

## Alaska Workers' Compensation Appeals Commission

State of Alaska, Department of Health and  
Social Services,  
Appellant,

vs.

Carolyn A. Thomas and United Physical  
Therapy, Inc.,  
Appellees.

### Final Decision

Decision No. 270      October 11, 2019

AWCAC Appeal No. 18-024  
AWCB Decision No. 18-0120  
AWCB Case No. 201701295

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0120, issued at Anchorage, Alaska, on November 16, 2018, by southcentral panel members Ronald P. Ringel, Chair, Bronson Frye, Member for Labor, and Bradley Evans, Member for Industry.

Appearances: Kevin G. Clarkson, Attorney General, and Adam R. Franklin, Assistant Attorney General, for appellant, State of Alaska, Department of Health and Social Services; J. C. Croft, The Croft Law Office, for appellee, United Physical Therapy, Inc.; appellee, Carolyn A. Thomas, was dismissed from this appeal.

Commission proceedings: Appeal filed November 27, 2018; Motion for Stay filed December 6, 2018; Order on Motion for Stay issued January 18, 2019; briefing completed July 3, 2019; oral argument was not requested by any party.<sup>1</sup>

Commissioners: Michael J. Notar, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

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<sup>1</sup> Actually, the State of Alaska, Department of Health and Social Services (DHSS) did request oral argument in July 2019; however, the request was filed with the Alaska Workers' Compensation Board (Board) instead of the Alaska Workers' Compensation Appeals Commission (Commission). The Commission did not receive the request until DHSS called the Commission in September 2019 asking about a date for the oral argument. When DHSS discovered the request had not been filed with the Commission, DHSS opted to waive its request for oral argument.

*1. Introduction.*

Carolyn A. Thomas was injured while working for the State of Alaska, Department of Health and Social Services (DHSS) on January 18, 2017. In December 2017, and January and February 2018, she treated with United Physical Therapy, Inc. (UPT) on referral from her treating physician. DHSS had an employer's medical evaluation (EME) performed on February 28, 2018, and then controverted payment for the treatment with UPT on March 13, 2018.

The Alaska Workers' Compensation Board (Board) heard the claim by UPT for payment for its treatment on October 10, 2018. The Board first ordered DHSS to file all medical records in its possession with the Board and then issued its decision requiring DHSS to pay for the treatment on November 16, 2018. DHSS timely appealed to the Alaska Workers' Compensation Appeals Commission (Commission). The Commission now affirms the Board's decision.

*2. Factual background and proceedings.<sup>2</sup>*

On January 18, 2017, while working for DHSS, Ms. Thomas was involved in a motor vehicle accident.<sup>3</sup> Her vehicle was hit on the side by the other vehicle.<sup>4</sup>

Ms. Thomas has treated for fibromyalgia since 2000, first with Michael Taylor, M.D.,<sup>5</sup> and since September 3, 2002, on referral from Dr. Taylor, with Jessica Spayd, A.N.P., and William Leroy Herold, M.D., of Eagle River Pain and Wellness.<sup>6</sup> Among other prescriptions, Ms. Thomas has taken opioids for the fibromyalgia.<sup>7</sup>

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<sup>2</sup> We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

<sup>3</sup> *Thomas and United Physical Therapy, Inc. v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 18-0110 (Oct. 24, 2018)(*Thomas I*); Exc. 001.

<sup>4</sup> Exc. 002.

<sup>5</sup> *Thomas and United Physical Therapy, Inc. v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 18-0120 (Nov. 16, 2018)(*Thomas II*); R. 445.

<sup>6</sup> R. 445-1097; 1152-1155; 1160-1164; 1171-1174; 1178-1189; 1193-1203; 1238-1242; 1255-1259; 1266-1267; 1270-1274.

<sup>7</sup> Exc. 007-008.

On January 20, 2017, Ms. Thomas saw Teresa J. Bormann, M.D., and reported that the day before, one day after the auto accident, she began to experience neck, back, and hip pain. Dr. Bormann diagnosed a back strain from the cervical spine through the lumbar spine, prescribed a muscle relaxer, and ordered x-rays of Ms. Thomas's cervical spine.<sup>8</sup> The x-rays taken January 20, 2017, showed degenerative changes without evidence of an acute injury.<sup>9</sup>

On January 25, 2017, Ms. Thomas began massage therapy, which she received on four more occasions.<sup>10</sup> Ms. Thomas then saw Dennis D. Young, D.C., on February 22, 2017, and reported her condition had deteriorated since the accident. Dr. Young diagnosed cervical strain and dysfunction, myalgia, and headache, and treated her until December 6, 2017.<sup>11</sup>

On December 7, 2017, Ms. Thomas returned to Dr. Bormann. She reported daily neck pain and stiffness as well as headaches several days each week. Dr. Bormann diagnosed neck muscle strain that was likely a "prolonged whiplash type injury of the lateral neck muscles." Dr. Bormann also concluded Ms. Thomas's headaches were secondary to her neck injury. She referred Ms. Thomas to physical therapy with UPT for "chronic neck pain" and a diagnosis of "strain of neck muscle."<sup>12</sup>

Ms. Thomas underwent an initial evaluation with UPT on December 12, 2017. UPT proposed treatments twice a week for eight weeks, and Dr. Bormann approved the treatment plan on December 17, 2017.<sup>13</sup> Ms. Thomas treated with UPT on December 12, 14, 19, and 21, 2017, January 2, 4, 9, 11, 19, and 25, 2018, and February 7, 14, and 27, 2018. Dr. Bormann approved additional treatment with UPT on March 6, 2018. On

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<sup>8</sup> Exc. 002-003.

<sup>9</sup> R. 1215-1216.

<sup>10</sup> Exc. 009-014.

<sup>11</sup> Exc. 015-019.

<sup>12</sup> Exc. 210-211.

<sup>13</sup> Exc. 071-078.

December 19, 2017, Ms. Thomas noted her neck was better and by February 27, 2018, she reported she had not been in pain for three weeks.<sup>14</sup>

On February 28, 2018, Ms. Thomas saw M. Sean Green, M.D., and R. David Bauer, M.D., for an EME. In addition to examining Ms. Thomas, Drs. Green and Bauer reviewed a medical record from 2005 relating to Ms. Thomas's fibromyalgia and the next record, from February 16, 2010, also relating to her fibromyalgia. There were no other records preceding Dr. Bormann's January 20, 2017, chart note. The doctors stated lifetime medical records were critical to a comprehensive analysis of her chronic pain, and they included a disclaimer that the medical records provided were insufficient to fully understand Ms. Thomas's current complaints. Drs. Green and Bauer reviewed Dr. Bormann's January 20, 2017, and December 7, 2017, chart notes, the records from Pairmore & Young, and UPT's daily notes for December 2017 and January 2018. Regarding Dr. Bormann's December 7, 2017, chart note, the EME doctors stated, "'Whiplash' is a diagnostic construct that has been long discredited." The doctors stated it was reasonably probable Ms. Thomas suffered a strain as the result of the work injury, but cervical strains usually resolve in a matter of days to weeks, and there is no such thing as a chronic muscle strain. They stated the work injury was not the substantial cause of medical treatment beyond two days after the injury and the symptoms addressed by physical therapy must have another cause, which they did not identify. They did not say that physical therapy to treat strains was unreasonable.<sup>15</sup>

On March 6, 2018, Dr. Bormann authorized two physical therapy treatments per month for the next eight weeks.<sup>16</sup>

On March 13, 2018, DHSS filed a controversion notice denying all benefits after January 20, 2017, in reliance on the EME report.<sup>17</sup> On March 23, 2018, UPT filed a claim

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<sup>14</sup> Exc. 071-096; 213-218.

<sup>15</sup> Exc. 097-121.

<sup>16</sup> R. 198.

<sup>17</sup> Exc. 122 (the controversion is based on the EME done after the last physical therapy treatment).

for medical costs, penalty, and interest. Attached to the claim was UPT's initial evaluation and plan of care, which Dr. Bormann approved.<sup>18</sup>

On April 2, 2018, DHSS's adjuster filed a medical summary to which were attached Dr. Bormann's referral to UPT, chart notes from UPT for 13 dates of service, and the EME report from Drs. Green and Bauer. No chart notes from Ms. Thomas's treating physicians were included.<sup>19</sup> Also on April 2, 2018, UPT filed a medical summary to which were attached Dr. Bormann's December 7, 2017, referral to UPT, UPT's December 12, 2017, initial evaluation, its daily treatment notes for all dates of service, Dr. Bormann's March 6, 2018, approval of additional treatment, and the EME report.<sup>20</sup>

On April 19, 2018, UPT submitted a health insurance claim form for the two December 2017 dates of service. The form was stamped as received by DHSS the same day.<sup>21</sup> At the April 26, 2018, prehearing conference, UPT explained it was seeking payment for its December 19 and 21, 2017, and February 7, 14, and 27, 2018, dates of service, totaling \$809.26.<sup>22</sup>

On May 7, 2018, UPT filed its responses to DHSS's discovery requests. UPT explained it was seeking payment for the December 19 and 21, 2017, and February 7, 14, and 27 dates of service plus penalty and interest. UPT recalculated its claimed fees and determined the amount owing under the 2017 and 2018 fee schedules was \$765.38. A transaction history showed a "Bill Date" of December 22, 2017, for the December 21, 2017, service.<sup>23</sup>

The July 5, 2018, prehearing conference summary stated:

[DHSS] stated it has requested [this] conference in order to determine [UPT's] position on the controversy filed 3/13/18. [UPT] stated it was not

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<sup>18</sup> Exc. 127.

<sup>19</sup> R. 167-168.

<sup>20</sup> R. 167-168.

<sup>21</sup> R. 123-125.

<sup>22</sup> Exc. 128-130 (since no claim was made for the January 2018 dates of service it appears these were timely paid).

<sup>23</sup> Exc. 131-136; 139-142.

seeking to challenge the controversion itself, but argued that the medical bills should be paid even with the controversion in place. [UPT] states that all five dates of service at issue occurred before the controversion was filed, and two occurred before the controversion's stated effective date.<sup>24</sup>

On July 12, 2018, UPT filed a medical summary, attached to which were its answers to DHSS's informal discovery requests and an explanation of its charges and billing information. No medical records were included.<sup>25</sup>

On July 19, 2018, UPT filed an affidavit of readiness for hearing on its March 23, 2018, claim.<sup>26</sup>

On August 9, 2018, DHSS paid UPT for the two December 2017 dates of service.<sup>27</sup>

At the August 29, 2018, prehearing conference, the parties stipulated to an October 10, 2018, hearing. The Board designee identified the issue for hearing as the "[m]erits of [UPT's] 3/23/2018 Workers' Compensation Claim (WCC)." Parties were directed to file evidence by September 20, 2018.<sup>28</sup> Neither party requested the August 29, 2018, prehearing conference summary be amended or reconsidered.<sup>29</sup>

UPT filed its evidence for the October 10, 2018, hearing which included a February 5, 2018, "Progress Note/Recertification" setting out UPT's proposed treatment plan for Ms. Thomas. Dr. Bormann approved the plan on March 6, 2018.<sup>30</sup> UPT's evidence included a billing statement for the February 2018 dates of service, the current procedural terminology (CPT) codes, and the billed amount. The statement shows a total billed amount of \$170.00 for each of the three dates.<sup>31</sup>

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<sup>24</sup> Exc. 145-147.

<sup>25</sup> R. 232.

<sup>26</sup> Exc. 150.

<sup>27</sup> *Thomas II* at 5, No. 26; R. 120-121.

<sup>28</sup> Exc. 153-155.

<sup>29</sup> *Thomas II* at 6, No. 28.

<sup>30</sup> R. 198; 047; 052-056.

<sup>31</sup> Hr'g Tr. at 7:20-24; 8:18-24; 9:18 – 10:1, Oct. 10, 2018.

UPT contended it was not paid timely for two dates of service in December 2017 and had received no payment for three dates in February 2018. UPT acknowledged it was paid for the December 2017 services after it had filed its claim, but it was still seeking penalties and interest for those dates. It contended AS 23.30.097(d) requires an employer to pay an employee's medical bills within 30 days of receipt, but makes no mention of a controversion. UPT contended allowing retroactive denial of payment for services that have already been rendered unfairly places the burden on providers, particularly where, as here, the provider cannot make a medical diagnosis and may only provide services on referral from a physician. UPT also contended the March 13, 2018, controversion did not provide an adequate reason to deny payments for the February 2018 dates of service, and argued it was virtually impossible to conclude a condition had resolved within days after it had been treated for more than a year.<sup>32</sup> UPT explained physical therapists cannot diagnose injured workers, but must treat according to a physician's referral. Denying them payment for services already rendered is unfair.<sup>33</sup>

DHSS contended that while it had paid UPT's December 2017 bills, the bills had not been timely submitted, so no penalty or interest was due. DHSS contended no payment was due on the February 2018 bills because DHSS had controverted benefits within 30 days of receiving the bills.<sup>34</sup> DHSS stated it had paid for the December 2017 treatment dates, but because there was no evidence UPT had timely mailed the bills, it was not liable for penalty or interest for those dates. DHSS also contended it did not owe payment for the February 2018 treatment dates because it had controverted all benefits within 30 days of receiving UPT's bills. An exhibit to DHSS's brief was a health insurance claim form dated February 20, 2018, for the February 7, 2018, date of service.<sup>35</sup>

At the October 10, 2018, hearing, the Board chair noted that Dr. Green's and Dr. Bauer's EME report referred to several medical records that had not been filed with

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<sup>32</sup> Hr'g Tr. at 10:2 – 11:19; R. 133-137.

<sup>33</sup> Hr'g Tr. at 21:3 – 22:15; R. 133-137.

<sup>34</sup> Hr'g Tr. at 12:5-13; R. 71-132.

<sup>35</sup> Hr'g Tr. at 13:3-23; R. 71-132.

the Board, and the Board ordered both parties to file all medical records in their possession. Had Ms. Thomas filed a claim for the same medical costs that UPT was seeking, the panel would have to weigh [UPT's] reports against DHSS's EME report, and decide which should be given the most weight. DHSS's attorney stated that the issue for hearing was not the actual medical costs, but only whether DHSS had denied payment within 30 days of receiving UPT's bills.<sup>36</sup>

UPT acknowledged it had been paid for the December 2017 dates of service, but was still seeking penalties and interest. At the time of the October 10, 2018, hearing, the Board's file contained only those medical records attached to UPT's April 2, 2018, medical summary.<sup>37</sup>

At the October 10, 2018, hearing, UPT contended it had provided the medical services as ordered by Ms. Thomas's doctor, and it should be paid for the three dates of service in February 2018 in addition to a penalty and interest. With regard to the penalty and interest on the December 2017 dates of service, UPT pointed to its transaction history, and stated it was UPT's practice to mail bills within a week of the date of service. However, it had no actual evidence showing when the bills had been mailed. UPT also questioned the EME doctors' conclusion that the physical therapy services had not benefited Ms. Thomas. The EME doctors had not examined Ms. Thomas before the services, and had no way of knowing whether the benefits of the therapy was reflected at the time of the EME.<sup>38</sup>

As to the February 2018 bills, DHSS contended the issue was not medical costs, but whether DHSS had properly denied payment of medical bills received within the thirty days before its controversion.<sup>39</sup>

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<sup>36</sup> *Thomas I* at 4, No. 13.

<sup>37</sup> *Thomas II* at 6, Nos. 31-32.

<sup>38</sup> Hr'g Tr. at 7:24 – 8:24.

<sup>39</sup> Hr'g Tr. at 30:15-18; 31:1-3.

At the October 10, 2018, hearing, the Board chair orally ordered DHSS to file all medical records in its possession with a medical summary.<sup>40</sup> The Board reaffirmed this order in the first decision and order issued on October 24, 2018. In its final decision and order, the Board found all treatment by UPT to be compensable, denied a penalty on the late payments for both the December 2017 and the February 2018 treatment, and awarded interest on the February 2018 bills.<sup>41</sup> DHSS timely appealed, contending the Board erred regarding the issue for hearing, erred in deciding the merits of UPT's treatment when Ms. Thomas had not filed a claim for same, and violated DHSS's rights in evaluating the underlying controversion.

On October 11, 2018, UPT filed a 41-page medical summary that included Dr. Bormann's referral for physical therapy, a December 7, 2017, chart note from Dr. Bormann in which she diagnosed a neck strain and stated she would refer Ms. Thomas back to physical therapy, and UPT's treatment notes.<sup>42</sup> Also, on October 11, 2018, DHSS filed a 158-page medical summary that included records beginning with Dr. Bormann's January 20, 2017, report, through the EME report by Drs. Green and Bauer. Medical records from before Ms. Thomas's January 18, 2017, injury were not included.<sup>43</sup>

On October 11, 2018, DHSS filed a petition for reconsideration of the oral order to file medical summaries contending the records are irrelevant due to UPT's lack of involvement in other components of Ms. Thomas's treatment. DHSS also contended questions and comments by the panel suggested it intended to address issues beyond those set for hearing.<sup>44</sup> The Board denied the petition for reconsideration. DHSS appealed to the Commission.

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<sup>40</sup> *Thomas II* at 7, No. 35.

<sup>41</sup> *Thomas II* at 15.

<sup>42</sup> R. 245-285.

<sup>43</sup> R. 286-443.

<sup>44</sup> *Thomas I* at 1.

### 3. *Standard of review.*

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.<sup>45</sup> Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>46</sup> "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."<sup>47</sup> The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is thus conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.<sup>48</sup> On questions of law and procedure, the Commission does not defer to the Board's conclusions but rather exercises its independent judgment.<sup>49</sup> However, the Board's conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine credibility of witnesses.<sup>50</sup>

### 4. *Discussion.*

#### *a. The issues for hearing were the merits of UPT's claim for payment.*

DHSS contends only one issue was before the Board: whether its controversion was timely and whether, based on its controversion, it appropriately denied payment for UPT's bills for treatment in February 2018 and a penalty for the late paid December 2017 treatment. UPT contended that DHSS should not be able to controvert treatment after the treatment occurred, and that it was entitled to payment for the February 2018 treatment and a penalty on the late paid December 2017 treatment. UPT's worker's

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<sup>45</sup> AS 23.30.128(b).

<sup>46</sup> *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

<sup>47</sup> *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

<sup>48</sup> AS 23.30.122.

<sup>49</sup> AS 23.30.128(b).

<sup>50</sup> AS 23.30.122; AS 23.30.128(b).

compensation claim was for payment for its February 2018 treatments to Ms. Thomas, including interest and penalty, and for a penalty on the alleged late paid December 2017 treatment.<sup>51</sup>

Ms. Thomas was injured in January 2017. She initially treated with Dr. Bormann on January 20, 2017, and then with Dr. Young between January 25 and December 6, 2017.<sup>52</sup> In December 2017, Dr. Bormann referred Ms. Thomas to UPT for physical therapy. UPT treated Ms. Thomas on December 12, 14, 19, and 21, 2017, January 2, 4, 9, 11, and 25, and February 7, 14, and 27, 2018. DHSS arranged for Ms. Thomas to be seen by its EME physicians, Drs. Green and Bauer, on February 28, 2018, and on March 13, 2018, controverted all benefits after January 20, 2017.<sup>53</sup> DHSS disputed payment for the physical therapy treatment in February 2018 and a penalty on the bills for the December 2017 treatment. DHSS eventually paid for two days of physical therapy in December 2017, claiming the delay was due to the bills not being timely submitted. When DHSS paid for these two days, it did so asserting it was an attempt to resolve the dispute. Nonetheless, DHSS did not pay for the three days of physical therapy in February 2018, asserting that its EME found the work injury healed sometime in early 2017 and, therefore, the physical therapy treatment was unnecessary. It appears DHSS paid most of Ms. Thomas's medical bills, including the January 2018 physical therapy treatments.

DHSS asserts UPT never identified the compensability of the physical therapy as an issue for hearing relying on UPT's statement in an early pre-hearing that it was not contesting the controversion. However, UPT's claim was always that it wanted the bills paid.<sup>54</sup> Payment for medical treatment is a compensability issue.

The prehearing conference summary for July 5, 2018, stated UPT was seeking payment for all treatment that occurred prior to the filing of the controversion.<sup>55</sup> The

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<sup>51</sup> Exc. 127.

<sup>52</sup> Exc. 002; 009-070.

<sup>53</sup> Exc. 097-121; 122.

<sup>54</sup> Exc. 127.

<sup>55</sup> Exc. 145-147.

prehearing conference summary for August 29, 2018, under Issues, identified the “[m]erits of [UPT’s] 3/23/2018 Workers’ Compensation Claim” as the issue for hearing.<sup>56</sup> The Board’s regulation provides that the issue for hearing is that which is set forth in the prehearing conference summary. The regulation states:

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.<sup>57</sup>

The Alaska Supreme Court (Court), in *Schmidt*, plainly stated “the summaries of the prehearing conferences, not the pleadings, control the subsequent course of the suit.”<sup>58</sup>

Likewise, whatever statements were made at the prior prehearing conferences, the issue for hearing was plainly stated in the August 29, 2018, summary. It was at this prehearing conference that the date for hearing was set. The prehearing conference summary identified the issue for hearing as the merits of UPT’s claim. This prehearing conference summary is what controls the issue for hearing. DHSS did not seek modification of the issue as stated in the prehearing conference summary and, thus, was on notice that the merits of UPT’s claim for payment of its physical therapy bills was an issue for hearing. DHSS was on notice that issues for hearing would be the merits of UPT’s claim, along with DHSS’s defense that the timing of the controversion precluded any penalty and payment. In order to determine if UPT’s bills should be paid despite the controversion, the Board, of necessity, had to determine if the treatment was reasonable and necessary for the work injury.

The Board properly identified the issues as whether the treatment provided by UPT was compensable and, thus, payable to UPT, and whether UPT would be entitled to

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<sup>56</sup> Exc. 153-155.

<sup>57</sup> 8 AAC 45.065 (emphasis added).

<sup>58</sup> *Schmidt v. Beeson Plumbing and Heating, Inc.*, 869 P.2d 1170, 1176 (1994).

interest and penalty for either or both the December 2017 and February 2018 dates of treatment. DHSS controverted all benefits for Ms. Thomas after January 20, 2017.<sup>59</sup>

*b. DHSS timely filed its controversion.*

The Board considered whether DHSS properly controverted payment of the February 2018 bills by finding DHSS controverted all benefits for Ms. Thomas based on its EME report and filed the controversion with UPT within 30 days of receipt of the invoices for the February 2018 treatment. The EME was performed the day after the last physical therapy appointment and the controversion was filed after the treatment was completed and the invoices submitted. Nonetheless, the controversion was filed within 30 days of the receipt of the invoices from UPT for the February 2018 treatment.

The purpose of a controversion is to put the injured worker and the treatment providers on notice that the employer disputes the injury, the treatment, and/or the cause of the injury. Once an employer controverts benefits, the employee and/or the provider have the right to seek a hearing to determine what benefits are compensable. The Board will then decide if the benefits sought are compensable under the Alaska Workers' Compensation Act (Act).

UPT argues that it is unfair for the controversion to have retroactive effect, which is a sympathetic stance. However, UPT has a remedy which it used. That is, it was entitled to file a claim and have the Board decide if the treatment should be paid for in spite of the controversion. It did just that. To make a decision, the Board needed to determine if the treatment provided by UPT was reasonable and necessary and, thus, compensable. The process protects both the employer from paying for unreasonable and/or unnecessary treatment and protects the provider by having a remedy through which to seek recovery.

UPT contends that DHSS wrongfully denied payment for its physical therapy and, therefore, it was entitled to a penalty. UPT relied solely on AS 23.30.097(d). AS 23.30.097(d) provides that medical bills must be paid within 30 days of receipt of the bill and the completed report. AS 23.30.097 provides in pertinent part:

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<sup>59</sup> Exc. 122.

(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.

This subsection does not discuss a possible controversion.

The controversion mentioned in subsection .097(g) allows an employer to controvert prescription costs and travel expenses within 30 days of receiving the necessary documentation, and is specifically limited to prescription costs and travel reimbursement.

g) Unless the employer controverts a charge, the employer shall reimburse an employee's prescription charges under this chapter within 30 days after the employer receives the health care provider's completed report and an itemization of the prescription charges for the employee. 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. If the employer does not plan to make or does not make payment or reimbursement in full as required by this subsection, the employer shall notify the employee and the employee's health care provider in writing that payment will not be made timely and the reason for the nonpayment. The notification must be provided not later than the date that the payment is due under this subsection.<sup>60</sup>

Controversion of any type of medical benefits is implied in subsection .097(i) which states, "[a] provider whose bill has been denied or reduced by the employer may file an appeal with the board within 60 days after receiving notice of the denial or reduction."<sup>61</sup> Moreover, the Board's regulation specifically provides for a controversion of medical treatment:

(d) Medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and a completed report in accordance with

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<sup>60</sup> AS 23.30.097(d) and (g).

<sup>61</sup> AS 23.30.097(i).

8 AAC 45.086(a). 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 the medical provider's completed report in accordance with 8 AAC 45.086(a), a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and an itemization of the prescription numbers or an itemization of the dates of travel, destination, and transportation expenses for each date of travel. If the employer controverts

(1) a medical bill or if the medical bill is not paid in full as billed, the employer shall notify the employee and medical provider in writing the reasons for not paying all or a part of the bill or the reason for delay in payment no later than 30 days after receipt of the bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and completed report in accordance with 8 AAC 45.086(a);

(2) a prescription or transportation expense reimbursement request in full, the employer shall notify the employee in writing the reason for not paying all or a part of the request or the reason for delay within the time allowed in this section in which to make payment; if the employer makes a partial payment, the employer shall also itemize in writing the prescription or transportation expense requests not paid.<sup>62</sup>

It often takes time for an employer to collect the necessary evidence to controvert a claim. Treatment and benefits are frequently paid while an employer seeks the evidence necessary to support a controversion. A controversion must be filed in good faith. Good faith means the employer has evidence which, if contrary evidence is not produced, would result in a finding the claimant is not entitled to benefits.<sup>63</sup> A good faith controversion protects the employer from paying a penalty for non-payment of medical treatment or other benefits.<sup>64</sup>

The Act is required to be interpreted in a way as to make the whole sensible. AS 23.30.001 requires the Act to be interpreted "so as to ensure the quick, efficient, fair,

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<sup>62</sup> 8 AAC 45.082 (emphasis added).

<sup>63</sup> *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

<sup>64</sup> *Id.*

and predictable delivery of indemnity and medical benefits. . . .”<sup>65</sup> To harmonize the various parts, it is necessary to find that a controversion may be filed by an employer within 30 days of receipt of medical bills, provided it has obtained the necessary supporting evidence. Here, DHSS filed a controversion for all benefits to Ms. Thomas from January 20, 2017, and ongoing. Based on this controversion, it controverted payment to UPT for physical therapy treatments in February 2018 because the invoices were received within 30 days of the controversion. This comports with the requirements of the Act.

To determine if the controversion was in good faith, the Board reviewed the EME report and determined it was the kind of evidence that would support a good faith controversion. Two medical doctors opined in the EME report that Ms. Thomas’s work injury had resolved early in January 2017. The EME report was analyzed as part of the presumption analysis. Under AS 20.30.120(a), a claim for benefits (whether from an injured worker or her medical provider) is presumed to be compensable absent evidence to the contrary.

The presumption analysis is a three-step process. At the first step, the claimant (here UPT) had to provide some evidence establishing a “preliminary link” between the treatment and the work injury. DHSS did not challenge that Ms. Thomas sustained an injury within the course and scope of her employment. UPT demonstrated that her treating physician referred Ms. Thomas for physical therapy and that it provided the treatment with its bills and daily notes. DHSS rebutted this presumption with substantial evidence through its EME report from Drs. Green and Bauer. Substantial evidence is that which is relevant, meaning it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion.<sup>66</sup> Credibility is not weighed at this step.<sup>67</sup>

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<sup>65</sup> AS 23.30.001.

<sup>66</sup> *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-612 (Alaska 1999).

<sup>67</sup> *Norcon, Inc. v. Alaska Workers’ Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

The Controversion by DHSS dated March 13, 2018, denied all benefits, including any medical treatment, occurring after January 20, 2017.<sup>68</sup> The controversion was supported by the EME report of Drs. Green and Bauer. The Board has found that UPT's March 23, 2018, WCC requested payment of unpaid medical costs plus penalty and interest. Before the Board could decide on payment, interest, and penalty, the Board, given that the controversion included all medical treatment, was required to determine if the treatment by UPT was compensable. Only then could it address when the invoices were sent to DHSS, when payment was made by DHSS to UPT, whether payment was due to UPT, and whether the controversion protected DHSS from a penalty for any late payments.

While UPT argued that the treatment should have been paid for since it occurred prior to the EME and the controversion, the controversion was properly filed and UPT's treatment timely controverted. The controversion stands for the proposition that DHSS would not pay for any treatment regardless of when it occurred because, based on its EME, any treatment was not work-related.

*c. Credibility findings by the Board are final and binding.*

In analyzing whether the treatment should be compensable, the Board relied on the *AMA Guides to the Evaluation of Permanent Impairment (Guides)*, 6th ed., 2008, which recognizes a diagnosis of "Non-specific chronic recurrent neck pain (also known as chronic strain/sprain, symptomatic degenerative disc disease, facet joint pain, chronic whiplash, etc.)" can be the basis of a permanent impairment.<sup>69</sup> The Board, utilizing its authority to investigate a claim, discounted the EME report for saying a whiplash injury is medically discredited.<sup>70</sup> This statement is not true according to the *Guides* upon which the Board is obligated to rely for permanent partial impairment (PPI) ratings.<sup>71</sup> This is

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<sup>68</sup> Exc. 122; UPT seemed to assume DHSS controverted only medical treatment after January 20, 2018, but the Controversion states all benefits after January 20, 2017, are controverted.

<sup>69</sup> *Thomas II* at 4, No. 15.

<sup>70</sup> AS 23.30.135(a).

<sup>71</sup> AS 23.30.190(b).

the kind of information upon which the Board may use its expertise in investigating and evaluating claims before it. The Court has stated the Board may rely on its “experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above” in making its investigation.<sup>72</sup> This is what the Board did here.

More importantly, it is the sole province of the Board to make credibility determinations. “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.”<sup>73</sup> Further, the mandate to the Commission by the legislature is that “[t]he board’s findings regarding the credibility of testimony of a witness before the board are binding on the commission.”<sup>74</sup> The Court has said that the “legislature requires the Commission to defer to the Board’s credibility findings. . . . We construe AS 23.30.128(b) to mean that the Commission must follow the Board’s credibility findings.”<sup>75</sup>

The Board’s finding giving less weight to the EME report is binding on the Commission. Moreover, it is supported by Ms. Thomas who testified the physical therapy helped her improve for the first time since the auto accident.<sup>76</sup> Therefore, the Board was within its authority to give less weight to the EME report than to the reports of Dr. Bormann and UPT.

*d. Filing of medical records required by statute.*

Another point on appeal is DHSS’s claim that the Board erred in ordering it to file medical records in its possession. DHSS contended the medical records were irrelevant to the claim before the Board and, therefore, it had no obligation to file them with the

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<sup>72</sup> *Fairbanks North Star Borough v. Rogers and Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

<sup>73</sup> AS 23.30.122 (emphasis added).

<sup>74</sup> AS 23.30.128(b).

<sup>75</sup> *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013).

<sup>76</sup> Hr’g Tr. at 29, L. 7-13.

Board. However, DHSS ignores the statutory language which requires, once a claim is filed, “*all parties* to the proceeding must immediately . . . send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control. . . .”<sup>77</sup> This language indicates that all medical records in possession of a party must be filed with the Board, and the party may not elect to file only those medical records it considers pertinent. Moreover, the language does not delineate between an injured worker’s claim and any other claim. As the Court has stated, medical providers have a right to file a claim with or without the injured worker filing a claim.<sup>78</sup>

Once UPT filed its claim, DHSS had a statutory duty to file immediately all medical records in its possession at that time, and to continue to file any medical records that came later into its possession. DHSS’s allegation it did not need to file the medical records in its possession with the Board is in direct conflict with the statutory mandate. The Board was correct in ordering DHSS and UPT to file any medical records related to Ms. Thomas that either of them possessed.

*e. Ms. Thomas was not a necessary party to UPT’s claim.*

DHSS contends that Ms. Thomas was an essential party and since she was never added as a party the Board could not determine the merits of whether UPT’s bills should be paid, whether the controversy was timely or not.

However, the Court, in *Barrington*, observed that AS 23.30.030 provides a medical provider with an independent claim.<sup>79</sup> The statute, in pertinent part, reads:

(4) The insurer will promptly pay to the person entitled to them the benefits conferred by this chapter, including physician’s fees, nurse’s charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and all installments of compensation or death benefits awarded or agreed upon under this chapter. The

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<sup>77</sup> AS 23.30.095(h) (emphasis added).

<sup>78</sup> *Barrington v. Alaska Communications Systems Group, Inc.*, 198 P.3d 1122, 1128 (Alaska 2008)(*Barrington*).

<sup>79</sup> *Id.*

obligation of the insurer is not affected by a default of the insured employer after the injury, or by default in giving a notice required by this policy. The policy is a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation or death benefits, and is enforceable in the name of that person. The insurer shall provide claims facilities through its own staffed adjusting facilities located within the state, or by independent, licensed, resident adjusters with power to effect settlement within the state.

The Court continued "that an employer is 'directly liable to health-care providers for treatment for work-related injuries.'"<sup>80</sup> Based on this language, UPT had the same right to seek payment for the medical treatment it provided to Ms. Thomas as she did. In determining the merits of UPT's claim, the Board necessarily had to determine if the treatment provided was necessitated by Ms. Thomas's work injury. DHSS had a direct liability to UPT.

Furthermore, Ms. Thomas testified at hearing. DHSS could have requested to cross-examine her, but chose not to do so.<sup>81</sup> The joinder of Ms. Thomas to UPT's claim was neither needed nor warranted. DHSS's rights were not hindered by Ms. Thomas not being a party to the claim of UPT.

*f. The Board's decision is supported by substantial evidence as a whole.*

The Board's decision "shall be upheld by the commission if supported by substantial evidence in light of the whole record."<sup>82</sup> The record as a whole supports the Board's decision.

The Board applied the presumption of compensability to the claim of UPT for payment of its medical treatment to Ms. Thomas and the record supports its conclusions. DHSS has focused its appeal on its belief the Board improperly decided an issue not before it, did not provide it with proper notice of the issue the Board decided, and

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<sup>80</sup> *Barrington*, 198 P.3d 1128.

<sup>81</sup> Hr'g Tr. at 29:7 – 30:14.

<sup>82</sup> AS 23.30.128(b).

inappropriately weighed the credibility of its EME report. These assertions are addressed above.

The Board found that UPT was entitled to payment, including interest, for the physical therapy treatments provided in February 2018 and utilized the presumption analysis in reaching this conclusion. The record supports the finding that the treatment was needed for the work injury. Dr. Bormann, on December 7, 2017, referred Ms. Thomas to physical therapy stating Ms. Thomas had a neck muscle strain that was likely “a prolonged whiplash type injury of the lateral neck muscles” and further concluded her headaches were secondary to the neck injury.<sup>83</sup> Ms. Thomas testified that the physical therapy improved her condition and helped bring her headaches under control.<sup>84</sup> The Board, as is its prerogative, discounted the EME report finding that their statement that whiplash injuries were long discredited to be incorrect. The Board based its opinion on the fact that the *Guides*, which the Board is required to use for PPI ratings, recognizes the very condition the EME report said did not exist.<sup>85</sup> Having discounted the EME report, the Board had substantial evidence in the referral by Dr. Bormann to UPT, the reports of UPT regarding the provided treatments, and Ms. Thomas’s testimony about the efficacy of the treatments.

Moreover, the Board’s findings regarding credibility as discussed above are binding on the Commission. Interest was due pursuant to AS 23.30.155(p) which requires interest to be paid when benefits are not paid when due. While the controversion protected DHSS from a penalty for the late payment, DHSS still owed interest on the ordered payments.

The Board discussed UPT’s issue with the timing of the controversion and found the controversion to be in good faith, based on the EME report by Drs. Green and Bauer. Even though the EME report was discounted in reaching the conclusion UPT should be

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<sup>83</sup> R. 169-170.

<sup>84</sup> Hr’g Tr. at 29:7-13.

<sup>85</sup> *See*, AS 23.30.190(b).

paid, it was substantial evidence to support the controversion and, thus, precluded DHSS from having to pay a penalty to UPT for the February 2018 treatments.

The Board also addressed the issue of whether UPT had sufficient evidence to support its claim that it had timely mailed the invoices for the December 2017 dates of treatment. The Board noted that while UPT testified to its usual and customary practice of mailing invoices within a week of service, other evidence, including the health insurance claim form for February 7, 2018, showed the practice was not always followed. DHSS asserted it had not received timely the invoices for the two dates in December 2017, and, only received the invoices when UPT sent invoices in April 2018. Therefore, DHSS did not owe a penalty to UPT for the December 2017 treatment since the invoices were received after the controversion was in place.<sup>86</sup>

#### 5. Conclusion.

The Board's decision is AFFIRMED.

Date: 11 October 2019

Alaska Workers' Compensation Appeals Commission



*Signed*

\_\_\_\_\_  
Michael J. Notar, Appeals Commissioner

*Signed*

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Amy M. Steele, Appeals Commissioner

*Signed*

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Deirdre D. Ford, Chair

#### APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

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<sup>86</sup> There is a question as to whether DHSS was on notice of ongoing physical therapy treatment after receiving Dr. Bormann's referral, but it is the provider's obligation to send invoices timely with appropriate attachments. AS 23.30.097.

Clerk of the Appellate Courts  
303 K Street  
Anchorage, AK 99501-2084  
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 270, issued in the matter of *State of Alaska, Department of Health and Social Services vs. Carolyn A. Thomas and United Physical Therapy, Inc.*, AWCAC Appeal No. 18-024, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 11, 2019.

Date: October 15, 2019



*Signed*

K. Morrison, Appeals Commission Clerk