Compensation Laws and Regulations Annotated (2019).

ANALYSIS

1) Is Claimant entitled to payment of his invoices?

Between November 2016 and April 2017, the parties engaged in protracted disputes over Claimant's invoices for vocational rehabilitation services. In addition to Employer's allegations of excessive billing, and the issue of whether Claimant's invoices complied with 8 AAC 45.500(b), the parties' disputes also involved 8 AAC 45.445, which limits the performance of specific vocational rehabilitation services to certified rehabilitation specialists. Employer repeatedly cited 8 AAC 45.445 as a basis for requesting Claimant provide the names of persons who performed the activities listed in its invoices, while Claimant viewed Employer's requests as "overreaching."

Just as it did in its several letters to Employer, at hearing Claimant cited AS 23.30.041(m), which provides "only a rehabilitation specialist may accept case assignments as a case manager and sign eligibility determinations and reemployment plans," in contrast to 8 AAC 45.445, which sets forth some twelve activities that are only to be performed by a certified rehabilitation specialist. Since Claimant did not file a hearing brief, its argument concerning the regulation is not fully developed. However, Claimant contended the regulation is in conflict with the statute because it requires rehabilitation specialists to perform a greater number of activities than the legislature originally specified in AS 23.30.041(m). The import of Claimant's argument seems to be, the regulation is invalid because it conflicts with statute and Employer should be precluded from relying on the

regulation as a defense to its claim. Therefore, this decision will first address 8 AAC 45.445's validity as a preliminary issue.

An agency's regulation will be upheld as long as it is consistent with and reasonably necessary to implement the statutes authorizing its adoption. *Gunert.* Not only does the board's general rulemaking authority expressly include the regulation of rehabilitation specialists, but the Reemployment Benefits Administrator (RBA) is further tasked with recommending regulations that establish performance criteria for rehabilitation specialists and enforcing the quality and effectiveness of vocational rehabilitation benefits. AS 23.30.005(h); AS 23.30.041(b)(2), (3). The legislature itself expressly contemplated rehabilitation "casework" being performed by a "person who is not a rehabilitation specialist," and saw fit to designate certain activities that must be performed only by a rehabilitation specialist. AS 23.30.041(m). Given this statutory framework, a regulation designating additional activities that must be performed only by a rehabilitation specialist does not conflict with the statute; but rather, merely enhances it, and is entirely consistent with the board's regulatory function. *Gunert.*

One activity under this regulation that must be performed by a rehabilitation specialist is interviewing employees. Ms. Saffir testified she became concerned about Claimant's compliance with 8 AAC 45.445 after asking Employee about his experience with its principal, Mr. LaBrosse. Employee purportedly told Ms. Saffir he had never met Mr. LaBrosse or spoken with him by phone. Ms. Saffir's hearing testimony comported with Employee's affidavit, lending credence to both. They both are credible. AS 23.30.122. Given Claimant's September 2, 2016 invoice billed Employer for Mr. LaBrosse and Ms. Sprout meeting with Employee, and also billed for Mr. LaBrosse telephoning Employee, Employee's statements that he had never met Mr. LaBrosse, or spoken with him by telephone, understandably caused Ms. Saffir concern, thus prompting her scrutiny of Claimant's subsequent invoices.

Between December 2016 and April 2017, Employer tiresomely explained to Claimant in its letters that listing two people for a given activity does not allow it to identify which person actually performed the activity. Meanwhile, Claimant gave vacillating explanations of who actually performed activities accompanied by pairs of initials on its invoices. AS 23.30.122. In his

December 6, 2016 letter, Mr. LaBrosse contended pairs of initials indicated another person had performed the activity under his supervision. Then, on January 10, 2017, Mr. LaBrosse wrote pairs of initials indicate both persons had performed the activity. Next, on March 31, 2019, Mr. LaBrosse was back to his original position that the other person had performed the activity under his supervision. Then, in that same letter, Mr. Labrosse also put forth yet another contradictory assertion that he performed all activities listed under 8 AAC 45.445 without explaining why other persons' initials might also appear accompany those entries. Mr. LaBrosse's conflicting and contradictory testimony is not credible and is given no weight. *Id*.

Mr. LaBrosse's lack of credulity extends beyond his letters to Employer. *Id*. At hearing, he testified Employer never asked him for clarification of the vague line item entries for "Action planning," a demonstrably false statement in light of Employer's November 8, 2016 email and its April 17, 2017 letter. His explanation for why "Action planning" was required 11 times in 22 days when the only work required was to secure a job analysis approval from Employee's physician is also not credible. *Id*. According to Mr. LaBrosse, "Action planning" means figuring out how to solve a problem, and it was a "big problem" that Employee had been released to work without a job analysis approval from his physician. However, there was no need for Mr. LaBrosse to figure out how to solve this problem because the RBA designee had already instructed him how to solve it in her October 12, 2016 letter.

Regarding his vague line item entries, Mr. LaBrosse testified he has, "submitted thousands of invoices just like this and [he's] never had anyone say [he's] not providing enough detail." He further testified he had been putting the same categories on his invoices for the last 10 years and his categories have never been a problem. However, *Strong* and *Smith* show this testimony to be false as well, since multiple Employers have questioned his invoices in the last 10 years. *Id*. Mr. LaBrosse's testimony it would have been physically impossible for him to type what records he reviewed when he billed for "Records Review" lacks credulity given his job involves producing written work product. AS 23.30.122. Finally, Mr. LaBrosse's refusal prior to hearing to identify what records he reviewed on four different dates where he billed for that service, and his inability to identify those records at hearing, calls into question the veracity of those entries, as well. *Id*.

Claimant's invoices, in all their various iterations, suffer from two infirmities. The first is their vague line item entries. The regulation requires an "itemized billing statement." 8 AAC 45.500(b). "Itemize" means to list *in detail*. Black's Law Dictionary 909 (9th ed. 2009) (emphasis added). Nebulous activity descriptions such as "Records Review," "Action planning," "Case file review" and "Document preparation" make it impossible to determine what services were actually provided, whether those services were provided in an efficient and cost effective manner, or whether any service was provided at all. AS 23.30.001(1); AS 23.30.041(b)(3), (4); 8 AAC 45.440(b)(8). The second is their failure to identify the name of the individual performing the service. 8 AAC 45.500(b).

In responding to Employer's November 21, 2016 letter, which asked Claimant to "[p]lease itemize charges for 'DL', 'PLP', 'ST' and 'PS' separately," Claimant contended 8 AAC 45.500(b) "does not state that more than one name can/cannot be considered." However, the plain language of the regulation instructs that an "itemized billing statement must reflect, for *each* activity . . . the *name* of the individual who performed the activity . . . ." *Id*. (emphasis added). All iterations of Claimant's invoices contain numerous line item activity descriptions that identify the name of the person who performed the activity by pairs of initials or pairs of names. None provide a singular name for all line item activity descriptions, which is rather remarkable given that Claimant has been previously encouraged to name the individual who performed each activity. *Strong*. Failure to name the individual performing the activity not only prevents auditing for compliance with 8 AAC 45.445, as Employer repeatedly contended, but also makes it impossible to identify duplicative work or billing. Because Claimant's invoices do not comply with the regulation, its claim will be denied. 8 AAC 45.500(b). Claimant may revise its invoices so that they comply with regulation and resubmit them to Employer for its review and payment. AS 23.30.135(a); AS 23.30.155(h).

2) Is Claimant entitled to a penalty and interest?

Rehabilitation specialists' fees are "compensation" subject to penalty. *Smith*. Unless compensation payments are controverted in good faith, *Harp*, the law imposes a penalty when compensation is "not paid within seven days after it becomes due," AS 23.30.155(e). Here,

Claimant seeks penalty and interest on the basis Employer did not timely pay or controvert its invoices. Employer does not dispute it neither paid Claimant's invoices nor controverted them. Instead, it likens the requirements for rehabilitation specialists' invoices at 8 AAC 45. 500(b) to those for medical bills at AS 23.30.097 and 8 AAC 45.082 and contends, since Claimant's invoices did not comply with the regulation, its obligation to either pay or controvert them never came due, and a penalty should not be ordered.

The Act is nearly silent on rehabilitation specialists' fees and merely provides they "shall be paid by the employer and may not be included in determining the cost of the reemployment plan," AS 23.30.041(k). Given this statutory void on the subject, the legislature clearly left it to the board to "adopt regulations to carry out the provisions of this chapter." AS 23.30.005(h). The board did so, and adopted 8 AAC 45.500 one year after Court's *Konecky* decision, which noted the legislative intent behind the 1988 statutory changes to AS 23.30.041 was to create a less expensive reemployment system and reduce the use of vocational rehabilitation as a litigation tool. "Itemized billing statements" with basic information, such as "the date of service, the activity performed, the name of the individual who performed the activity, and the fee charged for the activity," provide a basis for evaluating the efficiency and cost effectiveness of vocational rehabilitation services, 23.30.041(b)(3), and whether those services were provided in accordance with applicable regulations, 8 AAC 45.440; 8 AAC 45.445.

The regulation's declaratory language, "will not be processed for payment," most closely resembles similar declaratory language pertaining to the submission of treatment plans at 23.30.095(c), which provides, "If the treatment plan is not furnished as required under this subsection, neither the employer nor the employee may be required to pay for treatments that exceed the frequency standard." The Alaska Supreme Court has held an employer's decision to controvert is not relevant to the application of the frequency standards under the Act, and stated to hold otherwise would place the burden on the employer to object to medical treatments if they exceeded the statutory standard. *Grove*. The regulation's language is similar and, for reasons just explained, the same rationale should apply here. Just as the legislature requires treatment plans as a prerequisite for payments in excess of the frequency standards, so too does the board require some basic information for the payment of rehabilitation specialists' fees. To paraphrase *Grove*

and *Burke*, the regulation is clear that it is the rehabilitation specialist who must take steps to ensure he gets paid. 8 AAC 45.500(b).

Just as the date an employer has both a completed physician's report and a medical bill in hand "starts the payment clock running" for medical costs, so too does the date an employer has an invoice in hand, which meets the requirements of 8 AAC 45. 500(b), start the payment clock running for rehabilitation specialists' fees. *See Monzulla* (when medical bills "become due" for purposes of penalty). Since Claimant's invoices were not in compliance with the regulation, they did not come due for payment or controversion under AS 23.30.155(e), and a penalty will not be ordered. *Id*. Similarly, interest will be denied as well. AS 23.30.155(p).

3) Did Employer unfairly or frivolously controvert Claimant's invoices?

In his claim, Claimant contended Employer should have at least paid uncontested portions of his invoices and its failure to do so is an unfair claim settlement practice under AS 21.36.125. Since Employer did not "unqualifiedly accept" and denied liability for payment of Claimant's invoices, it controverted them in fact. *Shirley*. However, bad faith is a prerequisite for a finding of unfair or frivolous controversion. *Ford*. If a controversion is based on colorable legal arguments, supported in part on undisputed facts, it is a good faith controversion. *Redgrave*. As Employer pointed out at hearing, 8 AAC 500(b) does not require Employer to pay uncontested portions of an invoice. To the contrary, it succinctly directs, noncompliant invoices, not portions of them, "will not be processed for payment." As discussed above, Claimant's invoices did not comply with the regulation. Therefore, since Employer had a good faith legal basis for controverting them, its controversion was not unfair or frivolous, and there is no basis for a referral under AS 23.30.155(o).

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

The law provides for an attorney fee award as a percentage of the amount of benefits awarded to a claimant when an employer controverts a claim. AS 23.30.145(a); *Moore*. Since Claimant has not prevailed on its claim for payment of its invoices, which Employer controverted in fact, his claim for attorney fees and costs will be denied.

CONCLUSIONS OF LAW

1) Claimant is not entitled to payment of its invoices.
2) Claimant is not entitled to penalty and interest.
3) Employer did not unfairly or frivolously controvert Claimant's invoices.
4) Employee is not entitled to attorney fees and costs.

ORDER

Claimant's December 13, 2018 claim is denied.

Dated in Fairbanks, Alaska on February 5, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Julie Duquette, Member

/s/
Jacob Howdeshell, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of MICHAEL REGO, employee; DAL Enterprises, L.L.C., claimant v. UNIVERSITY OF ALASKA, self-insured employer / defendant; Case No. 201605303; 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 February 5, 2020.

/s/
Ronald C. Heselton, Office Assistant II