ALASKA WORKERS' COMPENSATION BOARD

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

RICHARD G. KAMITCHIS, Employee, Claimant, v. SWAN EMPLOYER SERVICES, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201203798 AWCB Decision No. 14-0039 Filed with AWCB Anchorage, Alaska On March 24, 2014

Remaining issues from Richard Kamitchis' (Employee) June 29, 2012 claim were heard on February 20, 2014, in Anchorage, Alaska, a date selected on December 19, 2013. Attorney Elliott Dennis appeared and represented Employee, who appeared and testified. Attorney Rebecca Holdiman-Miller appeared and represented Swan Employer Services (Employer). Sam Ward appeared and testified on Employer's behalf. As a preliminary matter, Employer's request for an order requiring mediation was orally denied. Employer's motion to quash a subpoena for witness Ward was also denied. This decision examines the two oral orders and addresses the remaining issues from Employee's June 29, 2012 claim, Employee's request for attorney's fees and costs, on their merits. The record closed at the hearing's conclusion on February 20, 2014.

ISSUES

As a preliminary matter, Employer contended the parties should be ordered to mediate Employee's attorney's fee and cost issues. It contended mediation would likely resolve the only issues remaining in the original claim, and prevent the need for a hearing.

Employee contended the attorney's fee and cost claims were already mediated. He contended it was unlikely the parties could resolve the attorney's fees and costs by further mediating on the hearing date, when they were unable to resolve the issue earlier.

1) **Was the oral order denying Employer's mediation request correct?**

Employer contended Employee's subpoena for witness Ward was inappropriate and should be quashed because it was not properly served on Employer's counsel. Furthermore, Employer contended it produced everything Employee requested and Ward could not provide any additional information, so his testimony was irrelevant.

Employee contended he properly served the Ward subpoena on the witness and on Employer's counsel. Furthermore, Employee contended there was a gross failure by Employer to produce the requested documents, and Ward's testimony was necessary to lay a foundation for adjuster's notes, and act as a record custodian.

2) **Was the oral order denying Employer's request to quash a subpoena correct?**

Lastly, Employee contends Employer resisted, or controverted-in-fact, his right to surgery for his shoulders. He contends he did not know how to proceed because his surgeon would not schedule surgery without Employer's carrier authorizing it, or without a personal guarantee Employee would pay all associated costs himself. Since the adjuster would not preauthorize the surgery, Employee contends he had no choice but to hire an attorney, file a claim, and force the insurer to pay for his surgery. Thus, Employee contends he is entitled to an attorney's fee and cost award.

Employer contends Employee's case was open and billable. It contends Employer never controverted Employee's right to have any medical treatment for his work injury and never

resisted any such treatment. Consequently, Employer contends Employee's lawyer is not entitled to an attorney's fees or cost award.

3) Is Employee is entitled to an attorney's fees and cost award?

FINDINGS OF FACT

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

1) On March 13, 2012, Employee reportedly injured his left shoulder and left groin area while trying to prevent a client from slipping and falling in the shower, while Employee was working for Employer (Report of Occupational Injury or Illness, March 15, 2012).

2) On March 14, 2012, Employee saw providers at First Care; his chief complaint was right and left shoulder pain. They diagnosed him with a "strain" (First Care reports, March 14, 2012).

3) On March 22, 2012, a physician's assistant ordered bilateral shoulder arthrograms (Orthopedic Physicians Anchorage, narrative report, March 22, 2012).

4) On March 28, 2012, the physician's assistant reviewed the bilateral shoulder arthrograms and diagnosed bilateral slap tears and stated if injections and physical therapy did not help, "then he will require surgery" (Orthopedic Physicians Anchorage narrative report, March 28, 2012).

5) From March 28, 2012, through approximately May 7, 2012, Employee had conservative care for his shoulders including corticosteroid injections and physical therapy, none of which provided lasting relief (medical records from March 28, 2012, through May 7, 2012; Employee).

6) On April 10, 2012, Employee had successful hernia repair surgery. He had no difficulties with obtaining this treatment and no resistance from Employer (Employee).

7) On May 14, 2012, Employee saw Brent Mason, D.O. for another opinion, and after a thorough evaluation and examination, Dr. Mason diagnosed mild impingement syndrome, right shoulder, SLAP lesion right shoulder, partial rotator cuff tear right shoulder, mild impingement left shoulder, SLAP lesion left shoulder by MRI not correlated by clinical examination with conservative care not successful. Dr. Mason provided additional subacromial injections in both shoulders and believed this would provide employee with temporary relief. He further stated: "[H]owever, if and when it begins to hurt again, which I believe it will, he is a candidate for arthroscopic evaluation with repair of SLAP lesion versus biceps tenodesis and repair of partial tear rotator cuff (Mason chart note, May 14, 2012).

8) On May 17, 2012, Employer's adjuster noted Employee was seeking treatment for his bilateral shoulders. The adjuster planned to send updated "closing forms" to Employee's attending physician for anticipated maximum medical improvement in June and would review "foreclosure" in 30 days. The adjuster noted if Employee was not at maximum medical improvement, the adjuster would schedule "IME foreclosure" (adjuster's notes, May 17, 2012).

9) By May 21, 2012, Employer knew Employee was requesting surgery on his shoulders given the results of his arthrograms. However, the adjuster noted Dr. Manion said before any surgery discussion he would exhaust conservative treatment with at least another month to six weeks of physical therapy. The adjuster also planned to write Dr. Manion to see whether he thought the SLAP tears were due to Employee's work injury, or degenerative. Employer also considered scheduling an independent medical evaluation (adjuster's notes, May 21, 2012).

10) Employee did not like Dr. Manion and thought he was rude to him and sarcastic. Employee testified Dr. Manion told him to go back to work and "work out the pain." Consequently, employee saw Bret Mason, D.O., for a second opinion. Dr. Mason reviewed employee's magnetic resonance imaging arthrograms and said he could help relieve his symptoms. Dr. Mason demonstrated, using models, what Employee's problems were and how he could fix them. As he had earlier planned, Employee move from Alaska and relocated to Georgia near the end of May 2012. Employee told the adjuster and Dr. Mason's office he was relocating to Georgia. The adjuster told him he could find a surgeon and have surgery performed in Georgia. Employee at first had difficulty finding an orthopedic surgeon in Atlanta willing to help him (Employee).

11) Employee called the adjuster's several times from Georgia trying to update his situation as he was looking for work. Employee's numerous phone calls went un-returned (*id*.).

12) On May 24, 2012, Employee called the adjuster and said he had gone to the emergency room for pain relief since he had not yet been able to find a physician. The adjuster told employee Dr. Manion was not totally convinced the slap tears were actually present (adjuster's notes, May 24, 2012).

13) On or about May 24, 2012, adjuster Tracey Young was assigned to Employee's case. She determined to seek a medical opinion from Dr. Mason instead of incurring costs associated with independent medical examination (adjuster's notes, May 24, 2012).

14) On May 29, 2012, a different adjuster reported receiving a call from Employee, who was seeking authority to see "Dr. Absi." The adjuster authorized a single evaluation and told Employee the next adjuster would decide what, if any, additional treatment would be authorized (adjuster's notes, May 29, 2012; Employee).

15) On May 30, 2012, Employee saw Joseph Absi, M.D., in Atlanta, Georgia. Dr. Absi performed an evaluation and diagnosed a SLAP lesion with partial thickness rotator cuff tear in the right shoulder and a SLAP lesion with minimal findings in the left shoulder. He recommended surgery and would try to get approval for surgery from Employee's workers' compensation carrier (Absi chart note, May 30, 2012).

16) On May 31, 2012, adjuster Young again said she would send a "causation" letter to Dr. Manion to save money on an independent medical examination. She further noted if Dr. Manion's opinion was unclear she would obtain an independent medical examination for a second opinion and would follow-up for Dr. Manion's response by June 14, 2012 (adjuster's note, May 31, 2012).

17) On June 6, 2012, Employee called the adjuster asking about his claim status. The adjuster stated the insurer could not "direct Employee's care" including limiting his visits or advising him what will not be covered until such time as a controversion can be issued "on the basis of evidence" (adjuster's notes, June 6, 2012).

18) On June 12, 2012, adjuster Young recorded a call from employee wanting Young's authority to seek emergency room treatment to obtain pain medication. She noted: "I advised that we do not preauthorized (sic) in Alaska. . . ." Employee stated "he is waiting for surgery," and adjuster Young advised him she was "waiting for Dr. Manion's response regarding surgery" and she would follow-up with the doctor's office on the following Thursday. Employee asked about the independent medical evaluation and adjuster Young told him she was unsure whether it would be necessary, and depended upon Dr. Manion's response (adjuster's note, June 12, 2012).

19) On June 14, 2012, adjuster Young recorded in her notes that Employee would need a SLAP repair but a prior doctor opined the need for this was not the direct result of this injury. Young reiterated that, to save cost of an independent medical evaluation, she had sent Dr. Manion a "substantial cause" letter on May 31, 2012, and would follow-up for his response (adjuster's note, June 14, 2012).

20) On June 21, 2012, Employee's lawyer entered an appearance and sent Employer's insurance adjuster a letter requesting a complete copy of the claim adjusting file for his case. The letter further advised the claims representative that Employee needed bilateral shoulder surgery as soon as possible; one and possibly two doctors recommended surgery; stated Employee's understanding that Liberty Northwest was not willing to pay for Employee to undergo shoulder surgery and was waiting for "something more" from his physician, which Employee viewed as a "controversion in fact"; and advised if Employer was not controverting the claim for surgical treatment, requested the adjuster call to discuss the matter to avoid Employee having to file a claim requesting surgery (Dennis letter, June 21, 2012).

21) In June 2012, Employee returned to Alaska to be "closer to the players" to take care of this workers' compensation situation. He was "completely lost" and did not know what to do about getting his necessary shoulder surgeries (Employee).

22) On June 25, 2012, Employee saw Dr. Mason again for follow-up. Dr. Mason diagnosed a PASTA lesion, SLAP lesion in the right shoulder, and impingement syndrome and bursitis, right shoulder. Noting Employee previously had two unsuccessful injections, Dr. Mason recommended arthroscopic surgery as "previously documented" and stated Employee would be off work until he was better following surgery (Mason chart note, June 25, 2012).

23) Dr. Mason would not schedule surgery for Employee's shoulder without the insurance company either authorizing it, or Employee personally guaranteeing to pay for the medical services rendered. Employee did not have the financial ability to personally guarantee payment, so Dr. Mason would not schedule the surgery (Employee).

24) At some point, the date of which is unclear from the record, Employee went to the pharmacy near his doctor's office to fill a pain pill prescription, and was speaking to adjuster Young on his cell phone. Adjuster Young told him no treatment or surgery was authorized. That is why he eventually hired attorney Dennis (*id*.).

25) On June 29, 2012, Employee through counsel filed a Workers' Compensation Claim requesting: TTD from March 13, 2012, through the then-present, and continuing; temporary partial disability (TPD), permanent partial impairment (PPI); medical costs, continuing; transportation costs including airfare to and from Georgia; penalty; interest; and attorney fees and costs. The reason Employee gave for filing his claim was: "Three doctors who have seen EE have diagnosed significant bilateral shoulder injury treatable only with surgery. Adjuster has

now requested IME which is resulting in delayed treatment though surgery was recommended/predicted over a month ago" (claim, June 29, 2012).

26) Attached to Employee's June 29, 2012 claim were, among other things, an injury report, and a July 5, 2012 medical summary to which were attached Employee's work-injury-related medical records from March 13, 2012, through June 25 2012 (claim, June 29, 2012, and attachments).

27) On July 12, 2012, Dr. Manion responded to Employer's May 31, 2012 letter. Adjuster Young's letter advised Dr. Manion: "Worker's (sic) Compensation benefits are payable if, in relation to other causes, the injury, or work duty, on March 13, 2012 is the substantial cause of the employee's condition or medical treatment." Adjuster Young then asked Dr. Manion: "Applying the definition of 'the substantial cause' set out above and taking into account [Employee's] medical condition and history of treatment, is [Employee's] work injury, or work duties, of March 13, 2012 'the substantial cause' of his current need for medical treatment and/or surgery?" To this, Dr. Manion responded "likely" (Liberty Northwest letter, May 31, 2012; made in response, July 12, 2012).

28) On July 17, 2012, Employer began paying Employee temporary total disability (TTD) benefits from June 25, 2012 and continuing (Compensation Report, August 7, 2012).

29) On August 17, 2012, Employee saw Michael Fraser, M.D., orthopedic surgeon, at Employer's request as an employer's medical evaluator (EME). Dr. Fraser diagnosed bilateral shoulder subacromial impingement and bursitis with mild rotator cuff tendinopathy; bilateral acromioclavicular joint arthrosis, preexisted and chronic; and bilateral shoulder biceps tendinitis with superior labrum anterior to posterior tears, more symptomatic on the right. Dr. Fraser opined the March 13, 2012 injury mechanics supported the SLAP tears and supported aggravation of some underlying rotator cuff tendinopathy and long head biceps tendinitis. However, the acromioclavicular joint arthrosis was not currently a cause of significant symptoms and was a pre-existing condition. Dr. Fraser further opined Employee had exhausted all conservative treatment and further treatment would consist of shoulder arthroscopy with possible biceps tenodesis and labrum repair versus debridement. He may also need subacromial bursectomy and possible acromioplasty. His right shoulder should be addressed first as it was more symptomatic. Dr. Fraser stated the industrial injury was the substantial cause for his current symptoms regarding his diagnosis. Employee was not currently capable of performing

his regular job duties and was restricted to lifting and no more than 10 pounds and no overhead work. Dr. Fraser stated these were temporary restrictions and Employee should be able to return to full duty work after both shoulders were repaired, including rehabilitation. Dr. Fraser opined the work injury was the substantial cause of Employee's then-current need for medical treatment. Employee was not medically stable and Dr. Fraser could not say when he would be medically stable, but he would require treatment first, with appropriate shoulder rehabilitation (EME report, August 17, 2012, at 11-13).

30) On August 29, 2012, Employee filed a petition stating: Petitioner seeks an order from Board that ER must pay for surgical treatment of his shoulders which were injured on-the-job. ER has not "committed" to pay so treating doctor will not perform surgery. EE continues to be in pain and he is unemployable until shoulder surgery is performed and he can recuperate. All doctors have seen EE have recommended surgery. Seek medical records (previously submitted) attached to Notice of Intent to Rely (Petition, August 27, 2012).

31) On August 29, 2012, Employee also filed and served documents upon which he intended to rely at a hearing. These documents included: March 14, 2012 records from First Care, documenting Employee's injury and symptoms; a March 14, 2012 x-ray report from Harold Cable, M.D., showing an old A/C separation in Employee's left shoulder and a negative right shoulder; a March 22, 2012 office visit report from Duane Heald, PA-C, diagnosing bilateral labral tears and prescribing arthrograms; March 23, 2012 left and right shoulder magnetic resonance imaging (MRI) arthrograms demonstrating SLAP lesions in both shoulders; a March 28, 2012 report from John Botson, M.D., describing corticosteroid injections into Employee's shoulders; a March 30, 2012 report from Frontier Therapy describing Employee's physical therapy for bilateral SLAP lesions in his shoulders; an April 5, 2012 Frontier Therapy note stating Employee had hernia surgery and his bilateral shoulder pain was increasing; April 9, 2012 letter from Michael Todd, M.D., stating Employee was able to work as of April 3, 2012, but was restricted to no lifting more than 10 pounds for six weeks, and was limited in bending, twisting, turning and pulling; an April 10, 2012 Frontier Therapy report documenting pain in Employee's bilateral shoulders; an April 12, 2012 Frontier Therapy report stating shoulder therapy could not be accomplished secondary to complications with Employee's hernia surgery; an April 17, 2012 Frontier Therapy report stating Employee was not fully compliant with treatment but his bilateral shoulders were improving with physical therapy; April 24, 2012

Frontier Therapy report stating a cortisone injection had worn off and Employee's right shoulder pain was increasing; an April 26, 2012 Frontier Therapy report stating Employee's right shoulder pain is increased; a May 1, 2012, Frontier Therapy report stating Employee had a right rotator cuff tear and was "contemplating surgery"; a May 31, 2012 letter from Liberty Northwest to Christopher Manion, M.D., asking his opinions about Employee's situation in which Dr. Manion stated the March 13, 2012 injury mechanics support the injury found, Employee denied any previous shoulder problems, and it was "likely" Employee's March 13, 2012 work injury was "the substantial cause" of his current need for medical treatment "and/or surgery"; a July 5, 2012 chart note from Bret Mason, D.O., stating Employee's workers' compensation carrier wanted an independent medical examination prior to fixing his shoulder but Employee was in significant discomfort and requesting pain relief, so Dr. Mason performed injections and considered a referral to a rheumatologist for further evaluation; and a July 16, 2012 chart note from Dr. Mason stating Employee continued to be off work and would remain off work and unable to do his normal occupation given his shoulder condition but was hopeful Employee might return to his job "once the anatomy is fixed" (notice of intent to rely, August 27, 2012, with attachments).

32) On August 29, 2012, Employee requested a hearing on his claim (Affidavit of Readiness for Hearing, August 27, 2012).

33) On September 6, 2012, Employee again requested a hearing on his claim (Affidavit of Readiness for Hearing, September 4, 2012).

34) On September 6, 2012, Employer filed an opposition to Employee's August 27, 2012 hearing request (Affidavit of Opposition, September 6, 2012).

35) On September 6, 2012, Employee's attorney received a call from defense counsel stating her client agreed to pay for Employee's shoulder surgery (Dennis letter, September 13, 2012).

36) On September 14, 2012, Employer filed an opposition to Employee's September 4, 2012 hearing request (Affidavit of Opposition, September 14, 2012).

37) September 18, 2012, Employer responded to Employee's petition requesting an order requiring Employer to pay for his shoulder surgeries. Employer stated:

> The employee's petition is moot. The employer has not controverted and/or denied medical costs for which proper documentation was submitted relative to the employee's reported work injury of March 13, 2012. Additionally, under AS 23.30.095, 8 AAC 45.082, and 8 AAC 45.084, the employer is not required to preauthorize payment for medical benefits. The employee's Petition dated

August 27, 2012, should be deemed moot by the Board (Response to Employee's Petition, September 18, 2012).

38) On September 21, 2012, the parties attended a prehearing conference. Employee's claim was reviewed as was his petition for pre-authorization for shoulder surgery. The summary states "no controversion has been filed and medical remain open, however, they are not required to pre-authorize surgery." Employee's lawyer advised Employee was scheduled for surgery on October 2012 (Prehearing Conference Summary, September 21, 2012).

39) On October 2, 2012, Employee had right shoulder surgery (Employee).

40) On October 31, 2012, the parties attended another prehearing conference at which Employee's claim and petition were discussed. Employee reported he had undergone surgery on one shoulder and the other shoulder surgery was scheduled for surgery following his recovery from the first. The summary further states Employer was paying benefits (Prehearing Conference Summary, October 31, 2012).

41) On January 4, 2013, Employee had left shoulder surgery (Employee).

42) On February 6, 2013, a hearing officer signed a subpoena requiring Ward to attend the hearing and give testimony (subpoena, February 6, 2013).

43) The board's internal process involving subpoenas is as follows: A person brings in a subpoena and asks that it be issued. The board's administrative assistant records the subpoena in a logbook and gives it to a hearing officer for review and signature. Once the hearing officer signs and dates the subpoena, the assistant takes the signed subpoena and scans it into the workers' compensation database called ICERS. This all happens prior to the parties serving the subpoena on the witness. A party does not technically "file" the subpoena with the board as such is not required; the receptionist requires a copy (experience, judgment, observations).

44) On April 10, 2013, Employer propounded seven interrogatories to Employee for his response (First Set of Interrogatories to Employee, April 10, 2013).

45) On May 24, 2013, Employee's attorney sent a letter to Employer's counsel with 17 informal discovery requests, and requesting a privilege log (Dennis letter, May 24, 2013).

46) On July 2, 2013, Employer noticed Employee's deposition for August 12, 2013 (Notice of Taking Deposition, July 2, 2013).

47) On July 10, 2013, Employer through counsel responded to Employee's May 24, 2013 discovery request. Employer alleged to have responded fully to all 17 discovery requests Employee made (Holdiman-Miller letter, July 10, 2013).

48) On September 16, 2013, Employee's lawyer sent Employer's counsel a letter making an "official discovery request" for three categories of information (Dennis letter, September 16, 2013).

49) On October 23, 2013, Employer's counsel sent a letter to Employee's lawyer advising she was unaware of any ongoing disputes warranting response to his discovery requests and noting there was no claim for any late payments requiring production of payment information he had previously requested. The letter further stated Employee's treating physician agreed with Employer's medical evaluator, and suggested there were no disputes. In short, on these grounds Employer refused to respond to discovery (Holdiman-Miller letter, October 23, 2013; observations).

50) On October 25, 2013, Employee's lawyer responded to Employer's counsel's October 23, 2013 letter stating the requested information was relevant to his claim for attorney's fees. The letter further stated Employer controverted Employee's case by resisting providing workers' compensation benefits, which resulted in Employee hiring an attorney to file a claim, which brought about Employer's compliance (Dennis letter, October 25, 2013)..

51) On November 4, 2013, Employee requested a hearing on a claim dated "July 9, 2012" (Affidavit of Readiness for Hearing, November 1, 2013).

52) Employee has not filed a claim dated July 9, 2012 (observations).

53) On November 7, 2013, Employee filed a petition stating: "EE seeks an order from the Board compelling a response to EE's discovery that was submitted to ER on May 24, 2013 and September 16, 2013." Attached to this petition were:

- The June 21, 2012 letter from Employee's counsel to Employer's workers' compensation claims representative
- The May 24 2013 letter from Employee's counsel to Employer's attorney.
- The September 16, 2013 letter from Employee's counsel to Employer's lawyer making an "official discovery request" for three categories of information.
- The October 23, 2013 letter from Employer's counsel to Employee's lawyer.

- The October 25, 2013 letter from Employee's lawyer to Employer's counsel (Petition, November 6, 2013, with attachments).

54) On November 21, 2013, Employer opposed Employee's petition to compel discovery stating it had fully complied with his informal discovery requests, the requests were overly broad, and were outside the scope of relevant discovery since no "active claim" existed (Employer's Opposition the Petition to Compel, November 21, 2013).

55) On November 26, 2013, Employer filed a notice denying PPI benefits in excess of 4% whole person issued by Donald Schroeder, M.D.; medical treatment including prescription reimbursement requests following August 13, 2013; and costs associated with Employee's evaluation by Edward Barrington, DC, conducted October 25, 2013. After given the reasons for the specifically controverted benefits, Employer's notice stated: "The employer continues to rely on defenses cited in its prior controversion notice dated August 20, 2013" (Controversion Notice, November 25, 2013).

56) On December 5, 2013, Employee replied to Employer's opposition to his petition to compel conceding some documents have been produced, but others were not. Employee further noted he had an active claim for attorney's fees and costs among other things (Reply to Employer's Opposition to Petition to Compel, December 5, 2013).

57) December 19, 2013, the parties attended a prehearing conference at which they discussed the remaining issues and the designee propounded a discovery order. The parties also agreed to a hearing on Employee's claim from February 20, 2014 (Prehearing Conference Summary, December 19, 2013).

58) On February 5, 2014, the board approved the parties' settlement agreement, which resolved all issues in this case with exception of Employee's attorney's fees and costs (Settlement Agreement, approved February 5, 2014).

59) Employee sought out attorney Dennis' services because he did not know what to do to move his workers' compensation case forward. Employee did not think he would ever get anything from the insurance company without assistance from an attorney. In respect to the settlement agreement, he was happy with the results. Employee and attorney Dennis communicated regularly about his claim and settlement. Employee thinks he would not have

shoulder surgery yet and would have been stuck with an unacceptable four percent PPI rating, but for attorney Dennis's assistance (Employee).

60) On February 6, 2014, a hearing officer signed a subpoena requiring Ward to appear at the February 20, 2014 hearing and to bring with him a complete and unedited copy of the adjuster's "journal" entries related to Employee, and a copy of Dr. Manion's response to the adjuster's May 31, 2012 letter seeking his opinion regarding the cause for Employee's need for medical treatment (Subpoena to Appear and Produce Records, February 6, 2014).

61) Thereafter, Ward received a subpoena to attend the hearing from Employee and promptly told Employer's counsel he had been subpoenaed (Employer's lawyer's hearing statements).

62) On February 12, 2014, Angela Enz testified through affidavit stating she was employed by Dr. Mason's office as office manager. Enz has experience with numerous injured workers involved in workers' compensation cases. She testified in general, when Dr. Mason is treating a patient involved in a workers' compensation claim who is a surgical candidate, he will wait to schedule surgery until he knows the claim's status. She further stated her office is encouraged to contact a workers' compensation claims adjuster to ensure there is an open claim. Dr. Mason has discretion in deciding when surgery is scheduled depending upon payment and other concerns. Lastly, Enz stated:

> If there is an independent medical examination pending, which could result in denial of payment or if there is any other reason for denial of payment, Dr. Mason proceed with surgery if the injured worker personally guarantees to pay for all medical bills in the event the payment for surgery is declined by the workers [sic] compensation carrier (affidavit of Angela Enz, February 12, 2014).

63) On February 12, 2014, Employee filed an affidavit outlining his attorney's fees and costs from June 21, 2012, through June 19, 2013, billed at $300 per hour for a total of 26.90 hours equaling $8,070. Another attachment to Employee's fee affidavit itemized attorney's fees from July 17, 2013, through February 10, 2014, billed at $300 per hour for 65.40 hours totaling $19,620. Another attachment to Employee's affidavit was an itemization of Marsha Fowler's paralegal fees from August 14, 2013, through February 10, 2014, billed at $150 per hour for a total of 58 hours equaling $8,700. Employee's affidavit also documented $1.36 in postage and long distance calls and $672.22 in other, non-paralegal out-of-pocket costs (Affidavit of Counsel for Proof of Attorney's Fees, Paralegal Fees, and Costs, February 12, 2014).

64) Employee seeks attorney's fees and costs under either AS 23.30.145(a) or (b) (Employee's Hearing Brief, February 12, 2014, at 14).

65) On February 13, 2014, Employer filed a motion to quash the subpoena issued for Ward, arguing it should have been served on Employer's counsel, but acknowledging Ward contacted Employer after receiving the subpoena (Employer's Opposition to and Motion to Quash Employee's Subpoena to Appear and Produce Records, February 13, 2014).

66) On February 18, 2014, Employee filed an affidavit signed by paralegal Fowler itemizing and documenting Fowler's work on Employee's case from May 31, 2012, through June 28, 2013 totaling 10 hours billed at $150 per hour equaling $1,500. Fowler's affidavit also documented $132.16 in non-paralegal out-of-pocket costs incurred in this case from June 30, 2012, through June 28, 2013, and 58 hours from August 14, 2013, through February 10, 2014, at $150 per hour totaling $8,700 (Affidavit of Paralegal for Proof of Paralegal Fees and Costs, February 13, 2014).

67) In summary, Employee documented actual attorney's fees of $27,690, paralegal fees of $10,200 and out-of-pocket expenses of $672 (Employee's hearing brief, February 12, 2014).

68) At hearing on February 20, 2014, Employer moved for mediation and Employee opposed the motion. The panel denied Employer's mediation request because the parties had attempted to resolve the attorney's fee and cost issue the day prior to hearing, and were unsuccessful (record).

69) Mediation is a helpful adjunct to the workers' compensation adjudicative process and many difficult cases are resolved through mediation (experience, judgment, observations).

70) At hearing on February 20, 2014, the panel denied Employer's motion to quash the subpoena requiring Ward to attend the hearing and give testimony. The panel found the subpoena was properly served on Ward, Ward advised his attorney he had been served with a subpoena, and Ward's testimony might be relevant to support Employee's attorney's fee and cost award, and to provide foundation for adjuster's notes as a record custodian (record).

71) At hearing on February 20, 2014, Ward testified he is a claims case manager for Employer's insurer and familiar with workers' compensation law as well as Employee's log notes kept by various insurance adjusters. Ward reviewed Dr. Manion's report and admitted nothing in the note stated Employee's shoulder injuries were not work-related. He reviewed the adjuster's notes relied upon by Employee, and interpreted some of the abbreviations. He also explained "closed" means "file closure." Ward conceded the notes reflect Employee was seeking authorization for shoulder surgery. He testified the insurer does not preauthorize

treatment in Alaska unless it is through a stipulation or settlement agreement. Ward believes preauthorization is not required in Alaska, and thinks this is an accurate statement of Alaska law. He testified most providers in Alaska do not call and ask for preauthorization, but rather, call the adjusters to inquire if the case is controverted, open, or if an EME is planned. In Ward's opinion, not preauthorizing is not a "denial." Employer's insurer has no standard procedure for requiring an EME versus writing a treating doctor for an opinion. No prior adjusters' notes state an EME was scheduled for Employee as of July 17, 2012. The assigned adjuster on Employee's case would have seen Dr. Manion's response to the adjuster's May 31, 2012 letter within three days. Ward stated there was no controversion notice filed in Employee's case at the time of the EME. Employee could have gotten his shoulder surgeries any time he wanted. Had Employer's adjusters received bills for Employee's shoulder surgeries, the bills would have been processed for payment in the normal fashion (Ward).

72) The parties spent approximately five hours at hearing (observations).

73) Employee's attorney represented he incurred an additional 12 hours in attorney's fees during the hearing and on the day prior. At $300 per hour, Employee incurred an additional $3,600 in actual attorney's fees. Employer did not dispute these numbers (Employee's attorney's hearing statement; record).

74) Employee argued Employer's position was "specious." He admitted his attorney's fees were "appallingly high" but were based upon Employer's "roadblocks" to obtaining his shoulder surgeries. Employee further argued there was a fair amount of risk in a contingent case such as this, all caused by Employer's calculated delays, which justified his perhaps higher-than-normal attorney fees (Employee's closing argument).

75) Employer agreed Employee's attorney's fees were high. It argued nothing was in dispute, there was an open claim, there was no controversion, and no denial. Employer argued the only thing in dispute was PPI, which was ultimately resolved through the settlement agreement. In short, Employer argued it was Dr. Mason's fault Employee's surgery was delayed because Dr. Mason would not schedule the surgery (Employer's closing argument).

76) The claimant's bar is aging rapidly and is limited to begin with, with only a handful of competent attorneys willing to represent injured workers. Two claimant lawyers are in their 70s and 80s and are nearing retirement. There are few, if any young attorneys entering the worker's compensation bar representing injured workers or other claimants. It is difficult for injured

workers to find a competent attorney, and approximately 50 percent of all injured workers who appear at hearings are not represented by an attorney (experience, judgment, observations and inferences drawn from all the above).

77) Employer's refusal to preauthorize shoulder surgery was a controversion-in-fact of Employee's pre-claim right to this benefit, and was resistance to Employee's right to medical treatment for a non-controverted injury, and caused substantial delay in Employee's ability to obtain treatment for his work related shoulder injuries (experience, judgment, observations and inferences drawn from all the above).

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.
> . . .

This decision may be based not only on direct testimony, medical findings, and other tangible evidence, but also on the panel'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, 533-534 (Alaska 1987).

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires. . . .
> . . .
>
> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and

> every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . .
>
> **AS 23.30.122**. **Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.
>
> **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. . . .

Rose v. Alaskan Village, Inc., 412 P.2d 503 (Alaska 1966) explained:

> AS 23.30.145(a) of the Alaska Workmen's Compensation Act enjoins the Board, in determining the amount of legal fees that are to be awarded, to
>
> > take into consideration the nature, length and complexity of the services performed. . . .
>
> In the instance where an employer fails to pay compensation or otherwise resists the payment of compensation, AS 23.30.145(b) provides:

> (I)f the claimant has employed an attorney in the successful prosecution of his claim, the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation ordered. . . .
>
> We construe AS 23.30.145 in its entirety as reflecting the legislature's intent that attorneys in compensation proceedings should be reasonably compensated for services rendered to a compensation claimant. . . .

Johns v. State, Dept. of Highways, 431 P.2d 148 (Alaska 1967) dealt with fees for an injured worker's lawyer on appeal. But the court said in referring to AS 23.30.145 the court reiterated: "We construe AS 23.30.145 in its entirety as reflecting the legislature's intent that attorney's [sic] in compensation proceedings should be reasonably compensated for services rendered to a compensation claimant" (footnote omitted; *id*. at 154).

In a four justice plurality opinion, *Haile v. Pam American World Airways, Inc*., 505 P.2d 838 (Alaska 1973), the issue was whether attorneys in three workers' compensation death cases were entitled to a statutory minimum attorney's fee percentage under AS 23.30.145(a) or, in the alternative, whether the board could award a "reasonable" attorney's fee without regard to the minimum provisions, under AS 23.30.145(b). The board had awarded a lower fee under §145(b), and the employees appealed. *Haile* noted in multiple death cases, "the minimum attorney's fees could well exceed $15,000, whereas reasonable fees for the services involved would be a much smaller sum" (*id*. at 839). The employer in *Haile* never controverted the death claims but "failed to respond to the claim or to pay compensation," so the claimants filed claims, which were set for hearing (*id*.). Prior to hearing, the employer notified the board it did not contest any of the claims (*id*. at 839-40). After citing AS 23.39.145, *Haile* concluded: "Thus, the award of the minimum statutory fees applies only in cases where a claim has been controverted" (*id*. at 840). *Haile* further said:

> It is to be noted that subsection (b) makes no reference to the award of a minimum fee, but refers only to the allowance of a 'reasonable attorney fee.' Had the legislature intended the minimum fee provision to apply to subsection (b), it would have been a simple matter to have so specified. The failure to do so, coupled with the illogic of awarding a fee which may be out of all proportion to the services performed, dictates a construction of subsection (b) as being separate and distinct from the minimum fee provision of subsection (a) (*id*.).

As to whether the employer's delay in payment without having filed a formal controversion notice equated to a controversion in fact, bringing the fee request under §145(a), *Haile* declined to find doing nothing is not a "controversion" and reasoned:

> The attorneys who represented the claimants are certainly entitled to an award of reasonable feeds. That is provided for by the act. But there is no reason why they should receive a sum out of all proportion to the services performed. Alaska's provision allowing attorney's fees is unique in its generosity to the claimants and their counsel (footnote omitted). It, however, does not provide that a delay in payment, by itself, constitutes a controversion of the claim justifying the award of the minimum fees. There is no justification for adding such provision to the comprehensive terms of the act (*id*. at 841).

In *Bradley v. Mercer*, 563 P.2d 880 (Alaska 1977), the Alaska Supreme Court addressed attorney's fees where the employer "did not contest workman's right to compensation, but did contest the computation of average weekly wages for the purpose of fixing the amount of such compensation" (*id*. at 880). Bradley was injured and the insurer began voluntarily paying benefits, though at the minimum weekly rate. Bradley filed a claim and prevailed on his rate adjustment claim. The board awarded attorney's fees but ordered these paid from Bradley's award. He appealed; the superior court affirmed and he appealed again. The opinion does not say whether or not the carrier filed a controversion notice. On appeal, the employee argued he was entitled to fees under §145(b) in addition to his benefits. The employer argued §145(a) applied because it did not oppose paying compensation, but only objected to the amount requested (*id*. at 881). *Bradly* rejected the employer's argument and said: "We hold that when a carrier contests the amount of compensation owed to an injured workman, it 'resists the payment of compensation' within the meaning of AS 23.30.145(b). In such cases, if the claimant has hired an attorney in the successful prosecution of his claim, AS 23.30.145(b) entitles him to reasonable attorney's fees in addition to any added compensation that is awarded to him" (*id*.).

In *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978), the board awarded reasonable fees under §145(b) and the employee appealed, apparently because statutory minimum fees under §145(a) would have been considerably higher. The superior court reversed. The Alaska Supreme Court affirmed the higher award. The court's opinion does not state whether or not the employee's claim was controverted or "controverted in fact." *Houston* stated:

> Houston claimed that he was entitled to [PTD] and [TTD]. The carrier resisted both of these claims. . . . The Board found in favor of Houston on each claim. However, it refused to award him percentage attorney fees based on AS 23.30.145(a); instead it granted $1,000 in attorney fees under AS 23.30.145(b), to be paid by the carrier. In justifying this award the Board stated:
>
> > The defendant did resist payment of compensation, and the applicant retained an attorney in the successful prosecution of his case. We find that the applicant's attorney was only required to do a minimal amount of work, and the claim was not complex, but the benefits resulting to the applicant were considerable (*id*. at 619).

On appeal, the employer argued *Haile* resolved the necessity of a controversion and apparently because there was no controversion filed in *Houston*, argued the superior court was wrong to apply §145(a). It objected to statutory fees that were "glaringly absurd." *Houston* said:

> Section 145(a) requires only that the Board 'advises that a claim has been controverted,' not that a formal notice of controversy be filed under §155(d). That latter provision serves the independent concern, not relevant here, of §155, and does not purport to define when a claim is in fact controverted. To require that a formal notice of controversion be filed as a prerequisite to an award of the statutory minimum attorney fees would serve no purpose that we are able to perceive. It would be a pure and simple elevation of form over substance because the nature of the hearing, the pre-hearing discovery proceedings, and the work required of the claimant's attorney are all unaffected by the existence or not of a formal notice of controversion when there is controversion in fact (*id*. at 619).
> . . .
>
> It is not part of our function to question the wisdom of legislation, and if the minimum fees are in general too high that is true independent of whether there exists in the file of any given case a formal notice of controversion. Thus, any absurdity that might be said to exist is inherent in the statute and not dependent on any interpretation which might be given it (*id*. at 621).

Notably, *Houston*, referencing *Bradley*, above, said: "As the carrier admits in the present case, controversion of a claim may at the same time also include 'an attempt to resist payment of compensation,' and therefore arguably be subject to the provisions of §145(a) and §145(b) (*id*. at 620).

Wien Air Alaska v. Arant, 592 P.2d 352 (Alaska 1979) (*reversed on other grounds*), in adopting the "controversion-in-fact" doctrine, stated:

> In *Haile* . . . we held that the section 145(a) formula only applies to 'controverted' claims and the section 145(b) grant of reasonable attorney fees applies to an employer who otherwise fails to make payment of compensation (footnote omitted). The Arants maintain that Wien controverted the claim. Wien maintains that while it 'resisted' payment of the increased amount, it did not 'controvert' the claim (*id*. at 364).

The board in *Arant* had not discussed the controversion issue but merely concluded the employer had resisted the claim in excess of a certain amount, the employee retained an attorney in the successful claim prosecution and the board awarded fees under §145(b). *Arant* held the employer had controverted the claim by denying it owed the employee more benefits without filing a formal controversion notice, distinguished *Haile* on that basis, and remanded for fee computation under §145(a). The fact the employer agreed to pay some benefits but "only disputed the amount" did not preclude a controversion finding (*id*. at 365). *Arant* concluded: "We hold that a notice of controversion by the employer is not required for an award of attorney's fees under AS 23.30.145(a)" (*id*.). In remanding to the board for fee redetermination, *Arant* further stated:

> AS 23.30.145 seeks to insure that attorney's fee awards in compensation cases are sufficient to compensate counsel for work performed. Otherwise, workers will have difficulty finding counsel willing to argue their claims (footnote omitted). Also, high awards for successful claims may be necessary for an adequate overall rate of compensation, when counsel's work on unsuccessful claims is considered (*id*. at 365-66).

The Alaska Supreme Court in *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955 (Alaska 1982) stated the Act is "designed to provide the most efficient, dignified, and certain means of determining benefits for workers sustaining work-connected injuries." *Whaley* further noted: "In particular, AS 23.30.145 is unique in its generosity to claimants and their counsel" (*id*. at 959).

Wise Mechanical Contractors v. Bignell, 718 P.2d 971 n. 7 (Alaska 1986), a controverted case addressed fees under §145(c) and applied factors from the Alaska Code of Professional Responsibility, DR-106(B) in determining a "reasonable fee" as follows:

> The factors are:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> (3) The fee customarily charged in the locality for similar legal services.
> (4) The amount involved and the results obtained.
> (5) The time limitations imposed by the client or by the circumstances.
> (6) The nature and length of the professional relationship with the client.
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
> (8) Whether the fee is fixed or contingent.

In expanding this holding to all workers' compensation fees, *Bignell* said: "We see no reason to exclude that factor [contingent fee] from the reasonableness determination to be made in worker's compensation cases" (*id*. at 974-75). *Bignell* further noted:

> In this case, as in many worker's compensation cases, the only fee arrangement between the claimant and counsel is that counsel will be paid whatever fee is approved by the board or the court, and payment of any fee is contingent upon success (footnote omitted). A contingency arrangement is ordinarily necessary because most injured claimants lack the financial resources to pay an attorney an hourly fee. If an attorney who represents claimants makes nothing on his unsuccessful cases and no more than a normal hourly fee in his successful cases, he is in a poor business. He would be better off moving to the defense side of the compensation hearing room where attorneys receive an hourly fee, win or lose, or pursuing any of the other various law practice areas where a steady hourly fee is available (*id*. at 975).

In *Bailey v. Litwin Corp*., 713 P.2d 249 (Alaska 1986), the court remanded the case and "instructed the Board to award Bailey attorney's fees and costs pursuant to AS 23.30.145(a), (b)" (*id*. at 259). On remand the employee requested $21,700.00 in fees, which were double his "normal hourly rate," but the board awarded him only $5,156.25. In *Bailey v. Litwin Corp*., 780 P.2d 1007 (Alaska 1989), the Alaska Supreme Court reviewed the latter ruling, addressed some of its prior cases discussing attorney's fees and stated:

> In this case, the Board determined that Bailey was not limited to the minimum fee calculated under AS 23.30.145(a), but that he was entitled to additional compensation because of the nature, length and complexity of the services performed. Bailey's actual attorney's fees were $10,850, representing 62 hours at $175 per hour. He requested $21,700. The Board adjusted the hourly rate from $175 to $125 (footnote omitted). The Board also reduced the number of compensable hours from 62 to 55, because the Board found that Bailey had

> already been paid for seven hours of work. This finding is supported by the record (*id*. at 1011).

The board had declined to apply a contingency factor in this case and found the employee did not prevail on all issues in his claim. *Bailey's* footnote omitted from the above quotation says: "The Board has consistently held that $125 an hour is a reasonable fee" (*id*. at 1011 n. 11). On this record, *Bailey* affirmed the board's attorney's fee award (*id*. at 1012).

In *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990), an injured worker lost on a controverted disability claim before the board but prevailed on his medical claim. The board awarded only statutory minimum fees under §145(a) (*Cortay v. Silver Bay Logging*, AWCB Decision No. 87-0239 (October 8, 1987) at 7). On the employee's appeal, the superior court reversed the fee award stating it was "inadequate as a matter of law," and directed the board to award higher, actual fees apparently at one-half the lawyer's hourly rate for the employee's success on the medical care issue (*Cortay v. Silver Bay Logging*, Memorandum of Decision (September 13, 1988) at 8). The employee again appealed the fee issue arguing the superior court's fee award, though higher than the board's was still "inadequate as a matter of law" (*id*. at 108). *Cortay* reviewed prior Alaska Supreme Court cases interpreting and applying AS 23.30.145, including §145(c), which applies only to attorney's fees on appeal, and reiterated "a 'full fee' is not necessarily limited to an hourly fee if a fee calculated at an hourly rate would not reflect the amount of work expended" (*id*.; citations omitted). In reversing the superior court's attorney's fee award and without discussing why §145(b) applied in this "controverted" case rather than §145(a), *Cortay* concluded:

> Applying this analysis to the present case, the superior court erred in not awarding attorney's fees with respect to Cortay's attorney's work on the prevailing medical issues at his actual rate of $110 per hour. Awarding fees at half a lawyer's actual rate is inconsistent with the purpose of awarding full attorney's fees in the workers' compensation scheme. If lawyers could only expect 50% compensation on issues on which they prevail, they will be less likely to take injured workers' claims in the first place (*id*. at 109).

Olson v. AIC/Martin, J.V., 818 P.2d 669 (Alaska 1991) held fees were properly awarded under §145(b) where an employer unsuccessfully tried to obtain a compensation rate reduction, which would have resulted in a $44,000.00 overpayment had the employer been successful. The board

found the employer had "otherwise resisted" paying benefits and there was no "award" to the employee upon which to base a fee order under §145(a), which "requires that compensation be 'awarded.'" Neither the Alaska Supreme Court's opinion nor the board's decision state whether or not the employer controverted the claim or the employee's right to benefits (*id*.; *Olson v. AIC/Martin, J.V.*, AWCB Decision No. 88-0254 (September 29, 1988)).

In *Childs v. Copper Valley Electric Ass'n*, 860 P.2d 1184, 1187 (Alaska 1993), the employer controverted the employee's claim. The employer voluntarily paid some benefits after a claim was filed and before hearing, the employee lost on most issues at hearing, but the board failed to award any attorney's fees on the amounts controverted but later paid voluntarily. On appeal, the Alaska Supreme Court cited AS 23.30.145 and distinguished it from Civil Rule 82, noting §145 provides "attorney's fees in workers' compensation cases should be *fully* compensatory and reasonable, in order that injured workers have competent counsel available to them" (*id*. at 1190-91; citations omitted; emphasis in original). *Childs* held the employer's voluntary payment was the "equivalent of a Board award, because the efforts of Childs's counsel were instrumental to inducing it" (*id*. at 1191). Consequently, the board should have awarded Childs' lawyer fees on the voluntary payment "pursuant to AS 23.30.145(a)." The opinion does not say if these fees were limited to statutory minimum. Lastly, *Childs* said:

> In addition, CVEA delayed payment of TTD benefits that were due until August 1990. Where an employer fails to pay compensation due or resists paying compensation, AS 23.30.145(b) directs an award of reasonable attorney's fees and costs to successful claimants. Thus Childs should receive an award of reasonable fees and costs, because the efforts of his attorney were necessary to inducing CVEA to finally pay the benefits. Though CVEA asserts that it already paid the attorney's fees applicable to the delayed payment of TTD benefits, the Board should ascertain if they are reasonable pursuant to the statute (*id*.).

Childs concluded: "Childs is entitled to a Board award of full reasonable attorney's fees for those matters on which he has prevailed: CVEA's payment of TTD benefits, interest payments, and the 20 percent penalty" (*id*. at 1193).

Underwater Construction, Inc. v. Shirley, 884 P.2d 156 (Alaska 1994) held: "Nonetheless, section 145(a) limits the Board's authority to award attorney's fees to 'the amount of

compensation controverted and awarded'" (*id*. at 159). *Shirley* reviewed the "policies underlying the attorney's fees statute" and said these included "to ensure that injured workers are able to obtain effective representation" and the fact the "employer is required to pay the attorneys' fees relating to the unsuccessfully controverted portion of the claim because he created the employee's need for legal assistance" (*id*.).

In *Bouse v. Fireman's Fund Ins. Co*., 932 P.2d 222 (Alaska 1997), both parties appealed the board's award of 50 percent of the requested, actual attorney's fees in a controverted case. The employee contended he should have been awarded 100 percent and the employer said Bouse should have been awarded no attorney's fees because it had controverted his claim merely as a precaution. The Alaska Supreme Court affirmed the board's award noting the employee did not prevail on his main issue; it also rejected the employer's argument noting the insurer had "filed a controversion and exposed itself to an attorney's fees award" (*id*. at 242).

Thompson v. United Parcel Service, 975 P.2d 684 (Alaska 1999), in a controverted claim reversed the board's denial of a compensation rate adjustment (*id*. at 686, 691). The Alaska Supreme Court said: "Because we reverse, Thompson is entitled to receive reasonable attorney's fees and legal costs pursuant to AS 23.30.145" (*id*. at 691).

In *Seville v. Holland America Line Westours, Inc*., 977 P.2d 103 (Alaska 1999), a controverted claim, the Alaska Supreme Court reversed the board's benefits denial. The court further stated, without analysis: "Seville has separately argued that the Board erred in failing to award attorney's fees. We need not address the issue. Having now prevailed on her claim for compensation, Seville will be entitled as a matter of course to an award of fees under AS 23.30.145(b)" (*id*. at 113 n. 56).

In *Bustamante v. Alaska Workers' Compensation Board*, 59 P.3d 270 (Alaska 2002), the Alaska Supreme Court recognized, referring to the injured worker: "Without counsel, a litigant's chance of success on a workers' compensation claim may be decreased" (*id*. at 274).

In *State v. Cowgill*, 115 P.3d 522 (Alaska 2005), the board ruled in Cowgill's favor on her controverted claim (*Cowgill v. State*, AWCB Decision No. 00-0147 (July 18, 2000) at 8). In a subsequent decision the board said:

> The employer argues that because it filed a timely controversion notice that the employee is limited to an award of attorney fees under subsection .145(a). We disagree. We read subsection .145(b) literally, finding that there are three separate scenarios under which we may award attorney's fees under this subsection. First, an employer fails to timely controvert. Second, an employer may fail to pay compensation or other benefits. Third, the employer may otherwise resist payment of compensation. We find that a timely controversion does not preclude an award of attorney's fees under AS 23.30.145(b). We find the employer did not pay and resisted paying the employee's PPI benefits (by filing a timely controversion), and conclude we will award attorney's fees under subsection .145(b).
>
> Subsection .145(b) requires that the attorney's fees awarded be reasonable. Our regulation 8 AAC 45.180(d) requires that a fee awarded under subsection 145(b) be reasonably commensurate with the work performed. It also requires that we consider the nature, length and complexity of the services performed, as well as the amount of benefits involved.
>
> We find practice in the Workers' Compensation forum to be contingent upon prevailing upon issues presented to the Board. We find the employee's counsel has practiced in the specialized area of workers' compensation law for many years. We find the employee's counsel to have considerably more experience than the other well qualified counsel who were recently awarded $200.00 and $215.00 per hour respectively (citations omitted). In light of Mr. Kalamarides' expertise and extensive experience, and the contingent nature of workers' compensation practice, we find $240.00 per hour to be a reasonable hourly rate for Mr. Kalamarides (*Cowgill v. State*, AWCB Decision No. 01-0099 (May 10, 2001) at 17-18).

The state appealed, and the superior court reversed and said:

> In conclusion, the legislature has provided a framework under which the Board awards attorney's fees for representing claimants. How those fees are calculated, and whether the employer is directed to pay the fees in addition to other benefits awarded, depends on the employer's actions or inactions regarding the payment of the benefits ultimately 'awarded' by the Board. The Board decided that an employer by simply filing a timely controversion notice is also 'failing' to timely pay benefits and 'otherwise' resisting payment of benefits. Contrary to the Board's construction, the legislature and the courts have recognized that separate and distinct actions or inactions trigger separate and distinct fee awards under AS 23.30.145(a) and (b). Because the State filed a timely controversion notice, the Board should have awarded attorney's fees under AS 23.30.145(a).

> Therefore, the award is reversed and this matter is remanded to the Board for a fee calculation based upon the relevant factors, under AS 23.30.145(a). In reaching this decision, the court is not suggesting that the amount awarded in this case would not be appropriate under AS 23.30.145(a). The amount of attorney's fees is left to the Board's discretion under the applicable part of the statute (*State of Alaska v. Cowgill*, 3AN 01-7469 Civil (April 17, 2002).

On remand the *Cowgill* board reviewed its past decisions and found:

> In *Wooley v. City of Fairbanks*, AWCB Decision No. 86-0283 (October 28, 1986), we implied that an award of actual fees may be awarded under AS 23.30.145(a). Because we find that Employer controverted Employee's claim, section 145(a) applies to the award of attorney's fees. Under section 145(a), fees may not be less than the specified statutory minimums, *i.e.*, 25 percent of the first $1000 of compensation, and 10 percent of all sums exceeding $1000 of compensation. However, this section gives the Board discretion to award additional attorney's fees when justified by the nature, length and complexity of the case.
>
> The Board has, in fact, more recently, awarded actual fees under AS 23.30.145(a). In *Koerber v. Lynden Transport*, AWCB Decision No. 95-0193 (July 27, 1995), after reviewing the nature, length, and complexity of the services performed, and the benefits resulting to the employee, we awarded the reasonable hourly fees requested by the employee under subsection .145(a). Accordingly, we conclude we have the authority to award an hourly fee in the present case (*Cowgill v. State*, AWCB Decision No. 02-0252 (December 5, 2002) at 5).

Using the same analysis it used for the first attorney's fee award under §145(b), the board concluded the same hourly rate applied under §145(a) and awarded the same actual fees. The board in explaining its reasonableness determination relied on among other things, the contingent nature of representing workers' compensation claimants (*id*. at 523-24). The state appealed again and the superior court affirmed, finding the $240.00 hourly rate was not unreasonable; the state appealed to the Alaska Supreme Court (*Cowgill*, 115 P.3d 522 at 524).

Apparently, on appeal the state abandoned its argument made at hearing that only statutory minimum fees could be awarded in this case under §145(a). Instead, on appeal the state argued defense fees were the benchmark for evaluating claimants' fees, and the "enhanced" so-called "normal" rate is not justifiable because claimants' lawyers seldom receive nothing for their work when awards and settlement are considered (*id*.). Though the court did not have occasion to

address the abandoned §145(a) issue, *Cowgill* explained what constitutes adequate Board findings to support an attorney's fee award:

> The board explained that the
>
> > claim was vigorously litigated by very competent counsel. The range of litigated benefits to the employees was significant (between $0.00 and $24,300.00 in PPI benefits). . . . [W]e find the medical evidence was fairly complex. Last, we find the employer raised unique arguments regarding attorney's fees, not previously decided (*id*. at 526).

In *Circle De Lumber Co. v. Humphrey,* 130 P.3d 941 (Alaska 2006), the employer argued the board erred by awarding the injured worker's lawyer attorney's fees in excess of statutory minimums because the lawyer failed to file a fee affidavit. The board had awarded 35 percent of the overall award, to the attorney. *Humphrey* stated:

> Although we have previously noted that subsections (a) and (b) are construed separately (*see Haile v. Pan American*, 505 P.2d 838, 840 (Alaska 1973)), they are not mutually exclusive. Rather, in a controverted case, the claimant is entitled to a percentage fee under subsection (a) but may seek reasonable fees under subsection (b). In prior cases we have looked to hourly measures of reasonable compensation, even though the cases qualified for treatment under subsection (a). *See, e.g., Bailey v. Litwin Corp.*, 780 P.2d 1007, 1011 (Alaska 1989) (affirming board's conclusion that claimant was not limited to statutory minimum fee calculated under subsection (a), but rather claimant was entitled to additional reasonable compensation) (*Humphrey*, 130 P.3d 941, 953 n. 76).

Humphrey noted the superior court had remanded and directed the board to make findings to support its award, absent the required fee affidavit. The board on remand exercised its discretion under 8 AAC 45.195 and "set aside" the procedural requirement for the employee to file a fee affidavit finding the requirement worked a "manifest injustice" on a party. On review, the Alaska Supreme Court applied a deferential standard to the board's relaxation of the fee affidavit requirement and found the lack of the fee affidavit did not impede the employer's ability to challenge the fee award. *Humphrey* therefore found the board did not abuse its discretion in awarding the fee, and affirmed (*id*. at 954). Neither the board's decisions nor *Humphrey* discussed whether or not the claim was controverted or controverted-in-fact.

Harnish Group, Inc. v. Moore, 160 P.3d 146, 150 (Alaska 2007) said §145(a) authorizes attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim. An award under §145(a) may include continuing attorney's fees on future benefits. By contrast, §145(b) requires an employer to pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. In *Harnish*, an injured worker received benefits and participated in a reemployment plan. When the plan did not work out, another was developed. His employer changed his benefits to permanent total disability benefits but five days later signed a second reemployment plan. An attorney filed a workers' compensation claim on the employee's behalf. In response to the claim, the employer admitted it was liable for permanent total disability benefits but denied it should have to pay attorney's fees, asserting that it had not controverted the claim. The board awarded statutory minimum attorney's fees under §145(a) after finding the employer had controverted the claim in fact. The employer appealed to the superior court, which affirmed; the employer again appealed the determination it had controverted the claim. The Alaska Supreme Court found because the employer had not controverted the claim, attorney's fees were not awardable under §145(a). *Harnish* further said:

> But we remand for an award of reasonable attorney's fees under AS 23.30.145(b) because the Board's findings that NC Machinery resisted payment of benefits and that Moore's attorney played a significant role in his receipt of benefits are supported by substantial evidence (*id*. at 147).

The board had awarded Harnish's lawyer statutory minimum fees under §145(a) finding in its decision on reconsideration, that the employer had "controverted in fact" (*id*. at 151). On appeal, noting a "claim" is a written application for benefits filed with the board, *Harnish* concluded: "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). Since the employer reclassified the employee's benefits to PTD before the employee's lawyer filed a claim, and the employer admitted liability for PTD in its answer to the claim, there was no controversion-in-fact and the board erred by awarding attorney's fees under §145(a). *Harnish* also explained how attorney's fees are awarded under §145(b). There must be a finding the employer "otherwise resisted" payment of benefits and the claimant "employed an attorney in

the successful prosecution of the claim" (*id*. at 153). Notably, the Alaska Supreme Court has never cited *Harnish* for any purpose.

In *Lewis-Walunga v. Municipality of Anchorage*, 249 P.3d 1063, 1065 (Alaska 2011), "the Municipality controverted Lewis-Walunga's workers' compensation claim." The employer argued at the board hearing that the employee's fees should be awarded under §145(a) rather than (b). The board ultimately rejected this argument and awarded attorney's fees under §145(b), but reduced them by 30 percent. The employee appealed and the commission reversed and ordered the board to not reduce the attorney's fees "under AS 23.30.145(b) based on the size of the benefits awarded to his client," but rather to award attorney's fees "the Board finds were reasonably incurred in the representation of the employee in this case" (*id*. at 1065). The commission further raised the question why the attorney's fees should be calculated under §145(b), rather than §145(a), and decided the board plainly erred in failing to explain why it awarded fees under subsection §145(b) rather than subsection §145(a). Noting AS 23.30.145(a) established "a minimum fee, but not a maximum fee," the commission held "the record could support" the board's decision to award "a reasonable fee in excess of the statutory minimum" but determined the board "had not made adequate findings" (*id*.). The Alaska Supreme Court stated: "We note that neither the workers' compensation statutes nor the Board's regulations authorize the Board to consider settlement offers when awarding attorney's fees. *See* AS 23.30.145(a)-(b); 8 AAC 45.180 (2004)" (*id*. at 1070 n. 20).

In *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011) the appeals commission addressed the employer's claim the board erred by awarding attorney's fees under both §§145(a) and (b). Though the commission vacated the board's decision on other grounds, it discussed attorney's fee awards anticipating the issue would arise again, and stated:

> Uresco makes two arguments regarding the attorney fees award (footnote omitted). Uresco argues that the board cannot award 'duplicative' fees based on both AS 23.30.145(a) and (b) (footnote omitted)] and that the board should have reduced the award because Porteleki did not prevail on the issue of frivolous or unfair controversion. We address these arguments because they are likely to arise again on remand if the board decides that Porteleki prevailed on his claim for medical benefits.

> The board awarded reasonable fees under AS 23.30.145(b), but concluded 'the employee is entitled to mandatory statutory minimum attorney fees under AS 23.30.145(a) when, and if, the statutory minimum amount based on the payment of past and future medical, indemnity, and all other benefits exceeds the attorney fee awarded under AS 23.30.145(b)' (footnote omitted). Although the Supreme Court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (footnote omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (footnote omitted). Subsection (b) may apply to fee awards in controverted claims, (footnote omitted) in cases in which the employer does not controvert but otherwise resists, (footnote omitted) and in other circumstances (footnote omitted). It is undisputed that Uresco controverted Porteleki's claim. Thus, we see no reason his attorney could not seek fees under either AS 23.30.145(a) or (b) and find no error in the board's decision to award fees under the higher of (a) or (b).
>
> We review the board's decision to not deduct for the time spent on the unsuccessful unfair or frivolous controversion claim for an abuse of discretion. 'The board is in a far better position than the commission to evaluate . . . whether a party successfully prosecuted a claim, and any other consideration bearing on the attorney fee issue (footnote omitted). Here, the board acted within its discretion in evaluating the fee award and adequately explained its reasoning for deciding the time spent on the unsuccessful controversion claim was *de minimis*, and substantial evidence supports the *de minimis* finding. Thus, on remand, if the board decides in favor of Porteleki on the medical benefits claim, the board need not reduce the fee award for the time spent litigating the unsuccessful unfair controversion claim (*id*. at 7-8).
>
> **8 AAC 45.082. Medical treatment**. . . .
> . . .
>
> (d) medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill, . . . and a completed report in accordance with 8 AAC 45.086(a). . . .

In the recent workers' compensation case *Harris v. M-K Rivers*, ___ P.3d ___ (Alaska 2014), the Alaska Supreme Court addressed penalties on medical benefits prescribed but not actually provided and said:

> The Alaska Workers' Compensation Act sets up a system in which payments are made without need of Board intervention unless a dispute arises (footnote omitted). If the employer disputes payment, it is required to file a timely controversion notice (footnote omitted). The purpose of the act is 'to ensure the quick, efficient, fair, and predictable delivery of indemnity and *medical benefits* to

> injured workers at a reasonable cost to the employers . . . subject to [it]" (footnote omitted). The workers' compensation system also recognizes that it is appropriate to require an employer, who gets the benefit of protection from tort liability by participating in the system, (footnote omitted) to bear the cost of a worker's injury, rather than impose that cost on the general public (footnote omitted). Under this compensation system, payments 'due' under the act are more appropriately characterized as '[p]ayable immediately or on demand,' not '[o]wed as a debt'" (footnote omitted) (*id*. at 8).

Harris reiterated the Alaska Supreme Court's previously recognized importance of medical care in workers' compensation cases, citing *Summers v. Korobkin Construction*, 814 P.2d 1369, 1372 (Alaska 1991). *Summers* held an injured worker who had been receiving medical treatment has the right to a prospective determination of compensability. *Summers* noted injured workers must weigh many variables before deciding whether to pursue a course of medical treatment. An important factor in many cases is whether the indicated treatment is compensable under the law. This factor, in turn, illuminates who must pay for the treatment.

Harris also cited *Childs v. Copper Valley Electric Association*, 860 P.2d 1184, 1192 (Alaska 1993), which applied the Act's penalty provisions to medical care as an incentive for employers to pay medical bills promptly. *Harris* noted: "Without the possibility of a penalty, an insurer would be able to controvert expensive medical care for no reason and escape without sanction, even when the care is critical to the employee's health" (*Harris* at 8).

Harris next cited *Hammer v. City of Fairbanks*, 953 P.2d 500, 506 (Alaska 1998), which held PPI became "due" when the employer received a rating from the employee's doctor. Because the employer only wrote a letter to the doctor seeking clarification of the rating, but did not file a controversion notice or pay within the time required, *Hammer* held the employer had to pay a penalty on the PPI amount. In short, by analogy, *Harris* held "medical benefits become due for purposes of controversion and penalties when the employer has notice they have been prescribed by a doctor." Additionally, *Harris* held "a controversion of medical benefits that is not made in good faith delays receipt of the benefit" (*Harris* at 8).

Lastly, *Harris* cited *McLaughlin v. Workers' Compensation Appeal Board*, 808 A.2d 285, 289 (Pa. Commw. 2002), and said:

The most closely analogous case to the present case is also from Pennsylvania. The Pennsylvania Commonwealth Court decided that a penalty was appropriate when an insurer refused to pre-certify back surgery and failed to file a '[utilization review] determination petition' prior to its refusal (footnote omitted). The worker's back injury had been found compensable, but at the time of the surgery request, the employer refused to pre-certify it because its doctor contended the employee had fully recovered from the work-related injury (footnote omitted). The worker was unable to have the surgery after the insurer refused to authorize it (footnote omitted). The administrative law judge imposed a penalty of 20% of the claimant's compensation for more than a year, from the date of the scheduled surgery to the date of the administrative decision (footnote omitted). The insurer argued on appeal that a penalty could be assessed only when it failed to pay a bill that had been presented for payment (footnote omitted). Calling the employer's argument 'disingenuous,' the court disagreed because the insurer's 'own action effectively prevented Claimant from receiving the recommended treatment in the first place'; it thus upheld the penalty (footnote omitted).

The argument rejected by the Pennsylvania court is similar to the Commission's view in this case that no penalties could be imposed on the improper controversion of the Clinitron bed because 'no bills were presented for payment.' But a rule that a penalty can be imposed only when a bill is presented for payment can result in an insurer never being penalized for issuing a controversion that is not made in good faith because the worker may not be able to afford the treatment on his own. Such a controversion could prevent an injured worker from receiving the treatment, so there would never be a bill to present for payment. The Commission's construction of the statute is contrary to the statute's purpose of providing 'quick, efficient, fair, and predictable delivery' of medical benefits to a claimant (footnote omitted). And if an employer can choose to controvert, without good reason, treatment that it has been providing for years, as M–K Rivers did here with Harris's hypertension medication, and does not suffer a penalty, it has no incentive to consider carefully whether it should controvert. . . .

8 AAC 45.180. Costs and attorney's fees.

. . .

(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.
> . . .
>
> (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. . . .
>
> **Civil Rule 45. Subpoena**. . . .
> . . .
>
> (c) **Service**. A subpoena may be served by a peace officer, or any other person who is not a party and is not less than 18 years of age. Service of the subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to the person the fees for one day's attendance and the mileage prescribed by rule. . . . A subpoena may also be served by registered or certified mail. In such case the clerk shall mail a subpoena for delivery only to the person subpoenaed. . . . Proof of service shall be paid by affidavit. . . .

ANALYSIS

1) Was the oral order denying Employer's mediation request correct?

Mediation is a helpful adjunct to the workers' compensation adjudicative process. Many difficult cases are resolved through mediation. However, in this instance, the parties prior to

hearing attempted to resolve the remaining attorney's fee and cost issues through informal mediation. They were unsuccessful. Nothing suggested continuing the hearing and attempting further, formal mediation would successfully resolve the remaining issues. Furthermore, Employee opposed further mediation and desired to proceed with the hearing. Employee waited long enough to get these issues resolved. AS 23.30.001(1). Given these facts, the oral order denying Employer's request for additional mediation was correct.

2) Was the oral order denying Employer's request to quash a subpoena correct?

Employer objected to a subpoena issued for witness Ward and moved at hearing to quash it. Employer's main objection was that the subpoena was not properly served on Employer's counsel. Its secondary objection argued Ward's testimony was unnecessary given the limited issues set for hearing, and its argument that it had already produced all documents Employee requested. Employee contended Ward's testimony was necessary, if for no other reason, then to authenticate adjuster's notes and give general testimony about the insurer's practices and procedures in respect to medical benefits for injured workers.

Most civil rules do not apply in informal, workers' compensation cases. There was no question Employee served Ward with the subpoena. Civil Rule 45(c). Ward promptly advised his attorney he had been served. It is unclear from the record whether or not Employee served Ward's attorney with a copy of the subpoena. Employee says he did, while Employer says he did not. It would have been helpful had Employee produced a copy of the subpoena including a completed service certificate or affidavit to resolve the service dispute. Nevertheless, Ward appeared at the hearing. Employee argued Ward's testimony could be relevant to Employee's request for attorney's fees and costs. Since Employee served Ward with the subpoena, and he promptly advised his attorney, Employer was not prejudiced in any way even if Employee did not serve Employer's lawyer with a copy of the subpoena. Employer's due process rights were duly protected, as it had ample opportunity to cross-examine Ward at hearing. As it turned out, Ward's testimony was relevant and helpful in deciding the attorney's fee and cost issue. The process concerning Ward subpoena was fair to all parties. AS 23.30.001(1). Therefore, given these facts, the oral order denying Employer's motion to quash the Ward subpoena was correct.

3) Is Employee is entitled to an award of attorney's fees and costs?

Employee seeks attorney's fees and costs under either AS 23.30.145(a) or (b). The attorney's fees statute, AS 23.30.145 is somewhat difficult to understand on its face and is rather confusing. It has a long history, as demonstrated by the cases cited in the principles of law section, above. Early cases from the Alaska Supreme Court are rather fact specific. The early trend was to award only statutory minimum attorney's fees in cases which were controverted. *Rose*; *Haile*. Later cases determined a "controversion-in-fact" was adequate to award the claimant statutory minimum fees. Still later cases decided an injured worker's lawyer was entitled to attorney's fees even if there was no claim filed but the injured worker's lawyer successfully defended against an employer's offensive. *Bradley*. Many of the court's older decisions lack extensive analysis. *Houston*.

Eventually, the Alaska Supreme Court determined the goal in awarding attorney's fees in workers' compensation cases was to ensure competent counsel was available to represent injured workers. *Arant*. *Whaley*; *Bignell*; *Bailey*. This has been a constant theme ever since. *Cortay*; *Olson*; *Childs*; *Shirley*; *Bouse*. At some point, again without extensive analysis, the Alaska Supreme Court began affirming fees awarded in controverted cases under either §145(a) or (b), and started holding such fees were awardable on its own motion. *Thompson*; *Seville*; *Cowgill*. The court also explained these two fee sections were "not mutually exclusive." *Humphrey*. Some cases have provided analysis on the fee statute but have never again been cited by the court for any purpose. *Harnish*. The commission weighed in on attorney's fees and concluded in a controverted case "we see no reason why [the employee's] attorney could not seek fees under either AS 23.30.145(a) or (b) and find no error in the board's decision to award fees under the higher of (a) or (b)." *Porteleki* at 7-8.

Employee's claim for attorney's fees and costs is analyzed in light of AS 23.30.145 and decisions interpreting it. Employer initially enjoyed the best of both worlds. In essence, its position required it to do nothing. It neither preauthorized nor expressly denied paying a medical benefit, while at the same time it did not controvert Employee's request for medical care for his shoulders. The adjuster's notes make several points very clear. First, the adjuster was aware Employee was seeking authorization for shoulder surgery. Second, the adjuster did not want to incur costs associated with an EME. Third, the adjuster did not want to controvert Employee's claim, knowing if it did so, Employee would almost certainly enlist an attorney's aid and the attorney would have a much easier

time obtaining attorney's fees and costs in a formally "controverted" claim. The problem with Employer's theory is that it placed Employee in legal limbo.

There is no question Employee's shoulder surgeries were delayed through Employer's adjusters' actions. Employer incorrectly places the blame for surgical delays on Dr. Mason. The Act has limited influence over medical providers. The Act's influence is limited to regulating fees for medical services. Other Act provisions concerning medical care address Employee's and Employer's and its agents' duties and responsibilities. AS 23.30.095(a) plainly states Employer "shall furnish" medical, surgical, and other attendance or treatment, as well as nurse and hospital service and medicine. This provision obviously does not require Employer or its adjuster's to perform surgery on Employee or personally provide him with medication or treatment. In context, it requires Employer to pay professionals to furnish these services. Payment, or more specifically, authorization for treatment absent any reason to deny it, is the key as this case amply demonstrates.

Employee's unfortunate situation is classic, but the statute is clear. Once a physician prescribed medical treatment for Employee, Employer had to authorize the medical services, *i.e.*, "furnish" them, or controvert within the required time. *Harris*. The treatment was "due" when prescribed. *Id*. Employer confuses the statutory requirement for it to "furnish" medical services to Employee, with the procedural requirement in the administrative regulation, which addresses when Employer must pay bills once medical records and associated billings are received. 8 AAC 45.082(d). The two sections are not in conflict, and the latter does not give Employer the right to refuse to preauthorize prescribed surgery in a non-controverted case. AS 23.30.095(a); 8 AAC 45.082(d). In other words, the statute *requires* Employer to furnish the medical services necessary, absent a good faith reason to controvert it in writing, while the regulation simply provides the procedure for processing and paying the medical bills once they are received.

In *Hammond*, because an employer only wrote a letter to a treating doctor seeking clarification of an opinion, but did not file a controversion notice or furnish care within the time required, the employer had to pay a penalty on the benefit in dispute. The facts are very similar here. Though *Harris* dealt with penalty issues, its language and reasoning are persuasive. *Harris*' reliance on *McLaughlin* is particularly compelling. In *McLaughlin*, the court applied penalty provisions to

an insurer's failure to "pre-certify" surgery without taking required steps under Pennsylvania law. The *McLaughlin* court called the insurer's defense, similar to the defense Employer raises in this case, "disingenuous."

The Act gave Employer an opportunity to have Employee seen by its EME physician. AS 23.30.095(e). The earliest examination could have occurred 14 days after the injury and every 60 days thereafter. Here, by her own acknowledgment, Employer's adjuster decided to save money by seeking an opinion from Employee's prior physician rather than sending him to an EME. It took two months for the physician to respond, and when he did, Dr. Manion's response further supported medical opinions from other physicians favoring Employee's right to have surgery for his shoulders. In short, Employer had absolutely no medical evidence upon which to base a controversion. It probably knew as much. Yet, Employer refused to preauthorize shoulder surgeries citing its mistaken legal interpretation of the Act as not requiring preauthorization. *Harris* recently cast considerable doubt upon Employer's understanding of the law. Nevertheless, under the facts in this case, Employee really had no choice but to contact an attorney and file a claim if he wanted his treatment. *Summers*. Even then, Employee's attorney tried informally to resolve the matter short of filing a claim. He was unsuccessful because Employer steadfastly stood by its flawed legal premise.

Employee credibly testified he could not afford to guarantee payment for bilateral shoulder surgeries. AS 23.30.122. As his surgeon understandably would not agree to perform the surgeries without some assurances he would be paid for his services, Employee was stuck. Enz' affidavit regarding Dr. Mason's office practices is immaterial. The Act does not *require* Dr. Mason to perform surgery, or to perform it without assurances of payment for his services. Therefore, his internal practices have nothing to do with this case, other than to highlight Employee's predicament. By refusing to either controvert or preauthorize surgery, Employer resisted Employee's right to benefits in an uncontroverted case, which required him to hire an attorney, file a claim and force Employer into complying with its duty to "furnish" medical and surgical treatment for his work related shoulder injuries. AS 23.30.095(a). This also amounts to pre-claim controversion-in-fact of Employee's right to this benefit.

Under this case's facts, Employee would be entitled to attorney fees under either AS 23.30.145(a) or (b). Therefore, the analysis and result would be the same under either subsection. Understandably, Employee wants the highest attorney's fees award to which he is legally entitled. In this case, statutory minimum fees under §145(a) would be less than his actual attorney's fees and would not fairly compensate Employee's attorney for the work he did on this case to obtain shoulder surgeries and the benefits set forth in the parties' settlement agreement for his client. It is unlikely Employee's counsel would have accepted the case if he knew he would be limited to statutory minimum fees. More recent Alaska Supreme Court cases and the commission's *Porteleki* decision recognize actual, reasonable attorney fees may be awarded under either §145(a) or §145(b). The attorney's fee regulation has similar provisions for awarding actual attorney fees under either section. 8 AAC 45.180(b), (d). It is not clear why the "controversion" factor is of any import here.

The Alaska Supreme Court in *Cowgill* affirmed what it thought constituted adequate findings to support an attorney's fee award:

> [The] claim was vigorously litigated by very competent counsel. The range of litigated benefits to the employees was significant (between $0.00 and $24,300.00 in PPI benefits). . . . [W]e find the medical evidence was fairly complex. Last, we find the employer raised unique arguments regarding attorney's fees, not previously decided (*Cowgill* at 526).

These factors are present in Employee's case. First, Employee's counsel handled this case competently. Employer is also represented by competent counsel who vigorously defended against Employee's claim. *Cowgill*. Second, as a direct result of Employee's lawyer's efforts, Employee obtained his needed bilateral shoulder surgeries more quickly than he would have without it. Third, Employer raised novel preauthorization and discovery arguments, which were important to resolve. The nature of legal services Employee's lawyer provided in this case relates to highly specialized workers' compensation issues. The length of time during which legal services were provided was longer than it needed to be, because Employer resisted providing benefits in an un-controverted case, and resisted discovery based on its misunderstanding that nothing was in dispute. Employee's medical and legal issues were of average complexity, requiring similar legal services. Employee's lawyer's services were not particularly difficult, but he persevered and pursued this case diligently. Employee prevailed on his primary claim, which was to force Employer to authorize bilateral

shoulder surgery. *Summers*. Receiving the bilateral shoulder surgeries more promptly than he would have otherwise received them is a significant benefit to Employee because it allows him to recover more quickly and hopefully return to full employment. AS 23.30.145(b).

Employee's attorney's fees are not excessive simply because Employer says they are. Though Employer argues Employee's attorney's fees are excessive, it has not demonstrated Employee's lawyer performed any legal services in this case that were unreasonable or unnecessary in presenting Employee's claim or responding to Employer's arguments. Employer has a duty to weigh the benefits at issue and determine how much resistance it wants to mount knowing full well if it loses, Employee's lawyer is likely to receive actual, reasonable attorney fees, possibly far in excess of the benefits Employee receives. Employee's likelihood of prevailing in this claim without the able assistance of his attorney, or one like him, would have been slim. *Bustamante*.

As a practical matter, Employer had the *right* to send Employee to an EME, but no legal *obligation* to ever do so. Using Employer's logic, it never had to preauthorize shoulder surgery either. Thus, but for Employee hiring an attorney to take up his cause, he might still not have received his shoulder surgeries. Employer only sent him to an EME after its first plan to receive a hopefully favorable response from his prior attending physician, Dr. Manion, failed. Employer took a calculated risk. It risked waiting on an attending physician's opinion to see if the physician's response would give it a basis to controvert Employee's right to surgery for his shoulders. It could have used an EME far sooner, but chose to save money instead. AS 23.30.095(e). Meanwhile, Employee went too long without necessary and reasonable medical care for his painful work injury. Employer's improper process thwarts the legislative intent for quick, efficient, fair and predictable delivery of medical and indemnity benefits to injured workers at a reasonable cost to Employer. AS 23.30.001(1).

In reviewing Employee's attorney's fee affidavits, experience, judgment, observations and inferences drawn from all of the above show his services appear reasonably commensurate with the actual work performed given the nature, length, and complexity of the services performed, and the actual benefits resulting to Employee from the services as discussed above. *Rogers & Babler*. The attorney's hourly rate is considerably less than most attorneys representing injured

workers in workers' compensation claims. Given his lawyer's experience representing injured workers, his hourly rate and the rate for his paralegal assistant are both reasonable.

The claimant's bar is aging rapidly. It is a limited bar to begin with, with only a handful of competent attorneys willing to represent injured workers. Two claimant lawyers are in their 70s and 80s and are nearing retirement. There are few, if any young attorneys entering the worker's compensation bar representing injured workers or other claimants. It is difficult for injured workers to find a competent attorney, and approximately 50 percent of all injured workers who appear at hearings are not represented by an attorney. These factors justify awarding successful claimants' lawyers a reasonable fee to ensure competent counsel remain available to represent injured workers in these cases, and justifies Employee's counsel's hourly rate in this case.

Because Employer failed to file a written controversion notice, and failed to furnish medical benefits when they became "due," and otherwise resisted payment of medical benefits, and because Employee hired an attorney who prevailed on the primary issue, he is entitled to a reasonable attorney's fee and costs under AS 23.30.145(b). Obtaining bilateral shoulder surgeries as well as other benefits in the parties' settlement agreement is a significant present benefit for Employee and is the result of his attorney's conscientious efforts. Including the time spent at hearing, Employee's attorney will be awarded $31,290, in actual, reasonable attorney's fees ($27,690 + $3,600 = $31,290) and $10,872 in costs ($10,200 paralegal fees + $672 in other costs = $10,872).

CONCLUSIONS OF LAW

1) The oral order denying Employer's mediation request was correct.
2) The oral order denying Employer's request to quash a subpoena was correct.
3) Employee is entitled to an award of attorney's fees and costs.

ORDER

1) Employee's claim for attorney's fees and costs is granted.
2) Employer is ordered to pay Employee $31,290 as a reasonable attorney's fee.
3) Employer is ordered to pay Employee $10,872 in paralegal and other costs.

Dated in Anchorage, Alaska, on March 24, 2014.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Michael O'Connor, Member

_____
Pam Cline, Member

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 in the matter of RICHARD G. KAMITCHIS, employee / claimant v. SWAN EMPLOYER SERVICES. Employer; LIBERTY NORTHWEST INSURANCE COMPANY, insurer / defendants; Case No. 201203798; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 24, 2014.

_____

Kimberly Weaver