Case: *State of Alaska, Department of Education vs. Jason U. Ford*, Alaska Workers' Comp. App. Comm'n Dec. No. 133 (April 9, 2010)

Facts: Jason Ford (Ford) injured his lower back catching a copy machine as it tipped off a dolly while working for the State library. He sought compensation for back surgery. The State controverted based on Dr. Marks' opinion that he could not recommend surgery at this time and that Ford could continue to work without the surgery. Ford had the surgery and sought medical benefits and temporary total disability (TTD) compensation. The State later withdrew its controversion. The main issue the parties disputed was whether a late-payment penalty was owed on any of the benefits and whether the State's controversion was frivolous, unfair, or made in bad faith. Also, Ford sought attorney fees and discovery costs. The State wanted a release of Ford's employment records. After the board decision, both Ford and the State appealed. In addition, Ford sought modification of the board's decision so that he could admit the insurance adjuster's notes. The board denied modification.

Applicable law: AS 23.30.155(e) provides that if payment of compensation without an award is not made within seven days after it is due,

> . . . there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid . . . unless notice is filed under (d) of this section or unless the nonpayment is excused by the board [upon a showing that] owing to conditions over which the employer had no control the installment could not be paid within the period prescribed . . . .

AS 23.30.155(o) provides that the director of the workers' compensation division shall "promptly notify" the division of insurance "if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due[.]"

8 AAC 45.182(d)(2) imposes a similar duty to notify the Commissioner of Labor and Workforce Development's designee if a self-insured employer frivolously or unfairly controverts compensation. The notification is placed in "the self-insured employer records for consideration in its renewal application for self-insurance."

For a controversion 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 v. ARCO Alaska, Inc.,* 831 P.2d 352 (Alaska 1992).

Bad faith alone does not provide a legal basis for imposition of penalty; the compensation on which the penalty is based must also be paid late. *Sumner v. Eagle Nest Hotel*, 894 P.2d 628, 632 (Alaska 1995).

AS 23.30.095(a) requires the employer to

> furnish medical, surgical, and other attendance or treatment . . . for the period which the nature of the injury or process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued

> treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize treatment or care or both as the process of recovery may require.

A claim for medical treatment made in the first two years following the injury must (1) be reasonable and (2) be necessitated by a work-related injury. *Philip Weidner & Assocs., Inc. v. Hibdon,* 989 P.2d 727, 731 (Alaska 1999).

> [W]here the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable. If the employee makes this showing, the employer is faced with a heavy burden – the employer must demonstrate to the Board that the treatment is neither reasonable and necessary, nor within the realm of acceptable medical options under the particular facts. *Id.* at 732.

In the case of TTD compensation, payment "becomes due on the 14th day after the employer has knowledge . . . . Subsequent compensation shall be paid in installments, every 14 days. . . ." AS 23.30.155(b). Payment of medical charges, excluding prescription charges or transportation, is payable within 30 days *after* the later date when the employer receives the provider's bill or a completed report (required by AS 23.30.095(c)). AS 23.30.097(d). Transportation expenses for medical treatment are due "30 days after the employer receives the . . . provider's report and an itemization of the dates, destination, and transportation expenses . . . ." AS 23.30.097(d).

AS 23.30.145 deals with attorney fee awards.

Issues: (1) Did the board have substantial evidence to support its finding that the controversion of back surgery was filed in bad faith? (2) Did the board have substantial evidence to support that the controversion was frivolous or unfair? (3) Did the board have substantial evidence on which to conclude that the employer owed a penalty for late payment of medical or transportation expenses? (4) Did the board err in failing to impose a late-payment penalty for TTD compensation? (5) Did the board err in deciding attorney fees? (6) Did the board err in requiring the State to provide free copies to Ford for discovery purposes? (7) Did the board err in affirming a grant of a protective order barring the release of employment records because they were not relevant? (8) Did the board err in refusing to modify its decision to consider the adjuster's notes that Ford sought to admit after the decision?

Holding / analysis: The commission summarized case law and commission decisions and described the tests for determining good faith, frivolous or unfair and bad faith:

> First, examining the controversion, and the evidence on which it was based in isolation, without assessing credibility and drawing all reasonable

> inferences in favor of the controversion, the board must decide if the controversion is a "good faith" controversion. Second, if the board concludes that the controversion is not a good faith controversion, the board must decide if it is a controversion that is frivolous or unfair. If the controversion lacks a plausible legal defense or lacks the evidence to support a fact-based controversion, it is frivolous; if it is the product of dishonesty, fraud, bias, or prejudice, it is unfair. But, to find that a frivolous controversion was issued in bad faith requires a third step – a subjective inquiry in to the motives or belief of the controversion author. Dec. No. 133 at 21.

(1) In Ford's case, the commission decided that the board erred as a matter of law in concluding that paraphrasing or summarizing a doctor's opinion on the controversion notice constitutes "bad faith" conduct. The form does not require, nor provide space for, direct quotes. In addition, the board decision was not supported by substantial evidence. Only one of the eight opinions summarized in the controversion notice was incomplete, giving the impression of a more definitive opinion than what Dr. Marks expressed. Dr. Marks stated that he could not recommend surgery "at this time" and the notice left out the qualifying "at this time." "Drawing all reasonable inferences in favor of a facially valid controversion, the text is an incomplete statement of Dr. Marks's opinion, but it does not, as the board found, attribute to Dr. Marks more than one opinion he did not express." *Id.* at 25. Also, the board had no evidence examining the motives or beliefs of the controversion's author. Without evidence to support an intent to "mislead or deceive," the board could not find bad-faith conduct. In addition, the board skipped a step in the analysis – before deciding bad faith, it needed to decide whether the controversion was frivolous or unfair.

(2) The board record contained sufficient evidence to support a conclusion that the controversion was frivolous within the meaning of AS 23.30.155(o). When issued, the controversion lacked the necessary evidence to support the stated grounds for controversion.

> In his strongest statement, Dr. Marks states that the prognosis for [a successful recovery with] surgery is *quite guarded* and that *he would recommend against it* at this time. . . . Although the phrase "guarded prognosis" suggests the prospect of a successful outcome is tenuous, a "guarded prognosis" is not equivalent to a "poor prognosis," a term that conveys that the outcome probably will not be successful. Even drawing reasonable inferences in favor of validity, Dr. Marks's recommendation (against surgery) was not based on an opinion that the proposed surgery was not likely to benefit Ford, or probably would not help Ford recover from the work injury. There is a subtle but important distinction between saying that the likelihood of benefit is doubtful or weak, and saying that benefit is unlikely or benefit probably will not result. Therefore, the commission concludes that Dr. Marks's report falls short of the *Bockness*

> standard for a controversion based on grounds that proposed medical treatment is "not reasonable and necessary." *Id.* at 29-30.

AS 23.30.155(o) does not permit referral of self-insured employers to the Division of Insurance. Instead, 8 AAC 45.182(d)(2) applies. The referral to the commissioner's designee should note when a self-insured employer's claims are adjusted by an independent adjuster "if the board found that employer conduct resulted in the unfair or frivolous controversion, or if the referral is made on the basis of adjuster conduct, or if the board had insufficient evidence to make a determination of responsibility." *Id.* at 33.

(3) The commission concluded that employee failed to meet his burden of producing evidence in support of a claim for penalty for late payment of medical expenses or transportation expenses. The board erroneously appeared to require the employer to produce evidence. Some evidence of late payment is required to support a penalty under AS 23.30.155(e). The only evidence the board had was one bill that was unpaid and sent back to the medical provider because the bill omitted her federal employer identification number. Ford, moreover, acknowledged that he had not submitted an accounting of transportation expenses and he knew of no late paid bills.

(4) The commission concluded a late-payment penalty was owed on TTD. The board found that penalties were not due on payment of TTD because the employer's evidence was sufficient to support controversion. But the commission concluded that after the surgery occurred, Dr. Marks' opinion that Ford could have continued to work without surgery was no longer sufficient to support a controversion of disability compensation related to the surgery. *Id.* at 35. The commission concluded that because TTD was not paid 14 days after the employer or adjuster learned of the disability, a late-payment penalty was owed.

(5) The board denied an award of attorney fees and legal costs "at this time" under AS 23.30.145(b) but reserved jurisdiction to do so if the employer filed a "subsequent controversion and other wise dispute[d] the entitlement to medical or other future benefits, or even [made] a claim for retroactive offset for overpayments." The commission remanded to the board to decide attorney fees, concluding that the board could not leave the claim for attorney's fees in an "indeterminate state" because it rendered the claimant's "opportunity to be heard" per AS 23.30.001(4) meaningless. *Id*. at 40. In addition the board "failed to consider if Ford's attorney was entitled to an award of a fee that exceeds the minimum fee on ongoing compensation." *Id*.

(6) The commission concluded the board erred in requiring the State to provide Ford with discovery at no charge. First, the "board erred as a matter of law in holding that it could impose 'initial' costs of production on the employer because the employer may recover them if the employer prevails against the employee." *Id.* at 41-42. AS 23.30.145 only permits the employee, not the employer, to recover legal costs, include photocopying, when he is the prevailing party. Second the commission held:

> While the State must provide medical records to Ford at no charge under AS 23.30.095(h), this duty is a shared duty – Ford had an obligation to

> serve copies of his medical records on the State as well. And, while the duty to file and serve *medical records* continues during the pendency of the proceeding, the duty under subsection .095(h) does not extend to providing more than one copy of the same record at no charge. Because the board did not find that the State had failed to provide its medical records with a medical summary under AS 23.30.095(h), the reliance on the authority of subsection .095(h) to direct the State to provide a copy of the adjuster's file to Ford at no charge was error. *Id.* at 42.

Lastly, the commission concluded that the board could not require prepayment of State employee discovery requests because payment of copy charges is governed by a regulation, 2 AAC 96.360.

(7) The commission found clear error by the board designee in denying the request for a release of employment records because Ford had not requested reemployment benefits and, therefore, the commission reversed the board order affirming the grant of a protective order. Ford was injured after the 2005 amendments to AS 23.30.041. Because he was not required to request reemployment benefits, the absence of a request was not material. Moreover, AS 23.30.041(c) mandated a reemployment eligibility evaluation because Ford had been totally disabled for 90 consecutive days. "The employment record release was relevant to the history that Ford gives the specialist and the State's response to any recommendation by the specialist." *Id.* at 43.

(8) The commission decided that the board did not abuse its discretion in denying modification. After the board's decision, Ford sought admission of the adjuster's notes and the board denied modification, concluding the notes were not relevant. The board erred because the notes were relevant to the question of when the adjuster knew Ford was disabled for the purposes of determining whether a penalty was owed on late-paid TTD compensation. However, the error was harmless because there were other grounds to deny modification under AS 23.30.130 (modification may occur for mistake of fact, change in conditions or newly discovered evidence that could not have been produced earlier).