ALASKA WORKERS' COMPENSATION BOARD

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

JONATHAN BOCKUS, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201302957
FIRST STUDENT SERVICES, Employer,	)	AWCB Decision No. 14-00400
and	)	Filed with AWCB Fairbanks, Alaska on March 24, 2014.
SEGDWICK CMS, INC., Adjuster, Defendants.	)	

Jonathan Bockus' (Employee) September 20, 2013 claim was heard on January 2, 2014, in Fairbanks, Alaska, a date selected on November 18, 2013. Attorney John Franich appeared and represented Employee, who appeared and testified. Attorney Krista Schwarting appeared and represented First Student Services (Employer). Kymberly LaRose testified telephonically on Employer's behalf. The record closed at the hearing's conclusion on January 2, 2014.

ISSUES

On December 20, 2013, the parties took Nancy Nashlund's deposition. Ms. Nashlund is the surgery coordinator for Employee's provider, Dr. Kim Wright, M.D. During Employee's cross-examination of Ms. Nashlund, Employer twice objected to questions regarding surgery scheduling. Employer's basis for its objections was Employee's questions called for witness speculation.

1) Should Employer's objection be sustained?

Employee presents a rather complex and intriguing case theory and Employer controverted-in-fact his third surgery. He contends Employer's adjuster denied or delayed his surgery until such time as its own physician would approve it. Employee specifically contends Employer's adjuster effectuated this delay or denial by not only refusing to preauthorize the surgery when it was contacted by his provider, but also by deliberately informing his provider of a pending employer's medical evaluation (EME), which then caused his provider to delay scheduling his surgery. Eventually, after Employer's physician approved his surgery, and when his provider next contacted Employer's adjuster to inquire about the status of its preauthorization, he contends, only at that point, did Employer's adjuster again signal his provider to proceed with scheduling his surgery.

Employee contends there is a difference between how the Legislature intended the Act to work and how it actually works. He dismisses his treating physician's office's explanation of its policy of contacting workers' compensation adjusters prior to scheduling surgery – "so the patient doesn't get stuck with a big bill," and instead contends doctors do not provide services unless they are going to get paid. Employee also contends, in actual practice, an EME is a signal to a provider that a controversion is likely. He contends his surgery could have been scheduled in July of 2013, but Employer resisted by not preauthorizing his surgery until an October 16, 2013 telephone conversation. As a result, Employee contends he was forced to suffer three additional months of unnecessary pain since his surgery did not take place until November 2, 2013. He contends the Supreme Court resolved how the Legislature intended the Act to work and how it works in actual practice in *Summers v. Korobkin*, 814 P.2d 1369 (Alaska 1991), by affording a claimant an opportunity to apply to the Board for preauthorization for treatment when an insurer will not preauthorize it.

Employer denies it controverted-in-fact Employee's third surgery. It contends it paid indemnity and medical benefits since the injury date; and further contends it has not denied benefits, filed any controversions or challenged compensability of Employee's claim. Employer relies on certain witness testimony denying Employee's provider was seeking preauthorization for his

surgery, and further contends it was not required to preauthorize Employee's surgery even if his provider was seeking authorization. Instead, it points out a July 27, 2013, EME was postponed at Employee's request and it attributes any delay in the scheduling of Employee's surgery to his provider's policy of not scheduling surgeries until after an EME takes place. Finally, Employer contends *Summers* is distinguishable, since it involved a reservation of rights.

2) Did Employer controvert in fact Employee's medical treatment?

As an alternate issue, Employee's claim for attorney fees will be analyzed under AS 23.30.145(b). At hearing, the parties presented their respective cases on whether or not there was a controversion in fact such that attorney fees could be awarded under AS 23.30.145(a). Except for a brief mention in Employer's closing statement, they did not present argument on whether or not Employer otherwise resisted providing medical benefits such that attorney's fees could be awarded under §145(b). It is presumed the parties rely on their respective contentions set forth above.

3) Did Employer otherwise resist providing Employee's medical treatment?

Employee seeks and award of attorney's fees and costs. Even though his provider eventually performed the surgery, Employee contends the voluntary payment of benefits is an "award" and his attorney's efforts were instrumental in obtaining his third surgery notwithstanding a favorable EME.

Employer contends, since it has not denied benefits, filed any controversions or challenged the compensability of Employee's claim; Employee's attorney has not obtained any benefits for Employee. It contends he is not entitled to an award of attorney's fees and costs.

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

FINDINGS OF FACT

The following facts and factual conclusions are established be a preponderance of the evidence:
1) On March 6, 2013, Employee injured his back pulling open a gate while working as a driver for Employer. (Report of Occupational Injury or Illness, March 19, 2013).

2) On March 6, 2013, Employee saw the Fairbanks Memorial Hospital Emergency Department for severe pain in his back and radiating down into his legs. A thoracic magnetic resonance imaging (MRI) study showed a central disc herniation at T10-11 impinging on Employee's spinal cord, but did not show evidence of cord edema. Because of the likelihood Employee required surgery, and because a neurosurgeon was unavailable, it was decided to transport Employee to Providence Hospital in Anchorage. (Emergency Department report, March 6, 2013).

3) On March 7, 2013, Employee underwent another thoracic MRI at Providence Hospital, which showed a large right paracentral disc extrusion at T10-11 causing significant canal stenosis and associated thoracic cord edema. (MRI report, March 7, 2013).

4) On March 8, 2013, Kim Wright, M.D., attempted to perform a right T10-11 laminectomy. A calcified ligament and synovial cyst were removed but, because of Employee's body habitus, the disc herniation could not be located. Dr. Wright thought she may have been off one level but decided to close and perform a repeat MRI rather than search for the herniation by performing additional laminectomies. (Wright report, March 25, 2013).

5) On March 9, 2013, a repeat MRI showed a right paracentral disc protrusion at T10-11 with associated cord distortion, as well as surgical changes at T11-12. (MRI report, March 9, 2013).

6) Based on the most recent MRI results, Dr. Wright proceeded with another surgery one level higher than the previous day. She performed right T10-11 hemi-laminotomy and removed a calcified ligament, decompressed the spinal cord and removed a free disc fragment. (Wright report, March 9, 2013).

7) On March 10, 2013, Dr. Wright reported Employee's pain was markedly improved. Post-surgical imaging studies showed marked improvement in Employee's cord compression but some residual osteophyte remained. Dr. Wright determined osteophyte removal would require rib removal and fusion to improve Employee's condition further. Instead, she recommended conservative management. (Wright report, March 10, 2013).

8) On March 10, 2013, Employer began paying disability benefits. (Compensation report, March 18, 2013).

9) On April 17, 2013, Paul Williams, M.D., performed an EME. He opined the work injury was the substantial cause of Employee's thoracic spine condition and further opined medical

treatment, including the two surgeries, was medically reasonable and necessary. (Williams report, April 17, 2013).

10) Dr. Wright noted Employee did not appear to be responding to conservative treatment and discussed possible additional surgery with him, including a repeat microdiscectomy or a discectomy with fusion. Employee did not feel he was improving and was anxious to seek more timely relief. Dr. Wright reported Employee "makes it clear that he does not wish to suffer another recurrent disc herniation and has chosen to include the fusion at the time of his decompression." Employee wanted to proceed with surgery. (Wright report, undated).

11) On June 4, 2013, a MRI showed post-surgical changes and a residual disc fragment within the right paracentral/foraminal region at T10-11. (MRI report, June 4, 2013).

12) On June 21, 2013, Employee saw Dr. Wright for an MRI review and reported disabling, recurring back pain that radiated around his chest wall, accompanied by a "good deal" of numbness. Dr. Wright explained Employee's symptoms may improve with convalescence and time, but if they did not, she suggested a repeat discectomy and possible fusion might be appropriate. (Wright report, June 21, 2013).

13) On July 16, 2013, Employer scheduled Employee to attend another EME by Dr. Williams on July 27, 2013. The appointment confirmation notice for this EME bares a July 16, 2013 "referral date." This EME was later rescheduled on account of Employee's prior plans to attend a family reunion. (IME Appointment Confirmation, July 16, 2013; Employee; LaRose).

14) On July 19, 2013, Employee returned to Dr. Wright and reported significant, reoccurring, back pain. Employee did not feel he was improving and was anxious to seek more timely relief. Dr. Wright reported, "[c]learly, the patient still does not appear to be responding to further conservative treatment, including convalescence and the tincture of time." She discussed with Employee performing a repeat microdiscectomy or discectomy with fusion, and specifically recommended a modified transpedicular approach to the canal, and posterior lateral fusion. Employee wanted to proceed with surgery. (Wright report, July 19, 2013).

15) On August 7, 2013, Employee returned to Dr. Wright's office and saw Jan DeNapoli, PA-C. He reported continued and worsening back pain and advised PA-C DeNapoli he had a scheduled EME that was postponed until September 27, 2013. Employee stated he was ready to proceed with surgery but his Employer would not approve the surgery until the EME was completed. PA-C DeNapoli's report bares a notation for follow-up that states, "[p]atient will

followup [sic] with Dr. Wright Oct [sic] 4 or later, once we have his new IME report and approval for surgery." It also concludes: The patient . . . wishes to proceed with surgery. We are simply awaiting his new IME and approval for his surgery. In the meantime, patient would also like to see Dr. Zipperer for pain management to be able to get through to the Sept [sic] 27 IME and followup [sic] before hopeful surgery. We will facilitate the visit." (DeNapoli Report, August 7, 2013).

16) On September 20, 2013, Employee filed a claim seeking medical and transportation costs and attorney's fees and costs. His reason for filing the claim was: "Controversion in fact. ER has resisted payment of medical benefits by not approving surgery that has been recommended by treating physician until after an EIME. See Summers v. Korobkin Const., 814 P.2d 1369, at 1371-72 (Alaska 1991)." (Employee's claim, September 20, 2013).

17) On September 23, 2013, Employee's September 20, 2013 claim was served on Employer. (Alaska Workers' Compensation Division's (Division) electronic database, September 23, 2013).

18) Employee's September 20, 2013 claim was served on Employer on September 23, 2013. (Division's electronic database, September 23, 2013).

19) On September 27, 2013, Dr. Williams performed an EME and opined a repeat discectomy was appropriate medical treatment. (Williams report, September 27, 2013).

20) On October 17, 2013, Employer filed its answer to Employee's September 20, 2013 claim. Regarding Employee's claim for medical benefits, it asserted "no controversions have been filed in this claim, nor have any medical benefits been denied." Regarding Employee's claim for attorney's fees, Employer stated there "has not been any resistance to paying medical benefits," and Employee's attorney "has not obtained any benefits of value to him; therefore, no attorney's fees are due." (Employer's answer, October 11, 2013).

21) On October 22, 2013, Nancy Nashlund, Surgery Coordinator for Dr. Wright's office, wrote a letter at Employer's request to explain the process of scheduling surgeries for workers' compensation patients. In her letter, she explained after she received an order from Dr. Wright to schedule Employee for surgery, she called Employer's adjuster and talked to "Adela," who told her Employee had an "open and billable claim." Adela also mentioned Employee has an EME scheduled for July 27, 2013, and Dr. Wright's office "usually" waits for the outcome of an EME before scheduling surgery. Employee called to schedule surgery but she informed him he would have to wait for outcome of the EME before she could schedule the surgery. Employee's

attorney also called her to ask if the adjuster had instructed her to delay scheduling the surgery. Ms. Nashlund explained to Employee's attorney what their "usual" process was, and she was told by Employer's adjuster Employee had an "open and billable" claim. She told Employee's attorney there was an EME scheduled and Dr. Wright's office waits for the outcome of an EME so the "patient doesn't get stuck with a big bill." (Nashlund letter, October 22, 2013).

22) On November 2, 2013, Employee underwent surgery. (Employee; LaRose).

23) On November 18, 2013, the parties agreed to the instant hearing at a prehearing conference. The summary states: "EE's atty stated that he wants to go to hearing on the issue of ER not preauthorizing surgery until after the EIME." (Prehearing Conference Summary, November 18, 2013).

24) On December 20, 2013, the parties took Ms. Nashlund's deposition. Ms. Nashlund testified as follows: She is a nationally certified medical assistant. For the past four years, she has been the surgery coordinator for Dr. Wright's office. After Dr. Wright recommended surgery for Employee, she called Employer's adjuster, Adela, who told her Employee had an "open and billable" claim, but he also had an "IME" scheduled. Adela did not tell her surgery was denied or ask her to postpone scheduling until after the EME was completed. If an adjuster tells her there is an IME scheduled, Dr. Wright asks her to postpone the scheduling of surgeries until after the IME is completed. Ms. Nashlund received a call from Employee, who stated he was ready to schedule his surgery, but she told Employee she had not heard back from the insurance company yet regarding the IME. She received a call from Employee's attorney, who asked her whether Employee's surgery was denied. Ms. Nashlund stated it had not been scheduled, explained to Employee's attorney Employee had an "open and billable" claim and she could not schedule the surgery until Employee completed the IME. When asked if she received a copy of the EME report in Employee's case, she replied, "I don't know if we ever got it or not. I think we – they don't have to give it to us, but sometimes we get it." She could not recall if she received a copy of the IME report. Employer's adjuster, Kimberly LaRose, advised her Employee's surgery was authorized on October 17, 2013, and Employee had the surgery on November 2, 2013. Ms. Nashlund denied Employer's adjuster asked her to delay surgery or told her surgery was denied. On cross-examination, Ms. Nashlund testified, after Dr. Wright recommended surgery, she first called Employer's adjuster on July 22, 2013, and asked if Employee had an "open and billable" claim. If the adjuster had told her it was okay to go ahead

with surgery, she stated: "Usually we can get the surgery scheduled within a couple weeks." The surgery could have conceivably been scheduled by the end of August. She does not schedule surgery when there is a pending IME because "we don't want to stick the patient with a huge bill that they can't pay." On re-direct, Ms. Nashlund testified she asked Employer's adjuster if there was an "open and billable" claim rather than ask it to authorize surgery. She denied asking Employer's adjuster to authorize the surgery and stated "My understanding is that workers' comp companies don't authorize surgeries, per se, but they will tell us there is an open and billable claim." When she calls adjusters, they will also tell her if a claim had been denied or controverted, but in Employee's case, they did not. (Nashlund dep., December 20, 2013).

25) The following exchange occurred on Employer's direct examination of Ms. Nashlund at her deposition:

> Q. Did there come a point where you were informed that the surgery was being authorized?
>
> A. Yes.
>
> . . . .
>
> Q. Do you have any record as to when it was scheduled or when it – when the scheduling happened?
>
> . . . .
>
> A. Let's see. I talked to Kimberly on October 17th.
>
> Q. So the surgery was authorized on October 17th?
>
> A. Yes.

Id. at 10-11.

26) On Employee's re-cross at Ms. Nashlund's deposition, the following exchange took place:

> Q. When you called [Employer's adjuster] on July 22nd, 2013, if the adjuster had told you it was okay to go ahead with the surgery, how soon could that surgery have been scheduled?
>
> *[Employer]: Objection, calls for speculation. Go ahead and answer – if you can answer it, go ahead.*
>
> A. I don't know. Usually we can get the surgery scheduled within a couple of weeks.

Q. Okay. So it could have been scheduled by the end of August?

[Employer]: Objection, calls for speculation. Answer if you can.

A. Yes. Conceivably, yes.

Ms. Nashlund went on to testify the only reason surgery could not have been scheduled within 30 days of July 22, 2013, was if the doctor was out of town. She thought the doctor was out of town for one week at the beginning of August. *Id*. at 15-16.

27) On Employer's re-direct at Ms. Nashlund's deposition, the following exchange took place:

Q. The policy regarding IME's, that's an office policy, not something that's specific to [Employee's] case, correct?

A. Oh, correct, yeah.

Id. at 18.

28) On a subsequent re-cross by Employee at Ms. Nashlund's deposition, the following exchange took place:

Q. . . . if the person from [Employer's adjuster] when they called you back on . . . July 22nd had said yes, we are authorizing this surgery, you would not have waited for the IME. You would have gone ahead and scheduled surgery, correct?

A. Correct. If they authorized it, yes.

Q. And you had called them to authorize it?

A. Correct.

Q. They did not, in fact, authorize it when you called on July 22nd?

A. Correct.

Q. If they had authorized it, you would have scheduled it at that time?

A. Yes.

Id. at 19.

29) Ms. Nashlund fills out what she calls a "surgery sheet" on every surgery she schedules. The parties questioned her on Employee's surgery sheet at her deposition. Employee's surgery sheet shows the following entries: "7/22/13 LMTRC for adjuster;" 7/22/13 Adela open &

billable claim – IME;" and 10/17/13 S/W Kimberly & we are ok top go forward w/surg". (*Id*. at 11-14; Ex. 2).

30) On December 30, 2013, Employee filed an affidavit of attorney's fees and costs, which lists 9.9 hours of attorney time and $52.25 in costs. The affidavit does not set forth an hourly rate for attorney time. (Employee's fee affidavit, December 30, 2013; observations).

31) On December 30, 2013, Employer filed its hearing brief. It contended it was not required to preauthorize treatment and cited *Richards v. Fireman's Fund*, 384 P.2d 445 (Alaska 1963) in support of its contention. (Employer's brief, December 27, 2013 at 6).

32) Employee did file a hearing brief. (Record; observations).

33) On January 2, 2014, Employee testified as follows: Dr. Wright recommended surgery in July and he called Ms. Nashlund to schedule the surgery. He was in pain and the delay in getting his surgery was the IME. Employee called Dr. Wright's office numerous times then went to see his attorney and they filed his claim. Dr. Williams performed the IME on September 27, 2013, and he had surgery on November 2, 2013. On cross-examination, Employee testified Ms. LaRose initially called him and said the IME was scheduled for September 27, 2013, but a week later called back and said she had made a mistake and the IME was on July 27, 2013. He called Ms. LaRose after receiving the letter for the July 27, 2013 IME and told her he already had plans involving a family reunion on that date. Employee acknowledged Ms. LaRose never told him his surgery was denied and she rescheduled the IME as he requested. He called Ms. LaRose about three times to schedule the surgery, and she told him his claim was "open." He called Ms. Nashlund three or four times to schedule the surgery and Ms. Nashlund told him she was calling Employer to "get the surgery going." On one occasion, Ms. Nashlund stated she was calling for preauthorization. Employee acknowledged Ms. Nashlund never told him surgery was denied. (Employee).

34) On January 2, 2014, Kymberly LaRose testified she was the adjuster on Employee's claim and had accepted all benefits. Employee has been paid benefits since March of 2013, and his benefits have never been controverted. On July 16, 2013, Employee first told her he "might" need surgery. During this conversation, she told Employee the IME had been scheduled for July 27, 2013. The IME was "already in the works" before she became aware of Employee's need for his third surgery. She initiated scheduling of the IME with an email on July 9, 2013. Ms. LaRose had another conversation with Employee on July 22, 2013, and Employee thought the

IME was on August 27, 2013, not September 27, 2013. She sent Employee a letter informing him of the IME on July 27, 2013. During the July 22, 2013, conversation, Employee told her he was going to a family reunion in Kenai and had spent $1,500.00 on the trip and he could not get his money back. Ms. LaRose asked Dr. Williams to do a records review to "move things along" for Employee but he wanted to do a physical examination. September was the next available date with Dr. Williams. Employee asked her if his surgery would be paid for before the IME and she told him the doctors usually call before scheduling and she would be "obligated" to inform the doctor of a pending IME. Ms. LaRose told Employee some doctors proceed with surgery with a pending IME and some do not. She denied instructing Employee to not have the surgery. Ms. LaRose denied telling Employee his surgery would be denied if he went forward before the IME. She acknowledged receiving a letter from Employee's attorney contending she was denying surgery unless it was approved by her own physician. She disagrees with the contentions in Employee's attorney's letter. Ms. LaRose denied she was asked by Ms. Nashlund to preauthorize the surgery. On October 16, 2013, Ms. LaRose spoke with "Trina" from Dr. Wright's office, who informed her Dr. Wright's office had not received a reply to its request for preauthorization. Ms. LaRose told Trina a formal request was not necessary. All bills have been paid from the November 2, 2013, surgery. On cross-examination, Ms. LaRose testified no one contacted her before Employee's first or second surgeries and she had already received and paid bills from Dr. Wright's office by July 16, 2013. She frequently gets call from providers when "something significant" is going to happen with medical treatment and the providers want to know if anything is pending, such as IME's. Generally, providers will call her and ask if there is an open and billable claim, as well as other issues, like IME's. Ms. LaRose's "standard answer" to providers is to tell them there are "no issues" with the claim. She does not preauthorize surgery because she "can't direct medical treatment." Regarding the October 16, 2013 conversation with "Trina" from Dr. Wright's office, Ms. LaRose testified she had not received a written request for preauthorization and told Trina there were "no issues" with the claim and she did not need to send a written request. (LaRose).

35) A July 9, 2013 email from Ms. LaRose attempting to initiate the EME does not appear in the record. (Record; observations).

36) Employer has never filed a controversion for this injury. (Record; observations).

37) Employee did not file a supplemental affidavit of attorney's fees and costs following the hearing. (*Id*.).

38) Employer did not object to Employee's December 30, 2013, affidavit of fees and costs. (*Id*.).

39) Counsel has previously been awarded attorney fees at the rate of $350.00 per hour based on his level of experience representing claimant's in work injury cases. *Smith v. State of Alaska*, AWCB Decision No. 13-0037 (April 1, 2013); *Harris v. M-K Rivers*, AWCB Decision No. 13-0014 (January 28, 2013).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute . . . .

The Alaska Workers' Compensation Act (Act) has a liberal humanitarian purpose, *Burgess Construction Co. v. Lindley*, 504 P.2d 1023, 1025 (Alaska 1972); to provide workers with a simple and speedy remedy to compensate them for work related injuries. *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987); *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978).

> **AS 23.30.045. Employer's liability for compensation.** (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 - 23.30.215. . . .

> **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 . . . . The board may authorize continued treatment or care or both as the process of recovery may require. . . .
>
> (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. . . . 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. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited. . . .

Injured workers must weigh many variables when deciding whether to pursue a certain course of medical or related treatment. An important treatment consideration in many cases is whether a physician's recommended treatment is compensable under the Act. *Summers v. Korobkin*, 814 P.2d 1369, 1372 (Alaska 1991). Therefore, an injured worker is entitled to a hearing and a prospective determination on whether medical treatment for his injury is compensable. *Id.* at 1373-74.

In *Richards v. Fireman's Fund Ins. Co.*, the Alaska Supreme Court decided whether an employer had an affirmative duty to select a physician and arrange for the medical care of an injured employee. The Court concluded, in the first instance, the injured employee makes his own selection of a physician, and held "the only affirmative duty of an employer . . . is that of paying for all necessary medical expenses." *Id*. at 450.

> **AS 23.30.097. Fees for medical treatment and services.**
> . . . .
>
> (f) An employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter. . . .

> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter. . . .

The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including claims for medical benefits and for continuing care. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991). The presumption of compensability continues during the course of an injured worker's recovery from injury and disability. *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991). Once an employee is disabled, the law presumes the employee's disability continues until the employer produces substantial evidence to the contrary. *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567, 573 (Alaska 2012) (citing *Grove v. Alaska Constr. & Erectors*, 938 P.2d 454, 458 (Alaska 1997) and *Bailey v. Litwin Corp*., 713 P.2d 249, 254 (Alaska 1986)).

> **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.

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g*., *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005). The board has the sole discretion to determine the weight of the medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 087 at 11 (Aug. 25, 2008).

The legislative history of AS 23.30.122 states the intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation

Act." *De Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013). The Alaska Workers' Compensation Appeals Commission is required to accept the board's credibility determinations. *Id.* If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, and elects to rely on one opinion rather than the other, the board's decision will be affirmed. *Id.* at 147. The board can also choose not to rely on its own expert. *Id.* It is an error for the commission to disregard the board's credibility determinations. *Id.* at 145-147.

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

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

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is

available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are also considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975.

When an employee files a claim to recover controverted benefits, subsequent payments, though voluntary, are the equivalent of a board award, and attorney's fees may be awarded where the efforts of counsel were instrumental in inducing the payments. *Childs v. Copper Valley Elect. Ass'n.*, 860 P.2d 1184; 1190 (Alaska 1993).

The statute at AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009) at 5. A fee award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the board to consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." *Id.*

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. . . .

The Alaska Supreme Court has taken a broad reading of the term "controverted," and has held a "controversion in fact" can occur when an employer did not file a formal notice of controversy. *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978). A controversion-in-fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation, *Shirley v. Underwater Construction, Inc.*, 884 P.2d 156; 159 (Alaska 1994), or when an employer consistently denies and litigates its obligation to pay an increase in benefits. *Wien Air Alaska v. Arant*, 592 P.2d 352 (Alaska 1979). An employer does not have unilateral authority to terminate an employee's benefits. *Shirley*. To determine whether there has been a controversion-in-fact, an employer's answer to a claim for benefits and its actions after the claim

is filed must be examined. *Harnish Group, Inc. v. Moore*, 160 P.3d 146; 152 (Alaska 2007). Resistance before the filing of a claim cannot serve as a basis for a controversion-in-fact. *Id*. For there to be a controversion in fact, an employer must take some action in opposition to a claim after it is filed. *Id*.

Employers have a right to defend against claims of liability. Alaska Const., art. I sec. 7. Employers also have a statutory duty to adjust workers' compensation claims promptly, fairly and equitably. AS 21.36.010 *et seq*.; 3 AAC 26.010 - .300. An employer must begin paying benefits within 14 days after receiving knowledge of an employee's injury, and continue paying all benefits claimed, unless or until it formally controverts liability. *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska 1987). Section 155(e) gives employers a direct financial interest in making timely benefit payments. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). It has long been recognized §155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways,* 505 P.2d 838 (Alaska 1973). An employee is also entitled to penalties on compensation due if compensation is not properly controverted by the employer. *Williams v. Abood*, 53 P.3d 134, 145 (Alaska 2002). Medical benefits are considered "compensation" for the purpose of AS 23.30.155 penalties. *Id.* at 145. If an employer does not file a formal controversion notice, nor pays compensation due, §155 imposes a penalty. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992).

In *Harris v. M-K Rivers*, No. 6876, Slip Op. at 15-18 (March 14, 2014), the Alaska Supreme Court interpreted when benefits come "due" under the Act's penalty section. Noting medical care can be critical to an employee's health, it concluded the statute permitted imposition of a penalty on a medical benefit that had been prescribed but was not yet paid. *Id*. at 17. The Court held, under the Alaska Workers' Compensation system, payments "due" are "payable immediately or on demand," rather than "owed as a debt" to be paid later. *Id*. at 16.

> **8 AAC 45.050. Pleadings.** (a) A person may start a proceeding before the board by filing a written claim or petition. . . .
>
> (c) **Answers.**

> (1) An answer to a claim for benefits must be filed within 20 days after the date of service of the claim and must be served upon all parties. A default will not be entered for failure to answer, but, unless an answer is timely filed, statements made in the claim will be deemed admitted. The failure of a party to deny a fact alleged in a claim does not preclude the board from requiring proof of the fact.

> **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, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and a completed report in accordance with 8 AAC 45.086(a). . . .

> **8 AAC 45.182. Controversion.** (a) To controvert a claim the employer shall file form 07-6105 in accordance with AS 23.30.155(a) and shall serve a copy of the notice of controversion upon all parties in accordance with 8 AAC 45.060.
>
> (b) If a claim is controverted on the grounds that another employer or insurer is liable, as well as on other grounds, the board will, upon request under AS 23.30.110 and 8 AAC 45.070, determine if the other grounds for controversion are supported by the law or by evidence in the controverting party's possession at the time the controversion was filed. If the law does not support the controversion or if evidence to support the controversion was not in the party's possession, the board will invalidate the controversion, and will award additional compensation under AS 23.30.155(e). . . .

> **Evid. R. 602. Lack of Personal Knowledge.** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. . . .

ANALYSIS

1) Should Employer's objection be sustained?

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony . . . ." Evid. R. 602. Ms. Nashlund testified she is a nationally certified medical assistant and, for the past four years, has been the surgery coordinator for Dr. Wright's office. Starting on July 22, 2013, she made several calls to Employer's adjuster in efforts to schedule Employee's surgery. Her four years'

experience as Dr. Wright's surgery coordinator imparted her with personal knowledge of Dr. Wright's surgery calendar and the surgery scheduling process in general. Additionally, her efforts to schedule Employee's surgery, in particular, imparted her with further firsthand knowledge of how soon Employee's surgery could have been scheduled in this instance. Here, Ms. Nashlund established, by her own testimony, she had firsthand knowledge about the matters on which Employee questioned her. Therefore, Employer's objections are overruled. *Id*.

2) Did Employer controvert-in-fact Employee's medical treatment?

Employee contends Employer controverted-in-fact his medical treatment by refusing to preauthorize his surgery and by notifying his provider of a pending EME, which he contends, caused his provider to postpone scheduling his surgery until such time as Employer's own physician would approve it. Employer denies it controverted-in-fact Employee's surgery. It relies on testimony showing Employee's provider did not contact Employer's adjuster for preauthorization and, instead, attributes any delay in the scheduling of his surgery to Employee's provider's office policy of not scheduling surgeries when there is a pending EME.

For there to be a controversion in fact, an employer must take some action in opposition to a claim after it is filed. *Harnish*. Resistance before the filing of a claim cannot serve as a basis for a controversion in fact. *Id*. In this case, both events Employee cites as evidence of a controversion in fact, allegedly refusing to preauthorize his surgery and notifying his provider of a pending EME, occurred on July 22, 2013. Employee filed his claim on September 20, 2013. Therefore, since both events Employee cites pre-date the filing of his claim, they cannot serve as a basis for a controversion-in-fact. *Id.*

However, it is also recognized that an employer's resistance to paying benefits can be of a continuing nature. Thus, in a case such as this, Employer's answer to Employee's claim for benefits, and its actions after a claim is filed, must be examined to determine whether there was a controversion-in-fact. *Id*. A controversion-in-fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation, *Shirley*, or when an employer consistently denies and litigates its obligation to pay benefits, *Arant*. Here, Employer filed its answer on October 17, 2013. Even the most critical review of its answer does not show any hint

of an intention to deny or litigate benefits. Incidentally, it is interesting to note, October 17, 2013, is also the date, according to Ms. Nashlund, Employer's adjuster authorized Employee's surgery. Therefore, in the instant case, Employer's answer and its post-claim actions do not support a conclusion it did not accept Employee's claim for compensation. *Harnish*.

Finally, it is further noted, an employer must file it answer to a claim within 20 days of the claim's service. 8 AAC 45.050(c)(1). If it does not, statements made in a claim will be deemed admitted. *Id*. In the instant case, Employee's claim was served on Employer on September 23, 2013, and even though Employer's answer was dated October 11, 2013, it was not filed until October 17, 2013. However, the Act prescribes workers' compensation cases shall be decided on their merits except where otherwise provided by statute. AS 23.30.001(2). Additionally, the regulations further prohibit default entries. 8 AAC 45.050(c)(1). Therefore, in light of the other evidence in the record, Employer's untimely answer alone is not sufficient to warrant a different conclusion under this issue. While the statements made in Employee's claim may have initially been deemed admitted, further evaluation of the issue on the merits reveals substantial evidence to refute Employer's imputed admission it controverted in fact Employee's medical treatment. *Id*.

3) Did Employer otherwise resist providing Employee's medical treatment?

Attorney's fees can be awarded under AS 23.30.145(b) when an employer "otherwise resists" paying benefits. Employee's claims for attorney's fees will therefore be analyzed under §145(b). Under this subsection, Employee's theory of the case it is not without basis. There is considerable evidence in the record supporting Employee's contention his provider was calling Employer's adjuster to secure preauthorization for his surgery, which it initially withheld and later granted. Similarly, evidence also indicates Employer's adjuster delayed its authorization until it could complete its EME. For examples, following Dr. Wright's July 19, 2013 surgical recommendation, Employee again presented on August 7, 2013, when he was seen by PA-C DeNapoli. Employee reported continued and worsening back pain, and given his surgery was being delayed until after the EME, he requested a referral for pain management so he could get through to the September 27, 2013 EME. PA-C DeNapoli's chart notes candidly and repeatedly

refer to waiting for the EME report and "approval" for surgery. She concludes her notes by referring to a future, follow-up visit before "hopeful" surgery.

Additionally, certain evidence regarding the scheduling of the EME calls into question the purpose for its scheduling. Employer's adjuster, Ms. LaRose, testified Employee first told her he might need a third surgery on July 16, 2013, and it was during that same conversation she informed him an EME had been scheduled for July 27, 2013. She stated the EME "was already in the works," and she initiated scheduling the EME by email on July 9, 2013. However, Employer did not provide a copy of Ms. LaRose's purported July 9, 2013 email for hearing and the EME appointment confirmation notice bares a referral date of July 16, 2013. Perhaps it is just coincidence the referral date on EME appointment confirmation notice is the same day Employee informed Ms. LaRose he might need further surgery, perhaps not. However, this portion of the record may indicate the EME was not scheduled in advance of Ms. LaRose becoming aware of Employee's need for additional surgery, but rather as a result of it.

At her deposition, Ms. Nashlund alternately testified: 1) she was calling Employer's adjuster for authorization; or 2) she was merely calling to inquire whether Employee had an "open and billable" claim while denying she was calling for authorization. Her testimony regarding the purpose of her July 22, 2013, call vacillated according to which party's attorney was conducting the examination. Therefore, credibility determinations must be made, and certain portions of Ms. Nashlund's deposition are deemed more credible than others. AS 23.30.122.

Several portions of Ms. Nashlund's deposition, in particular, are considered quite probative on the issue of her credibility. AS 23.30.122. During Employee's re-cross, Ms. Nashlund testified, had Employer's adjuster authorized his surgery on July 22, 2013, she would have scheduled it at that time. Furthermore, had Employer's adjuster authorized Employee's surgery on July 22, 2013, the surgery could have been performed within a couple of weeks. It is implausible Employee's surgery would have been performed as late as November 2, 2013, if Employer's adjuster had not refused to provide authorization on July 22, 2013. *Id*. Additionally, and perhaps the most revealing portion of Ms. Nashlund's deposition testimony regarding the purpose of her July 22, 2013, call was a portion of Employer's own direct examination, where it

explicitly asked if there came a point in time when its adjuster informed her Employee's surgery had been "authorized." Ms. Nashlund specifically identified October 17, 2013, as that date; and further identified Ms. LaRose as the person who authorized the surgery. It is believed Ms. Nashlund's answers at this point are factually accurate. *Id*. Finally, her "surgery sheet" unmistakably documents, "10/17/13 S/W Kimberly & we are ok to go forward w/ surg." Ms. Nashlund's written documentation is believed to be factually accurate, and it is not thought a coincidence Employee's surgery next occurred on November 2, 2013, two weeks later. *Id*.

Ms. LaRose's testimony suffers credibility infirmities, too. AS 23.30.122. Although she denied Ms. Nashlund ever asked her to preauthorize Employee's surgery, it is rather curious to note she acknowledged an October 16, 2013, conversation with "Trina," from Employee's provider, who was following up on a request for preauthorization she had sent to Employer's adjuster. It is not plausible, when Ms. Nashlund stated she understood as early as July 22, 2013, "workers' comp. companies don't authorize surgeries, per se," Employee's provider would have sent Employer's adjuster a preauthorization request, and continued to pursue a response to it until October 16, 2013, unless Employee's provider was truly seeking preauthorization. *Id*. Furthermore, if Employee's provider was not seeking preauthorization, neither is it plausible it would repeatedly contact Employer's adjuster over the course of several months for only repeated assurances Employee had an "open and billable claim," while still not scheduling his surgery. *Id.*

As another example, Ms. LaRose's explanation for not preauthorizing surgery further impugns her credibility and the weight given to her tetimony. She testified she does not preauthorize surgery because she "can't direct medical treatment." Here, her answer is wholly not understood. *Id*. If she were to have preauthorized surgery, it still would have been Employee's and Dr. Wright's decision to proceed with it. Thus, it is unknown how preauthorizing treatment would have been "directing" treatment. Conversely, not preauthorizing surgery amounts to direction of sorts, albeit negative direction, by eliminating surgery as a treatment option because the surgeon will not schedule it unless she is going to be paid for her services. Finally, Ms. LaRose testified she gave Employee's provider her "standard" answer on October 16, 2013, and told her there were "no issues" with Employee's claim. It is implausible, after several months of being told Employee had an "open and billable claim," Ms. LaRose's standard answer of "no

issues" would have given Employee's provider any greater assurance she would be paid than she had already been given, let alone assurance sufficient to finally schedule Employee's surgery. *Id*. Yet, at that point, Employee's provider scheduled his surgery.

This decision shares Employee's cynicism with respect to Ms. Nashlund's explanation for Dr. Wright's office policy of contacting workers' compensation adjusters prior to scheduling surgery --- so the "patient doesn't get stuck with a big bill." AS 23.30.122. Ms. LaRose testified she frequently gets calls from providers when "something significant" is going to happen with medical treatment and they want to know whether anything is pending, such as EME's. Ms. Nashlund testified it is Dr. Wright's office policy to delay scheduling surgeries until pending EME's are completed. Regardless whether Employee's provider was seeking a preauthorization, or some other form of assurance more concrete than "open and billable;" clearly, the purpose of its calls was to assess the likelihood of being paid for its services should it undertake Employee's surgery. As Employee contends, physicians want to be paid for their services, just as anyone else would. "Open and billable" is hardly synonymous with "open and payable."

Thus, Employee's provider was not really concerned with an EME itself, but payment for its services. This conclusion is supported by yet further evidence. First, Ms. Nashlund is not credible regarding the office policy of not scheduling surgeries until after an EME is completed. AS 23.30.122. When asked to confirm the policy of waiting for an EME was an office policy, rather than "something" specific to [Employee's] case, her response was less than convincing: "Oh, correct, yeah." *Id*. Additionally, in her October 22, 2013 letter, Ms. Nashlund stated Dr. Wright's office "usually" waits for the outcome of an EME before scheduling surgery, and she explained to Employee's attorney what their "usual" process is. Her choice of the word "usual" necessarily means it is not a policy applied in every case. Therefore, in this case, Employee was afforded different treatment than, at least, some other workers compensation patients. The only plausible reason for Employee's disparate treatment is, for whatever reason, his provider wanted additional assurance in this case she would be paid for her services and; furthermore, his provider believed, for whatever reason, additional assurance was not going to be forthcoming until after an EME took place. *Id*.

Moreover, when asked if she received a copy of the EME report in Employee's case, she replied, "I don't know if we ever got it or not. I think we – they don't have to give it to us, but sometimes we get it." If Employee's provider was truly concerned about an EME itself, rather than just securing payment for her services, it is not plausible it would have delayed Employee's surgery for three months while awaiting an EME, only later to schedule surgery, without being in receipt of the EME report, unless Employer's adjuster provided an authorization. *Id*. The only player in this case the EME report had any significance to, was Employer's adjuster.

It is noted, Employer contends the Act does not requires it to preauthorize treatment and it cites *Richards* in support of its position. However, it is not entirely clear whether *Richards* actually supports Employer's contention. In *Richards*, the Court decided whether the Act placed an affirmative duty on employer's to actually select physicians and make arrangements for the medical care of injured workers or whether employers' duty was limited to just paying for medical services. It held: "the only affirmative duty of the employer . . . is that of paying for all necessary medical expenses." *Id*. at 450. Here, Employee did not need Employer to select a physician for him, he had already chosen one. Neither did he need Employer to arrange for his medical treatment. Ms. Nashlund stood ready to schedule it. The only thing Employee and his provider needed were an assurance of payment.

Given the liberal, humanitarian purposes of the Act, and given mandates in AS 23.30.045(a), which prescribes the employer "shall secure" payment for medical treatment; and in AS 23.30.095(a), which prescribes the employer "shall furnish" medical treatment; and in AS 23.30.155(a), which calls for the prompt payment of compensation without an award, it is quite possible, under *Richards*, an employer's duty is not limited to just paying bills after the fact in accordance with 8 AAC 45.082(d), but could conceivably include a duty to address other payment issues, such as providing payment assurances, or at least accurately portraying the uncontroverted status of an injured worker with a compensable injury to the employee's selected provider to facilitate treatment. AS 23.30.001; AS 23.30.045(a); AS 23.30.095(a); AS 23.30.097(f); AS 23.30.155(a). In other words, 8 AAC 45.082(d) merely sets forth the procedural requirement for when bills must be paid following receipt. It does not form the basis for a sweeping legal doctrine stating Employer did not have to preauthorize medical care in

Alaska. By contrast, AS 23.30.045(a) affirmatively requires employers to "secure" payment for medical treatment and AS 23.30.095(a) requires them to "furnish" the treatment, *i.e.*, authorize it when requested unless there is a valid legal of factual reason to deny it. This rationale is further supported by the Alaska Supreme Court's most recent decision in *Harris*, which concluded a penalty can be imposed on a medical benefit prescribed but not yet paid. *Id*. at 17. It held a benefits due is payable on demand. *Id*. at 16.

Here, Employee began "demanding" his benefits as early as July 16, 2013. He continued to enjoy the presumption the surgery he sought was compensable. AS 23.30.120; *Meek*; *Olson*. At the same time, Employer was, and would remain, without any evidence to controvert. 8 AAC 45.182(b). Yet, after two months, Employee still could not get the surgery to which he was entitled. AS 23.30.095(a); AS 23.30.155(a); *Runstrom*. Meanwhile, Employee and his attorney were being repeatedly told the surgery was being delayed to afford Employer an opportunity to procure an EME. While it is recognized Employer has a right to perform an EME, nothing in the Act requires Employer to perform an EME. AS 23.30.095(e). Thus, under these circumstances, as Employee's provider stood by waiting for an EME, and Employee stood by waiting for his surgery, Employer could have, conceivably, delayed Employee's surgery indefinitely by simply never performing an EME and never preauthorizing the surgery, which it had no valid reason to deny.

Similarly, neither is there any provision in the Act requiring Employee to forego medical treatment until such time as Employer can procure an EME. Therefore, any effort to attribute the delay in scheduling Employee's surgery to his postponement of the July 27, 2013 EME is not well taken. For whatever reasons of her own, Employer's adjuster, who felt "obligated" to inform Employee's provider of an EME, did not feel similarly obligated to offer payment assurances to Employee's provider sufficient for Employee to receive surgery; or, alternatively, explain Employer was without any evidence to controvert Employee's treatment, irrespective of a future EME.

Employer's right to investigate and defend against claims of liability is recognized. Alaska Const., art. I sec. 7. However, Employer also had an obligation to pay benefits and to continue

paying benefits until it controverted. *Suh*. Employer's right and its obligation are not mutually exclusive. It could have pursued its investigation according to the methods and timelines afforded it under the Act while simultaneously facilitating the quick and efficient delivery of medical benefits to Employee. AS 23.30.001(1).

Even if the Act does not require Employer to preauthorize treatment, *Summers* provides Employee with a remedy. On September 20, 2013, Employee filed his claim seeking an order setting forth Employer's obligation to provide for his surgery. Employer contends *Summers* is distinguishable because that case involved paying medical bills under a reservation of rights and this case does not. However, this case is thought to involve a reservation of rights, as well. Employer contends it was not obligated to preauthorize treatment. Moreover, as discussed above, Employer's adjuster is likely under the impression her obligation to provide medical treatment only arises after Employer has procured an EME. The only difference between *Summers* and this case is, in this case, Employer's reservations of rights were informally asserted. Furthermore, Employee's claim in this case is even more compelling than in *Summers* because, in *Summers*, the employee was at least receiving treatment; whereas, here, Employee unsuccessfully struggled for months to get surgery. It does not now matter that Employer's adjuster, subsequent to Employee filing his claim, authorized Employee's provider to proceed with his surgery. *Shirley*. At the time he filed his claim, *Summers* was directly applicable to Employee's circumstances.

Ms. Nashlund and Ms. LaRose are not credible in their denials Employee's provider was calling for preauthorization. AS 23.30.122. A preponderance of credible evidence in this case supports Employee's contentions his provider was calling Employer's adjuster to secure authorization for his surgery, which it initially withheld, and only later granted, when it was required to answer Employee's claim. It is not thought a coincidence Employer authorized Employee's surgery on the very same date it answered Employee's claim. A preponderance of credible evidence also indicates Employer's adjuster delayed its authorization until it could complete an additional EME. Employer did not have unilateral authority to terminate Employee's benefits. *Shirley*. However, here, Employer's refusal to preauthorize Employee's surgery effectively did just that.

Its actions interrupted the course of Employee's medical treatment and his recovery, and do amount to resistance, as contemplated by the statute at AS 23.30.145(b).

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

Employer resisted promptly providing Employee's surgery by delaying its preauthorization. He retained counsel who successfully obtained a valuable benefit for him; namely, the surgery itself, by filing a claim that forced Employer to authorize Employee's compensable treatment on October 17, 2013. Employee is entitled to an attorney's fee and cost award under AS 23.30.145(b).

In making attorney's fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on behalf of the employee, and the benefits resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings, and fully but reasonably compensate attorneys, commensurate with their experience, for services performed on issues for which the employee prevails. *Bignell*.

Employee's counsel is an experienced litigator. He has represented injured employees in workers' compensation cases for many years. Employee's counsel provided a verified attorney fee itemization billing detailing 9.9 hours of attorney time and $52.25 in costs. He did not set forth an hourly rate for his time. Employer has not objected to Employee's affidavit.

Counsel has previously been awarded attorney fees at the rate of $350.00 per hour based on his level of experience representing claimant's in work injury cases. *Smith v. State of Alaska*, AWCB Decision No. 13-0037 (April 1, 2013); *Harris v. M-K Rivers*, AWCB Decision No. 13-0014 (January 28, 2013). Based on Employee's counsel's efforts and success in this case, his years of experience, the contingent nature of workers' compensation cases, recent awards to him and to attorneys similarly situated, an hourly rate of $350.00 for attorney time spent is reasonable here, as are the itemized costs. Employee is entitled to an award of actual fees and costs totaling $3,517.25.

CONCLUSIONS OF LAW

1) Employer's objection will not be sustained.
2) Employer did not controvert-in-fact Employee's medical treatment.
3) Employer otherwise resisted providing Employee's medical treatment.
4) Employee is entitled to an award of attorney's fees and costs.

ORDER

1) Employer's objection is overruled.
2) Employee's September 20, 2013 claim for attorney's fees and costs is granted.
3) Employee is awarded attorney's fees and costs in the amount of $3,517.25.

Dated in Fairbanks, Alaska on March 24, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Sarah LeFebvre, Member

/s/_____
Zeb Woodman, 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 accordance with 8 AAC 45.050. The petition requesting

reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of JONATHAN BOCKUS, employee / claimant v. FIRST STUDENT SERVICES, employer; NEW HAMPSHIRE INS. CO., insurer / defendants; Case No. 201302957; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, on March 24, 2014.

/s/_____
Darren Lawson, Office Assistant II