

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

PAUL D. PIETRO,)
)
 Employee,) FINAL DECISION AND ORDER ON
 Petitioner,) RECONSIDERATION & MODIFICATION
)
 v.) AWCB Case No. 199530232
)
 UNOCAL CORP.,) AWCB Decision No. 14-0035
)
 Employer,) Filed with AWCB Anchorage, Alaska,
 Respondent.) on March 21, 2014
)
)

Paul Pietro's (Employee) December 11, 2013 Petition for Reconsideration, Modification and/or Clarification was heard on March 12, 2014, in Anchorage, Alaska, a date selected on February 13, 2014. Attorney Michael Jensen appeared and represented Employee. Attorney Richard Wagg appeared and represented Unocal Corporation (Employer). There were no witnesses. The record closed at the hearing's conclusion on March 12, 2014.

ISSUES

Employee contends *Pietro v. Unocal Corporation*, AWCB Decision No. 13-0156 (December 3, 2013) (*Pietro IX*), erred by excluding 207.30 hours of paralegal fees from its cost award simply because Employee failed to file affidavits from the paralegals. He seeks an order reconsidering *Pietro IX* and awarding the disputed paralegal fees as costs.

Employer contends regulations exist for a reason and Employee provided no grounds to relax the rules simply because he failed to follow them. It seeks an order denying Employee's petition for reconsideration on this point.

1)Should *Pietro IX*'s denial of Employee's paralegal fees as costs be vacated?

Employee next contends *Pietro IX* made a factual error in its attorney and paralegal fee and out-of-pocket cost calculations. He contends this was an arithmetic mistake and *Pietro IX* should be corrected and modified.

Employer does not directly dispute this contention. However, it contends a cost associated with Edward Barrington, D.C., should be disallowed because *Pietro IX* declined to accept Dr. Barrington's opinions, finding him an unlawful change in Employee's choice of physician.

2)Should arithmetic errors in the attorney and paralegal fee and out-of-pocket cost award in *Pietro IX* be corrected, and Dr. Barrington's cost deducted?

Employee contends *Pietro IX* was not clear in its attorney fee award. He contends all attorney's fees and costs through August 30, 2011, were incurred to establish Employee's peripheral neuropathy and skin cancers as compensable injuries. Employee seeks an order distinguishing those attorney's fees and costs from later-incurred fees and costs on other issues likely to be appealed, which are not yet subject to appellate finality.

Employer contends no fees or costs should be awarded because *Pietro IX* will be appealed as soon as the instant matter is resolved and the appeal results may affect the fees allowed in this case. It seeks an order holding any fee and cost award in abeyance.

3)Should *Pietro IX*'s attorney's fee and cost awards be clarified?

Lastly, Employee contends he is entitled to additional attorney's fees and paralegal costs for bringing this petition for reconsideration, modification and clarification.

Employer contends all attorney's fees and costs should be held in abeyance as an appeal may result in reduced attorney's fees and costs from those already awarded.

4)Is Employee entitled to additional attorney's fees and costs for bringing this petition?

FINDINGS OF FACT

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

1) *Pietro v. Unocal Corp.*, AWCB Decision No. 05-0287 (November 4, 2005) (*Pietro I*), held Employee's "peripheral neuropathy" was not work-related and denied Employee's request for medical care and disability (*Pietro I* at 26).

2) *Pietro v. Unocal Corp.*, AWCB Decision No. 05-0317 (November 30, 2005) (*Pietro II*), denied Employee's request for reconsideration of *Pietro I* (*Pietro II* at 5).

3) Following *Pietro II*, Employee appealed to the superior court. The court stayed the appeal to permit review of Employee's post-*Pietro II* petition for modification, which he filed based upon new evidence of "dermatological issues." The superior court eventually affirmed *Pietro I* and *II*.

4) *Pietro v. Unocal Corp.*, AWCB Decision No. 07-0260 (August 27, 2007) (*Pietro III*), heard Employee's petition for modification of *Pietro I* and *Pietro II*, and his October 11, 2006 claim for benefits related to basal cell carcinoma and melanoma. *Pietro III* denied the modification petition but did not rule on the cancer claim (*Pietro III* at 22-23).

5) *Pietro v. Unocal Corp.*, AWCB Decision No. 07-0300 (September 28, 2007) (*Pietro IV*), addressed Employee's petition for reconsideration, modification, or clarification of *Pietro III*. Employee contended *Pietro III* failed to rule on his cancer claim. *Pietro IV* granted Employee's petition and ordered oral argument (*Pietro IV* at 5).

6) *Pietro v. Unocal Corp.*, AWCB Decision No. 08-0029 (February 22, 2008) (*Pietro V*), denied Employee's petition for reconsideration, modification, or clarification of *Pietro III* and denied Employee's cancer claim (*Pietro V* at 8).

7) *Pietro v. Unocal Corp.*, 233 P.3d 604 (Alaska 2010), reversed and remanded *Pietro II* with directions for the fact-finders to consider and analyze lay evidence describing Employee's arsenic exposure. The court also directed the fact-finders on remand to decide whether Employee's peripheral neuropathy began before his rheumatoid arthritis, and to make more findings regarding lay evidence (*Pietro*, 233 P.2d at 614-15).

8) *Pietro v. Unocal Corp.*, AWCB Decision No. 10-0199 (December 10, 2010) (*Pietro VI*), examined the scope of the Alaska Supreme Court's remand. *Pietro VI* ordered the matter on remand would be decided on the existing record, and directed the parties to appear for oral argument with briefs and appropriate attachments from the existing record to support their positions (*Pietro VI* at 9).

9) *Pietro v. Unocal Corp.*, AWCB Decision No. 11-0044 (April 15, 2011) (*Pietro VII*), addressed only compensability of Employee's peripheral neuropathy, basal cell carcinoma and melanoma. *Pietro VII* held Employee's peripheral neuropathy, basal cell carcinoma and melanoma all arose out of and in the course of his employment with Employer and were compensable (*Pietro VII* at 57).

10) Employer appealed *Pietro VI* and *VII* to the Alaska Workers' Compensation Appeals Commission. While the appeal was pending, *Pietro v. Unocal Corp.*, AWCB Decision No. 11-0132 (August 25, 2011) (*Pietro VIII*), held the panel had no jurisdiction to hear and decide Employee's claim because the case was on appeal (*Pietro VIII* at 6).

11) The commission reversed and remanded *Pietro VI*, stating it erred by not allowing Employer to call witnesses and present additional evidence on remand from the Alaska Supreme Court. *Unocal Corp. v. Pietro*, AWCAC Decision No. 170 (September 26, 2012).

12) Employee petitioned the Alaska Supreme Court to review the commission's September 2012 decision. The court accepted review and summarily reversed the commission's decision and remanded so the commission could consider any remaining issues appealed from *Pietro VI* and *VII* (Order, Petition for Review, November 27, 2012).

13) *Unocal v. Pietro*, AWCAC Decision No. 178 (March 19, 2013) found substantial evidence supported *Pietro VII* and the commission affirmed (*id.* at 17).

14) On July 16, 2013, and September 23, 2013, Employee timely filed two attorney's fee and cost affidavits for the October 2, 2013 hearing (Affidavit of Attorney's Fees and Costs for Services Before the Alaska Workers' Compensation Board Incurred Through August 25, 2011 Interlocutory Decision and Order, July 15, 2013; Affidavit of Attorney's Fees and Costs for Services Before the Alaska Workers' Compensation Board Incurred Since August 25, 2011 Interlocutory Decision and Order, September 19, 2013).

15) On October 2, 2013, Employee filed a supplemental affidavit including 9.70 hours attorney and 2.10 hours paralegal time and \$500 for "Dr. Barrington testimony (est.)" (Supplemental Affidavit of Attorney's Fees and Costs for Services Before the Alaska Workers' Compensation Board Incurred Since August 25, 2011 Interlocutory Decision and Order, October 2, 2013).

16) Employee's three attorney's fee and cost affidavits timely filed for the October 2, 2013 hearing included two columns showing the date services were rendered and a brief description of each service, and two columns identifying whether an attorney or a paralegal incurred the time and performed the service, along with the amount of time incurred. The legal services were listed on the

affidavits in reverse chronological order, with the most recent services at the top of the first page. Each affidavit states at the end: “MICHAEL J. JENSEN, being duly sworn, states that the above itemization accurately reflects the hours expended as well as the extent and character of the work performed by my office.” Following this declaration on all affidavits is attorney Jensen’s notarized signature. None includes a notarized signature from any paralegal performing services on Employee’s case (Affidavit of Attorney’s Fees and Costs for Services Before the Alaska Workers’ Compensation Board Incurred Through August 25, 2011 Interlocutory Decision and Order, July 15, 2013; Affidavit of Attorney’s Fees and Costs for Services Before the Alaska Workers’ Compensation Board Incurred Since August 25, 2011 Interlocutory Decision and Order, September 19, 2013; Supplemental Affidavit of Attorney’s Fees and Costs for Services Before the Alaska Workers’ Compensation Board Incurred Since August 25, 2011 Interlocutory Decision and Order, October 2, 2013).

17) On December 3, 2013, *Pietro v. Unocal Corporation*, AWCB Decision No. 13-0156 (December 3, 2013) (*Pietro IX*), decided Employee’s claims for specific benefits on their merits. *Pietro IX* concluded Employee was entitled to temporary total disability (TTD), permanent total disability (PTD), medical care for his peripheral neuropathy and skin cancer. It also awarded interest, attorney’s fees and non-paralegal costs. It denied Employee’s request for paralegal fees as litigation costs because the paralegals did not file affidavits to support their fees (*id.* at 78-79).

18) All factual findings from *Pietro IX* are incorporated herein by reference. In respect to attorney’s fees and costs, *Pietro IX* found and ordered:

99) Employee’s counsel documented litigation costs totaling \$26,549.16 for work done from April 16, 2003 through August 24, 2011, and \$184.89 since August 30, 2011. Employer did not object to these costs (Affidavit of Attorney’s Fees and Costs for Services Before the Alaska Workers’ Compensation Board Incurred Through August 25, 2011 Interlocutory Decision and Order, July 15, 2013; Affidavit of Attorney’s Fees and Costs for Services Before the Alaska Workers’ Compensation Board Incurred since August 25, 2011 Interlocutory Decision and Order, September 19, 2013).

100) Employee’s counsel documented 260.36 hours attorney time and 186.50 hours paralegal time for services rendered from April 16, 2003 through August 24, 2011. He documented 21.30 hours attorney time and 20.80 hours paralegal time for services rendered from August 30, 2011 through the hearing and requested 3.5 hours attorney’s time for services at the hearing. Employer did not object to the hours

requested, but objected to the lack of affidavits from the paralegals (*id.*; Employer's hearing argument).

101) Employee provided no cost affidavits for his past or current paralegals and did not request that the record be left open to receive post-hearing affidavits (Employee's hearing arguments; observations) (*Pietro IX* at 30).

...

ORDER

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6) Employee's request for attorney's fees and costs is granted in part and denied in part. Employee's request for a retroactive hourly rate increase is denied. Employer is ordered to pay Employee's counsel costs totaling \$26,549.16. Employee's request for paralegal costs is denied. Employer is ordered to pay Employee 285.16 hours attorney's fees in accordance with this decision. . . . (*Pietro IX* at 79).

19) On December 11, 2013, Employee timely filed a petition seeking reconsideration, modification and clarification of *Pietro IX*. Employee argued his paralegal fees should be awarded as Employer had never objected to his paralegal fees without affidavits from his paralegals in the past. Employee attached affidavits from former and current paralegals Faith White, Julie Calcote, Kimberly Gedicks and Bryan Haugstad, all of who swore they were paralegals assigned by attorney Jensen to assist with pursuing benefits for Employee; they performed legal services at specified times reflected in attorney Jensen's affidavit; attorney Jensen's affidavit accurately reflected the work the paralegals did on Employee's case; and each worked under attorney Jensen's supervision. Employee argued he cured any deficiency by filing these affidavits. Employee's petition also argued *Pietro IX* should excuse strict compliance with 8 AAC 45.180(f)(14)(D), under 8 AAC 45.195, and accept the post-hearing paralegal affidavits. Employee further argued arithmetic errors in *Pietro IX* should be corrected. Lastly, Employee contended *Pietro IX* should also make it clear Employee was entitled to substantial attorney's fees and costs by virtue of prevailing on the compensability issue regarding peripheral neuropathy and skin cancer (Petition for Reconsideration, Modification and/or Clarification, December 11, 2013).

20) On December 20, 2013, *Pietro v. Unocal Corp.*, AWCB Decision No. 13-0126 (December 20, 2013) (*Pietro X*), granted Employee's petition for reconsideration, modification and clarification, to consider additional briefing and argument (*id.* at 8).

21) On March 3, 2014, Employee filed a hearing brief similar to his December 11, 2013 petition. Employee attached to his brief copies of his three attorney's fee and cost affidavits filed previously in this case, as well as additional copies of the paralegal affidavits attached to his December 11, 2013 petition (Employee's Hearing Brief, March 3, 2014).

22) On March 4, 2014, Employee filed another attorney's fee and cost affidavit signed by him and by his paralegal documenting 10.8 hours attorney time at \$385 per hour and 2.2 hours paralegal time at \$165 per hour for services provided on this case from December 4, 2013, through March 4, 2014 (Affidavit of Attorney's Fees and Costs for Services Before the Alaska Workers' Compensation Board Incurred Since the October 2, 2013 Hearing Related to the Petition for Reconsideration/Modification and/or Clarification, March 4, 2014).

23) Employer did not object to the March 4, 2014 affidavit's form or to the attorney's fees and costs set forth therein, though it objected to Employee's petition and all relief requested (record).

24) At hearing on March 12, 2014, Employee reiterated arguments set forth in his petition and hearing brief. Employee asked the panel to invoke its authority under 8 AAC 45.195 to relax strict compliance with the regulations requiring paralegals to file affidavits supporting their fees before the hearing. As support he cited numerous decisions illustrating the panel's authority to relax procedural requirements. Employee also reviewed arithmetic errors in *Pietro IX* and asked for correction and modification. Lastly, he asked that *Pietro IX* be clarified to ensure attorney's fees and costs were awarded for his success in getting Employee's peripheral neuropathy and skin cancers found compensable (Employee's hearing arguments).

25) *Pietro IX* repeated a mistake from Employee's counsel's July 15, 2013 affidavit, which contained arithmetic errors in respect to Employee's attorney's fees and costs. *Pietro IX*'s factual mistakes are identified, clarified and corrected as follows:

- Employee's July 15, 2013 attorney's fee and cost affidavit contained a typographical error and actually documented 260.80 attorney hours and 186.50 paralegal hours.
- Employee's September 19, 2013 attorney's fee and cost affidavit documented 21.30 attorney hours and 20.80 paralegal hours.
- Employee's October 2, 2013 attorney's fee and cost affidavit documented 9.70 attorney hours and 2.10 paralegal hours.
- The parties spent about 5.0 hours at the October 2, 2013 hearing.

- Therefore, *Pietro IX* should have identified 296.80 attorney hours ($260.80 + 21.30 + 9.70 + 5.0 = 296.80$) and 209.40 paralegal hours ($186.50 + 20.80 + 2.10 = 209.40$) rather than 285.16 and 207.30, respectively, as stated in *Pietro IX*.
- Employee's attorney's fee and cost affidavits document \$27,262.13 in non-paralegal, out-of-pocket costs ($\$26,549.16 + \$184.89 + \$528.08 = \$27,262.13$). Deducting Dr. Barrington's \$500 estimated fee for testifying results in a corrected cost determination of \$26,762.13 rather than \$26,734.05, as stated in *Pietro IX* (observations).

26) At hearing on March 12, 2014, Employer argued 8 AAC 45.180(f)(14) should be strictly applied and argued Employee provided no reason for not following the regulation and failing to file paralegal affidavits. It conceded the panel had power to waive regulations, but not to simply excuse a party from failing to comply with them. It contended ignoring the rules with attendant consequences does not equate to "manifest injustice." As to the lack of any specific time requirements for filing the paralegals' affidavits, Employer argued when read as a whole, 8 AAC 45.180 requires paralegals' affidavits be filed along with attorney's fee affidavits, at least three working days before a hearing. Otherwise, Employer contended, the paralegal filing requirement is a nullity and meaningless. Employer also suggested any attorney's fee and costs award resulting from *Pietro IX* should be held in abeyance since *Pietro IX* will be appealed and the appeal's result may affect any fees and costs awarded. It argued Dr. Barrington's \$500 testimony cost should be denied because *Pietro IX* declined to allow Dr. Barrington's testimony at hearing (Employer's hearing arguments).

27) Employee agreed to deduct Dr. Barrington's \$500 cost bill from his cost request as Dr. Barrington never testified (Employee's hearing statement).

28) Employee did not present any evidence or argument stating he could not have obtained the paralegal affidavits prior to the hearing in time to attach them to his previously filed attorney's fees and costs affidavits. Employee's lawyer's practice emphasizes representing injured workers in workers' compensation cases, and he has represented employees in Alaska in these cases for decades (record; experience, observations).

29) At hearing, Employee stated he incurred another 1.3 hours in attorney time between his March 4, 2014 affidavit and the hearing, and Employer did not object to this calculation, though it objected to all relief Employee sought in his petition (Employee's counsel's statements; record).

30) The parties participated in the hearing on Employee's petition for approximately .80 of an hour and Employee requested this amount be added to his attorney's fee request. Employee incurred a total of 12.90 in attorney hours (10.80 + 1.30 +.80 = 12.90) and 2.20 in paralegal hours on his December 11, 2014 petition subject of this decision (observations).

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 . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . subject to the provisions of this chapter. . . .

The board may base its decision not only on direct testimony 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 23.30.130. Modification of awards. (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

The Alaska Supreme Court discussed AS 23.30.130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 164, 168 (Alaska 1974) stating: "The plain import of this amendment [adding 'mistake in a determination of fact' as a ground for review] was to vest a deputy commissioner with broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted" (*quoting O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)). An examination of all previous evidence is not mandatory whenever there is an allegation of mistake in determination of fact under AS 23.30.130(a). "The concept of 'mistake' requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a back-door route to retrying a case

because one party thinks he can make a better showing on the second attempt” (*id.* at 169; citing 3 Larson, *The Law of Workmen’s Compensation* §81.52, at 354.8 (1971)).

In the case of a factual mistake or a change in conditions, a party “may ask the board to exercise its discretion to modify the award at any time until one year” after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). By comparison and contrast, a petition for reconsideration has a fifteen day time limit for the request and the board’s power to reconsider “expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied” (*id.* at n. 36). *See also, Williams v. Safeway Stores*, 525 P.2d 1087, 1088 (Alaska 1974) (AS 23.30.130 “requires that the application for modification be made ‘before one year after the date of last payment of compensation.’”). Nothing in AS 23.30.130(a)’s language limits the “mistakes in determination of fact” basis for review to issues relating solely to disability. “We hold . . . there is no limitation as to the type of fact coming within the ambit of the statutory ‘mistake in its determination of a fact’ review criterion.” *Fischback & Moore, Inc.*, 453 P.2d 478, 484 (Alaska 1969).

AS 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. . . .

8 AAC 45.180. Costs and attorney’s fees. (a) This section does not apply to fees incurred in appellate proceedings.

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours

expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

(c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed. Board approval of an attorney fee is not required if the fee

(1) is to be paid directly to an attorney under the applicant's union-prepaid legal trust or applicant's insurance plan; or

(2) is a one-time-only charge to that particular applicant by the attorney, the attorney performed legal services without entering an appearance, and the fee does not exceed \$300.

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.

(2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

(e) Fee contracts are not enforceable unless approved by the board. The board will not approve attorney's fees in advance in excess of the statutory minimum under AS 23.30.145.

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:

...

(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk

- (A) is employed by an attorney licensed in this or another state;
- (B) performed the work under the supervision of a licensed attorney;
- (C) performed work that is not clerical in nature;
- (D) files an affidavit itemizing the services performed and the time spent in performing each service; and
- (E) does not duplicate work for which an attorney's fee was awarded. . . .

8 AAC 45.195. Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

In *Cole v. Ketchikan Pulp Co.*, 850 P.2d 642 (Alaska 1993), the Alaska Supreme Court excused the requirement that a settlement agreement be signed by the injured employer, because the claimant died before he could provide the required signature. *Lisenbury v. Alaska Mechanical, Inc.*, AWCB Decision No. 08-0102 (June 3, 2008), relaxed the three day rule and allowed the injured worker to file his attorney's fee affidavit late, over the employer's objection, because it was the first time the attorney had appeared before the board. *Lisenbury* provided the employer a post-hearing opportunity to object to the attorney's fees and cost bill. *Miller v. NANA Regional Corp., Inc.*, AWCB Decision No. 13-0169 (December 26, 2013), relaxed the procedure for an employer to select a medical evaluator because it could not be determined from the record who actually selected the medical provider to whom the injured worker was sent, and there was no report resulting from the patient's visit to that provider. *Miller's* citation to employer's

significant costs incurred for subsequent physicians' evaluations as justification for its decision was secondary to these findings. *Stackhouse v. C.G.G. Veritas Services Holding, Inc.*, AWCB Decision No. 09-0022 (February 4, 2009), came to a similar result and relaxed the rule to encourage the claimant's inexperienced lawyer to represent otherwise possibly unrepresented injured workers. *Bermel v. Banner Health Systems*, AWCB Decision No. 08-0239 (December 5, 2008) (*Bermel I*), reached a similar result where the claimant's lawyer filed no attorney's fee affidavit at all. *Bermel I* allowed the lawyer 14 days to file and allowed the employer 10 days to object. *Bermel v. Banner Health Systems*, AWCB Decision No. 11-0004 (January 6, 2011) (*Bermel II*), explained that *Bermel I* had not waived the procedural requirement for the claimant's lawyer to timely file an attorney's fee and cost affidavit but had simply modified it to prevent manifest injustice. Lastly, *Strong v. DAL Enterprises, LLC v. Fairbanks Memorial Hospital*, AWCB Decision No. 12-0004 (January 6, 2012), relaxed the attorney's fee filing rule when the claimant's lawyer filed his fee affidavit the day before the hearing rather than three days before. Citing Alaska Supreme Court precedent requiring "fully compensatory" fees in worker's compensation cases, *Strong* found limiting the claimant's lawyer to statutory attorney's fees would not fully compensate the claimant.

In *Kim v. Alyeska Seafoods, Inc.*, 197 P.2d 193 (Alaska 2008), the Alaska Supreme Court addressed the procedural statute requiring an injured worker to file an affidavit stating she is ready for a hearing on a controverted claim, within two years of the controversion, to avoid having her case dismissed. *Kim* decided the statute was "directory, not mandatory" and decided "strict compliance" with it was therefore not required.

ANALYSIS

1) Should *Pietro IX*'s denial of Employee's paralegal fees as costs be vacated?

Employee's main contention is that he previously and routinely filed attorney's fees affidavits, which included paralegal fees as litigation costs, without an accompanying affidavit from the paralegals. In prior instances, including in this case, he contends Employer and other parties have not objected. Employee implies Employer waived its objection by not raising it before. But the law does not provide a time limit during which a party must raise a procedural objection to an employee's attorney's fee or cost statement. 8 AAC 45.180. The procedural regulations

require a party requesting other than statutory minimum attorney's fees to file an affidavit at least three working days prior to the hearing. 8 AAC 45.180(b), (d)(1). Though it is true only the attorney's fee subsections in 8 AAC 45.180 specify a filing deadline, and the costs subsection is silent on when a cost affidavit must be filed, when read as a whole 8 AAC 45.180 also requires the party requesting paralegal fees as a litigation cost to file the requisite paralegal affidavits at the same time as the attorney's fees affidavit. Otherwise, the party could file the "statement listing each cost claimed" and the affidavit "stating that the costs are correct and that the costs were incurred in connection with the claim" and the paralegal's affidavits "itemizing the services performed and the time spent in performing each service" at any time, including after the hearing. Such practice would defeat the legislative intent requiring the Act be construed to ensure quick, efficient, fair and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1).

Employer has the right to review cost bills before the hearing so objections can be raised and resolved at hearing. Employee's proposed practice results in the possible need for two hearings instead of just one; one on the merits and another on the subsequently filed cost bill. As a practical matter, Employee's lawyer's timely filed affidavits listed and described all the paralegal fees. All that was missing were the paralegals' signatures on a short affidavit. This is not an onerous requirement. 8 AAC 45.180(f)(14). Employee simply ignored it.

Employee next contends 8 AAC 45.180's strict requirements should be modified or waived under 8 AAC 45.195, arguing Employer was not prejudiced by the missing paralegal affidavits. He cites case law to support his position. But Employee's cases are all distinguishable. Unlike *Cole*, where the claimant died before he could provide the required signature on his settlement agreement, the paralegals involved in this case are all alive and well as shown by their signatures on affidavits provided several days after the hearing was over.

Miller is also distinguishable from this case because *Miller* relaxed the procedure for an employer to select a medical evaluator when it could not be determined from the record who actually selected the medical provider to whom the injured worker was sent, and there was no report resulting from the patient's visit to that provider. The employer's significant costs

incurred for subsequent physicians' evaluations were secondary to these findings. *Miller's* facts bear no resemblance to Employee's situation.

Moore waived the procedural requirement requiring the injured worker to file an attorney's fee affidavit, because his attorney said the records had been destroyed and he could only estimate a range for his fees, given his known hourly rate. *Moore* split the difference in the range and awarded the employee actual fees. By contrast, Employee had no lost cost records and carefully itemized each paralegal's time. He simply ignored the rule requiring him to show the paralegals were employed by a licensed attorney, performed the work under the attorney's supervision, and the work was not clerical or duplicative of the attorney's work. He also failed to have the paralegals sign affidavits itemizing the services performed and the time spent performing each service.

Lisenbury relaxed the three day filing rule and allowed the injured worker to file his attorney's fee affidavit late, over the employer's objection, because it was the first time the attorney had appeared before a panel. *Stackhouse*, *Bermel I*, and *Bermel II* all came to similar results and relaxed the three day filing rule to encourage the claimants' relatively inexperienced lawyers to represent injured workers. These factors are not existent in Employee's case. Employee's lawyer has been representing injured workers in Alaska for decades, does it for a living and needs no incentive to continue. He has no excuse.

Lastly, *Strong* relaxed the attorney's fee filing rule based on Alaska Supreme Court precedent requiring "fully compensatory" attorney's fees in workers' compensation cases. *Strong* is limited to attorney's fees, while this case addresses Employee's litigation costs. Employee cites no Alaska Supreme Court case stating litigation costs should be fully compensable. For all these reasons, Employee's petition seeking reconsideration of *Pietro IX's* denial of paralegal fees as costs will be denied.

2)Should arithmetic errors in the attorney and paralegal fee and out-of-pocket cost award in *Pietro IX* be corrected, and Dr. Barrington's cost deducted?

Employee's attorney's fee and costs affidavits were a little hard to decipher, and one included Employee's own calculation error. However, Employee at hearing adequately demonstrated *Pietro IX* made arithmetic errors when calculating Employee's attorney's fees and costs. Employer does not oppose correcting the mistakes, but contends any attorney's fee and costs award should be held in abeyance pending resolution of its appeal of *Pietro IX*, which is sure to come. Because computational errors were made in *Pietro IX*, Employee's petition for modification, based on these factual errors will be granted. AS 23.30.130. Employee conceded his cost request should be reduced by Dr. Barrington's \$500 bill, as *Pietro IX* did not allow Dr. Barrington's report or testimony at hearing. Therefore, *Pietro IX* is modified as follows:

- Employee's July 15, 2013 attorney's fee and cost affidavit documented 260.80 attorney hours and 186.50 paralegal hours.
- Employee's September 19, 2013 attorney's fee and cost affidavit documented 21.30 attorney hours and 20.80 paralegal hours.
- Employee's October 2, 2013 attorney's fee and cost affidavit documented 9.70 attorney hours and 2.10 paralegal hours.
- The parties spent about 5.0 hours at the October 2, 2013 hearing.
- Therefore, *Pietro IX* is modified to identify 296.80 attorney hours and 209.40 paralegal hours.
- Employee's attorney's fee and cost affidavits document \$27,262.13 in non-paralegal, out-of-pocket costs. Dr. Barrington's \$500 estimated fee for testifying will be deducted from this amount resulting in a corrected cost determination of \$26,762.13.

However, the paralegal costs are corrected only for accuracy and appeal purposes. Employee's request for these paralegal fees will still be denied for the reasons stated in section 1, above.

3)Should *Pietro IX*'s attorney's fee and cost award be clarified?

Pietro IX addressed Employee's attorney's fees and costs from the claim's inception because attorney's fees and costs were not raised as issues at the first hearings following the Alaska Supreme Court remand. Employee now seeks an order clarifying *Pietro IX*'s attorney's fee and cost award. Employer's only objection to Employee's clarification request, apart from the

overall objection to paralegal costs as discussed above, is its contention all attorney's fees and costs should be held in abeyance because *Pietro IX* is going to be appealed. Employer had also objected to a retroactive hourly rate increase and *Pietro IX* denied Employee's request.

Employee now wants *Pietro IX* clarified to award his attorney's fees and costs incurred through August 30, 2011, solely because he prevailed on the disputed compensability issues. Employer provided no legal support for its argument any attorney's fees and costs should be held in abeyance simply because *Pietro IX* will be appealed. If and when Employer appeals *Pietro IX*, Employer can request a stay from the appeals commission. Employee's petition for clarification will be granted based upon the following analysis:

As *Pietro IX* stated, Employee's attorney is clearly and currently entitled to attorney's fees and non-paralegal costs for the entire body of his representation. However, in accordance with Employee's clarification request, his lawyer's services will be analyzed separately, by timeframe and issues. The "nature" of legal services Employee's lawyer delivered in this case through August 30, 2011, was in the highly specialized workers' compensation field. The "length" of his counsel's legal service, provided from April 16, 2003, through August 30, 2011, was unusually long. His attorney diligently represented Employee in an extraordinarily difficult case on causation and compensability issues for about eight years. As mentioned in *Pietro IX*, peripheral neuropathy and skin cancer cases are rare. The "complexity" of legal services Employee's lawyer provided on the medical causation issues through August 30, 2011, was unique and extreme in accordance with the equally complex medical and lay evidence. Employee's counsel prepared for and attended numerous depositions and hearings related solely to causation and compensability. Employee's out-of-pocket costs were also unusually high, again reflecting the case's complexity.

Employee's attorney's fees were contingent and he has had to wait, and continues to wait, for over 10 years to be paid for his services. Ultimately, Employee was correct in his factual and legal arguments concerning causation of both his peripheral neuropathy and his skin cancers. It is not Employee's or his attorney's fault *Pietro I* and several subsequent decisions were eventually reversed by the Alaska Supreme Court, and Employer sought appellate review of

decisions in which Employee prevailed, which were affirmed by the appeals commission or the court. His attorney will not be punished for persevering through years of litigation when he ultimately prevailed on the vast majority of Employee's primary issues, most notably causation and compensability. As stated in *Pietro IX*, the only minor issue upon which Employee did not prevail was pre-judgment interest on his attorney's fees and costs.

Employee sought attorney's fees under AS 23.30.145(b). As stated in *Pietro IX*, this case was controverted and the law allows for attorney's fee awards in controverted cases under AS 23.30.145(b). As found in *Pietro IX*, Employer did not object to the hours Employee's attorney incurred as reflected in his attorney's fee affidavits. Considering the nature, length, and complexity of legal services performed and the significant benefits resulting from the services to Employee, on the compensability and other issues resolved by Employee's lawyer's legal services through August 30, 2011, Employee's attorney will be awarded the total hours requested in his attorney's fee affidavits, from April 16, 2003, through August 30, 2011. He succeeded on complex causation and compensability issues and successfully obtained medical and PPI benefits. Therefore, he will be awarded the greater of actual attorney's fees at his normal hourly rates for each year as set forth in *Pietro IX*, or statutory minimum attorney's fees for legal services provided between April 16, 2003, and August 30, 2011, inclusively, for prevailing on causation and compensability issues.

Employee's attorney's fees and costs after August 30, 2011, are also analyzed. Employee's attorney successfully obtained for Employee a period of TTD, PTD and interest. The "nature" of legal services Employee's lawyer delivered in this case since August 30, 2011, was again in the highly specialized workers' compensation field. The "length" of his counsel's legal service provided since August 30, 2011, was about average. His attorney diligently represented Employee in a difficult case on indemnity issues for about three more years following August 30, 2011. As mentioned in *Pietro IX* and above, peripheral neuropathy and skin cancer cases are rare. The "complexity" of legal services Employee's lawyer provided on indemnity issues since August 30, 2011, was unique and extreme in accordance with the equally complex medical and lay evidence. Employee's counsel prepared for and attended hearings related solely to indemnity issues. He prevailed on his TTD and PTD claims, which are of significant benefit to Employee.

Employee's out-of-pocket costs since August 30, 2011, were about average. Therefore, Employee will be awarded the greater of actual attorney's fees at his normal hourly rates for each year as set forth in *Pietro IX*, or statutory minimum attorney's fees for legal services provided since August 30, 2011, for prevailing on indemnity and related issues.

In summary, Employee's clarification petition will be granted as discussed above and Employer will be ordered to pay Employee the greater of 296.80 total hours attorney's fees, all calculated at Employee's lawyer's annual rates established in *Pietro IX*, or statutory minimum attorney's fee. Employer will also be ordered to pay Employee's itemized legal costs totaling \$26,762.13.

As was the case in *Pietro IX*, this decision does not calculate the actual attorney's fees resulting from the above. These calculations are the parties' jobs. Any disagreement as to amounts may be brought back for further adjudication if necessary. However, it is conceivable the statutory minimum may exceed Employee's actual attorney's fees. This decision cannot award less than the statutory minimum attorney's fee. Therefore, if the parties determine statutory minimum fees exceed Employee's actual attorney's fees at the rates calculated in *Pietro IX*, and as corrected in this decision, Employer will alternately be ordered to pay statutory minimum fees on all benefits awarded.

4) Is Employee entitled to additional attorney's fees and costs for bringing this petition?

Employee also incurred additional attorney's fees and costs bringing this petition to hearing. Employer did not object to these additional requested attorney's fees or costs, which included paralegal fees. These hours total 12.90 attorney and 2.20 paralegal. Employee did not prevail on all issues in his petition, because he did not obtain reconsideration on his paralegal fees denied in *Pietro IX*, but did prevail on modification and clarification. Therefore, Employee will be awarded two-thirds of his requested attorney's fees incurred on his petition ($12.90 \times 2/3 = 8.60$) at \$385 per hour and two-thirds of his requested costs ($2.20 \times 2/3 = 1.46$) at \$165 per hour.

CONCLUSIONS OF LAW

1) *Pietro IX*'s denial of Employee's paralegal fees will not be vacated.

- 2) Arithmetic errors in the attorney and paralegal fee and out-of-pocket cost award in *Pietro IX* will be corrected, and Dr. Barrington's cost will be deducted.
- 3) *Pietro IX*'s attorney's fee and cost award will be clarified.
- 4) Employee is entitled to additional attorney's fees and costs for bringing this petition.

ORDER

- 1) Employee's petition to reconsider *Pietro IX*'s paralegal fee order is denied.
- 2) Employee's petition to modify *Pietro IX* to correct arithmetic errors in the attorney's and paralegal fee and out-of-pocket cost award is granted. *Pietro IX* is modified to identify a total of 296.80 attorney hours and 209.40 paralegal hours. *Pietro IX* is also modified to identify and award Employee \$26,762.13 in non-paralegal costs.
- 3) Employee's petition for clarification of *Pietro IX*'s attorney's fee award is granted.
- 4) *Pietro IX* is clarified to award, and Employer is ordered to pay, the total attorney hours requested in Employee's attorney's fee affidavits, from April 16, 2003, through August 30, 2011, in accordance with the hourly rates established in *Pietro IX*, solely because Employee prevailed on causation and compensability issues.
- 5) *Pietro IX* is clarified to award, and Employer is ordered to pay, the total attorney hours requested in Employee's attorney's fee affidavits since August 30, 2011, in accordance with the hourly rates established in *Pietro IX*, with exception of his March 4, 2014 affidavit as discussed below, because he also prevailed on indemnity issues.
- 6) If the parties determine statutory minimum fees exceed Employee's actual attorney's fees at the rates determined in *Pietro IX*, Employer is alternately ordered to pay statutory minimum fees on all benefits awarded or paid to date.
- 7) Employee's request for additional attorney's fees and costs as set forth in his March 4, 2014 affidavit and at hearing, for bringing his December 11, 2013 petition, is granted. In addition to the above, clarified awards, Employee is awarded and Employer is ordered to pay 8.60 attorney hours at \$385 per hour and 1.4 paralegal hours at \$165 per hour.

Dated in Anchorage, Alaska on March 21, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Dave Kester, Member

Patricia Vollendorf, Member

WILLIAM SOULE, DESIGNATED CHAIR, CONCURRING IN PART & DISSENTING

The dissent concurs fully with the majority on two points. Employee's petition for modification and clarification should be granted in accordance with the analysis set forth above. AS 23.30.130; *Rodgers*; *Lindekugel*, *Fischback*. However, the dissent would also grant Employee's petition to reconsider *Pietro IX*'s order denying Employee's paralegal fees as costs on its merits, would vacate that order and would award 209.40 hours in paralegal fees. AS 44.62.540.

Employee's three attorney's fee and cost affidavits timely provided Employer with all the information necessary for Employer to review and challenge any and all entries. They provided dates the services were provided, a brief description of the services and the time incurred. All that was missing were brief affidavits signed by the paralegals authenticating the work to satisfy a procedural requirement. 8 AAC 45.180(f)(14). Employer did not object to any entries as being unreasonable or unnecessary. Employee's initial attorney's fee affidavits substantially complied with the regulation. Employee subsequently provided the missing affidavits and Employer did not object to them. He cured the original defect. Employer had an opportunity to object to paralegal entries and to the paralegal fees at the March 12, 2014 hearing. Employer raised no objection to those paralegal fees on substantive grounds but objected to Dr. Barrington's costs, which were correctly deducted from the non-paralegal cost bill.

Since other decisions have relaxed the attorney's fees and paralegal filing rule in more egregious situations, and Employer could have but did not object to some of the same affidavits earlier, and because no harm or prejudice inured to Employer, the dissent would grant the reconsideration request on its merits. Furthermore, 8 AAC 45.195 makes a clear distinction between "waived"

and “modified.” The regulation does not allow this decision to “waive” the procedural requirements in 8 AAC 45.180(f)(14) merely to excuse a party from failing to comply with them. But, 8 AAC 45.195 allows this decision to “modify” those requirements. The dissent would modify 8 AAC 45.180(f)(14) and hold Employee’s post-hearing paralegal affidavits were satisfactory. Employee’s failure to strictly comply with 8 AAC 45.180(f)(14)’s procedure will result in Employee losing approximately \$30,000 in paralegal fees in a hard fought, successful case. In the dissent’s view, in light of all the mitigating factors discussed above, and given the fact 8 AAC 45.180(f)(14) does not contain an explicit time deadline for filing cost affidavits, manifest injustice will inure to Employee from the majority’s strict application of this regulation. If substantial compliance with a statute requiring a party to file an affidavit of readiness for hearing to avoid case dismissal is adequate to satisfy a statute, surely Employee’s substantial compliance and later full compliance ought to be enough to satisfy a procedural regulation. *Kim*. The dissent would vacate the order, modify 8 AAC 45.180(f)(14) and award 209.40 hours paralegal time at the annual rates established in *Pietro IX*. AS 44.62.540.

William Soule, Designated Chair

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers’ Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers’ Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order on Reconsideration, Modification and Clarification in the matter of PAUL D. PIETRO, employee / claimant; v. UNOCAL CORP, employer; , insurer / defendants; Case No. 199530232; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 21, 2014.

Anna Subeldia, Office Assistant