

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

PHILIP SAROF,)	
)	
Employee,)	
Claimant,)	FINAL DECISION AND ORDER
)	
v.)	AWCB Case No. 202100261
)	
THOMAS BURTON CUSTOM FINISHES,)	AWCB Decision No. 21-0123
)	
Uninsured Employer,)	Filed with AWCB Anchorage, Alaska
and)	on December 23, 2021
)	
ALASKA WORKERS' COMPENSATION)	
BENEFITS GUARANTY FUND,)	
)	
Insurer,)	
Defendants.)	
)	

Philip Sarof's (Employee) December 23, 2020 claim was heard in Anchorage, Alaska on December 9, 2021, a date selected on September 16, 2021. An August 16, 2021 hearing request gave rise to this hearing. Attorney Patricia Huna appeared and represented Employee. Thomas Burton appeared, represented Thomas Burton Custom Finishes (Employer), and testified. McKenna Wentworth and Velma Thomas appeared, represented the Alaska Workers' Compensation Benefits Guaranty Fund (Fund), and testified. The parties' stipulation Employee was Employer's employee when injured was approved on December 3, 2021. The record closed at the hearing's conclusion on December 9, 2021.

ISSUES

Employee contends he incurred medical expenses for his work injury. He seeks an order awarding medical benefits including transportation costs. The parties stipulate Employee's claim is compensable and he is entitled to workers' compensation benefits.

1) Is Employee entitled to medical benefits and transportation costs?

Employee contends he is entitled to a 20 percent penalty for all late paid benefits because Employer failed to file a report of injury.

Employer did not address this claim but contended it did not know it was required to have workers' compensation insurance for a temporary part-time helper used randomly and used only seldom to meet deadlines. The Fund contends no penalty should be assessed against it.

2) Is Employee's claim for a 20 percent penalty ripe?

Employee contends there should be an unfair and frivolous controversion finding against Employer. Neither the Fund nor Employer expressed an opinion on this issue but it is presumed Employer opposes it and the Fund is neutral and unaffected by this issue.

3) Is Employee entitled to an unfair or frivolous controversion finding?

Employee contends because he has been unable to return to his job as a painter for over 90 consecutive days he is entitled to a reemployment benefits eligibility evaluation. Employer and the Fund stipulate Employee has been unable to return to his job of injury since his November 9, 2020 work injury.

4) Is Employee entitled to a reemployment benefits eligibility evaluation?

Employee contends he is entitled to interest and attorney fees and costs if he succeeds on his claim. Neither Employer nor the Fund object to Employee's attorney fees and costs.

5) Is Employee entitled to interest, attorney fees and costs?

FINDINGS OF FACT

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

- 1) On November 9, 2020, while working for Employer as a painter, Employee was on a ladder that slid and caused him to fall off, hit his knee on the floor and fracture his patella. (First Report of Injury, January 7, 2021; Stipulation. November 29, 2021; Order Note, Kenneth Thomas, M.D., November 10, 2020.)
- 2) Employee's patella fracture was closed, displaced and comminuted, and required open reduction internal fixation surgical repair, which was done on November 10, 2020. (Operative Report, Dr. Thomas, November 10, 2020.)
- 3) On November 30, 2020, the Division confirmed it received Employee's injury report and notified him that on November 9, 2020, Employer was uninsured. (Letter to Employee from the Fund, November 30, 2020.)
- 4) On November 30, 2020, Employer was notified Employee reported he was injured while working for Employer, a Division records search indicated Employer was not insured for workers' compensation liability when Employee was injured and he may have a right to file a claim against the Fund. Employer was told:

Under the statute, if the Fund pays benefits to a claimant whose employer was uninsured and failed to pay workers' compensation benefits, the Fund is subrogated to the rights of the claimant. Consequently, this notice is to advise you of the Fund's intent to recover from Thomas Burton dba Thomas Burton Custom Finishes any and all benefits paid to Mr. Sarof by the Fund in this matter, plus legal costs, should that become necessary.

(Letter to Thomas Burton dba Thomas Burton Custom Finishes from the Fund, November 30, 2020.)

- 5) On December 23, 2020, Employee claimed temporary total disability (TTD), temporary partial disability (TPD), medical benefits, penalty and interest. (Workers' Compensation Claim, December 14, 2020.)
- 6) On December 30, 2020, Employee reported, while working for Employer, he broke his left knee because it hit the floor when the 12 to 14-foot extension ladder he was on to caulk windows rapidly

PHILIP SAROF v. THOMAS BURTON CUSTOM FINISHES

slid to the ground. (Employee Report of Occupational Injury or Illness to Employer, December 14, 2020.)

7) On January 6, 2021, the Fund's claims administrator, Wilton Adjustment Services (Wilton), notified Employee it was handling his workers' compensation claim on Employer's behalf. Employee was instructed to tell his medical providers to submit all bills and chart notes relating to his claim to Wilton and direct them to refer to claim number A21-1011. He was advised his mileage requests do not require a specific form and may be turned in at his claim's completion or at 100 mile increments. Employee was informed written requests for mileage reimbursement with sufficient documentation to show his medical care's dates, distance, and destination were typically reimbursed within 30 days. (Initial Contact Letter, Wilton Adjustment Service, January 6, 2021.)

8) On January 15, 2021, Employee was limping on his left side. Dr. Thomas ordered physical therapy two times per week for six to eight weeks. Restrictions were "weight-bearing as tolerated" and "activities as tolerated." (Chart Note, Dr. Thomas, January 15, 2021.)

9) On February 9, 2021, Employee started physical therapy. The plan was for him to attend two times a week for 12 weeks. (Physical Therapy Initial Examination, Anchorage Fracture & Orthopedic Clinic, February 9, 2021.)

10) On April 27, 2021, Ms. Wentworth asked Employee if he had informed his providers his knee injury was part of a workers' compensation case. Employee answered "yes" and said his providers were aware. Ms. Wentworth advised that related medical bills have been sent to Blue Cross/Blue Shield and it was pursuing subrogation rights. (Prehearing Conference Summary, April 27, 2021.)

11) On June 17, 2021, Employee completed physical therapy and had met all goals. He continued to make slow and steady progress. The physical therapist discussed Employee's pain and hesitation to return to work. He was advised it would be difficult for him to return to work no matter how long he waited, and to continue his work on stairs and strength exercises. (Physical Therapy Note/Billing Sheet, Anchorage Fracture & Orthopedic Clinic, June 17, 2021.)

12) On July 26, 2021, Employee had left knee pain complaints when he followed up with Alex Alonso, PA-C for health issues unrelated to his work injury. PA-C Alonso noted this was the first time Employee was seen for left knee issues. Employee said he continued to experience pain and swelling, had problems with gait, and was unable to work at his previous fish cannery employment. PA-C Alonso noted localized swelling, but no joint line pain. Employee had full active and passive

range-of-motion and no laxity of his MCL, LCL, PCL, or ACL. His McMurray test was negative and he did not have a popliteal mass. (Chart Note, PA-C Alonso.)

13) On July 26, 2021, Employee's left knee x-ray showed intact patellar fixation hardware and anatomic alignment, no joint effusion or fracture, well preserved joint spaces and mild pre-patellar soft tissue swelling. (X-ray, Alaska Radiology Associates, July 26, 2021.)

14) On August 12, 2021, upon referral by PA-C Alonso, Employee started physical therapy for pain in his left knee and gait immobility abnormalities. Climbing stairs and bending aggravated his pain. The plan was for him to attend physical therapy, which included pool therapy, one to two times a week for six weeks. (Initial Evaluation, Select Physical Therapy, August 12, 2021.)

15) On September 22, 2021, Employee felt his knee had improved overall. But he continued to have pain ascending stairs, felt weak when standing for greater than 10 minutes and continued to have occasional knee buckling. Employee's left knee range of motion and single leg balance had improved. To address Employee's remaining deficits and to allow for stair navigation, return to work and restore function for daily living activities, continued physical therapy two sessions per week for two months was recommended. Employee was expected to progress further. (Reevaluation, Select Physical Therapy, September 22, 2021.)

16) On November 5, 2021, Employee's claim was amended. He claimed TTD, permanent partial impairment (PPI) benefits, medical costs, transportation costs, penalty, interest, and reemployment benefits. Employee also requested a frivolous and unfair controversion finding. (Claim for Workers' Compensation Benefits, November 5, 2021.)

17) On November 9, 2021, Employee was discharged from physical therapy:

Patient is appropriate for discharge to seek medical treatment with his orthopedic surgeon. He has plateaued in physical therapy with LE strength and range of motion and endorses ongoing issues with stair negotiation and pain. He has significant crepitus through joint ROM with marked pain with any step loading. While his strength and range of motion steadily improved with PT he is most appropriate for consultation with his previous surgical provider to discuss if he is a surgical candidate.

(Plan of Care, Select Physical Therapy, November 9, 2021.)

18) On November 16, 2021, PA-C Alonso said Employee was not cleared to return to work. (Letter To Whom It May Concern from Alex Alonso, PA-C, Anchorage Neighborhood Health Ctr., November 16, 2021.)

PHILIP SAROF v. THOMAS BURTON CUSTOM FINISHES

19) On November 17, 2021, Premera Blue Cross of Alaska (Blue Cross) asserted its right to reimbursement and subrogation for medical claims it paid for Employee's November 9, 2020 injury, totaling \$29,288.58. (Optum Letter to Patricia Huna and Lien, November 17, 2021.)

20) On November 18, 2021, issues for hearing were identified as causation and compensability; transportation; medical costs; penalty; interest; unfair or frivolous controversion; Employer's failure to file a report of injury; attorney fees and costs; and reemployment benefits. Mr. Burton verbally answered Employee's November 5, 2021 claim. He admitted Employee was injured on the job and was concerned because he could not afford legal representation. Mr. Burton did not admit he was responsible to pay any benefits because he contended Employee was not his employee. Mr. Burton said he was not responsible to pay any compensation because he was only helping Employee make extra money. (Prehearing Conference Summary, November 18, 2021.)

21) On November 19, 2021, Employee filed and served Employer and the Fund with Blue Cross's lien. (Notice of Submission of Documentary Evidence and Intent to Rely, November 19, 2021.)

22) On November 24, 2021, Dr. Thomas confirmed Employee's "fall from the ladder on November 9, 2020" was the substantial cause of the need for left knee medical treatment and due to the knee injury Employee was unable to work as a painter or painter's helper from November 9, 2020, until "at least the date of his last physical therapy session on June 17, 2021." (Dr. Thomas's Responses to November 16, 2021 Inquiries from Patricia Huna, November 24, 2021.)

23) On November 29, 2021, the parties stipulated to the following facts:

- a. Employee is a painter.
- b. He has not returned to work and has not received compensation benefits since his November 9, 2020 injury.
- c. Employee was not a regular full-time employee for Employer but on occasion performed work for Employer and was paid.
- d. Employee worked for Employer.
- e. On November 9, 2020, Employee was working on a temporary basis for Employer painting a residential property and injured his left knee while when he fell off a ladder.
- f. Employer paid Employee for the work he performed on November 9, 2020.
- g. Employee continues to receive treatment for his November 9, 2020 left knee injury.

PHILIP SAROF v. THOMAS BURTON CUSTOM FINISHES

- h. Employee asserts the substantial cause of his left knee injury is the November 9, 2020 work-related injury. The Fund and Employer stipulate Employee has presented evidence that raises the presumption of compensability and neither Employer nor the Fund has any evidence to rebut the presumption.
- i. Employee was not: a part-time babysitter; a cleaning person; harvest help or similar part-time or transient help; a person employed as a sports official on a contractual basis and who officiates only at sports events in which the players are not compensated; a person employed as an entertainer on a contractual basis; a commercial fisherman, as defined in AS 16.05.940; an individual who drives a taxicab; a participant in the Alaska temporary assistance program (AS 47.27); a person employed as a player or coach by a professional hockey team; a person working as a qualified real estate licensee; or a transportation network company driver.
- j. Employee was not employed as an independent contractor as defined in AS 23.30.230(12)(A) – (H).

(Stipulation, November 29, 2021.)

23) On December 2, 2021, Employee provided his first transportation log to Employer and the Fund. He requests \$99.46 in mileage reimbursement for travel to medical appointments for his left knee injury. (Employee’s Hearing Brief, December 2, 2021; Wentworth.)

24) On December 3, 2021, the following order was issued:

The parties’ November 12, 2021 factual stipulations, filed on November 29, 2021, under 8 AAC 45.050(f), are accepted by the Board and the parties are bound by the factual stipulations.

(Approved Stipulation, December 3, 2021.)

24) On December 15, 2021, Employee served Employer and the Fund with his 2018 and 2019 income tax returns. In 2018, he had no reportable earnings. In 2019, he earned \$282.00. (2018 Income Tax Return, Philip Sarof; 2019 Income Tax Return, Philip Sarof.)

25) On December 17, 2021, 14 days after the board’s order stating the parties were bound by their factual stipulations, Employer was obligated to pay indemnity benefits due Employee. Employer has not paid indemnity benefits and is in default. (Judgment, observations, unique case facts, and inferences drawn therefrom.)

26) Employee testified he was unable to walk after the November 10, 2020 surgery. It was very painful and medications did not relieve his pain. He started physical therapy but does not remember how long he continued it; he thinks it ended in mid-summer 2021. Employee had an appointment with Dr. Thomas on or about June 23, 2021. He was then dismissed by Dr. Thomas and told it would take a long time for his knee to heal and he should treat with his primary care physician who could prescribe pain medications. Employee said Dr. Thomas told him he could get injections or surgery to remove the hardware if his knee did not get better. He has been unable to do his painting job since the injury. Employee said Dr. Alonso referred him to additional physical therapy and while at physical therapy, he was referred back to Dr. Thomas. On December 1, 2021, Dr. Thomas referred Employee to Dr. Liu for injections, which he has not yet had. It still hurts to climb ladders, walk up stairs or on uneven surfaces; however, he is better than he was in mid-summer 2021. He believes he is “getting better and better and healed.” (Employee.)

27) Employee did not work in 2016 or 2017. In 2016, he was in a car accident and injured his knee and back. In 2017, he had issues with his liver and heart that prevented him from working. He did not work very much in 2018; stayed home because he “had a different kind of sickness.” In 2018, he worked only for Employer a few times but does not recall how much money he made. He was a little better in 2019 and found a job; he worked for Goodwill for three or four days checking appliances to see if they worked. Employee was fired from the job. He also worked one day for Express Employment Agency but the job hurt his back. In 2019, his gross earnings were \$282.00. In 2019, Employee worked for Employer a few times. In 2020, he worked for Copper River Seafoods cleaning and packing fish from June to September and earned \$12.50 per hour and believes he earned about \$10,000. When he worked for Employer, he was paid \$20.00 per hour. He has not worked since he injured his knee. (Employee.)

28) Employee said Mr. Burton is a very nice man. “He helped me and I helped him.” Mr. Burton gave Employee money when his nephew and his aunt died to pay for their funeral expenses. Employee said Mr. Burton also gave him money to buy food and gas. When Employee worked for Employer deductions were taken for the money Mr. Burton had given him. Employee did not tell his providers he was injured at work but Emily from Anchorage Innovative Medicine told them. His medical bills have been sent to Blue Cross, not to Employee or Employer. He has paid for his prescription medications but does not know where he put his receipts. He also does not remember if he has received calls from Blue Cross requesting he reimburse them. (Employee.)

PHILIP SAROF v. THOMAS BURTON CUSTOM FINISHES

29) Burton testified he is a licensed, bonded, insured painting contractor and is a sole proprietor. He operates Thomas Burton Custom Finishes and specializes in home interior repainting. Burton worked by himself 99 percent of the time and only when he had pressing deadlines did he hire helpers, like Employee, who needed supplemental income. Burton was not aware he was required to have workers' compensation insurance until after Employee was injured. He learned from a Special Investigations Unit investigator he was required to have workers' compensation insurance even for employees who did not work fulltime but only randomly. Burton was introduced to Employee in 2010, was aware he had medical problems but details were not shared and Burton did not ask questions. He hired Employee to work on a limited, temporary basis. Burton and Employee had a "handshake" agreement to help one another. He paid Employee \$20.00 per hour for hours worked. The hours and days worked were intermittent and random and Employee recorded them on a piece of paper. When customers paid, Employer would pay Employee according to the hours recorded on the paper. When Employer paid Employee, taxes were not deducted because he was paid with cash and records were not maintained. Employer deducts materials and tool costs as tax write-offs. Labor costs are a part of his job estimates and income upon which he pays taxes. He does not deduct wages paid to "helpers" as business expenses. Burton never observed Employee struggling to do a job but knew he had problems on ladders so "kept him as close to the ground as possible." He usually did not call Employee, rather Employee called him when he was struggling financially and Burton would then try to put him to work. Burton used Employee to meet deadlines. Because Employee did a good job, Burton continued to use him periodically over a long time. In 2018 and 2019, Employee worked for Employer on a couple of projects for two to three days per project. He did not deny Employee was injured while working for Employer. (Burton.)

30) The Fund asserted Employee is not entitled to penalties on medical benefits or transportation costs because 30 days have not passed since the Blue Cross lien and Employee's transportation log were submitted. The Fund contended it has been asking for medical bills since January 6, 2021. The Fund pointed out the parties stipulated Employee incurred a compensable work injury and has been unable to work for over 90 days, which serves as a stipulation Employee is eligible for an eligibility evaluation. (Wentworth; Stipulation, November 29, 2021; Record.)

31) Neither Employer nor the Fund were provided medical bills by providers or Employee. The Blue Cross lien, which was the first evidence of medical costs to treat Employee's knee injury,

was provided to Employer and the Fund on November 19, 2021. Because the medical bills are not yet due, Employee withdrew his claim for penalties on late paid medical benefits. (Employee, Wentworth.)

32) Patricia Huna has been licensed as an attorney in Alaska since 1994 and has represented injured workers since 2017. She was a workers' compensation hearing officer for approximately four years and also spent approximately four years as an assistant attorney general defending Alaska in workers' compensation cases. Ms. Huna bills \$390.00 per hour for her time. She spent 37.4 hours pursuing benefits for Employee prior to submitting her fee affidavit on December 6, 2021. Ms. Huna supplemented fees not included in her fee affidavit at hearing. She spent two additional hours preparing for hearing and 4.3 hours in hearing. Ms. Huna spent 43.7 hours pursuing benefits for Employee. Employee claims total attorney fees of \$17,043 (43.7 x \$390 = \$17,043). Employee also claims \$250.00 in costs. (Patricia Huna Affidavit, December 6, 2021.)

33) Neither Employer nor the Fund objected to Employee's attorney fees and costs. (Observations.)

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. 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 decision on not only direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533 (Alaska 1987).

AS 23.30.010. Coverage. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment.

AS 23.30.041. Reemployment and reemployment of injured workers.

....

(c) An employee and employer may stipulate to the employee's eligibility for reemployment benefits at any time. . . . If the employee is totally unable to return to the employee's employment at the time of injury for 90 days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. . . .

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 file with the division a report

....

(f) An employer who fails or refuses to file a report required of the employer by this section or who fails or refuses to file 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 23.30.082. Workers' compensation benefits guaranty fund. . . .

....

(c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer 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. . . .

Medical benefits including continuing care are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991).

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. . . .

(d) An employer shall pay an employee’s bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider’s bill or a completed report as required by AS 23.30.095(c), whichever is later.

. . . .

(g) . . . Unless the employer controverts a charge, an employer shall reimburse any transportation expenses for medical treatment under this chapter within 30 days after the employer receives the health care provider’s completed report and an itemization of the dates, destination, and transportation expenses for each date of travel for medical treatment. . . .

(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.

. . . .

If an employer fails to rebut the raised presumption with substantial evidence to the contrary, the injured worker is entitled to benefits as a matter of law. *Carter v. B&B Construction, Inc.*, 199 P.3d 1150 (Alaska 2008). *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005), a vocational reemployment plan case, held the statutory presumption of compensability does not apply if there is no factual dispute about an issue.

Egemo v. Egemo Construction Co., 998 P.2d 434 (Alaska 2000) held filing a claim prematurely “does not justify [claim] dismissal,” and stated, “In our view, when a claim for benefits is premature, it should be held in abeyance until it is timely. . . .” *Id.* at 441.

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. . . .

AS 23.30.145. Attorney fees. . . .

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered. . . .

Attorney fees should be fully compensatory and reasonable so injured workers can retain competent counsel. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990). *Rusch v. Southeast Alaska Regional Health Consortium*, 450 P.3d 784, 798-799 (Alaska 2019) held when the reasonableness of a claimant’s attorney fees is at issue, the Board must consider all factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee.

AS 23.30.155. Payment of compensation. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, in a format prescribed by the director . . .

. . . .

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.

. . . .

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

. . . .

(o) The director shall promptly notify the division of insurance if the board determines that the employer’s insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

(p) An employer shall pay interest on compensation that is not paid when due. . . .

Moretz v. O'Neill Investigations, 783 P.2d 764, 765 (Alaska 1989) addressed interest in workers' compensation cases:

The applicable rule is that "a workers' compensation award, or any part thereof, shall accrue lawful interest . . . from the date it should have been paid." *Land & Marine Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984). In *Rawls*, we noted . . . "the economic fact that money awarded for any reason is worth less the later it is received" cannot be overlooked. *Id.* Judgment creditors, including workers' compensation claimants, are entitled to the time value of the compensation for their injuries. *Id.*

8 AAC 45.050. Pleadings. . . .

. . . .

(f) Stipulations.

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

8 AAC 45.082. Medical treatment.

. . . .

(d) Medical bills for an employee's treatment are due and payable within 30 days after the date the employer received the medical provider's bill and a completed report on form 07-6102. Unless the employer controverts the prescription charges or transportation expenses, an employer shall reimburse an employee's prescription charges or transportation expenses for medical treatment no later than 30 days after the employer received . . . an itemization of the dates of travel, destination, and transportation expenses for each date of travel.

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

....

(d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or more have accumulated, or upon completion of medical care, whichever occurs first. . . .

8 AAC 45.182. Controversion. . . .

....

(b) After hearing a party's claim alleging an insurer frivolously or unfairly controverted compensation due, the board will file a decision and order determining whether an insurer or self-insured employer frivolously or unfairly controverted compensation due. Under this subsection,

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

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

ANALYSIS

1) Is Employee entitled to medical benefits and transportation costs?

Employee seeks medical benefits and related transportation costs. AS 23.30.095(a). He provided Employer and the Fund a lien that itemizes his medical expenses paid by his health insurance carrier, Blue Cross on November 19, 2021. He provided his transportation log on December 2, 2021. Employer did not deny Employee's right to medical benefits or object to any particular medical benefit request. The Fund contends Employee knew he was to advise his medical providers to send bills and chart notes to Wilton and the providers knew Employee sustained a work injury. It contends providers should be barred from receiving payment for services provided

PHILIP SAROF v. THOMAS BURTON CUSTOM FINISHES

to Employee for bills that were not provided to Employer or the Fund within 180 days after the dates of service or the date the providers knew the injury occurred while Employee was working.

The parties stipulated Employee was working for Employer when he injured his left knee and his work injury is the substantial cause of his disability and need for medical treatment. Employer must therefore pay the reasonable and necessary costs, including medical, surgical and other attendance or treatment, and transportation costs for the period the process of recovery from his left knee injury requires. 8 AAC 45.080(f); AS 23.30.010; AS 23.30.095(a).

Accordingly, Employee is entitled to all benefits under the Act for which he may qualify, including medical treatment provided for his left knee, additional medical care and other benefits including transportation expenses. *Carter; B&B Construction, Inc.* Absent a valid legal or factual reason to controvert Employee's future right to medical benefits, Employer is required to pay medical bills for Employee's treatment within 30 days after the date Employer or the Fund receives the medical provider's bill and a medical report. 8 AAC 45.082(d). Employer and the Fund retain their right to controvert Employee's rights to benefits in the future, and any claims for those benefits he may make, in accordance with the Act. AS 23.30.097(g); AS 23.30.155(a); 8 AAC 45.082(d).

However, Employee's providers have not provided medical bills or completed medical reports to Employer. Nor have providers provided Employer or the Fund bills for most medical services within 180 days of the dates services were provided. Instead, his providers billed Blue Cross. As of November 17, 2021, Blue Cross had paid medical bills for Employee's left knee treatment totaling \$29,288.58 and asserted its right to reimbursement and subrogation.

When an employer knows an employee has been injured, it is obligated to file an injury report with the Division. AS 23.30.070(a). When an employer is insured, it routinely files an injury report with the division and would also notify its workers' compensation insurance carrier. *Rogers & Babler*. Likewise, when an employer is insured, medical providers are familiar with AS 23.30.097's timelines and claims are properly adjusted. *Id.*

PHILIP SAROF v. THOMAS BURTON CUSTOM FINISHES

Employer was uninsured and Employee was unaware medical bills should have been provided to his Employer or to Wilton until, at the earliest, January 6, 2021, which was after his treatment commenced. The Act's timelines and procedures were not adhered to, nor was his claim adjusted. *Id.* To avoid insurmountable debt, Employee accessed medical care utilizing his personal health insurance. A medical provider may receive payment for medical treatment provided to an injured worker only if the bill and corresponding medical report are provided to and received by the employer within 180 days after the service date or the date the providers knew the injury was work related. AS 23.30.097(d), (h). Employee's providers knew as early as November 9, 2020 Employee's knee injury occurred while he was working but because his Employer was uninsured, Blue Cross was billed and has paid for all his work-related medical treatment thus far. Employee's providers have not submitted bills or chart notes to Employer or the Fund and may not receive payment under the fee schedule for medical services provided more than 180 days ago. *Id.*

It is against public policy and unfair to permit Employer to escape its responsibility to provide medical care to Employee; therefore, Employer will be ordered to resolve Blue Cross's lien. AS 23.30.001. However, from this order's date and continuing into the future, Employer will be required to pay or controvert Employee's medical benefits according to AS 23.30.095 and AS 23.30.097. The Fund's adjuster and Employee will be ordered to notify his providers in writing of their obligation to submit their bills and chart notes to Wilton. AS 23.30.097.

Employee submitted his transportation log to Employer and the Fund on December 2, 2021, tracking mileage for travel to appointments for left knee treatment. He is entitled to \$99.46 for mileage reimbursement. 8 AAC 45.084.

2) Is Employee's claim for a 20 percent penalty ripe?

Employer was aware Employee was injured on November 9, 2021, the day the ladder collapsed. It did not timely file and serve an injury report because Burton was under the mistaken impression Employee was not his employee for workers' compensation insurance purposes. Employer did not timely file and serve an injury report or controversion notice and has never paid benefits to Employee or on his behalf. AS 23.30.070(a); AS 23.30.155(a). Employee seeks a penalty for

Employer's failure to timely file an injury report. AS 23.30.070(f). Though Employer may have questioned the employee-employee relationship, nothing prevented Burton from timely filing an injury report while also offering the defenses raised at prehearings. Because Employer never filed an injury report, if benefits were unpaid when due, Employee would be entitled to an award equal to 20 percent of the late paid amounts. AS 23.30.070(f).

Medical benefits have not yet become due because medical bills and chart notes have not been provided to either Employer or the Fund. Employee withdrew his claim for penalty on "late paid" medical benefits.

His claim for TTD benefits was not set for hearing. Employee will be entitled to a 20 percent penalty on late paid indemnity benefits; however, the 20 percent penalty issue is not ripe because any amount owed remains undetermined. This issue will be held in abeyance until Employee's claim for TTD benefits and a compensation rate adjustment are heard. *Egemo*.

3) Is Employee entitled to an unfair or frivolous controversion finding?

Employee contends he is entitled to a finding Employer unfairly or frivolously controverted benefits. An unfair or frivolous controversion finding can only be sought against an employer's insurer or a self-insured employer. 8 AAC 45.182(d). The consequence of a frivolous or unfair controversion finding is a referral by the Alaska Workers' Compensation Division's Director to the Division of Insurance, which will "determine if the insurer" committed an unfair claim settlement practice. AS 23.30.155(o). However, because Employer was not "self-insured" and is not an insurer, Employee's request for an unfair and frivolous controversion finding will be denied. Employee's recourse for late paid benefits, including indemnity benefits, is a 25 percent penalty under AS 23.30.155(e).

4) Is Employee entitled to a reemployment benefits eligibility evaluation?

If a work injury disables an employee from returning to his job of injury for 90 consecutive days, the reemployment benefits administrator (RBA) is required to order an eligibility evaluation. AS 23.30.041(c). On June 17, 2021, Employee had not returned to work and was advised it would

be difficult for him to do so no matter how long he waited. On November 16, 2021, PA-C Alonso said Employee was not released to return to work, which confirmed Employee had been totally unable to return to his job of injury for 90 consecutive days as a result of his left knee injury. Employee has been unable to return to his job of injury for over 90 consecutive days and is entitled to a reemployment benefit eligibility evaluation. *Id.*

5) Is Employee entitled to interest, attorney fees and costs?

Employee requests attorney fees, costs and interest. Interest on benefits not paid when due is mandatory. AS 23.30.155(p); *Moretz*. Employee's entitlement to indemnity benefits was not a hearing issue and the past due amount is undetermined. Interest owed on an undetermined amount is not ripe. This issue will be held in abeyance and determined when Employee's claim for TTD benefits and a compensation rate adjustment are heard. *Egemo*. Medical benefits are not past due and neither is interest.

Attorney fees and costs may be awarded when an employer fails to pay benefits when due and an attorney is successful in prosecuting an employee's claim. AS 23.30.145(b). Employee's attorney obtained a stipulation stating his injury arose out of and in the course of his employment with Employer and his attorney successfully prosecuted his claim for medical benefits and a reemployment benefits eligibility evaluation. Neither Employer, nor the Fund objected to Employee's attorney fees and costs or contend they are unreasonable. The *Rusch* factors therefore need not be considered. Ms. Huna has obtained valuable benefits for Employee. Employee is entitled to reasonable attorney fees of \$17,043 and \$250.00 in costs. *Cortay*.

CONCLUSIONS OF LAW

- 1) Employee is entitled to medical benefits and transportation costs.
- 2) Employee's claim for a 20 percent penalty is not ripe.
- 3) Employee is not entitled to a frivolous or unfair controversion finding.
- 4) Employee is entitled to a reemployment benefits eligibility evaluation.
- 5) Employee is entitled to attorney fees and costs.

ORDER

- 1) Employee was injured while working for Employer as an employee on November 9, 2021, and is entitled to medical benefits. Employer must pay future medical benefits pursuant to the Act.
- 2) The Fund's adjuster and Employee are ordered to notify his providers in writing of their obligation to submit their bills and chart notes to Wilton Adjustment Services.
- 3) Employee's providers are not entitled to payment for services provided Employee and billed to Blue Cross. Employer must contact Blue Cross to obtain the necessary information to resolve Blue Cross's lien for \$29,288.58 no later than 14 days after this decision is issued. Employer is ordered to pay all
- 4) Employer is ordered to pay Employee \$99.46 for mileage reimbursement.
- 5) Employee is ordered to submit future medical transportation logs to Wilton Adjustment Services.
- 6) Employee's request for a frivolous or unfair controversion finding is denied.
- 7) Wilton is ordered to contact the RBA to initiate Employee's reemployment benefits eligibility evaluation.
- 8) Employer is ordered to pay to Patricia Huna attorney fees and costs, which total \$17,293.
- 9) Jurisdiction is maintained to decide Employee's claims for TTD benefits, a compensation rate adjustment, a 20 percent penalty and a 25 percent penalty on amounts paid when undue.

Dated in Anchorage, Alaska on December 23, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Janel Wright, Designated Chair

/s/

Sara Faulkner, Member

/s/

Nancy Shaw, 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.

PHILIP SAROF v. THOMAS BURTON CUSTOM FINISHES

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 PHILIP SAROF, employee / claimant v. THOMAS BURTON CUSTOM FINISHES, uninsured employer; ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, defendants; Case No. 202100261; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on December 23, 2021.

/s/
Kimberly Weaver, Office Assistant II