

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JOSEPH D. WALKER, )  
)  
Employee, ) FINAL DECISION AND ORDER  
Claimant, )  
) AWCB Case No. 202305042  
v. )  
) AWCB Decision No. 24-0048  
STATE OF ALASKA, )  
) Filed with AWCB Anchorage, Alaska  
Self-insured Employer, ) on August 22, 2024.  
Defendant. )  
)  
\_\_\_\_\_ )

Joseph Walker's (Employee) April 1, 2024 and April 18, 2024 claims were heard on July 9, 2024, in Anchorage, Alaska, a date selected on May 22, 2024. A May 9, 2024 hearing request gave rise to this hearing. Attorney Keenan Powell appeared and represented Employee who appeared and testified. Attorney Justin Tapp appeared and represented the self-insured State of Alaska (Employer). At hearing, Employer stipulated Employee's bilateral hip and low back injuries arose out of and in the course of his employment, and that it failed to pay temporary total disability (TTD) benefits for five days in 2023, which it agreed to pay with penalty and interest. The stipulations rendered most of Employee's claims moot. This decision decides remaining issues. The record remained open for supplemental briefing and closed on July 23, 2024.

## ISSUES

The parties at hearing stipulated to compensability and benefits. Employee requested an order memorializing the parties' stipulations in accordance with the *Summers* decision.

**1) Should the parties' hearing stipulations be memorialized in an order?**

Employee contends Employer failed to promptly pay compensation when it was owed. He cites an initial TTD benefits check that was non-negotiable, and his personal payment for lodging related to his second independent medical evaluation (SIME). Additionally, he contends Employer's controversion of his hip injuries was based on a physician who gave an opinion opposite from Employer's stated basis for the controversion. Employee requests a finding of unfair or frivolous controversion for these events.

Employer contends the initial payment problem was inadvertent, and the hotel charge to Employee's personal credit card was caused by factors outside Employer's control. Moreover, it contends it reimbursed employee within seven days. Employer contends it based its hip controversion on a valid medical opinion from its position. Thus, Employer contends it made no unfair or frivolous controversion.

**2) Did Employer make frivolous or unfair controversions or controversions-in-fact?**

Employee contends he is entitled to a penalty and interest on five unpaid dates in April 2023 for which Employer stipulated he was entitled to temporary total disability (TTD) benefits.

**3) Is Employee entitled to penalty and interest on five days' TTD benefits in April 2023?**

Employee requests full attorney fees and costs as well as statutory *Wozniak* fees on future benefits. Employer did not object to Employee's attorney fees and costs and agreed to pay them.

**4) Is Employee entitled to attorney fees and costs?**

FINDINGS OF FACT

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

1) On September 28, 2007, Employee reported an injury to his lower back, and right leg, calf, and foot while working for Employer. (First Report of Occupational Injury, September 28, 2007, AWCB Case No. 200717008).

2) On October 19, 2007, John Godersky, MD, evaluated Employee for back pain complaints. He noted Employee had two prior unreported injuries working for Employer. A current magnetic resonance imaging (MRI) of Employee's back revealed a disc herniation at L4-L5. Dr. Godersky

diagnosed a recent onset of right L5 radiculopathy caused by a worsening of Employee's disc herniation. (Godersky report, October 19, 2007).

3) On November 7, 2007, Dr. Godersky opined the disc herniation was work-related based on Employee's symptoms arising after the September 28, 2007 work incident. He recommended physical therapy three times a week for six week and placed Employee off work until December 5, 2007. (Godersky report, November 7, 2007).

4) On November 16, 2007, Stephen Marble, MD, orthopedic surgeon, saw Employee as part of an employer's medical examination (EME). Dr. Marble diagnosed lumbar degenerative disc disease, with lumbar-transitional herniation and associated right L5 radiculopathy. He did not agree work was the substantial cause of Employee's need for treatment; instead, he believed a car accident in 1995 and prior back pain from 2002 were more indicative of degenerative back disease. Dr. Marble did agree the work incident in September 2007 suggested a significant exacerbation if not frank aggravation of Employee's back issues. (Marble report, November 16, 2007).

5) On January 8, 2008, Dr. Godersky performed an L4-5 partial hemilaminectomy and discectomy on Employee's right side. (Godersky operative report, January 8, 2008).

6) On March 19, 2008, Dr. Godersky released Employee to return to work with a physical therapy program two to three times per week for eight weeks. (Godersky report, March 19, 2008).

7) On December 12, 2008, Joella Beard MD, physiatrist, saw Employee for a second independent medical exam (SIME). She noted Employee had a medical history of lumbar pain predating both the 2005 and 2007 injuries. However, Dr. Beard opined the 2007 work injury accelerated his preexisting lumbar condition and caused his need for medical care. She noted Employee's disability level was commensurate with his injuries. (Beard report, December 12, 2008).

8) On July 20, 2009, the parties filed a Compromise and Release Agreement (C&R) for two cases; it addressed both the June 21, 2005, and September 28, 2007 work injuries. The C&R resolved all indemnity benefits for both cases and left future medical benefits open. (C&R, July 20, 2009).

9) On February 9, 2011, Employee reported an injury to his lower back while lifting a box of ice melt while at work for Employer. (First Report of Occupational Injury, February 9, 2011, AWCB Case No. 201101411).

10) On January 2, 2013, Employee reported another lower back injury while lifting a box of ice melt. (First Report of Occupational Injury, January 2, 2013, AWCB Case No. 201219313).

- 11) On February 12, 2018, Employee reported an injury to his right shoulder and arm from breaking ice on the airfield and shoveling ice into a loader truck. (First Report of Occupational Injury, February 12, 2018, AWCB Case No. 201802436).
- 12) On April 4, 2018, James Schwartz MD, orthopedist, examined Employee for an EME. He diagnosed Employee with an acute rotator cuff tear related to the February 12, 2018 work injury. Dr. Schwartz recommended surgical treatment for the tear. (Schwartz report, April 4, 2018).
- 13) On April 18, 2018, Robert McNamara, MD, orthopedic surgeon, performed a right shoulder arthroscopy open rotator cuff repair on Employee. (McNamara report, April 18, 2018).
- 14) On March 20, 2023, Employee while working for Employer was loading ice melt into a pickup truck when his hip and low back popped, and he felt pain. (First Report of Injury, April 17, 2023).
- 15) On March 31, 2023, Jared Kirkham, MD, physical medicine specialist, examined Employee for pain in his left hip and shin. He diagnosed lumbar radiculopathy and ordered a lumbar spine MRI. (Kirkham report, March 31, 2023).
- 16) On April 4, 2023, John McCormick, MD, radiologist, reviewed Employee's lumbar spine MRI and noted severe central stenosis at L3-4, diffuse bulging on both L5 nerves, and facet degenerative changes causing mass effect on both foraminal L4 nerves. (McCormick report, April 4, 2023).
- 17) On April 12, 2023, Dr. Kirkham placed Employee on work restrictions. Dr. Kirkham noted Employee's inability to walk more than 150 feet before needing to sit or crouch. He issued a work note effective on April 12, 2023. (Kirkham note, April 12, 2023).
- 18) On May 23, 2023, the claim administrator notified the Workers' Compensation Division (Division) that it had issued an initial payment to Employee. The payment covered the period April 12, 2023 through May 8, 2023, at a \$1,141.46 weekly rate and totaled \$3,587.45. (Notice of First Indemnity Payment, May 23, 2023).
- 19) On June 21, 2023, David Bauer, MD, physical medicine specialist saw Employee for an EME. He diagnosed a lower back straining injury, overexertion causing radicular symptoms down the left leg, and a coincidental diagnosis of hip and labral pathology related to age and not the work incident. Dr. Bauer opined the lumbar disc herniation was most likely caused by twisting, turning, and carrying heavy weights, which can cause preexisting degenerative disease of Employee's back to become symptomatic resulting in the herniated disc. He attributed the majority of Employee's

symptoms to age-related degeneration. He stated “not related to the incident in question, but the cause of his groin pain and discomfort, is the labral pathology within his hip. This is caused by age, degeneration, and femoral acetabular impingement.” He explained femoroacetabular impingement (FAI) is a common cause of hip pain that can affect a wide range of patients, it is due to altered bony morphology of the proximal femur and acetabulum, resulting in decreased function and progression to early osteoarthritis. Dr. Bauer believed Employee would most likely require a sedentary job and was unsure if he would fully recover from his back injuries and surgeries. (Bauer report, June 21, 2023).

20) On July 14, 2023, Employer denied all treatment for Employee’s left hip, and spine at levels other than L3-L5. It based this on Dr. Bauer’s IME report finding Employee’s left hip symptomology was degenerative and not caused by the work injury. Further, Dr. Bauer opined fusion surgery would be reasonable and necessary medical treatment from L3-L5, and Employer thus denied benefits for any other levels. (Controversion Notice, July 14, 2023).

21) On July 18, 2023, Samuel Waller, MD, neurosurgeon, performed lumbar fusion surgery on Employee at L4-5 and L5-S1. (Waller report, July 18, 2023).

22) On October 10, 2023, in response to Employer’s July 14, 2023 controversion, Employee claimed medical and transportation costs, attorney’s fees and costs for his March 20, 2023 injury to his left hip and low back. (Claim for Workers’ Compensation Benefits, October 10, 2023).

23) On November 1, 2023, Employer agreed Employee had radicular pain from a recurrent disc herniation at L4-5 and the work injury was the substantial cause for this. However, it disputed liability for his left hip based on Dr. Bauer’s report. Employer denied all benefits for the left hip and coverage for spinal surgery other than at L3-5. (Employer’s Answer, November 1, 2023).

24) On January 2, 2024, Employee claimed TTD benefits, unfair or frivolous controversion, attorney fees and costs, medical and transportation costs, penalty and interest. He contended the check Employer sent him was misprinted without a routing number, was non-negotiable and therefore void. (Claim for Workers’ Compensation Benefits, January 2, 2024).

25) On January 22, 2024, responding to employee’s January 2, 2024 claim, Employer admitted it had issued a check to Employee on December 28, 2023, which was non-negotiable due to a printing error. “Employer was made aware of the misprinted check and issued a corrected version of the check on January 3, 2024, six days after the check was issued and one day after the Employer

was notified of the error.” It did not state how it became aware of the error. (Employer’s Answer, January 22, 2024).

26) On February 26, 2024, Employee Rina Jain, MD, orthopedic surgeon, examined Employee for an SIME. She diagnosed a left hip labral tear, bilateral hip pain, left hip arthritis, multiple lumbar spine injuries with three prior surgeries, disc herniations, and subsequent degenerative changes. Dr. Jain opined all lumbar injuries were work-related. She also noted Employee’s left hip showed degeneration from years of heavy lifting at work. Dr. Jain explained Employee’s 2007 MRI showed no degeneration in the left hip, but a 2023 MRI showed significant reduction in cartilage verifiably caused by his work. She did not find Employee medically stable and expressed concern for his right hip. Dr. Jain noted repeated lifting from work caused osteoarthritis in his left hip and while she did not have imaging on his right hip it was safe for Dr. Jain to conclude based on her examination that osteoarthritis was also present in Employee’s right hip. In relation to treatment, she recommended a total left hip replacement and suspected a right hip replacement would be the natural sequelae. Dr. Jain reserved the right to alter her opinion if imaging of the right hip revealed otherwise. She did not find Employee medically stable. She opined Employee would not likely be able to return to his previous employment after his back surgery, and possible bilateral hip replacements. (Jain report, February 26, 2024).

27) On March 5, 2024, Employee claimed an unfair or frivolous controversion, attorney fees and costs, medical and transportation costs, penalty and interest. He stayed in a hotel on February 25 and 26, 2024, for his SIME in San Diego, California. The hotel charged Employee’s personal credit card instead of billing Employer. Employee requested payment for \$341.66 charged to his personal credit card. (Claim for Workers’ Compensation Benefits, March 5, 2024).

28) On March 26, 2024, responding to Employee’s March 5, 2024 claim, Employer acknowledged Employee’s card was wrongfully charged. It was made aware of the discrepancy on March 6, 2024, when Employee filed his March 5, 2024 claim. Employer issued a reimbursement check on March 8, 2024. It denied making a frivolous or unfair controversion on the bill and denied a penalty or interest because the mistake was rectified within three days. (Employer’s Answer, March 26, 2024).

29) On April 1, 2024, Employee amended his claims to add TTD and permanent partial impairment benefits (PPI), pursuant to the SIME report. (Claim for Workers’ Compensation Benefits, April 1, 2024).

- 30) On April 18, 2024, Employee amended his to claim to include his right hip based upon Dr. Jain's SIME report. For his right hip, Employee requested TTD and PPI benefits, medical and transportation costs, and attorney fees and costs. (Claim for Workers' Compensation Benefits, April 18, 2024).
- 31) On April 22, 2024, responding to Employee's April 1, 2024 claim, Employer said it had paid Employee TTD benefits from April 12, 2023 through April 7, 2024, with exception of April 12, 13, 22, 23 and 24, 2023. Employer did not state why these payments were not made. It denied owing Employee PPI because he was not yet medically stable and had no PPI rating. (Employer's Answer, April 22, 2024).
- 32) On April 22, 2024, Employee requested a hearing on his April 1, 2024 claim. (Affidavit of Readiness for Hearing, April 22, 2024).
- 33) On May 9, 2024, responding to Employee's April 18, 2024 claim, Employer said Employer had not controverted any right-hip benefits but reserved the right to do so pending further discovery. (Employer's Answer, May 9, 2024).
- 34) On May 9, 2024, Employee requested a hearing on his April 18, 2024 claim, combined with a hearing on his April 1, 2024 claim. (Affidavit of Readiness for Hearing, May 9, 2024).
- 35) On May 22, 2024, the parties attended a prehearing conference. Issues set for hearing were Employee's April 1, and 18, 2024 amended claims, which included TTD and PPI benefits, medical and transportation costs, unfair or frivolous controversions, interest, penalties, attorney fees and costs. (Prehearing Conference Summary, May 22, 2024).
- 36) On July 2, 2024, Employee's attorney itemized attorney fees and costs, totaling \$28,080 in fees and \$66.46 in costs. (Affidavit of Counsel Regarding Fees and Costs, July 2, 2024).
- 37) On July 2, 2024, Employer withdrew its controversion for Employee's left hips. Its controversion for all spinal surgeries at levels other than L3-L5 remained in place. (Controversion Withdrawal Notice, July 2, 2024).
- 38) On July 2, 2024, before he knew Employer had accepted compensability of the low-back and bilateral hips, Employee stated Employer's "June 29, 2023" [sic -July 14, 2023] controversion stated the exact opposite of Dr. Bauer's June 21, 2023 report upon which the controversion was based. Although the controversion had not been formally withdrawn, Employee conceded Employer had paid for low-back surgery and had paid ongoing TTD benefits for his low back injury since the [July 14, 2023] controversion. He sought a ruling on low-back compensability.

Employee acknowledged Dr. Bauer's opinion, which stated the left hip condition was age-related and not work-related. Nevertheless, it sought a compensability ruling for the left hip based on Dr. Jain's report. He made a similar argument in respect to his right hip, seeking a compensability order, but acknowledged that Employer had not controverted it. Employee sought a medical benefit award for his hips and low back. He asked for a PPI rating for each hip and his low-back upon medical stability. As for TTD benefits, Employee noted the several days in April 2023 for which he had not yet been paid and contended Dr. Bauer's report raised the presumption that he was entitled to disability benefits and there was no opposing evidence. Employee contended the [July 14, 2023] controversion based on Dr. Bauer's report was unfair or frivolous. He contended this controversion denied his treatment between June 22, 2023 and July 14, 2023. Thus, the controversion was "frivolous." Likewise, Employee contended the non-negotiable check and having to pay for his own SIME accommodations were frivolous "controversions-in-fact." He sought an order referring the matter to the Division of Insurance. Employee sought a penalty on the non-negotiable check and for Employer's "failure" to arrange payment for his SIME travel accommodations. Lastly, Employee sought attorney fees and costs to the date of hearing, and statutory *Wozniak* attorney fees on ongoing benefits thereafter. Powell provided a detailed explanation addressing the *Rusch* factors to support her attorney fee request. (Employee's Hearing Brief, July 2, 2024).

39) On July 2, 2024, in its hearing brief Employer stipulated it had "accepted" treatment for Employee's bilateral hips and he was receiving ongoing medical treatment. It further agreed that while not yet rated for permanent impairment, because Employee was not yet medically stable, upon reaching medical stability "he will be entitled to PPI benefits if found to have a ratable impairment by a physician." Employer stated that on July 2, 2024, it withdrew its July 14, 2023 controversion of left-hip-related benefits. In short, Employer contended that it had accepted all claimed benefits except for an "unfair or frivolous controversion" finding, which it opposed, and it objected to paying any penalty or interest on previously paid benefits. Employer contended its December 28, 2023 initial payment check contained an inadvertent printing error, which made it non-negotiable, which it resolved on January 3, 2024, by issuing a new check. It contended the hotel erroneously billed Employee's credit card. Once Employer discovered this through Employee's claim, it reimbursed him within two days, on March 8, 2024. Employer contended this was not within its control and no unfair or frivolous controversion occurred. It contended the



July 14, 2023 controversion was based on Dr. Bauer's EME report, which justified the denial, so there was no unfair or frivolous controversion. Employer concluded, "the Board should find that Employee suffered a compensable injury to his lower back and bilateral hips for which he is entitled to receive Workers' Compensation benefits, including indemnity, medical and transportation costs, any future PPI rating upon reaching medical stability, and attorney's fees." (Hearing Brief, July 2, 2024).

40) At hearing, Employee testified at length about his physically demanding job with Employer. He could not go for further left-hip treatment after he received Employer's controversion notice in 2023. Employee did not know the left-hip controversion had been withdrawn until July 2, 2024. He did not seek right-hip treatment until after the SIME was completed and he knew it would be covered. Employee tried to get treatment for his low-back between late June and mid-July 2023, by constantly communicating with his adjuster. The adjuster told him he had not been denied, "but they wouldn't approve it either." The designated chair advised the parties that the Division did not have a copy of a June 29, 2023 controversion in Employee's agency file. Powell acknowledged that she had made a mistake and there was no June 29, 2023 controversion notice in this case. On cross-examination, Employee admitted he did not have to make travel arrangements for his SIME appointment. Employee said it was "a few days" after he paid for his own hotel accommodations for the SIME that he received reimbursement from Employer. When he discovered the missing routing number on his initial benefits check, Employee sent the adjuster an email, and he received a new check within six days. (Record).

41) At hearing, consistent with its brief Employer orally stipulated Employee's bilateral hips and low back injuries were compensable based upon Dr. Jain's SIME report. It stipulated Employee was not currently medically stable, but PPI would be due upon a rating from a physician once he was medically stable. Employer did not oppose future medical or transportation costs that were properly documented and served in accordance with the Alaska Workers' Compensation Act (Act). (Record).

42) On July 12, 2024, Employee's attorney provided an updated itemized statement of fees and costs totaling \$32,774.46, including \$32,708 in fees and \$66.46 in costs. (Affidavit of Counsel Regarding Fees and Costs, July 12, 2024).

PRINCIPLES OF LAW

The Board may base its decision not only on 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, 533-34 (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. . . .

*Summers v. Korobkin Construction*, 814 P.2d 1369, 1372 (Alaska 1991) stated, "Moreover, we believe that an injured worker who has been receiving medical treatment should have the right to a prospective determination of compensability." A Board order determining compensability will help an injured worker decide whether to pursue medical treatment or procedures.

**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. . . .

**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. . . .

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

The 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 contingent nature of

representing injured workers, to ensure adequate representation. *State of Alaska v. Wozniak*, 491 P.3d 1081 (Alaska 2021) held a lump-sum award of fees incurred to the date of hearing and a separate award of ongoing fees on Employee’s ongoing benefits, under two subsections from the same attorney fee statute, was not “mutually exclusive,” and affirmed the lower decisions awarding attorney fees in this manner.

*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.” It held the Board must consider all the following eight non-exclusive factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a fee’s reasonableness:

- (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 23.30.122. 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.

**AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .  
. . . .

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

....

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

....

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

(p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.

*Harnish Group, Inc. v. NC Machinery Co.*, 160 P.3d 146, 151 (Alaska 2007) said:

In a workers' compensation case an employer can contest a claimant's entitlement to benefits in two ways. After a report of injury is filed, if an employer disputes its liability and refuses to pay benefits, it must file a notice of controversion (footnote omitted). Whether or not it has filed a notice of controversion, an employer may also deny liability for benefits in its answer to a workers' compensation claim (footnote omitted).

In *Harnish*, the parties were disputing attorney fees. The Alaska Supreme Court (Court) stated:

To determine whether there has been a controversion in fact in cases where an employer does not file a notice of controversion, the Board needs to look at the employer's answer to a claim for benefits and its actions after the claim is filed to determine whether the employer has controverted in fact the employee's claim for benefits. (*Id.* at 152).

*Bauder v. Alaska Airlines, Inc.*, 52 P.3d 166, 176 (Alaska 2002) stated, “When an employer neither timely pays nor controverts a claim for compensation, AS 23.30.155(e) imposes a 25% penalty,” but only if “if the employer is ultimately found liable for the disputed compensation.” 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.*

A controversion notice must be filed “in good faith” to protect an employer from a penalty. *Harp* at 358. “In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper.” But when nonpayment results from “bad faith reliance on counsel’s advice, or mistake of law, the penalty is imposed.” *State of Alaska v. Ford*, AWCAC Decision No. 133, at 8 (April 9, 2010) (citations omitted). “For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits.” *Harp* at 358 (citation omitted). Evidence in Employer’s possession “at the time of controversion” is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id.* If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the controversion was “made in bad faith and was therefore invalid” and a “penalty is therefore required” by AS 23.30.155. *Id.* at 359. *Vue v. Walmart Associates, Inc.*, 475 P.3d 270 (Alaska 2020), stated valid controversion notices must give notice of disputed issues, which an employee can then use to pursue a claim. *Vue* also adopted *Harp*’s standard to evaluate unfair and frivolous controversion claims.

**AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. . . .

**AS 23.30.190. Compensation for permanent partial impairment; rating guides.**

(a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee’s percentage of permanent impairment of the whole person. . . .

**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. . . .

**8 AAC 45.182. Controversion. . . .**

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

. . . .

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

ANALYSIS

**1)Should the parties' hearing stipulations be memorialized in an order?**

At the July 9, 2024 hearing, Employer stipulated Employee's low back and bilateral hip injuries arose out of and in the course of his employment. AS 23.30.010(a); 8 AAC 45.050(f)(2), (3). It withdrew its controversion for Employee's low back and left hip. Employee requested a written order on compensability for his lower back and bilateral hip injuries as is his right under *Summers*. The stipulation is well-supported by the evidence. Employee testified about his years of heavy manual labor working for Employer. His testimony was credible. AS 23.30.122. Dr. Jains opined that as a result of this work, Employee needs a total left-hip replacement and will probably need a right-hip total replacement. Her SIME opinion is given great weight. AS 23.30.122. If Employee chooses to have the bilateral hip replacement surgeries, Employer must pay reasonable and necessary costs, including medical, surgical and other attendance or treatment, and transportation costs for his bilateral hip work injuries, including total hip replacements. It must also pay all applicable benefits for his low back injury, all in accordance with the Act and any applicable regulations. 8 AAC 45.050(f); AS 23.30.010(a); AS 23.30.095(a).

At hearing, Employer also agreed to pay TTD benefits Employee claimed for five days in April 2023. It offered no defense for the missing five days' payments, which it conceded it failed to pay. Employer will be ordered to pay Employee TTD benefits for the five missing disability dates in April 2023. 8 AAC 45.050(f); AS 23.30.010(a); AS 23.30.095(a); AS 23.30.185.

**2) Did Employer make frivolous or unfair controversions or controversions-in-fact?**

Employer's July 14, 2023 controversion is the only relevant, formal controversion at issue here. However, Employee contends Employer "controverted-in-fact" two "payments" to Employee, both of which he says were frivolous and unfair. Employer denies it made any frivolous or unfair controversion or controversions-in-fact. A frivolous or unfair controversion finding against a self-insured employer results in the Division copying the decision and order to the commissioner's designee for consideration in the self-insured employer's next self-insurance renewal application. Employer is self-insured. AS 23.30.155(o); 8 AAC 45.182(d)(2). The genesis for Employee's frivolous or unfair controversion claim is: Employer issued a TTD payment on December 28, 2023, on a non-negotiable check due to a printing error. The second "payment" pertained to Employee's travel on February 25-27, 2024, for his SIME when the hotel Employee was staying at charged Employee's credit card for his room instead of charging Employer's travel account.

*A. The December 28, 2023 check was not a controversion-in-fact.*

Employee was injured on March 20, 2023, Dr. Kirkham placed Employee on work restrictions on April 12, 2023. Employee's first installment of compensation was due on April 26, 2023, fourteen days after employer had knowledge of the injury. AS 23.30.155(b). Subsequent payments being made every fourteen days thereafter. *Id.* Following, the fourteen-day sequence until December, Employee's compensation would have been due on December 20, 2023, and should have been paid seven days after it was due, no later than December 27, 2023. AS 23.30.155(e). The parties agreed TTD was issued to Employee on December 28, 2023. The check Employer issued was non-negotiable because it lacked the necessary routing information. Employer was made aware of the error prior to Employee's January 2, 2024 claim and a new check issued to Employee on January 3, 2024. Fourteen days after it was originally due. Employer's answer to Employee's claim admitted the inadvertent and faulty check and Employer's obligation to issue a new one. *Bauder.*

It does warrant sending this decision and order to the commissioner's designee for consideration under AS 23.30.155(o) or 8 AAC 45.182(d)(2). A 25% penalty and mandatory interest shall be awarded on the January 3, 2024 TTD payment.

*B. The SIME billing error was not a controversion-in-fact.*

Under AS 23.30.095(k) an Employer shall pay for the cost of an SIME and medical report; this would include hotel costs. Payment for Employee's room to attend his SIME was "due" when he checked out on February 27, 2024. The seven-day grace period to make payment expired on March 5, 2024. AS 23.30.155(e). On March 5, 2024, Employer first knew Employee had been charged for his hotel stay. On March 8, 2024, Employer issued a reimbursement check to him. Employee requests a finding of an unfair or frivolous controversion for failure to insure Employee was not charged for his stay. Employer contends the hotel in which Employee was staying had all the necessary documentation to charge Employer's travel agency rather than Employee. It relies on the defense of nonpayment based upon conditions over which Employer had no control. Specifically, the fact the hotel erroneously charged Employee's credit card instead of Employer's at the time of Employee's check-out. It rectified the nonpayment by issuing a check three days after receiving notice of nonpayment. The hotel's error will not be considered a controversion-in-fact on Employer's part, and thus it was not frivolous or unfair. Employer's answer to Employee's claim for this benefit admitted the hotel's error and Employer's obligation to reimburse Employee for this improper expense charged to his credit card. *Bauder*. This specific instance does not warrant a finding requiring notice to the commissioner's designee under AS 23.30.155(o) or 8 AAC 45.182(d)(2).

*C. The July 14, 2023 controversion.*

For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the claimant is not entitled to benefits. *Harp*. Evidence in Employer's possession at the time of controversion is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id*. If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the controversion was made in bad faith and was therefore invalid and a penalty is required. *Id*.



On July 14, 2023, Employer denied all hip benefits and spinal surgery at levels other than L3-L5 effective June 21, 2023 based upon Dr. Bauer's EME report. Which concluded Employee's hip injury was not substantially caused by work rather degenerative changes, and also concluded any surgery outside of L3-L5 was not caused by Employee's work injury. His opinion was sufficient to warrant a decision Employee's claimed injuries were not caused by his work. The July 14, 2023 controversion notice was made in good faith. *Harp*. Employee is not entitled to a finding of unfair or frivolous controversion on the July 14, 2023 controversion. AS 23.30.155(o).

*D. The unpaid TTD benefits in April 2023.*

The parties stipulate Employee was not paid for five days (April 15, 16, 22, 23, and 24, 2023). Employee's compensation rate is \$1,141.46 per week. Employee's compensation per day is \$163.07. ( $\$1,141.46 / 7 \text{ days} = \$163.07$ ). Employer's initial payment to Employee covered from April 12, 2023 – May 8, 2023 (a period of 27 days). Employer issued a check for \$3,587.45 for that period of time. However, 27 days of compensation multiplied by Employee's daily compensation rate equals \$4,402.89. ( $27 \text{ days} \times \$163.07 = \$4,402.89$ ). Employer failed to pay Employee for five days or \$815.33. ( $\$4,402.89 - \$3,587.45 = \$815.33$  OR  $\$163.07 \times 5 \text{ days} = \$815.33$ ). Therefore, Employer did fail to pay Employee for five days of TTD in April. The failure to pay Employee's TTD for five days warrants sending this decision and order to the commissioner's designee for consideration under AS 23.30.155(o) or 8 AAC 45.182(d)(2).

**3) Is Employee entitled to penalty and interest on five days' TTD benefits in April 2023?**

An employee is entitled to penalties on compensation due if it is not timely paid. AS 23.30.155(a), (b), (e). Employer agrees it failed to pay TTD payments for five days, April 15, 16, 22, 23 and 24, 2023. It did not controvert paying these benefits, and offered no explanation for non-payment. Employer will be ordered to pay Employee a 25% penalty on the five days of TTD in accordance with the Act. AS 23.30.155(e).

Interest is mandatory. AS 23.30.155(p). Employee is entitled to accrued interest on the above-referenced unpaid TTD benefits from April 2023. AS 23.30.155(p). Employer is directed to calculate interest in accordance with the Act on the five days of TTD.

**4) Is Employee entitled to attorney fees and costs?**

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 claimed injuries arose out of and in the course of his employment with Employer and his attorney successfully prosecuted his claim for past due TTD, future PPI, medical treatment and associated costs. Employer did not object to Employee's attorney fees and costs or contend they are unreasonable. This decision considered the *Rusch* factors based on Powell's affidavit. Powell has obtained valuable benefits for Employee. Employee is entitled to reasonable attorney fees of \$32,708.00 and \$66.46 in costs. *Bignell*.

Employee's attorney is also entitled to statutory attorney fees for any ongoing benefits paid to Employee after the July 9, 2024 hearing. *Wozniak*.

CONCLUSIONS OF LAW

- 1) The parties' hearing stipulations should be memorialized in an order.
- 2) Employer made frivolous or unfair controversions in fact.
- 3) Employee is entitled to penalty and interest on five days' TTD benefits in April 2023.
- 4) Employee is entitled to attorney's fees and costs.

ORDER

- 1) Employee's bilateral hip and low back injuries are compensable.
- 2) Employer shall pay past and future TTD benefits, PPI benefits upon medical stability and a rating from a physician, and medical and transportation costs, for Employee's bilateral hip replacement surgeries and his low back in accordance with the Act, regulations and this decision.
- 3) Employer shall pay Employee, interest in accordance with the Act for the TTD payment due on December 27, 2023 and paid on January 3, 2024.
- 4) Employer shall pay a 25 percent penalty on the TTD payment due on December 27, 2023 and paid on January 3, 2024.
- 5) Employer shall pay Employee, interest in accordance with the Act on past due TTD from April 2023.

- 6) Employer shall pay a 25 percent penalty on past due TTD from April 2023.
- 7) Employer shall pay Employee's attorney \$32,708.00 in fees and \$66.46 in costs.
- 8) Employer shall pay Employee's attorney statutory minimum *Wozniak* fees on ongoing TTD benefits from July 9, 2024, pursuant to the Act.
- 9) A copy of this decision and order shall be served upon the Commissioner's designee, Director Charles Collins.

Dated in Anchorage, Alaska on August 22, 2024.

ALASKA WORKERS' COMPENSATION BOARD

\_\_\_\_\_  
/s/  
Kyle D. Reding, Designated Chair

\_\_\_\_\_  
/s/  
Sara Faulkner, 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 Joseph D. Walker, employee / claimant v. self-insured STATE OF ALASKA, employer / defendant; Case No. 202305042; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on August 22, 2024.

\_\_\_\_\_/s/  
Rochelle Comer, Office Assistant