ALASKA WORKERS' COMPENSATION BOARD

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

NIKOLAY KOLEV, Claimant, and IVAYLO STOYANOV, Guardian for Claimant, v. KELUCO GENERAL CONTRACTORS, INC., TRIPLE B'S, LLC, BERNIE CULLEN, KEVIN FROHLING & BRAD LAYBOURN TRUST, and, BENEFITS GUARANTY FUND, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201816787 AWCB Decision No. 21-0090 Filed with AWCB Anchorage, Alaska on September 22, 2021.

Employee Nikolay Kolev and his guardian and conservator Ivaylo Stoyanov's (Claimants) November 16, 2018 claim and July 6, 2020 petition for guardianship and assisted living costs were heard on July 21, 2021, in Anchorage, Alaska, a date selected on May 19, 2021. A June 3, 2020 hearing request gave rise to this hearing. Attorney Michael Flanigan appeared and represented Claimants. Attorney Elliot Dennis appeared and represented Defendants Keluco General Contractors, Inc. (Employer), Triple B's, LLC (Triple B's), and Bernie Cullen. Defendant Kevin Frohling appeared and represented himself. Brad Laybourn did not appear or otherwise participate in the hearing but represents Defendant Brad Laybourn Trust (BLT). Attorney Adam Franklin appeared and represented the Benefits Guaranty Fund (Fund).

Stoyanov, Elena Koleva, Vesselin Nenchev, and Roland Catlett, testified for Claimants; Cullen testified for Employer, Triple B's and himself. The record remained open for additional evidence and briefing and closed on September 3, 2021.

ISSUES

Claimants contend Employee's earnings history does not fairly and accurately reflect his earning capacity and lost earnings during his post-injury disability. They contend Employee's permanent total disability (PTD) compensation rate should be adjusted based upon his earnings at the time he was injured while working for Employer.

Employer contends the PTD rate Employee requests is not reflective of his potential future earnings. They contend his request for a compensation rate adjustment should be denied.

Frohling, BLT and the Fund's positions on this issue are not known but are presumed in opposition.

1) Are Claimants entitled to compensation rate adjustment?

Employee contends Employer underpaid PTD benefits without a Social Security offset order; thus, the offset should not be applied retroactively.

Employer admits it applied the Social Security offset without an order. It contends Employee conceded this issue when he made a settlement offer inclusive of an offset. Employer requests determination of the appropriate offset.

Frohling, BLT and the Fund's positions on this issue are not known but are presumed in opposition.

2) Is Employer entitled to a Social Security offset?

Medical providers have been paid by Medicaid, and Employer has satisfied the Medicaid liens. However, Claimants seek an order requiring Employer to pay providers according to the Alaska Workers' Compensation Fee Schedule.

Employer contends medical providers should have known Employee's injury was work-related based on its requests for medical records. However, it contends providers did not timely submit medical bills or appeal its payment denial notice after it satisfied Medicaid's lien. Thus, Employer contends the providers waived reimbursement rights pursuant to the fee schedule.

Frohling, BLT and the Fund's positions on this issue are not known but are presumed in opposition.

3) Should Employer pay medical costs to providers according to the fee schedule?

Claimants contend Employer should pay costs associated with Stoyanov as Employee's guardian and reasonable fees for his services because Employee is incapacitated due to work injury, Employer requested a guardian, and an Oregon court appointed Stoyanov as his guardian.

Employer contends although Employee needs a guardian, this decision lacks authority to award guardianship costs or fees because guardianship is not a benefit under the Alaska Workers' Compensation Act. Further, Employer contends Claimants did not present any invoice to determine whether any charges would be reasonable and necessary.

Frohling, BLT and the Fund's positions on this issue are not known but are presumed in opposition.

4) Are Claimants entitled to guardian litigation costs and fees?

Claimants contend although Employee presently lives with his daughter Koleva who provides for his care, he may need to hire a nursing assistant or be admitted to an assisted living facility in the future. They seek an order requiring Employer pay for such costs in the future.

Employer contends PTD benefits cover Employee's living costs such as rent and food, and assisted living would provide food, lodging and supervision. Thus, payment of assisted living expenses in addition to PTD benefits would be a duplication of benefits.

Frohling, BLT and the Fund's positions on this issue are not known but are presumed in opposition.

5) Should Employer pay nursing assistant or assisted living costs in the future?

Claimants contend Employer did not timely pay or controvert benefits due, file proof of insurance and report Employee's injury to the division; they seek related penalties.

Employer contends it paid all benefits and penalties due; thus, Claimants are not entitled to any penalty.

Frohling, BLT and the Fund's positions on this issue are not known but are presumed in opposition.

6) Are Claimants entitled to penalties?

Claimants contend they are entitled to interest and attorney fees and costs on all benefits awarded in this decision.

Employer contends it has already paid statutory attorney fees on all accrued benefits and penalties paid and will continue to pay as they become due. Employer "believes" it has paid all compensation that could be subject to an interest claim; but if any interest is owed, it will pay.

Frohling, BLT and the Fund's positions on this issue are not known but are presumed in opposition.

7) Are Claimants entitled to interest and attorney fees and costs?

Claimants contend Employer, Triple B's, Cullen, Frohling, BLT, and the Fund should be jointly liable for Employee's work injury because (1) Employee was injured while working for an uninsured Employer, (2) Triple B's was the "project owner," (3) Cullen, Frohling and BLT were the principals of uninsured Triple B's, and (4) the Fund should pick up the shortfall if these entities and persons fail to pay all benefits owed. Employer, Frohling, BLT and the Fund's positions on this issue are not known but are presumed in opposition.

8) Are Defendants and the Fund jointly liable for Employee's work injury?

FINDINGS OF FACT

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

1) On September 20, 2017, Employee sustained a traumatic brain injury while working for Employer when he fell off the roof of a building owned by Triple B's, a limited liability company, which fully owns Employer; Triple B's members are Cullen, Frohling and BLT. (Claim for Workers' Compensation Benefits, November 16, 2018; Cullen). Neither Employer nor Triple B's was insured for workers' compensation liability at the time of Employee's work injury. (Employer's Report of Injury, March 14, 2019; Cullen).

2) On November 16, 2018, Employee claimed temporary total disability and PTD benefits, a compensation rate adjustment, medical care, related transportation costs, an unfair or frivolous controversion, attorney fees, costs, interest and penalties. (Claim for Workers' Compensation Benefits, November 16, 2018).

3) On December 12, 2018, Employer denied Employee's claim, contending he was an independent contractor and no notice of injury was provided as required under AS 23.30.100. (Answer; Controversion Notice, December 12, 2018).

4) On January 14, 2019, Employer withdrew the December 12, 2018 Controversion Notice. (Notice of Withdrawal of Controversion Notice Re Keluco General Contractors, Inc., January 14, 2019). Triple B's denied Employee's claim contending he was not its employee. (Triple B's LLC's, Answer; Controversion Notice Re Triple B's LLC, January 14, 2019). Cullen denied Employee's claim contending he was Employer's employee, not Cullen's employee. (Bernie Cullen's Answer; Controversion Notice Re Bernie Cullen, January 14, 2019).

5) On March 14, 2019, Employer retroactively reported Employee's September 20, 2017 work injury. (Employer Report of Injury, March 14, 2019).

6) On May 30, 2019, Employee served Employer with medical bills and liens for his September 20, 2017 work injury. (Employee's Notice of Filing Non Medical Evidence, May 30, 2019).

7) On June 13, 2019, Employer admitted there was an employer-employee relationship, but denied all benefits except PTD, reasonable and necessary medical care and related travel expenses, and attorney fees. (Employer's Amended Answer; Controversion Notice, June 13, 2019).

8) On July 9, 2019, BLT denied Employee's claim contending he was not its employee. (Brad Layburn Trust Answer; Controversion Notice, July 9, 2019).

9) On July 10, 2019, Frohling denied Employee's claim contending he was not Frohling's employee. (Kevin Frohling's Answer; Controversion Notice, July 10, 2019).

10) On June 15, 2020, Employer asked for a guardian or conservator for Employee because "if [he] is not competent to manage his affairs, then he may not be competent to hire an attorney or direct litigation or to make decisions which are in his best interest." (Petition, June 15, 2020).

11) On June 18, 2020, Employer sent payment denial letters to medical providers stating providers did not timely submit medical bills, their billings have been satisfied and there was no outstanding balance owed. (Employer's Hearing Brief, April 13, 2021, Exhibit 16).

12) On July 6, 2020, Employee asked for an order requiring Employer to pay assisted living expenses. (Petition, July 6, 2020).

13) On September 30, 2020, *Kolev v. Keluco General Contractors, Inc., et al*, AWCB Decision No. 20-0091 (September 30, 2020) (*Kolev I*) denied Employer's petition for a referral to the Director to seek a guardian or conservator based on lack of medical evidence. (*Kolev I*).

14) On November 23, 2020, Employer denied:

> (1) All benefits except PTD benefits in amounts currently being paid and benefits referenced below.
> (2) All unreasonable and unnecessary medical benefits.
> (3) All medical benefits not supported by the physician a report required pursuant to 8 AAC 45.086 and not billed pursuant to AS 23.30.097.
> (4) All medical bills waived by providers pursuant to AS. 23.30.097(i).
> (5) All medical lien claims not in compliance with applicable law.
> (6) All claims for assisted living services and guardianship fees.

(7) All claims for cost to establish guardianship.
(8) Medical travel charges which are unreasonable or not supported by evidence.
(9) All attorney fees except those being paid for the PTD which he has recovered.
(10) All benefits under the act which have not been affirmatively accepted.

(Controversion Notice, November 23, 2020).

15) On April 16, 2021, Flanigan, Employer and the Fund agreed Employee was incompetent and needed a guardian; they agreed to continue the merits hearing until a guardian was appointed by a competent court. (Prehearing Conference Summary, April 16, 2021).

16) Flanigan incurred $6,937 in litigation costs. (Expense Itemization, April 14, 2021).

17) On April 23, 2021, an Oregon court appointed Stoyanov as Employee's guardian and conservator. (Limited Judgment Appointing Permanent Guardian and Conservator of An Adult for an Indefinite Period of Time, April 29, 2021).

18) Employee earned $56,222 in 2008; $54,000 in 2009; $55,868.93 in 2010; $60,021.45 in 2011; $40,500 in 2012; $53,200 in 2013; $25,400 in 2014; $2,605 in 2015; and $5,179 in 2016. Based on these numbers, Employee's average yearly earnings from 2008 to 2016 was $39,221. In 2017, prior to his work injury, Employee earned $17,665 from Triple B's and $8,487 from Phoenix Excavating, Inc., totaling $26,152. His average weekly earnings in 2017 prior to his September 20, 2017 work injury were $696 ($26,152 / 263 days x 7 days = $696); thus, Employee was on pace to earn $36,195 ($696 x 52 weeks = $36,195) in 2017 if he had not been injured. Employer paid Employee by the hour. Based on gross weekly earnings of $696, Employee's weekly PTD benefit would be $452.39. (Employer's Hearing Brief, April 13, 2021, Exhibit 11; record; inferences; Benefit Calculator).

19) Since May 2021, Employee has been living with his daughter Koleva who provides care for him; she has not received any compensation. Koleva stopped working on May 6, 2021, to prepare for the registered nurse examination but will return to work soon. She intends to live with Employee "to keep a watchful eye but needs assistance" once she returns to work. Cullen spoke to Koleva soon after Employee's injury and provided transportation and lodging to her and her mother so they could be in Anchorage during Employee's hospitalization. Cullen was aware of Employee's medical bills and told Koleva she should file for bankruptcy to protect Employee's house. Employee receives $1,132 per month in SSDI benefits. (Stoyanov; Koleva; Cullen).

20) Employer calculated Employee's PTD benefits based on Cullen's estimate that "he might have found another $5,000 worth of work for Employee in 2017 but that would be a stretch." (Record; Dennis letter, May 15, 2019).

21) Nenchev is a general contractor and has two to three employees working for him. He has known Employee since 1995 and considers him to be a good contractor. Employee has never worked for him, but Nenchev would have paid him $20 to $25 per hour for a full-time employment in 2017. In 2017, Nenchev was actively seeking workers but did not make an actual job offer to Employee because Employee was going to work in Alaska. (Nenchev).

22) Catlett owns nine properties and regularly hires workers to "remodel, refurbish, and fix properties for rental." He hired Employee "off and on a couple of dozen" times because Employee was not licensed but did better than a licensed person. Catlett said he would have paid Employee $25,000 for a remodeling project that was available in 2017, but when asked how he came up with that figure, Catlett responded, "Because I know Nick," and declined to explain. Catlett could not remember the last time he hired Employee. (Catlett).

23) Employer offset Employee's PTD payments by his Social Security benefits without a Board order authorizing the SSDI offset. (Record; agency file).

24) Assisted living encompasses both living and medical costs; it provides room and board but also disability care; it is similar to hospitalization in that respect. (Knowledge; observation).

25) On August 24, 2021, the panel asked the parties to address the following issues: (1) penalties under AS 23.30.070(f) and AS 23.30.085(b); (2) a Social Security offset without an order pursuant to 8 AAC 45.225(b)(5); (3) application of AS 23.30.220(a)(10); and (4) reduction of PTD benefits for assisted living.

26) On September 1, 2021, Employer requested a Social Security offset. (Petition, September 1, 2021).

PRINCIPLES OF LAW

> **AS 10.06.990. Definitions.** In this chapter, unless the context otherwise requires,
> . . . .
>
> (10) "limited liability company" or "domestic limited liability company" means an organization organized under this chapter;
> . . . .

> (13) "corporation" or "domestic corporation" means a corporation for profit subject to the provisions of this chapter, but does not include a foreign corporation or a national bank;

The Alaska Revised Limited Liability Company Act is set out in Chapter 50, Title 10 of the Alaska Statutes. It includes both the definition of a limited liability company and a statement regarding the liability of the members:

> **AS 10.50.265. Liability of members to third parties.** A person who is a member of a limited liability company or a foreign limited liability company is not liable, solely by reason of being a member, under a judgment, decree, or order of a court, or in another manner, for a liability of the company to a third party, whether the liability arises in contract, tort, or another form, or for the acts or omissions of another member, manager, agent, or employee of the company to a third party.

> **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. . . .

The board may base its decision 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 23.30.030. Required policy provisions**. A policy of a company insuring the payment of compensation under this chapter is considered to contain the provisions set out in this section.
> . . . .
>
> (4) The insurer will promptly pay to the person entitled to them the benefits conferred by this chapter, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available ... and all installments of compensation. . . . awarded. . . . under this chapter. . . . The policy is a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices,

transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation. . . . and is enforceable in the name of that person. . . .

AS 23.30.045. Employer's liability for compensation. (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 - 23.30.215. If the employer is a subcontractor and fails to secure the payment of compensation to its employees, the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor. If the employer is a contractor and fails to secure the payment of compensation to its employees or the employees of a subcontractor, the project owner is liable for and shall secure the payment of the compensation to employees of the contractor and employees of a subcontractor,
as applicable.
. . . .

(f) In this section,

(1) "contractor" means a person who undertakes by contract performance of certain work for another but does not include a vendor whose primary business is the sale or leasing of tools, equipment, other goods, or property;

(2) "project owner" means a person who, in the course of the person's business, engages the services of a contractor and who enjoys the beneficial use of the work;

(3) "subcontractor" means a person to whom a contractor sublets all or part of the initial undertaking.

AS. 23.30.070. Report of injury to division. (a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall send to the division a report. . . .
. . . .

(f) An employer who fails or refuses to send a report required of the employer by this section or who fails or refuses to send the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.

AS 23.30.075. Employer's liability to pay.

. . . .

(b) . . . If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the division, upon conviction, the court shall impose a fine of $10,000 and may impose a sentence of imprisonment for not more than one year. If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

AS 23.30.085. Duty of employer to file evidence of compliance. (a) An employer subject to this chapter, unless exempted, shall initially file evidence of compliance with the insurance provisions of this chapter with the division, in the form prescribed by the director. The employer shall also give evidence of compliance within 10 days after the termination of the employer's insurance by expiration or cancellation. These requirements do not apply to an employer who has certification from the board of the employer's financial ability to pay compensation directly without insurance.

(b) If an employer fails, refuses, or neglects to comply with the provision of this section, the employer shall be subject to the penalties provided in AS 23.30.070 for failure to report accidents; but nothing in this section may be construed to affect the rights conferred upon an injured employee or the employee's beneficiaries under this chapter.

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

The term "compensation" includes medical benefits. *Williams v. Safeway Stores*, 525 P.2d 1087 (Alaska 1974). In *Humphrey v. Lowe's HIW, Inc.*, AWCB Decision No. 15-0097 (August 13, 2015), an injured worker incurred medical expenses totaling $182,259.76 at University Medical Center in Fairbanks for his work injury. Medicaid paid $5,144.40 of the total charges.

> **AS 23.30.097. Fees for medical treatment and services**. (a) All fees and other charges for medical treatment or service are subject to regulation by the board consistent with this section. . . .
> . . . .
>
> (h) A provider of medical treatment or services may receive payment for medical treatment and services under this chapter only if the bill for services is received by the employer within 180 days after the later of (1) the date of service; or (2) the date that the provider knew of the claim and knew that the claim related to employment. . . .

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

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

> **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. . . .

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (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.

Bignell 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*. at 973, 975. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), held "attorney's fees in workers' compensation cases should be fully compensatory and reasonable," so injured workers have "competent counsel available to them." Nonetheless, when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed. Fees incurred on lost, minor issues will not be reduced if the employee prevails on primary issues. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011). *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" and 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 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. . . .
> . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. . . .

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*.

AS 23.30.155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). To avoid a penalty, a controversion must be filed in good faith. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352 (Alaska 1992). For it 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 the claimant not entitled to benefits. *Id*. However, "an insurer has a continuing obligation to consider new evidence that comes to its attention and to modify or withdraw controversions based on that new evidence." *Vue v. Walmart Associates, Inc.*, 475

P.3d 270, 289 (Alaska 2020). Also, an opinion without a basis is mere speculation and cannot be the foundation of a valid controversion. *Id*.

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).

Moretz v. O'Neill Investigations, 783 P.2d 764, 766 (Alaska 1989), required a workers' compensation insurer to pay interest to the injured worker on medical benefits paid by a third-party insurer. *Moretz* rejected the carrier's claim that the injured worker would be "unjustly enriched" if he were to receive interest on third-party payments because he did not make them; the court decided if anyone had been "unjustly enriched" it was the carrier by "delaying payment" of the injured worker's medical benefits. This case was decided before the legislature adopted §155(p) and the board implemented 8 AAC 45.142(b). The penalty provision in AS 23.30.155(e) applies to medical benefits. *Childs v. Copper Valley Electric Association*, 860 P.2d 1184 (Alaska 1993).

> **AS 23.30.180. Permanent total disability.** (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . .
>
> **AS 23.30.220. Determination of spendable weekly wage**. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
>
> (1) if at the time of injury the employee's earnings are calculated by the week, the weekly amount is the employee's gross weekly earnings;
>
> (2) if at the time of injury the employee's earnings are calculated by the month, the employee's gross weekly earnings are the monthly earnings multiplied by 12 and divided by 52;

> (3) if at the time of injury the employee's earnings are calculated by the year, the employee's gross weekly earnings are the yearly earnings divided by 52;
>
> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;
>
> (5) if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees. . . .
>
> . . . .

In *Johnson RCA/OMS*, 681 P.2d 905 (Alaska 1984), the Alaska Supreme Court held the board was required to use an alternate §220 sub-section in cases where an injured worker's wages from prior years had no relationship to his earnings at the time he was injured. Though it did not decide the case on constitutional grounds, *Johnson* held for the first time:

> The objective of AS 23.30.220 is to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid. Normally the formula in subsection (2) will yield a fair approximation of this figure. However, sometimes it will not, and in those cases subsection (3) of the statute is to be used. (*Id*. at 907).

Since *Johnson*, the Alaska Supreme Court has often repeated this objective, which it derived from Professor Larson's workers' compensation treatise in which he said:

> The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of the impact of probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis. (*Id*. at 907; citing 2 A. Larson, *The Law of Workmen's Compensation* §60.11(d), at 10-564 (1983) (footnote omitted)).

AS 23.30.220 was amended in 1983 to read in part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury.
>
> (2) if the board determines that the gross weekly earnings at the time of the injury cannot be fairly calculated under (1) of this subsection, the board may determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history. . . .

AS 23.30.220 was amended again in 1988 to take into account workers who were "absent from the labor market" for a time. This version stated in part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury;
>
> (2) if the employee was absent from the labor market for 18 months or more of the two calendar years preceding the injury, the board shall determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history, but compensation may not exceed the employee's gross weekly earnings at the time of injury. . . .

The seminal case resulting from this §220 iteration is *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). *Gilmore* held rigid application of the mechanical formula set out in §220 leads to quick and predictable results, but such an efficiency is gained at the sacrifice of fairness in result, and struck it down "as applied" to the case on equal protection grounds. It held legislative intent could be gleaned from session laws stating, "[i]t is the intent of the legislature that AS 23.30 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 AS 23.30." *Gilmore*.

Following *Gilmore*, Alaska's legislature amended §220 in 1995 and incorporated many provisions from the "model statute." The "model" §220(a) included a method to account for variations in work histories, predict earnings and compensate injured workers for actual losses during their disability. Effective 1995, §220 said in part:

> **AS 23.30.220. Determination of spendable weekly wage.** (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
>
> . . . .
>
> (4) if at the time of injury the
>
> (A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing by 13 the employee's earnings, including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;
>
> (B) employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding (1)-(3) of this subsection and (A) of the paragraph, the employee's gross weekly earnings are computed by determining the amount that the employee would have earned, including overtime or premium pay, had the employee been employed by the employer for 13 calendar weeks immediately preceding the injury and dividing this sum by 13. . . .
>
> . . . .
>
> (10) if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of the employee's gross weekly earnings under (1) — (7) of this subsection does not fairly reflect the employee's earnings during the period of disability, the board shall determine gross weekly earnings by considering the nature of the employee's work, work history, and resulting disability, but compensation calculated under this paragraph may not exceed the employee's gross weekly earnings at the time of injury. . . .

Only two Alaska Supreme Court cases addressed this §220(a) version. In *Flowline of Alaska v. Brennan*, 129 P.3d 881 (Alaska 2006), the court affirmed the board's decision to use

§220(a)(4)(A) because it was the most appropriate formula for calculating the injured worker's rate, based on the facts in a 1999 case. *Brennan* again referenced *Gilmore* and stated:

> As we pointed out in *Gilmore,* a fair approximation of a claimant's future earning capacity lost due to the injury is the 'essential component of the basic compromise underlying the Workers' Compensation Act -- the worker's sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation' (footnote omitted). Despite subsequent amendments to the statute aimed at increasing the efficiency and predictability of the compensation process, this compromise, and the fairness requirements it engenders, provide the context for interpreting the Workers' Compensation Act. (*Brennan*, 129 P.3d 882-83).

In *Thompson v. United Parcel Service*, 975 P.2d 684 (Alaska 1999), the Alaska Supreme Court declined to accept a "broad" view requiring the board to calculate TTD rates by determining what was "fair" to both parties: the main question under *Gilmore* is not whether an award calculated according to AS 23.30.220(a)(1) is "fair," but rather, "it is whether a worker's past employment history is an accurate predictor of losses due to injury." *Id*. The objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. *Id*. *Thompson* also held "intentions as to [future] employment . . . are relevant to [determine] future earning capacity' in determining proper compensatory awards." *Id*.

In *Dougan v. Aurora Electric, Inc*., 50 P.3d 789, 797 (Alaska 2002), the Alaska Supreme Court stated, after the legislature adopted the "model law" suggested in *Gilmore*, the *Gilmore* test was no longer applicable. *Dougan* held the law in effect at the time of Dougan's injury provided for a variety of methods to calculate a TTD rate, while *Gilmore's* version of §220 relied exclusively on the average wage earned during a period of over a year without providing an alternate approach if the result was unfair. AS 23.30.220 was finally amended in 2005 to its present form.

Wilson v. Eastside Carpet Co., AWCAC Decision No. 106 (May 4, 2009), held an employer may presume that for an hourly worker, AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the employee's wages at the time of injury in most cases. The hourly employee has the burden to challenge the compensation rate established under §220(a) if it does not represent the equivalent wages at the time of the injury. The board "must look at the

evidence and decide the facts in each case" when determining the spendable weekly wage. *Id*. at 4. In *Wilson*, the commission found the board could not have ascertained the wage equivalent from Wilson's small self-employment record, and therefore was required to use a different §220(a) subsection to fit these circumstances. *Wilson* further held though tax records may be used to prove reported income, the board is not limited to federal tax returns as proof of an employee's earnings. *Id*. Once an injured worker claims a compensation rate adjustment, "the board must conduct a broader inquiry" to obtain evidence sufficient to determine the spendable weekly wage. *Id*.

> **AS. 23.30.225. Social security and pension or profit sharing plan offsets.** (a) When periodic retirement or survivors' benefits are payable under 42 U.S.C. 401 — 433 (Title II, Social Security Act), the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.
>
> (b) When it is determined that, in accordance with 42 U.S.C. 401 — 433, periodic disability benefits are payable to an employee or the employee's dependents for an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 — 433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury. . . .
>
> **AS 23.30.395. Definitions.** In this chapter,
>
> . . . .
>
> (26) "medical and related benefits" includes but is not limited to physicians' fees, nurses' charges, hospital services, hospital supplies, medicine and prosthetic devices, physical rehabilitation, and treatment for the fitting and training for use of such devices as may reasonably be required which arises out of or is necessitated by an injury, and transportation charges to the nearest point where adequate medical facilities are available. . . .
>
> **8 AAC 45.142. Interest.** (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. . . .

8 AAC 45.177. Claims against the workers' compensation benefits guaranty fund. (a) Upon receipt of a report of occupational injury or illness involving an injury to an employee employed by an employer who appeared to be uninsured at the time of the injury, the division shall immediately notify the division's special investigations section and the administrator of the workers' compensation benefits guaranty fund in the division's Juneau office. . . .

8 AAC 45.180. Costs and attorney's fees

. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:

. . . .

(17) other costs as determined by the board.

8 AAC 45.225. Social security and pension or profit sharing plan offsets. (a) An employer may reduce an employee's or beneficiary's weekly compensation under AS 23.30.225(a). . . .

(b) An employer may reduce an employee's weekly compensation under AS 23.30.225(b) by

(1) getting a copy of the Social Security Administration's award showing the

(A) employee is being paid disability benefits;
(B) disability for which the benefits are paid;
(C) amount, month, and year of the employee's initial entitlement; and
(D) amount, month, and year of each dependent's initial entitlement;

(2) computing the reduction using the employee or beneficiary's initial entitlement, excluding any cost-of-living adjustments;

(3) completing, filing with the board, and serving upon the employee a petition requesting a board determination that the Social Security Administration is paying benefits as a result of the on-the-job injury; the petition must show how the reduction will be computed and be filed together with a copy of the Social Security Administration's award letter;

> (4) filing an affidavit of readiness for hearing in accordance with 8 AAC 45.070(b); and
>
> (5) after a hearing and an order by the board granting the reduction, completing a Compensation Report form showing the reduction, filing a copy with the board, and serving it upon the employee. . . .

ANALYSIS

1) Are Claimants entitled to a compensation rate adjustment?

Claimants requested a PTD compensation rate adjustment. AS 23.30.220(a); *Gilmore*. It is undisputed Employee earned $26,152 in 2017 prior to his September 20, 2017 work injury. Employer, however, contends his intermittent work history and Cullen's estimate that "he might have found another $5,000 worth of work for Employee in 2017" properly reflect Employee's probable future earnings capacity. On the other hand, Claimants contend Employee was a skillful worker and had jobs lined up, and under the *Gilmore* rationale, the standard method for determining his spendable weekly wage under AS 23.30.220(a)(4) as an hourly worker is not an "accurate predictor of losses due to injury." *Thompson*.

A basic premise in Alaska workers' compensation law, and the "entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity." *Johnson*; *Gilmore*. The Alaska Supreme Court in *Gilmore* relied upon legislative intent, now codified in the Act, "to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers." AS 23.30.001(1). But in amendments to §220(a) subsequent to *Gilmore* but before the current law, the legislature adopted the "model law," which provided alternative methods for calculating gross weekly earnings when the "standard" method used for hourly employees did not accurately reflect an injured worker's lost earnings during the disability period. Thus, for a time and for injuries arising under the amended "model" statute, the *Gilmore* test was no longer applicable. *Dougan*.

In 2005, the legislature amended §220 to its current form, which bears a striking resemblance to §220 as it existed when *Gilmore* was decided. Since the law reverted back to a similar statutory scheme in effect when *Gilmore* was decided, there is no reason to suppose *Gilmore* and its

relevant progeny do not apply to Employee's claim. That may have been what the legislature intended when it adopted AS 23.30.220(a)(10) which states, "if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of the employee's gross weekly earnings under (1) — (7) of this subsection does not fairly reflect the employee's earnings during the period of disability, the board shall determine gross weekly earnings by considering the nature of the employee's work, work history, and resulting disability, but compensation calculated under this paragraph may not exceed the employee's gross weekly earnings at the time of injury." Thus, *Gilmore* will be applied but Claimants bear the burden to show AS 23.30.220(a)(4) is not "an accurate predictor of losses due to injury." *Id*; *Wilson*; *Thompson*.

Because Employee reported he earned $2,605 in 2015 and $5,179 in 2016, if AS 23.30.220(a)(4) were strictly applied, his gross weekly earnings would be $103.58 ($5,179 / 50 = $103.58). However, Employer calculated Employee's PTD benefits based on his actual earnings in 2017 and Cullen's estimate that "he might have found another $5,000 worth of work for Employee in 2017." They assumed Employee would have worked only for Employer, and if it did not have any work, he would simply stop working. Thus, Cullen's $5,000 estimate is given no weight. AS 23.30.122; *Smith*. By contrast, Claimants contend Employee could have earned $21,000 from Triple B's for the remainder of 2017, relying on Nenchev and Catlett's testimony. Nenchev said he would have paid Employee $20 to $25 per hour for a full-time employment in 2017. His testimony is given no weight; he knew Employee since 1995 but has never offered him an actual job. AS 23.30.122; *Smith*. Catlett said he would have paid Employee $25,000 for a remodeling project that was available in 2017. Yet, when asked how he came up with that figure, Catlett responded, "Because I know Nick," and declined to explain. Without an explanation, it is unclear how much Employee would have netted from that project. Thus, Catlett's testimony is given no weight. *Id*. In short, neither Claimants' nor Employer's calculation is given any weight.

It is undisputed from 2008 to 2016, Employee earned between $2,605 and $60,021.45 per year, with an average yearly earnings of $39,221. By using Employee's actual earnings of $26,152 in

2017, his average weekly earnings in 2017 prior to his September 20, 2017 work injury were $696; Employee was on pace to earn $36,195 in 2017 if he had not been injured. $36,195 is closer to $39,221, his average yearly earnings from 2008 to 2016, than Claimants' estimate of $47,152 or Employer's estimate of $31,152. *Wilson*; *Rogers & Babler*. Using $696, as Employee's gross weekly earnings and applying this number to the division's "Benefit Calculator," Employee's spendable weekly wage would be $565.49 and his weekly PTD rate $452.39. AS 23.30.180(a); AS 23.30.220(a)(10).

Given the above analysis, the compensation rate Employer is currently paying does not represent an "accurate predictor of losses due to injury." *Wilson*; *Thompson*. Therefore, Employee's weekly earnings based on his actual earnings in 2017 will be used to calculate his PTD rate, and his PTD compensation rate will be adjusted. AS 23.30.220(a)(10); *Gilmore*. As calculated above, his spendable weekly wage will be $565.49, and his weekly PTD benefit rate will be $452.39 from the date of the work injury.

2) Is Employer entitled to a Social Security offset?

It is undisputed Employer underpaid PTD benefits because it reduced his benefits without a Social Security offset order. It contends Employee had conceded this issue when he made a settlement offer inclusive of an offset. No statute, regulation or case law states or implies that a settlement offer can replace a required offset order. *Rogers & Babler*.

Employee receives $1,132 per month in Social Security benefits due to his work injury. Employer should have taken the following steps to reduce Employee's PTD benefits: (1) obtain a copy of the Social Security Administration's award; (2) compute the reduction using Employee's initial entitlement, excluding any cost-of-living adjustments; (3) request a determination that the Social Security Administration is paying benefits due to his work injury; (4) file an affidavit of readiness for hearing; and (5) complete a compensation report after a hearing and an order was issued. AS 23.30.225(b); 8 AAC 45.225(b). Employer first requested a Social Security offset on September 1, 2021.

Therefore, Employer is entitled to a Social Security offset prospectively from September 1, 2021; it is not entitled to an offset prior to September 1, 2021, because it did not follow the pertinent regulation. Employer ordered to pay PTD benefits (1) without a Social Security offset from the work injury date through August 31, 2021, and (2) with an offset prospectively from September 1, 2021.

3) Should Employer pay medical costs to providers according to the fee schedule?

Employee has incurred over $1 million in work-related medical bills; medical providers have been paid by Medicaid; and Employer satisfied the Medicaid liens. The issue is whom Employer should pay for Employee's medical care.

Claimants contend Employer must pay Employee's medical providers directly under the Act pursuant to the Alaska fee schedule, and his providers must then reimburse Medicaid. They contend it is improper for taxpayers to pay medical bills that should have been paid by workers' compensation insurance. Employer contends medical providers should have known Employee's injury was work-related based on their requests for medical records; however, providers did not timely submit medical bills or appeal its payment denial notice for failure to timely submit billing and based on the Medicaid lien satisfaction. Thus, Employer contends providers waived reimbursement pursuant to the Alaska fee schedule.

No statute, regulation or case law supports Employer's assertion that only medical providers can submit bills to Employer. AS 23.30.097(h) requires the bill for services to be "*received* by the employer within 180 days after the later of (1) the date of service; or (2) the date that the provider knew of the claim and knew that the claim related to employment." Employer denied an employee-employer relationship until January 14, 2019, and retroactively reported Employee's September 20, 2017 work injury on March 14, 2019. Employee served Employer with medical bills and Medicaid liens related to his work injury on May 30, 2019; this is less than 180 days from the date Employer admitted Employee's injury was "related to employment." AS 23.30.097(h). However, after Employer admitted PTD, reasonable and necessary medical and related travel expenses, and attorney fees on June 13, 2019, on June 18, 2020, it sent

payment denial letters to medical providers stating providers did not timely submit medical bills, their billings have been satisfied and there was no outstanding balance owed. This assertion was incorrect.

The fee schedule provides greater remuneration to medical providers than Medicaid's schedule. *Humphrey*. Therefore, Employer would save considerable money if all it had to do was reimburse Medicaid for Employee's compensable medical treatment. This would create an inappropriate incentive for employers to controvert claims, lengthen litigation and hope for Medicaid to provide payment for work-related medical services. This practice contravenes the legislature's intent to ensure quick, fair, efficient and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1). Claimants also contends taxpayers should not pay medical bills associated with a work-related injury.

Further, the Act requires employers to pay "to the person entitled to them" all benefits conferred under the Act including medical benefits. AS 23.30.030(4). Employers must furnish medical care, and a fee schedule regulates medical costs. AS 23.30.095(a); AS 23.30.097(a). Alaska's enabling statute and fee schedule, not Medicaid statutes, determine what the "reasonable cost" is to employers for a medical provider's services in a workers' compensation case. Employer must pay all compensation "directly to the person entitled to it." AS 23.30.155(a). "Compensation" includes medical benefits. *Williams*. The Act does not expressly state who is "entitled" to medical benefits. "Medical and related benefits" include "physician's fees, nurse's charges, hospital services, hospital supplies, medicine and prosthetic devices, physical rehabilitation" and related transportation expenses. AS 23.30.395(26). With the exception of transportation expenses, all these benefits refer to medical providers. Thus, it can be inferred the insurer owes the money directly to the provider for services rendered for a work injury.

In short, the law requires Employer to pay medical bills for work injuries directly to the medical providers, regardless of whether Medicaid has already paid the bills. This ensures quick, fair, efficient and predictable delivery of medical benefits to Employee at the pre-determined reasonable cost to Employer set forth in the fee schedule. AS 23.30.001(1); AS 23.30.097(a). It

also prevents Employer and its insurer from obtaining a windfall at the providers' expense, and requires Employer and its insurer, rather than the taxpayer or medical providers, to absorb work-related medical costs. AS 23.30.095(a); *Moretz*. Thus, Employer will be ordered to pay Employee's providers directly for his compensable medical care in accordance with the fee schedule. Federal law requires medical providers who accepted Medicaid payments to reimburse Medicaid and will prevent them from receiving double recovery.

4) Are Claimants entitled to guardianship litigation costs and fees?

Claimants contend Employer should pay costs associated with the appointment of Stoyanov as Employee's guardian and reasonable fees for his services because Employee is incapacitated due to work injury, Employer requested a guardian, and an Oregon court appointed Stoyanov as his guardian. Employer contends although Employee needs a guardian, this decision lacks authority to award guardianship costs or fees because guardianship is not a benefit under the Act. Further, Employer contends Claimants did not present any invoice to determine whether any charges would be reasonable and necessary.

Employer asked for appointment of a guardian or conservator because "if [Employee] is not competent to manage his affairs, then he may not be competent to hire an attorney or direct litigation or to make decisions which are in his best interest." Employee agreed and Flanigan paid costs associated with the appointment of Stoyanov as Employee's guardian, which were reasonable and necessary to litigate Employee's claim. Thus, Employer will be ordered to pay litigation costs associated with the appointment of Stoyanov as Employee's guardian. 8 AAC 45.180(f)(17).

However, this decision lacks authority to award guardianship fees. That protective proceeding is being administered by an Oregon court; there is no evidence it has been registered in Alaska. No statute, regulation or case law allows this decision to award such fees. Although AS 23.30.095(a) directs employers to provide "other attendance" as may be necessary after a work injury, this section read as a whole addresses the issue of medical attention. To hold §095(a) provides authority for payment of guardian fees would thwart the legislative intent which, by the

clear language of the statute, deals with medical care and treatment only. Therefore, this decision will not order Employer to pay guardianship fees.

5) Should Employer pay nursing assistant or assisted living costs in the future?

Claimants contend Employee presently lives with his daughter and caregiver Koleva, but he may need to hire a nursing assistant or be admitted to an assisted living facility in the future. By contrast, Employer contends Employee's PTD benefits cover his living costs such as rent and food, and assisted living would provide food, lodging and supervision; thus, payment of assisted living expenses in addition to PTD benefits would be a duplication of benefits.

However, assisted living is similar to hospitalization; both provide room, board and medical care. *Rogers & Babler*. If Employer has to pay Employee's hospitalization costs due to his work injury, it would also have to pay assisted living costs if needed due to his work injury. AS 23.30.095(a). In any event, Employee currently lives with Koleva who provides "continued treatment or care," and she intends to live with her father to "keep a watchful eye." Thus, Claimants' request for nursing assistant or assisted living costs is not ripe.

6) Are Claimants entitled to penalties?

(a) Penalty under AS 23.30.155(e)

Penalties are imposed when employers fail to pay compensation when due. AS 23.30.155(e); *Haile*. To avoid a penalty, a controversion must be filed in good faith. *Harp*. For it 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 claimant would not be entitled to benefits. *Id*. "An insurer has a continuing obligation to consider new evidence that comes to its attention and to modify or withdraw controversions based on that new evidence." *Vue*. An opinion without a basis is mere speculation and cannot be the foundation of a valid controversion. *Id*.

Employer paid PTD benefits based on Cullen's assumption that "he might have found another $5,000 worth of work for Employee," and Employee would have completely stopped working in 2017 if no work was given to him by Employer; it resisted PTD rate increase based on Cullen's unfounded assumption. *Harp*; *Shirley*. Because this basis was mere speculation, it cannot be the foundation of a valid controversion. *Vue*. Further, even after admitting liability for medical benefits, Employer deliberately chose not to pay medical bills according to the fee schedule as prescribed in pertinent statutes and regulations. *Shirley*. Instead, it sent out payment denial letters to medical providers stating they did not timely submit medical bills, their billings had been satisfied and there was no outstanding balance owed. However, there is an outstanding balance, and this was a "controversion in fact," which was not supported by sufficient evidence. *Houston*; *Harp*.

In short, Employer underpaid PTD payments. There was no valid controversion in place. It did not request a Social Security offset order until September 1, 2021. It did not pay medical bills according to the fee schedule. Further, its controversions were not in good faith. Thus, Employer will be ordered to pay a penalty under AS 23.30.155(e) for all unpaid benefits due in accordance with this decision. *Haile*; *Harp*.

(b) Penalty due to its failure to report injury to the division.

Employer knew about Employee's September 20, 2017 work injury soon after it happened. However, it reported the September 20, 2017 injury on March 14, 2019. An employer is required to report an employee's injury to the division within 10 days after the employer knows of the injury; the statute permits "additional award equal to 20 percent of the amounts that were unpaid when due." AS 23.30.070(a); (f).

Employer contends "[a] formal report of injury was not filed until March 14, 2019, but by that time the employee had filed claims and employer and counsel were trying to sort out the facts. While the report of injury was filed more than ten (10) days after employer had admitted liability this was simply a formality." No statute, regulation or case law states or implies the injury reporting requirement is "simply a formality." Also, Employer's December 12, 2018

controversion contradicts its statement: "Only after the Workers' Compensation claims were filed in November 2018, counsel was obtained and the facts were being identified, did it become apparent that employer did have liability for workers' compensation benefits." Employer withdrew its controversion on January 14, 2019, and admitted compensability of Employee's work injury; yet it waited two months to report the injury to the division. In short, Employer failed to timely report Employee's injury to the division; therefore, Claimants are entitled to a penalty on this basis. AS 23.30.070(a); (f).

(c) Penalty due to its failure to file proof of insurance with the division.

Employers must file proof of insurance with the division or be self- insured. AS 23.30.085(a). Employer contends it could not satisfy this requirement because it was uninsured; this is circular reasoning – *e.g.* a driver cannot get a ticket because he does not have a license. The pertinent statute serves both to encourage employers to obtain workers' compensation insurance and penalize those that fail to do so. Employer failed to file proof of insurance or be self-insured. Thus, Claimants are entitled to a penalty on this basis. AS 23.30.085(b).

7) Are Claimants entitled to interest and attorney fees and costs?

Claimants contend they are entitled to interest and statutory attorney fees on all benefits awarded in this decision. Employer contends it has already paid statutory attorney fees on all accrued benefits and penalties paid and will continue to pay as they become due. Employer "believes" it has paid all compensation that could be subject to an interest claim; but if any interest is owed, it will pay.

Flanigan investigated the case, filed a claim, performed discovery, assisted Employee in obtaining a guardian, and represented Claimants well at hearing. His services resulted in significant benefits to Claimants including PTD, and likely lifelong medical care. Thus, Claimants' request for past and ongoing statutory minimum attorney fees on all benefits awarded in this decision and $6,937 in litigation costs against Employer will be granted. AS 23.30.145(a); *Cowgill*.

Interest on benefits not paid when due is mandatory. AS 23.30.155(p). Employer will be ordered to pay statutory attorney fees and interest on all benefits awarded by this decision in accordance with relevant statutes.

8) Are Defendants and the Fund jointly liable for Employee's work injury?

Claimants contend Employer, Triple B's, Cullen, Frohling, BLT, and the Fund should be jointly liable for Employee's work injury because (1) Employee was injured while working for uninsured Employer, (2) Triple B's was the "project owner," (3) Cullen, Frohling and BLT were the principals of uninsured Triple B's, and (4) the Fund should pick up the shortfall if these entities and persons fail to pay all benefits owed.

It is undisputed Triple B's is jointly liable for Employee's work injury as the 100 percent owner of Employer and the project owner. AS 23.30.045(a); (f)(2). Because Employer and Triple B's were uninsured, the Fund should pick up the shortfall if they fail to pay all benefits owed in accordance with 8 AAC 45.177(a) and relevant statutes..

Under AS 23.30.075(b), when an employer is a corporation, all persons with the authority to insure the corporation and the person actively in charge of the corporation are personally liable for the payment of benefits to employees injured while the corporation was uninsured. However, Triple B's is an LLC, and AS 23.30.075(b) makes no mention of LLCs. A corporation created under the Alaska Corporations Code is an entirely different entity than an LLC organized under the Alaska Revised Limited Liability Company Act. AS 10.06.990(10); (13). It is unclear why a person responsible for insuring a business should be personally liable for benefits to an injured worker when it is organized as a corporation but not liable if the business is organized as an LLC. Also, there is no apparent reason that an employee of an uninsured LLC should have less protection than an employee of an uninsured corporation. Nevertheless, that is a matter for the legislature to address. Members of an LLC cannot be held personally liable for payment of benefits to an injured employee of the LLC. AS 10.50.265. Thus, Cullen, Frohling, and BLT will not be jointly liable for Employee's work injury.

CONCLUSIONS OF LAW

1) Claimants are entitled to a compensation rate adjustment.

2) Employer is entitled to a Social Security offset prospectively from September 1, 2021.

3) Employer shall pay medical costs to providers according to the fee schedule.

4) Claimants are entitled to guardianship litigation costs but are not entitled to guardianship fees.

5) Employer shall pay nursing assistant or assisted living costs in the future.

6) Claimants are entitled to penalties.

7) Claimants are entitled to interest and attorney fees.

8) Employer, Triple B's and the Fund are jointly liable for Employee's work injury. Cullen, Frohling and BLT are not liable for Employee's work injury.

ORDER

1) Employee's spendable weekly wage will be $565.49, and his weekly PTD benefit rate will be $452.39 from the date of the work injury.

2) Employer is not entitled to a Social Security offset prior to September 1, 2021.

3) Employer is ordered to pay PTD benefits without a Social Security offset from September 20, 2017, through August 31, 2021.

4) Employee receives $1,132 per month in Social Security benefits. Employer is ordered to calculate and pay his PTD rate taking into account a Social Security offset prospectively from September 1, 2021.

5) Employer is ordered to pay medical costs directly to providers according to the fee schedule.

6) Employer is ordered to pay guardianship costs.

7) Employee's claim for guardianship fees is denied.

8) Employer is ordered to pay reasonable and necessary care under the Act, including but not limited to nursing assistant or assisted living if and when prescribed.

9) Employer is ordered to pay penalties under §155(e) according to this decision.

10) Employer is ordered to pay penalties based on its failure to report injury to the division.

11) Employer is ordered to pay penalties based on its failure to file proof of insurance with the division.

12) Employer is ordered to pay interest on all unpaid benefits in accordance with 8 AAC 45.142.

13) Employer is ordered to pay Flanigan statutory attorney fees on all past benefits awarded in this decision and on all ongoing benefits, and $6,937 in litigation costs. Employer is credited for the attorney fees previously paid.

14) Employer, Triple B's and the Fund are jointly liable for Employee's work injury.

15) Cullen, Frohling and BLT are not liable for Employee's work injury.

Dated in Anchorage, Alaska on September 22, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Anthony Ladd, Member

/s/
Randy Beltz, 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 Nikolay Kolev, employee / claimant v. Keluco General Contractors, Inc., Triple B's, LLC, Bernie Cullen, Brad Layburn Trust & Kevin Frohling, employer; Benefit Guarantee Fund, insurer / defendants; Case No. 201816787; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on September 22, 2021.

/s/

Nenita Farmer, Office Assistant