

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

KIEL L. CAVITT,)	
)	
Employee,)	
Claimant,)	INTERLOCUTORY
)	DECISION AND ORDER
v.)	
)	AWCB Case No. 201513001
D & D SERVICES, LLC d/b/a NOVUS)	
AUTO,)	AWCB Decision No. 20-0012
)	
Employer,)	Filed with AWCB Anchorage, Alaska
and)	on March 6, 2020
)	
OHIO CASUALTY INSURANCE)	
COMPANY,)	
)	
Insurer,)	
Defendants.)	

Kiel L. Cavitt's July 5, 2018, July 8, 2018, and July 13, 2018 claims were originally heard on October 15, 2018 in Anchorage, Alaska. (*Cavitt v. D&D Auto Services, LLC*, AWCB Decision No. 18-0103 (October 15, 2018) (*Cavitt III*) was appealed to the Alaska Workers' Compensation Appeals Commission (Commission), which reversed *Cavitt III*'s holding the Board did not have jurisdiction to consider Employee's claim for a penalty on late-paid temporary total disability (TTD). By the parties' October 17, 2019 oral stipulation, a hearing was heard on the written record on December 3, 2019. Attorney Keenan Powell represented Kiel Cavitt (Employee). Attorney Martha Tansik represented D & D Services, LLC and Ohio Casualty Insurance Company (Employer). The record closed at the hearing's conclusion on December 3, 2019, but, after the Alaska Supreme Court issued *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d

784 (Alaska 2019) (*Rusch*), the record was reopened to allow the parties to address the effect, if any, of that decision. The record closed again on January 15, 2020.

HISTORY

In *Cavitt v. D&D Services, LLC*, AWCB Decision No. 17-0109 (September 13, 2017) (*Cavitt I*), Employer acknowledged Employee had been injured in the course of his employment. *Cavitt I* ordered Employer to pay Employee TTD until he was medically stable and to pay interest on past TTD that was not timely paid. It denied Employee's claims for a compensation rate adjustment, unfair or frivolous controversion, and penalty.

In *Cavitt v. D&D Services, LLC*, AWCAC Decision No. 248 (May 4, 2018) (*Commission Decision 248*), the Commission affirmed the Board's denial of a compensation rate adjustment and the unfair or frivolous controversion and penalty claims. The Commission determined Employer had "vigorously resisted" Employee's claim for ongoing TTD, and the *Cavitt I*'s award of attorney fees did not properly reflect the value of that benefit. The Commission remanded the case for a redetermination of attorney fees.

Cavitt v. D&D Services, LLC, AWCB Decision No. 18-0060 (June 25, 2018) (*Cavitt II*), addressed several issues, including the redetermination of attorney fees ordered by *Commission Decision 248*. Of relevance is that it found Employee was entitled to TTD from February 13, 2018 through April 12, 2018, but he was not entitled to a penalty for late payment.

Cavitt III addressed Employee's July 5, 2018, July 8, 2018, and July 13, 2018 claims for a penalty on the TTD from February 13, 2018 through April 12, 2018, late paid medical costs, and attorney fees and costs. *Cavitt III* held it did not have jurisdiction to determine Employee's claim for penalty on the late-paid TTD because Employee had appealed that issue to the Commission.

In *Cavitt v. D&D Services, LLC*, AWCAC Decision No 264 (July 8, 2019) (*Commission Decision 264*), the Commission reversed *Cavitt III*, holding Employee had appealed the issue of referral to

the Division of Insurance for an unfair or frivolous controversion, not whether he was entitled to a penalty because the TTD had not been timely paid.

ISSUES

Employee contends he is entitled to a penalty and interest on TTD benefits from February 13, 2018 through April 12, 2018 that were not timely paid. Employer contends the benefits were timely paid after the issuance of *Cavitt II*.

1) Is Employee entitled to a penalty and interest on TTD benefits from February 13, 2018 through April 12, 2018?

Employee contends he is entitled to attorney fees and costs related to the penalty on the late-paid TTD, late paid attorney fees, and late paid medical benefits. Employer contends the TTD was not paid late, and, consequently, no attorney fees are due. Employer also contends much of the attorney fee related to the late-paid medical bill was incurred after the bill had been paid, and the total fees are unreasonable. Employer concedes it paid attorney fees two days late and voluntarily paid the penalty; as a result, it contends the attorney fees incurred on the issue are unreasonable.

2) Is Employee entitled to attorney fees and costs, and if so, in what amount?

FINDINGS OF FACT

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

All findings in *Cavitt I*, *Cavitt II*, and *Cavitt III* are incorporated herein by reference. The following facts are reiterated from *Cavitt I*, *Cavitt II*, *Cavitt III* or are established by a preponderance of the evidence:

1. Employee worked for Employer as a glazier. On August 14, 2015, he was working on scaffolding replacing the windshield in a motorhome. He injured his right elbow when he fell while stepping off the scaffolding. (*Cavitt I*).
2. On July 20, 2016, a hearing was held on Employee's May 11, 2016 claim. At the hearing, the parties stipulated Employee had been injured in the course and scope of his employment with Employer. (*Cavitt I*).

3. On February 12, 2018, Employer controverted TTD based on an employer's medical evaluator's (EME) opinion that Employee was medically stable. (*Cavitt III*).
4. On February 22, 2018, Employee's doctor reviewed the EME report and agreed Employee was medically stable. (*Cavitt II*).
5. On May 10, 2018, Employer withdrew its February 12, 2018, controversion based on Employee's doctor's deposition statement that Employee needed further physical therapy and other conservative treatment and was, therefore, not medically stable. (*Cavitt II*).
6. At the *Cavitt II* hearing on May 15, 2018, Employee contended Employer had unfairly or frivolously controverted TTD from February 13 through April 12, 2018, and both the TTD and a penalty were due. (Employee, Hearing Brief, May 10, 2018, Employee Hearing Arguments).
7. On May 22, 2018, Employer paid Employee \$2,303.36 for the TTD from February 13, 2018 through April 12, 2018. (Employer, Check Number 87765661, and Postmarked Envelope).
8. *Cavitt II*, issued on June 25, 2018, held Employee was entitled to TTD for the period from February 13 through April 12, 2018, given Employer's withdrawal of its controversion. However, *Cavitt II* held Employer's controversion was not unfair or frivolous as it was based on a responsible medical opinion. Because Employer had withdrawn its controversion, *Cavitt II* ordered Employer to pay the TTD from February 13 to April 12, 2018, together with interest. It did not, however, award a penalty for late payment of the TTD, noting the TTD would be due within seven days of the withdrawal of the controversion (i.e., May 17, 2018), but the time period had not run by the date of the hearing. *Cavitt II* awarded Employee attorney fees of \$38,898.53. (*Cavitt II*).
9. On July 5, 2018, Employee filed a claim seeking a penalty on TTD from February 23, 2018 [*sic*] through April 12, 2018 because it was not paid by May 10, 2018, as well as interest and attorney fees. (Claim, July 5, 2018).
10. On July 9, 2018, Employee filed a claim seeking penalty and interest on a March 5, 2018 bill from Dr. Westley, one of his medical providers, as well as the penalty, interest, and attorney fees set out in his July 5, 2018 claim. (Claim, July 8, 2018).
11. On July 11, 2018, Employer mailed a check for \$38,898.53 to Employee's attorney for the attorney fees awarded in *Cavitt II*. (Employer, Check No. 87798673, July 11, 2018).
12. Also on July 11, 2018, Employer mailed a check for \$18.96 to Employee for interest on the TTD from February 13, 2018 through April 12, 2012. (Employer, Check No. 87799912, July 11, 2018).

13. On July 13, 2018, Employee filed another claim seeking penalties, interest, and attorney fees on the basis Employer had not timely paid the attorney fees and costs awarded in *Cavitt II*.
14. On July 20, 2018, Employee appealed *Cavitt II* to the Appeals Commission. (*Cavitt III*).
15. One issue on appeal was whether *Cavitt II* “erred in denying penalties for late-paid TTD from February 13, 2018 through April 12, 2018.” Employee’s points on appeal did not include the issue of unfair or frivolous controversion. (Points on Appeal, July 20, 2018).
16. On July 30, 2018, Employer filed a petition to dismiss Employee’s July 5, 2018 claim. Employer contended the Board lacked jurisdiction over the penalty issue because it had already been decided and was on appeal to the Commission. (Employer, Petition, July 30, 2018).
17. On August 7, 2018, Employer mailed a check for \$152.81 to Dr. Westley for his March 5, 2018 services. The check reflected payment under the Alaska Medical Fee Schedule, but did not include penalty or interest. (Employer, Check No 87816902, August 7, 2018; Observation).
18. At the August 29, 2018 prehearing conference, the parties stated they had resolved Employee’s July 13, 2018 claim for late-paid attorney fees and costs; Employer had paid the penalty, and Employee waived the claim for interest. They further agreed Employee’s claim for penalty and interest on TTD from February 23, 2018 through April 13, 2018, his claim for penalty and interest on the medical provider’s bill, and his claim for attorney fees and cost be heard on the written record on September 27, 2018. (*Cavitt III*).
19. The penalty under AS 23.30.155(f) on the \$38,898.53 in fees and costs awarded in *Cavitt II* would be \$9,724.63. (Observation).
20. On September 6, 2018, Employee stated he was still seeking the attorney fees and costs claimed in his July 5th, 9th and 13th claims. (Employee, Objection to Prehearing Conference Summary, September 6, 2018).
21. The August 29, 2018, prehearing conference summary was not amended in response to Employee’s objection. (Record, Observation).
22. On September 20, 2018, Employee withdrew his claim for penalty and interest on the medical provider’s bill. (*Cavitt III*).
23. In its brief for the *Cavitt III* hearing, Employer contended the TTD from February 13 through April 13, 2018 did not become due until *Cavitt II* was issued. Employer maintained the only remaining issue for the September 27, 2018 hearing was Employee’s claim for penalty. (Employer, Hearing Brief, September 20, 2018).

24. On March 29, 2019, the Commission issued Decision No. 259 addressing Employee's July 20, 2018 appeal.

25. *Cavitt III*, issued on October 18, 2018, determined the Board lacked jurisdiction to rule on Employee's claim for late-paid TTD, as the issue was on appeal to the Commission. Because it did not award Employee any benefits, it also denied Employee's claim for attorney fees. (*Cavitt III*).

26. On July 8, 2019, the Commission issued Decision No. 264. It stated *Cavitt III* "erred in construing the issue on appeal to be the issue of a penalty. The actual issue on appeal to the Commission in [*Cavitt II*] was whether or not [Employer] had unfairly and frivolously controverted his benefits." It remanded the case to the Board "to ascertain whether D&D failed to pay timely the TTD the Board awarded to Mr. Cavitt. If D&D failed to pay timely the TTD, then the mandatory penalty must be paid, pursuant to another Board order." (*Commission Decision 264*).

27. At the October 17, 2019 prehearing conference, a written record hearing was set for December 3, 2019, to consider the remand of *Cavitt III*. The issue for the hearing was, "If TTD was paid late, EE seeks penalty, interest, and attorney fees." (Prehearing Conference Summary, October 17, 2019).

28. On October 21, 2019, Employee objected to the October 17, 2019 prehearing conference summary stating he was "seeking all fees that were previously sought in the hearing resulting in decision No. 18-0103 [*Cavitt III*] including fees for pursuing penalties and interest subject of the appeal, an now being remanded and fees for obtaining medical benefits which the Board failed to address in No. 18-0103, and which was remanded as well." (Employee, Objection to Prehearing Conference Summary, October 21, 2019).

29. At the November 5, 2019 prehearing conference, the issues for the December 3, 2019 written record hearing were revised. The issues were changed to:

The remand of *Commission Decision 264*

Employee's July 5, 2018 Claim for penalty, interest, and attorney fees and costs

Employee's July 8, 2019 Claim for attorney fees and costs

Employee's July 13, 2019 claim for attorney fees and costs

30. The vast majority of Employee's brief for the December 3, 2019 hearing is taken word for word from his brief for the *Cavitt III* hearing; it still includes references to pending appeals at the

Commission, even though there currently are none. (Employee, Hearing Brief, November 25, 2019).

31. On November 25, 2019, Employee filed the affidavit of his attorney regarding fees and costs. The attorney identified several other workers' compensation cases in which she had represented injured workers. She stated she had been paid \$400.00 per hour for workers' compensation work in the past, and was asking for that rate in this case. She also billed \$185.00 per hour for paralegal work that she had performed herself. Attached to the exhibit was a billing worksheet that detailed 17.3 hours of attorney time for a total of \$6,920.00 and 2.4 hours of paralegal time for a total of \$444.00, resulting in \$7,364.00 in fees. In addition, the exhibit documented \$18.79 in costs. (Employee, Attorney Fee Affidavit, September 19, 2018).

32. On December 6, 2019, shortly after the December 3, 2019 written record hearing, the Alaska Supreme Court issued *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019) addressing attorney fees in workers' compensation cases. As a result, the panel reopened the record and asked the parties to address the effect, if any, of *Rusch* by January 15, 2020. (Letter to the Parties, December 12, 2019).

33. On December 27, 2019, Employee filed a revised attorney fee affidavit. The tasks and time spent are identical to the November 25, 2019 fee affidavit, but Employer's attorney increased her requested hourly rate to \$425.00 per hour, including the time she had previously billed at the reduced paralegal rate. In addition to describing her experience in workers' compensation, Employee's attorney described a variety of other litigation she had been engaged in since she was admitted to the bar in 1983. In the revised affidavit, Employee was requesting total attorney fees of \$8,372.50 and costs of \$18.79. She stated she had represented Employee since May 2016. (Employee, Attorney Fee Affidavit, December 27, 2019).

34. On December 27, 2019, Employee also submitted his brief on the attorney fees issue. Employee noted *Rusch* required the Board to consider the entirety of an attorney's experience, not just experience in workers' compensation, and *Rusch* stated that paralegal work done by an attorney is compensable at the attorney's regular rate. Employee explained his attorney's experience and argued that based on that experience she should receive \$425.00 per hour.

35. On January 14, 2020, Employer filed its brief on the attorney fees issue. Employer contended Employee's attorney should be estopped from retroactively increasing the hourly rate

for work previously done. Additionally, Employer contended by charging the full attorney rate for work previously billed at the paralegal rate, the fee for some of those tasks was unreasonable.

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

...

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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 23.30.008. Powers and duties of the commission.

(a) The commission shall be the exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter in those matters that have been appealed to the commission, except for an appeal to the Alaska Supreme Court. . . . Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

AS 23.30.125. Administrative review of compensation order.

....

(c) If a compensation order is not in accordance with law or fact, the order may be suspended or set aside, in whole or in part, through proceedings in the commission brought by a party in interest against all other parties to the proceedings before the board.

AS 23.30.128. Commission proceedings.

....

(d) The commission may affirm, reverse, or modify a decision or order upon review and issue other orders as appropriate. The commission may remand matters it determines were improperly, incompletely, or otherwise insufficiently developed. The commission may remand for further proceedings and appropriate action with or without relinquishing the commission's jurisdiction of the appeal. The administrative adjudication procedures of AS 44.62 (Administrative Procedure Act) do not apply to the proceedings of the commission.

In *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965), the Supreme Court held an administrative agency's jurisdiction is suspended when a party has appealed the agency's decision:

It is the general rule that when an order of an administrative agency is appealed to a court, the agency's power and authority in relation to the matter is suspended as to questions raised by the appeal [citations omitted]. The rule is based on common sense. If a court has appellate jurisdiction over a decision of an administrative body, it would not be consistent with the full exercise of that jurisdiction to permit the administrative body also to exercise jurisdiction which would conflict with that exercised by the court. The court's jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.

Whether, or to what extent, the board retains jurisdiction hinges on the questions raised by the appeal. In *Pietro v. Unocal Corporation*, AWCB Decision No. 11-0132 (August 25, 2011), the employee argued the board retained jurisdiction during an appeal to the Commission. The issue on appeal was the compensability of the employee's injuries. The board determined it did not have jurisdiction, because the issues before it were wholly dependent on the issues in the appeal. On the other hand, the board found it had jurisdiction over a claim for attorney's fees where the appeal was limited to the correctness of the compensation rate. *Barnes v. State of Alaska*, AWCB Decision No. 84-0130 (May 10, 1984).

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. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

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

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion (actual or in fact) is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id.* at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* In this latter scenario, reasonable fees may be awarded. *Id.* at 152-153. When an employer voluntarily pays a disputed amount after intervention by an employee's attorney, that payment can be construed as the equivalent of "awarding" compensation. *State Dept. of Highways v. Brown*, 600 P.2d 9 (Alaska 1979).

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), after a contentious case, the parties reached a settlement of all benefits except the employee's attorney fees. The claimant's attorney sought \$425.00 per hour and submitted an affidavit detailing 277.55 hours of work as well as a list of witness who would testify at a hearing on his fees. At hearing, the claimant was permitted to testify, but the attorney and other witnesses were precluded from testifying. The Board did allow the claimant's attorney to file a declaration stating he had more than 35 years' experience practicing law in multiple states, had represented hundreds of personal

injury clients and dozens of workers' compensation clients, including many clients he had assisted pro bono. In reviewing the claimed hourly rate, the Board stated it would review attorney fee awards in other published cases, but did not provide the parties with copies of the decisions or the names of the cases upon which it relied. The Board reduced claimant's attorney's hourly rate to \$300.00 per hour and the amount for "paralegal tasks" to \$130.00 per hour. In addition, the panel reduced the fee for time spent on tasks on which the claimant did not succeed. The Supreme Court reversed holding the Board should have considered the witnesses' testimony and allowed the parties the opportunity to respond to any cases or other information on which it relied. The Court held that because attorneys are not required to hire paralegals, it was improper to reduce the hourly rate when the work is actually done by the attorney. The Court also held the Board must consider all of an attorney's experience, not just the attorney's compensation experience. The Court held the Board must consider all factors in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee. Those factors are:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services 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 services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature 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.

The Supreme Court remanded *Rusch* for reconsideration consistent with its decision.

AS 23.30.155. Payment of compensation.

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

(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.

(f) If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment. The additional amount shall be paid at the same time as, but in addition to, the compensation, unless review of the compensation order making the award as provided under AS 23.30.008 and an interlocutory injunction staying payments is allowed by the court. The additional amount shall be paid directly to the recipient to whom the unpaid compensation 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.

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. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

ANALYSIS

1) Is Employee entitled to a penalty and interest on TTD benefits from February 13, 2018 through April 12, 2018?

Cavitt II found Employee was entitled to TTD from February 13, 2018 through April 12, 2018, but because it found Employer's February 12, 2018 controversion was not unfair or frivolous, it held the TTD was not due until seven days after Employer withdrew its controversion. Because

Employer withdrew the controversion on May 10, 2018, and the *Cavitt II* hearing was on May 15, 2018, it was unknown whether Employer had timely paid the TTD, and, consequently, whether Employer owed a penalty for untimely payment. Based on Employee's description of the issues on appeal to the Commission, *Cavitt III*, issued on October 15, 2018, held the Board lacked jurisdiction to determine whether Employee was due a penalty on the TTD. *Commission Decision 264*, held the Board had erred in determining the issue on appeal, and remanded the case to the Board to determine whether Employee is due a penalty for late-paid TTD.

As *Cavitt II* noted, with Employer's May 10, 2018 withdrawal of its controversion, it was no longer denying Employee was entitled to TTD from February 13, 2018 through April 12, 2018. As a result, *Cavitt II* stated Employer would be liable for a penalty under AS 23.30.155(e) if the TTD was not paid within seven days of the withdrawal of the controversion, which would be May 17, 2018. Employer did not pay the TTD until May 22, 2018, twelve days after it withdrew the controversion. Because the TTD was not timely paid, Employee is entitled to a penalty of 25 percent under AS 23.30.155(e). Twenty-five percent of the \$2,303.36 in TTD is \$575.84.

Employer's argument that the TTD was not due until 14 days after *Cavitt II* was issued is not well taken. Any compensation installment payable without an award must be paid within seven days after it becomes due to avoid a penalty. At the time of the *Cavitt II* hearing, Employer had withdrawn its controversion; the TTD was no longer in dispute and was payable without an award. Although *Cavitt II* ordered Employer to pay the TTD, it did so because it was undisputed, not to resolve an issue as to whether it was owed.

2) Is Employee entitled to attorney fees and costs, and if so, in what amount?

Employee seeks attorney fees for work done in regard to three claims: his July 5, 2018 claim for penalty and interest on the late paid TTD from February 13 through April 12, 2018, his July 8, 2018 claim for failure to timely pay Dr. Westley's bill as well as penalty and interest, and his July 13, 2018 claim for penalty and interest resulting from the failure to pay attorney fees and costs as ordered by *Cavitt II*.

The July 5, 2018 Claim:

Employee sought penalty and interest on the late paid TTD from February 13 through April 12, 2018. Employer paid interest on July 11, 2018, and the penalty was ordered in this decision. Although Employer voluntarily paid the interest, it did not do so until Employee's attorney had filed a claim. Under *Brown*, when an employer voluntarily pays a disputed amount after intervention by a claimant's attorney, the payment can be construed as being paid under an award. As a result, Employee's attorney's efforts to obtain the penalty and interest were successful, and Employee will be awarded related attorney fees and costs.

The July 8, 2018 Claim:

Employee sought payment of Dr. Westley's bill together with a penalty and interest. As *Cavitt II* noted, the claim for penalty and interest was subsequently withdrawn. However, Employer paid Dr. Westley's bill on August 7, 2018. Again, under *Brown*, this is construed as being due to the efforts of Employee's attorney. Although Employee withdrew the claim for penalty and interest, Employee's attorney's fee affidavit, shows only minimal time spent on the claim after the attorney learned Dr. Westley's bill had been paid. The amounts billed for that time are de minimus.

Employer contends Employee should not be awarded full fees on this issue because it is unreasonable to incur fees that are several times the amount of the underlying bill. However, the amount of a medical bill is not always a reflection of the significance of the result. An employee has an interest in maintaining a good relationship with his medical providers, and ensuring they are timely paid may be more important than the amount of a particular bill. Because Employee's attorney uses block billing in which an entry may include time spent on more than one issue, it cannot be determined precisely how much time Employee's attorney devoted to the medical bill issue, but the amount is not manifestly unreasonable. Employee will be awarded related attorney fees and costs.

The July 13, 2018 Claim:

Employee sought a penalty and interest resulting from Employer's failure to timely pay attorney fees and costs ordered in *Cavitt II*, which was issued on June 25, 2018. Under AS 23.30.155(f), payment of the attorney fees awarded to Employee were due by July 9, 2018. Because Employer

mailed the check for attorney fees on July 11, 2018, Employee's attorney was also entitled to a penalty and interest, but Employer also mailed Employee's attorney a check for interest on July 11, 2018, leaving only the penalty and the attorney fees claimed in the July 13, 2018 claim in dispute. Although the exact date is unclear, at the August 19, 2018 prehearing conference, the parties stated they had resolved the interest and penalty on the late-paid attorney fees. Employee's attorney's December 27, 2019 fee affidavit does not show any work done on the July 13, 2018 claim after August 2, 2018. Employee will be awarded related attorney fees and costs.

Because Employee's attorney utilized block billing, it is sometimes impossible to accurately allocate the fee charged to one of the three claims or to the penalty issue remanded by the Commission. However, because all of the work has been found compensable, an allocation is unnecessary. In addition to reviewing the work done, *Rusch* requires the Board to look at the eight factors in Alaska Rule of Professional Conduct 1.5(a) in determining a reasonable fee:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly:

The issues of penalty, interest, and attorney fees are common in workers' compensation cases. They are not particularly difficult, and do not require an unusually high level of skill to perform.

2. The likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer:

To some extent, time spent working on any client's case prevents an attorney from spending that time on another client's case. However, in her affidavit, Employee's attorney did not state the work for Employee precluded her from other employment.

3. The fee customarily charged in the locality for similar services:

In her affidavit, Employee's attorney stated she was requesting \$425.00 per hour "pursuant to *Rusch*." However, while the attorney in *Rusch* requested \$425.00 per hour, the Supreme Court did not award him that amount, but remanded for a determination of a reasonable fee. Neither party provided any evidence as to the hourly rate customarily awarded to

employee attorneys in workers' compensation cases in Anchorage. Employee's attorney has previously been awarded \$400.00 per hour.

4. The amount involved and the results obtained:

Employee's attorney was successful in obtaining a twenty five percent penalty on the late-paid TTD of \$575.84 and the voluntarily paid penalty of \$9,724.63 on late-paid attorney fees and costs. Also, Employee's attorney's efforts resulted in the payment of Dr. Westley's bill of \$152.81; as noted above, given the importance of Employee's relationship with his doctors, the significance of this payment is greater than the amount of the bill itself. In total, Employee's attorney was successful in obtaining \$10,453.28 in benefits and preserving Employee's relationship with his treating physician to which a monetary figure cannot be assigned..

5. The time limitations imposed by the client or by the circumstances:

In her affidavit, Employee's attorney did not identify any time limitation imposed by the client or the circumstances.

6. the nature length of the professional relationship with the client;

Employee's attorney has represented him since May 2016. This factor may favor either an increased fee or a decreased fee, depending on the case. In this case, the knowledge of the case that Employee's attorney gained during approximately three and one-half years suggests some tasks may have been completed in less time than would have been required for an attorney less familiar with the case.

7. The experience, reputation and ability of the lawyer or lawyers performing the services:

Employee's attorney has practiced law in Alaska since 1983, and has significant litigation experience, both in workers' compensation and other areas of law.

8. Whether the fee is fixed or contingent:

Virtually all fees for employee attorneys in workers' compensation are contingent. The contingent nature of the work is considered in determining an appropriate hourly rate.

Employer contends because Employee's attorney is no longer billing at a reduced rate for what was formerly "paralegal work," the fee for some routine tasks is now unreasonable. While the time spent and fee charged for a particular task may be relevant in determining a reasonable fee, under Rule of Professional Conduct 1.5(a), the focus is on the reasonableness of the entire fee. Given the evidence in the file, Employee will be awarded attorney fees for 19.7 hours at \$400.00 per hour, or \$7,880.00 plus costs of \$18.79, for a total of \$7,898.79. In light of the benefits obtained and the time expended, this is a reasonable, fully compensatory amount.

CONCLUSIONS OF LAW

- 1) Employee is entitled to a penalty, but not interest on the TTD benefits from February 13, 2018 through April 12, 2018.
- 2) Employee is entitled to attorney fees and costs of \$7,898.79.

ORDER

- 1) Employer is ordered to pay Employee a penalty of \$575.84 on the TTD from February 13, 2018 through April 12, 2018.
- 2) Employer is ordered to pay Employee attorney fees and costs of \$7,898.79.

Dated in Anchorage, Alaska on March 6, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Ronald P. Ringel, Designated Chair

/s/

Nancy Shaw, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of KIEL L. CAVITT, employee / claimant v. D & D SERVICES, LLC, d/b/a NOVUS AUTO, employer; OHIO CASUALTY INSURANCE COMPANY, insurer / defendants; Case No. 201513001; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by Certified U.S. Mail, postage prepaid, on March 6, 2020.

_____/s/
Nenita Farmer, Office Assistant