ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

TONY BEEMAN, Employee, Claimant, v. WEAVER BROTHERS, INC., Employer, and CONTINENTAL CASUALTY CO., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200801340 AWCB Decision No. 13-0101 Filed with AWCB Fairbanks, Alaska on August 28, 2013

Tony Beeman's (Employee) October 18, 2011 claim was heard on August 8, 2013 in Fairbanks, Alaska. This date was selected on May 13, 2013. Attorney Robert Beconovich appeared and represented Employee. Attorney Richard Wagg appeared telephonically and represented Weaver Brothers, Inc. and Continental Casualty Co., (Employer). There were no witnesses. The record closed at the hearing's conclusion on August 8, 2013.

ISSUE

The sole issue presented is Employee's entitlement to attorney fees and costs. Employee contends the parties have agreed Employer will pay for a magnetic resonance imaging (MRI) study and for the surgical evaluation. He contends he filed a claim seeking medical treatment, and the agreed upon MRI and surgical evaluation are medical treatment, so he has prevailed on an issue in his claim and is therefore entitled to attorney fees and costs. He cites *Childs v.*

Copper Valley Electric Assoc., 860 P.2d 1184 (Alaska 1993) and *State of Alaska v. Brown*, 600 P.2d 9 (Alaska 1979) in support of his position.

Employer contends it has agreed to pay for an MRI and a surgical evaluation. However, it contends Employee filed his claim seeking preauthorization for surgery and attorney fees are premature because no benefits have been awarded. It further contends there is not yet even a dispute for the board since there has been no recommendation for surgery and even Employee's treating physician has stated Employee is not a candidate for surgery. It acknowledges Employee's attorney has provided services, and contends if there is a future dispute over the need for surgery, then Employee might be entitled to attorney fees, if he is successful on his claim.

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

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On January 21, 2008, Employee injured his lower back and hip moving tanker hoses throughout the day while employed as a truck driver. (Report of Occupational Injury or Illness, January 31, 2008).

2) Employee initially sought chiropractic treatment. (Sun 7 chiropractic chart notes, January 24, 2008 to April 21, 2008).

3) On January 29, 2008, Employee had a magnetic resonance imaging (MRI) study that showed mild central canal stenosis at L4-5 with moderate to severe right facet hypertrophy and mild to moderate neural foraminal encroachment with nerve root compression at L5-S1. (MRI report, January 29, 2008).

4) On February 1, 2008 and February 4, 2008, Employee presented to Fairbanks Urgent Care complaining of lower back pain. J.A. Jellison, PA-C, concluded Employee required referral to a specialist because of the MRI results. Employee stated his chiropractor would initiate the referral. (Jellison reports, February 1, 2008; February 4, 2008).

5) On February 14, 2008, Marc Slominski, M.D., performed a caudal epidural steroid injection. (Slonimski report, February 14, 2008; Slominski letter, February 16, 2008).

6) On February 21, 2008, Dr. Slonimski performed a left S-1 epidural steroid injection. (Slonimski report, February 21, 2008).

7) On March 5, 2008, Employee saw Dr. Slonimski and inquired about surgical intervention. Dr. Slonimski did not think additional epidural steroid injections would be beneficial and referred Employee to David Witham, M.D. (Slonimski report, March 5, 2008).

8) On March 13, 2008, Employee began treating with Dr. Witham. Dr. Witham initially diagnosed left lumbar radiculopathy secondary to L5-S1 disc bulge and impingement and stated Employee "may wish to proceed with surgery in the not too distant future due to the severity of pain and its failure thus far to improve." He asked Employee to return in a week for a follow-up evaluation. (Witham report, March 13, 2008).

9) On March 18, 2008, Employee saw Dr. Witham for a follow-up evaluation and stated he would like to proceed with surgery. Dr. Witham noted he thought surgery was appropriate under the circumstances. (Witham report, March 18, 2008)

10) On March 19, 2008, Dr. Witham examined Employee. He concluded Employee's symptoms were consistent with S-1 radiculopathy and noted Employee's symptoms were persistent and severe. Dr. Witham stated Employee had decided to proceed with a left-sided, L5-S1 laminotomy and discectomy. (Witham report, March 19, 2008).

11) On April 10, 2008, John Ballard, M.D., performed an employer's medical evaluation (EME). Dr. Ballard diagnosed L5-S1 disc extrusion creating moderate right neuroforaminal encroachment; L4-5 mild central canal stenosis and L4-5 facet hypertrophy, right greater than left. He disagreed with Dr. Witham's diagnosis of left lumbar radiculopathy secondary to a disc bulge and impingement because, while Employee had had right leg pain in the past, his left leg pain was new and there were no MRI findings to correlate to Employee's left leg symptoms. Dr. Ballard did not think surgery was indicated, recommended conservative care and suggested a physical therapy evaluation. (Ballard report, April 10, 2008).

12) On April 14, 2008, Employee was seen at the Fairbanks Memorial Hospital Emergency Department. He was complaining of an exacerbation to his back and loss of bowel control. An MRI was ordered which showed no significant change from the February 29, 2008 MRI. Mild canal stenosis at L4-5 was noted with some right disc extrusion that was mildly compressing the nerve root. Employee was referred to Dr. Witham. (Emergency Department report, April 14, 2008).

13) On April 30, 2008, Employee saw Dr. Witham, who stated he "does not now feel surgical intervention would be appropriate" after noting the April 14, 2008 MRI and Dr. Ballard's report. He referred Employee for physical therapy. (Witham report, April 30, 2008).

14) On May 5, 2008, Employee began physical therapy. (Select Physical Therapy report, May 5, 2008).

15) On August 2, 2008, Dr. Ballard saw Employee for a follow-up EME. He opined Employee was medically stable at that time and assessed a two percent permanent partial impairment (PPI) rating.

16) On August 19, 2008, Employee told Dr. Witham he had decided to seek a second opinion concerning treatment for his back and leg pain from the Oregon Health Sciences spine department. Dr. Witham encouraged Employee to do so and commented his choice was "an excellent one," but cautioned Employee about "promises that are unlikely to be met." (Witham report, August 19, 2008).

17) On September 4, 2008, Employee was evaluated at the Oregon Health & Science University by David Sibell, M.D. Nerve conduction studies were normal with no evidence of radiculopathy. An MRI showed mild annular bulging at L1-2 and L2-3 with mild facet and ligamentum hypertrophy; mild disc bulging at L3-4 slightly more prominent on the right with facet and ligamentum hypertrophy; mild annular bulging at L4-5 with prominent facet and ligamentum hypertrophy particularly involving the right facet articulation; a central right disc osteophyte complex at L5-S1 producing mild to moderate canal narrowing and in close proximity to the right transversing nerve root. Dr. Sibell noted Employee's MRI is worse on the right but his symptoms are worse on the left. He also consulted with a neurosurgeon, Andrew Nemecek, M.D. Dr. Nemecek decided to obtain the reports of Employee's epidural steroid injections and suggested Employee might benefit from a left L5 transforaminal injection since that site tends to correspond with his symptoms. (Leone/Lou report, September 4, 2008; Sibell report; September 4, 2008).

18) On October 13, 2008, Dr. Sibell performed a left L5 transforaminal epidural steroid injection. (Sibell report, October 13, 2008).

19) On October 24, 2008 and August 31, 2009, Employee has repeat left L5 transforaminal epidural steroid injections. (Sibell report, October 24, 2008; Larson report, August 31, 2009).

20) Employee's condition improved following the epidural steroid injections in October 2008. (Crawford report, July 28, 2010).

21) On April 26, 2010, Attorney Robert Beconovich entered his appearance on behalf of Employee. (Entry of Appearance, April 23, 2010).

22) On July 28, 2010, Employee returned to the Oregon Health & Science University complaining of worsening pain. Lakeisha Crawford, M.D. noted Employee had transient improvement with the epidural steroid injections but did not think it was appropriate to continue with injections because Employee's condition was chronic. Employee expressed a desire to see a spinal surgeon, but Dr. Crawford thought treatment options were "extremely limited" because of Employee's lifestyle. Dr. Crawford advised Employee "to do some rehabilitation" and encourage him to quit smoking. (Crawford report, July 28, 2010).

23) On August 26, 2010, Dr. Nemacek evaluated Employee at the Oregon Health & Science University. In a brief report, he stated he did not think Employee was a candidate for surgery because "no surgical lesion was identifiable on MRI." He agreed with a physician's assistant who has recommended continuing conservative treatment.

24) On January 11, 2011, Dr. Ballard performed a follow-up EME and opined Employee's symptoms were consistent with degenerative changes in his back and they would wax and wane depending on activity level. He further opined Employee had remained medically stable since his August 2, 2008 report. (Ballard report, January 8, 2011).

25) Employee contends Dr. Sibell referred him to Todd Kuether, M.D., for a surgical evaluation. (Record).

26) On February 9, 2011, Dr. Kuether faxed Employee the following note: "To be seen in Oregon we need to have an open worker compensation claim w/ authorization of an office visit/excepted." (Kuether fax, February 9, 2011).

27) On October 18, 2011, Employee filed a claim seeking temporary total disability (TTD), PPI, and medical and transportation costs, as well as penalty, interest and attorney fees and costs. Employee stated the reason he was filing the claim was because "surgery had been recommended by Dr. Kuether, and pre-authorization for such surgery is necessary for Dr. Kuether to proceed. EEMS 4.15.11." (Claim, October 18, 2011).

28) On November 16, 2011, Employer answered and controverted Employee's claim, denying all benefits. (Answer, November 16, 2011; Controversion, November 16, 2011).

29) At a May 13, 2013 prehearing conference, the parties agreed to the instant hearing on Employee's request for a "pre-authorization" order for medical treatment and possible surgery. (Prehearing Conference Summary, May 13, 2013).

30) Subsequently to the May 13, 2013 prehearing conference, the parties reached an agreement that resolved their dispute and chose to put the terms of that agreement on the record at the scheduled hearing. However, another dispute arose concerning attorney fees. (Record).

31) On August 2, 2013, Employee filed an affidavit of attorney fees and costs totaling $4,482.10. This amount reflects $4,305.00 in fees billed at $350.00 per hour and $177.10 in costs. (Affidavit of Attorney Fees, August 2, 2013).

32) Employer does not object to Employee's attorney's hourly rate or the amount of time billed, but rather contends no fees are due because benefits have not been awarded. (Record).

PRINCIPLES OF LAW

> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . .
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986), held attorney's fees awarded by the board should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on the merits of a claim. (*Id*. at 973). The board was

instructed to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney's fees for the successful prosecution of a claim. (*Id*. at 973, 975).

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.

In *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009), the AWCAC stated "AS 23.30.145(a) establishes a minimum fee, but not a maximum fee." A fee award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the board to consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." *Id.*

Filing a controversion exposes an insurer to an attorney's fee award. *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 242 (Alaska 1997). An injured worker is entitled to reasonable attorney fees on issues prevailed upon. *Id*. at 241 (citation omitted). Where an insurer resists payment, thus creating the need for legal assistance, the insurer is required to pay the attorney's fees relating to the unsuccessfully controverted portion of the claim. *Id*. (citation omitted). Although attorney's fees should be fully compensatory so injured workers have competent counsel available to them, this does not mean an attorney automatically gets full, actual fees. *Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002). It is reasonable to award an employee half his attorney's fees when he does not prevail on all the issues raised by his claim. *Id*. at 147-148; *Bouse* at 242.

When a carrier subsequently decides to pay compensation because of the efforts of an attorney, the payment can fairly be construed as the equivalent of an "award" even though it was voluntarily made. *State of Alaska, Dept. of Highways v. Brown*, 600 P.2d 9; 12 (Alaska 1979); *Childs v. Copper Valley Electric Assoc.*, 860 P.2d 1184, 1190-1191 (Alaska 1993). In order to recover fees under AS 23.30.145(b), an employee must succeed on the claim itself, not a collateral issue. *Childs* at 1193. Interest awarded on belated TTD payments is a collateral issue. *Id*.

Attorney's fees have been awarded when an employer unsuccessfully resists an employee's request for a second independent medical evaluation (SIME). *McCain v. Nana Regional Corp.*, AWCB Decision No. 11-0025 (March 4, 2011). Attorney's fees have been denied when the merits of the claims presented have not been fully decided or resolved. *Whitson v. Chugach Support Services,* AWCB Decision No. 13-0011 (February 8, 2013).

ANALYSIS

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

As both a preliminary and an ancillary issue, Employer is correct in its contention there is not currently a dispute involving medical treatment. Contrary to Employee's contention in his claim, Dr. Kuether has not recommended surgery. In fact, Dr. Kuether has not yet rendered an opinion on the subject. Additionally, not only has Employer's medical evaluator, Dr. Ballard, opined against surgery; so far, each of Employee's physicians had too. Dr. Witham initially thought surgery was warranted, but then changed his opinion following Dr. Ballard's report. After consulting with Dr. Nemecek, Dr. Sibell chose to pursue transforaminal steroid injections instead of surgery. Later, Dr. Nemecek summarily rejected surgery. Dr. Crawford also thought treatment options were limited for Employee because of his "lifestyle." To whatever extent there was a dispute over medical treatment, the parties have resolved it with their instant agreement to seek an additional surgical opinion from Dr. Kuether. Rather, the issue presented here is, whether Employee prevailed on an issue such that he would be entitled to attorney's fees.

Here, Employee apparently raises a novel issue since decisional authority directly on-point could not be found. Employee essentially urges a broad interpretation of his claim for "medical costs"

when analyzing the parties' agreement. Employer urges a narrow interpretation, citing Employee's specific desire to obtain pre-authorization for surgery, which was not agreed to.

Employee filed his claim seeking medical costs and Employer controverted. The parties have now agreed to perform another MRI study and to seek Dr. Kuether's opinion, both at Employer's expense. Although these services are diagnostic in nature, they are, nevertheless, medical services at a cost to Employer, who previously denied responsibility for medical benefits. Even though Employee's immediate focus at the time he filed his claim may have been on obtaining preauthorization for surgery, the parties' instant agreement represents a partial modification, however limited, of Employer's previously stated position from its controversion and answer, and Employee, who has been seeking surgical intervention since early 2008, will now enjoy another surgical opinion at Employer's expense. The MRI and surgical consultation are decidedly benefits to Employee and, as a result, he has prevailed on a disputed issue in the case.

As summarized above, so far, the physician's opinions in this case on the issue of surgical treatment are hardly favorable to Employee. Given the medical record as it exists now, Employee's attorney was clearly instrumental in securing yet another surgical opinion for Employee after Employer initially resisted the payment of any additional medical costs. Consequently, Employer's concession to pay for that service is the functional equivalent of an "award," *Brown*; *Childs*; and Employee is entitled to fees for his attorney's efforts, *Bouse*.

Furthermore, attorney's fees have been awarded for successfully obtaining a SIME. *McCain*. The facts here are analogous. Although Dr. Kuether's evaluation will be performed outside the parameters of the SIME process, the parties have agreed to obtain another expert medical opinion, at Employer's expense, from a physician who has neither personally treated Employee, nor rendered an opinion for Employer. Even though Dr. Kuether was not selected by the board, the parties and the board will benefit from his opinion and the decision in *McCain* lends further support to an award of fees here.

However, in addition to medical and transportation costs, Employee also seeks TTD and PPI, as well as penalty and interest. Penalty and interest are issues "collateral" to compensation in this

case. *Childs*. Meanwhile, Employee's entitlement to TTD and PPI have been neither decided, nor resolved, and attorney fees on these portions of Employee's claim are not warranted. *Whitson*. Employee has only prevailed on a limited, discrete issue involving a claimed benefit and, when one considers what medical costs Employee ultimately seeks - spinal surgery, the benefits secured by the parties' agreement represent a partial, if not slight, victory on that single issue. Moreover, as demonstrated by Employee's attorney's affidavit, his work in this case has involved minimal pleadings and litigation to date.

Attorney fee awards should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, to insure adequate representation. The nature, length, and complexity of the services performed, the resistance of employer, and the benefits resulting from the services obtained, are considered when determining reasonable attorney fees for successful prosecution of claims. Given these considerations, and for the reasons set forth above, Employee will be awarded one half his claimed fees and costs for an amount of $2,241.05. *Bignell*; *Williams*; *Bouse*.

CONCLUSIONS OF LAW

Employee is entitled to attorney fees and costs as set forth above.

ORDER

Employee is awarded $2,152.50 in fees and $88.55 in costs.

Dated in Fairbanks, Alaska on August 28, 2013.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Sarah Lefebvre, Member

/s/_____
Rick Traini, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of 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 Decision and Order in the matter of TONY BEEMAN employee / claimant v. WEAVER BROTHERS, INC., employer; CONTINENTAL CASUALTY CO., insurer / defendants; Case No. 200801340; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, on August 28, 2013.

_____
Nicole Hansen, Office Assistant