

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

BRENDA L. LABOY,)	
)	
Employee,)	
Claimant,)	
)	FINAL DECISION AND ORDER
v.)	
)	AWCB Case No. 201814780
CONCENTRA, INC.,)	
)	AWCB Decision No. 20-0069
Employer,)	
and)	Filed with AWCB Anchorage, Alaska
)	on August 4, 2020.
LIBERTY INSURANCE CORPORATION,)	
)	
Insurer,)	
Defendants.)	
)	

Brenda Laboy's (Employee) March 28, 2019 claim was heard on July 7, 2020, in Anchorage, Alaska, a date selected on April 15, 2020. A March 18, 2020 hearing request gave rise to this hearing. Attorney Elliot Dennis appeared and represented Employee. Attorney Stacy Stone appeared telephonically and represented Concentra, Inc. (Employer), and Liberty Insurance Corporation (Liberty). Employee and Keith Schafer appeared telephonically and testified for Employee. Adjuster Sharona Hlavinka appeared telephonically and testified for Employer. The record closed at the hearing's conclusion on July 7, 2020.

ISSUES

As a preliminary matter, Employer contended the penalty issue should not be heard because the last prehearing conference summary failed to list it for hearing.

Employee contended penalty is appropriate when medical bills were not paid in a timely matter. The panel orally granted Employer's request and decided not to hear the penalty issue.

1) Was the oral order excluding the penalty issue for this decision correct?

Employee contends Employer paid her medical bills due to her attorney's efforts. Therefore, she seeks attorney fees and costs.

Employer contends it did not controvert or resist paying Employee's medical bills. Therefore, it contends her attorney did not successfully prosecute any claim, and Employee is not entitled to attorney fees or costs.

2) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

- 1) On April 23, 2018, Employee injured her right elbow while working for Employer. (First Report of Injury, October 12, 2018).
- 2) Employee's April 23, 2018 work injury occurred when Wilton Adjustment Services (Wilton) was providing Employer's workers' compensation adjusting. However, she reported the work injury on October 12, 2018, when Liberty was providing workers' compensation coverage and adjusting. This created confusion in Liberty's bill review department. (Hlavinka).
- 3) Prior to July 2018, Wilton provided Employer's workers' compensation claims adjusting. In July 2018, Liberty began providing Employer's workers' compensation coverage and adjusting. (Hlavinka).
- 4) From November 18, 2018, through December 8, 2018, Employee had been treated by Alivio Therapeutic Massage (Alivio); Alivio's bill totaled \$1,980. (Notice of Intent to Rely, June 25, 2019).
- 5) From January 11, 2019, through April 26, 2019, Employee had been treated by Chugach Anesthesia (Chugach). The first Chugach's bill was \$1,304.50 and the second was \$2,274.79, totaling \$3,579.29. (Schafer; Hlavinka). The provider and services performed on the first bill

were different from the providers and services on the second bill. (Notice of Intent to Rely, October 24, 2019; observation).

6) On January 18, 2019, Schafer, a collection manager for Health Billing Services (HBS), which provided billing services for Chugach, sent the first Chugach's bill to Wilton. (Schafer).

7) On January 29, 2019, Employee claimed an unfair or frivolous controversion against Employer and Liberty. (Claim for Workers' Compensation Benefits, January 29, 2019).

8) On February 20, 2019, Employer and Liberty answered denying Employee's benefits contending she did not work for Concentra on April 23, 2018, and Liberty's policy had not covered the work injury location. (Answer to Employee's Workers' Compensation Claim; Controversion Notice, February 20, 2019).

9) On March 6, 2019, Schafer sent the second Chugach's bill to Wilton. He did not receive any response or payment from Wilton. (Schafer).

10) On March 28, 2019, Employee claimed temporary total disability (TTD), temporary partial disability (TPD), and permanent partial impairment (PPI) benefits, an unfair or frivolous controversion, medical and transportation costs, penalty, interest, attorney fees and costs. The claim was initially filed against Employer and Wilton but was later changed to Liberty. (Amended Claim for Workers' Compensation Benefits; Amended Claim, March 27, 2019).

11) On April 4, 2019, Employer and Liberty withdrew their February 20, 2019 controversion. (Notice of Withdrawal of Controversion, April 4, 2019).

12) On April 19, 2019, Employer and Liberty answered admitting TTD benefits, medical and transportation costs, attorney fees and costs, and denying TPD and PPI benefits, penalty, interest, and an unfair or frivolous controversion. (Answer to Employee's Amended Workers' Compensation Claim, April 19, 2019).

13) On June 25, 2019, Employee filed and served Alivio's bill on Stone. (Notice of Intent to Rely, June 25, 2019).

14) On August 29, 2019, Hlavinka received Alivio's bill and processed the payment. (Hlavinka).

15) On October 24, 2019, Employee filed and served the two Chugach's bills on Stone. (Notice of Intent to Rely, October 24, 2019).

16) On October 25, 2019, Employer provided Schafer with a new workers' compensation claim number for the two Chugach's bills. (Schafer).

- 17) On October 28, 2019, Schafer submitted the two Chugach's bills to Liberty with the new claim number. (Schafer).
- 18) On November 5, 2019, Schafer received a letter from Liberty stating, "This letter is to inform you that we are in receipt of your bill for medical services from your office. However, we cannot identify our record of workers' compensation claim of this patient information noted on your bill." (Schafer).
- 19) On November 8, 2019, Liberty rejected the October 28, 2019 bill submission stating Employee's claim was not on its file. (Schafer).
- 20) On February 24, 2020, Employer contacted Schafer to seek information regarding the two Chugach's bills. (Schafer).
- 21) On February 24, 2020, Employee asked Employer to provide proof it made payment to Chugach. (Letter, Employee's Hearing Brief, June 30, 2020, Exhibit 8).
- 22) On February 25, 2020, Schafer, emailed the two Chugach's bills to Employer. (Schafer).
- 23) On February 25, 2020, Employer responded, "the bill is currently being reprocessed." (Email, Employee's Hearing Brief, June 30, 2020, Exhibit 9).
- 24) On February 28, 2020, Liberty sent payment for the first Chugach's bill but denied the second bill because both bills had the same date of service and were deemed to be duplicate. However, she "asked for it to be re-reviewed and overwritten." (Hlavinka).
- 25) On March 2, 2020, Employee filed and served an updated Chugach bill with \$3,226.35 outstanding. (Notice of Intent to Rely, March 2, 2020).
- 26) On March 3, 2020, Schafer received payment for the first Chugach's bill. (Schafer).
- 27) On March 19, 2020, Employer informed Schafer about the "workers' compensation codes." (Schafer).
- 28) On March 23, 2020, Schafer sent the second Chugach's bill to Employer. (Schafer).
- 29) On April 15, 2020, Employer contended it was attempting to confirm the second Chugach's bill payment but the process had been delayed because due to COVID-19 quarantine. Employee contended the second Chugach's bill had been outstanding for over a year. The parties agreed to a hearing on medical costs, attorney fees and costs. (Prehearing Conference Summary, April 15, 2020).
- 30) On May 18, 2020, Schafer received a new claim number from Employer and sent the second Chugach's bill again. (May 18, 2020).

- 31) On June 17, 2020, Employee filed and served the second Chugach's bill. (Notice of Intent to Rely, June 17, 2020).
- 32) On June 23, 2020, Employer filed and served a spreadsheet showing \$772.27 outstanding to Chugach. (Notice of Intent to Rely, June 23, 2020).
- 33) On June 29, 2020, Employer paid the second Chugach's bill. (Notice of Intent to Rely, June 30, 2020; Schafer).
- 34) On June 30, 2020, Employee asked \$6,272.73 in attorney fees and \$4,376.73 in paralegal costs, totaling \$10,649.46 in fees and costs. (Second Affidavit for Award of Paralegal Fees Performed by Shona Embs; Second Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees and Costs, June 30, 2020). Dennis is an experienced workers' compensation attorney; he communicated with Employee, providers and Stone; reviewed various documents; prepared and filed claims, petitions, affidavits, evidence and brief; attended prehearings and a hearing; and researched law to prevail on Employee's attorney fees and cost claim. It is very likely that the acceptance of this case precluded Dennis from taking other cases. His hourly billing rate of \$395 is within the range of contingent fee customarily charged in Anchorage for workers' compensation cases. (Agency file; observation; inferences from the above).
- 35) Hlavinka could not explain why she did not promptly receive bills Employee sent to Stone. (Hlavinka).
- 36) Normally, when an employer's attorney is served with a bill, it promptly gets sent to the adjuster. (Hlavinka; observation).

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 so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. . . .

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).

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment. . . .

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. . . .

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. . . .

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. . . . 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. . . .

Wise Mechanical Contractors v. Bignell, 718 P.2d 971 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a “contingency factor” in awarding fees to employees’ attorneys in workers’ compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id.* at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services

obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id.*

Childs v. Copper Valley Electric Association, 860 P.2d 1184 (Alaska 1993), held because the employer had delayed disability payments, attorney fees and costs were also awardable because his attorney's efforts were necessary to induce the employer to finally pay the benefits. *Id.*

Rusch & Dockter v. SEARHC, 453 P.3d 784, 803 (Alaska 2019), held an award of attorney fees will only be reversed if it is "manifestly unreasonable" -- this differs from the "substantial evidence" test used for review of factual determinations. The Alaska Supreme Court explained "[a] determination of reasonableness requires consideration and application of various factors that may involve factual determinations, but the reasonableness of the final award is not in itself a factual finding." *Rusch & Dockter*. It also held the board must consider all of the following eight non-exclusive factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining the reasonableness of a fee:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

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. . . .

. . . .

(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.

The purpose of AS 23.30.155 is to motivate “employers to make prompt and timely compensation owing to employees.” *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1191 (Alaska 1984). Under the Act “payments are made without need of Board intervention unless a dispute arises. If the employer disputes payment, it is required to file a timely controversion notice. . . . [P]ayments ‘due’ under the act are more appropriately characterized as ‘[p]ayable immediately or on demand,’ not ‘[o]wed as a debt.’” *Harris v. M-K Rivers*, 325 P.3d 510, 519 (Alaska 2014). “Compensation” under subsection (e) includes medical benefits. *Childs*.

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).

8 AAC 45.065. Prehearings.

....

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request. . . .

8 AAC 45.070. Hearings.

....

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

....

8 AAC 45.180. Costs and attorney's fees. . . .

. . . .

(b) A fee under AS 23.30.145 (a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145 (a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

. . . .

ANALYSIS

1) Was the oral order excluding the penalty issue for this decision correct?

At the April 15, 2020 prehearing conference, the parties stipulated to a hearing on medical costs, attorney fees and costs. Neither party sought to have the April 15, 2020 prehearing conference summary amended or modified. 8 AAC 45.065(c); (d). Thus, absent any unusual and extenuating circumstances, this decision may not consider any other issues. 8 AAC 45.070(g). The oral order excluding the penalty issue for this decision was correct. AS 23.30.135(a); 8 AAC 45.065(c); (d); 8 AAC 45.070(g).

2) Is Employee entitled to attorney fees and costs?

Employee requests attorney fees and costs. AS 23.30.145(a). Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(a); *Childs*. Employee contends Employer paid her medical bills due to her attorney's efforts. Employer disagrees; it contends it did not resist or controvert payment; therefore, there is no basis for attorney fees or costs.

As Employee served Alivio's bill on Stone, it is undisputed Employer had knowledge of it on June 25, 2019, and paid it on August 29, 2019, after 61 days. Also, as she served the two Chugach's bills on Stone, it is undisputed Employer had knowledge of them on October 24, 2019, and paid the first bill on March 3, 2020, after 131 days, and the second bill on June 29, 2020, after 249 days.

Employer contends there was a confusion in processing medical payments because Employee reported her April 23, 2018 injury on October 12, 2018. In April 2018, Employer's workers' compensation coverage was provided by Wilton; Liberty took over in July 2018. Thus, when HBS submitted the two Chugach's bills with an injury date falling outside of Liberty's coverage period, they were rejected. Yet, it is unclear why Liberty paid Alivio's bill in 61 days in contrast to the two Chugach's bills that were paid in 131 days and 249 days respectively.

Further, Employer's November 5, 2019 letter and November 8, 2019 rejection of the two Chugach bills, stating it could not identify Employee or her claim, are unreasonable because (1) on April 4, 2019, it withdrew the February 20, 2019 controversy; (2) by August 29, 2019, Employer had paid Alivio's bill; (3) by October 24, 2019, Employee had filed and served the two Chugach's bills on Stone; and (4) by October 28, 2019, Schafer had re-submitted the two Chugach's bills to Liberty with the claim number it had provided. *Rogers & Babler*.

On February 24, 2020, Employer sought information regarding the two Chugach's bills. After Schafer emailed the bills to Employer on February 25, 2020, it responded, "the bill is currently being reprocessed." On February 28, 2020, Employer paid the first Chugach's bill but denied the second bill because both bills had the same date of service and were deemed to be duplicate. However, the amount, provider and services rendered in the first bill were completely different from those of the second bill; it is perplexing how they could be deemed as duplicate. In any event, Employer paid the second bill on June 29, 2020.

Employer admitted Employee's medical benefits. Therefore, it had to furnish her medical treatment and pay her medical bills within 30 days after it received Alivio's or Chugach's bills. AS 23.30.095(a); AS 23.30.097(d). It is irrelevant who -- Wilton or Liberty -- administered

Employer's workers' compensation policy on Employee's injury date. *Rogers & Babler*. Employee did not have to figure that out. Employer had to investigate and provide medical payment within 30 days; yet, it failed to do so in a timely manner. AS 23.30.097(d); *Rogers & Babler*. Lack of communication between Hlavinka and Stone delayed the process. Employee served Alivio's bill on Stone on June 25, 2019; Hlavinka received it two months later. When an employer's attorney is served with a bill, it should get passed on to the adjuster promptly to expedite the process. *Rogers & Babler*. In short, if Employer had timely paid Alivio's and Chugach's bills, the parties would have avoided unnecessary litigation. AS 23.30.001(1).

Alivio's and Chugach's bills were "[p]ayable immediately or on demand," not "[o]wed as a debt." *Harris*. If Employer disputed Alivio's or Chugach's bills, it was required to file a timely controversion notice. AS 23.30.155(a); *Harris*. Employer neither filed a controversion nor "unqualifiedly" accepted those bills; this was a "controversion in fact." *Houston; Shirley*. Though penalty is not an issue for this decision, it is worth noting AS 23.30.155(e) awards 25 percent penalty on any unpaid compensation within seven days after it becomes due. The Act motivates "employers to make prompt and timely compensation owing to employees," and Alivio's or Chugach's bills are "compensation" under subsection (e). *Childs; Rawls*.

Because Employer significantly delayed Alivio's and Chugach's payments, attorney fees and costs are awardable because Dennis' efforts were necessary to induce Employer to finally pay the bills. *Childs*. Also, Employer controverted-in-fact Chugach's payments, and Dennis was successful in prosecuting them, which allows this decision to award actual attorney fees under AS 23.30.145(a). Employee filed an affidavit "itemizing the hours expended as well as the extent and character of the work performed." 8 AAC 45.180(b). She seeks \$6,272.73 in attorney fees and \$4,376.73 in paralegal costs, totaling \$10,649.46 in attorney fees and costs.

Dennis began representing Employee in this case from March 28, 2019. He communicated with Employee, providers and opposing counsel; reviewed documents; prepared and filed claims, petitions, affidavits, and evidence; attended prehearings and hearing; and researched law to prevail on Employee's attorney fees and cost claim. *Rogers & Babler*. It is very likely that the acceptance of this case precluded Dennis from taking other cases. *Id.* The hourly billing rate of

\$395 is within the range of contingent fee customarily charged in Anchorage for workers' compensation cases. *Id.* Thus, Employee will be awarded \$10,649.46 in actual attorney fees and costs. *Rusch.*

CONCLUSIONS OF LAW

- 1) The oral order excluding the penalty issue for this decision was correct.
- 2) Employee is entitled to \$10,649.46 in attorney fees and costs.

ORDER

- 1) The penalty issue is not considered in this decision.
- 2) Employer shall pay Dennis \$10,649.46 in attorney fees and costs.

Dated in Anchorage, Alaska on August 4, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M Yeo, Designated Chair

/s/
Kimberly Ziegler, 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 Brenda L. Laboy, employee / claimant v. Concentra Inc., employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201814780; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on August 4, 2020.

/s/
Nenita Farmer, Office Assistant