ALASKA WORKERS' COMPENSATION BOARD

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

CHARLIE A HAYS, Employee, Petitioner, v. ARCTEC ALASKA, Employer, and ARCTIC SLOPE REGIONAL CORP., Insurer, Respondents.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201203775 AWCB Decision No. 15-0131 Filed with AWCB Fairbanks, Alaska on October 8, 2015

Charlie Hays' (Employee) June 18, 2015 oral petition for an award of attorney's fees and costs was heard in Fairbanks, Alaska on July 16, 2015, a date selected on June 18, 2015. Attorney Michael Jensen appeared telephonically and represented Employee. Attorney Robert Bredesen appeared telephonically and represented Arctec Alaska (Employer). There were no witnesses. The record was held open to allow Employee to file a supplemental attorney fee affidavit and cited decisional authority, and was closed upon receipt of those documents on July 20, 2015.

ISSUE

After his eligibility for reemployment benefits was administratively denied, Employee contends his attorney filed a claim seeking reemployment benefits and 295 pages of additional medical records on his behalf. Following these filings, he contends Employer next agreed to remand the issue of his eligibility determination back the Reemployment Benefits Administrator and further agreed to commence paying him the reemployment stipend. Employee contends Employer's

voluntary remand of his eligibility determination, and its voluntary stipend payments, entitle him to attorney's fees and costs. He seeks both statutory minimum fees on all past and continuing reemployment benefits, including stipend and plan costs, and reasonable attorney fees attributable to litigating this issue.

Employer acknowledges it stipulated to remanding Employee's ineligibility determination back to the Reemployment Benefits Administrator and voluntarily began paying Employee stipends benefits in response to Employee's recently filed medical records. However, it contends it has never controverted Employee's reemployment benefits, never resisted the payment of stipend, and there is no basis to award Employee his claimed attorney's fees. Employer cites *S&W Radiator Shop v. Flynn*, AWCAC Decision No. 009 (August 4, 2006), and emphasizes the Alaska workers' compensation scheme is a "voluntary pay" system and its voluntary payment of stipend should not be construed as an admission of liability for benefits. It contends the Reemployment Benefits Administrator has not yet "awarded" Employee benefits, and since the issue of Employee's reemployment stipend is not before this panel, it "is in no position to 'award' the stipend" either. Nevertheless, Employer acknowledges Employee's attorney helped "induce [Employer's] decision to stipulate to a remand and voluntarily pay stipend," and further contends it has always been willing to approve some payment of attorney's fees to "provisionally compensate" Employee's attorney for his work in this matter. However, it contends the parties were unable to come to terms on the specific mechanics of such an agreement. Employer proposes Employee be paid statutory minimum attorney's fees, on a quarterly basis, based on the amount of benefits paid during the previous quarter.

Is Employee entitled to attorney's fees and costs?

FINDINGS OF FACT

All findings of fact in *Hays v. Arctec Alaska,* AWCB Decision No. 15-0095 (August 5, 2015) (*Hays I*), are incorporated herein. The following facts and factual conclusions are reiterated from *Hays I* or established by a preponderance of the evidence:

1) Employee has reported at least 33 injuries with 12 different employers, dating back to 1982. These injuries include: AWCB Case No. 198417628 (back); AWCB Case No. 199025753 (right shoulder); AWCB Case No. 199824566 (back); AWCB Case No. 200012692 (left hand); AWCB

Case No. 200026447 (left shoulder); AWCB Case No. 200026448 (left elbow) and AWCB Case No. 200601618 (neck). (Incident Claims and Expense Reporting system (ICERS) Case Information).

2) Employee has reported seven injuries with Employer, dating back to 2009. These include: AWCB Case No. 200914198 (lower back strain); AWCB Case No. 200918157 (lower back strain); AWCB Case No. 201001297 (right index finger); AWCB Case No. 201004236 (left wrist); AWCB Case No. 201009399 (lower back strain); AWCB Case No. 201109725 (back strain) and AWCB Case No. 201203775 (right shoulder strain). (Incident Claims and Expense Reporting system (ICERS) Case Information).

3) On March 8, 2012, Employee reported injuring his right shoulder while lifting a heavy bucket at work. (Report of Occupational Injury or Illness, March 12, 2012).

4) On March 15, 2012, a right shoulder magnetic resonance imaging (MRI) study showed multiple abnormalities, including a high grade supraspinatus tendon tear with retraction. (MRI report, March 15, 2012).

5) On March 22, 2012, Christopher Manion, M.D. performed right shoulder rotator cuff repair surgery. (Operative Report, March 22, 2012).

6) On April 17, 2012, Employee began over nine months of physical therapy at First Choice Physical Therapy. (First Choice report, April 17, 2012 to February 1, 2013).

7) On September 19, 2012, Employee reported to Dr. Manion he had tripped over a log about a week earlier and landed on his right, outstretched hand, which increased his shoulder discomfort. (Manion report, September 19, 2012).

8) On December 31, 2012, Employee reported he was performing physical therapy about two-and-a-half to three weeks previously, when he felt a "pop" in his right shoulder, which caused him significant pain since. (Heald report, December 31, 2012).

9) On January 2, 2013, a computed tomography (CT) study showed a possible superior labrum, anterior to posterior (SLAP) tear, and a partial thickness tear of the supraspinatus tendon. Dr. Manion's physician's assistant, Duane Heald, recommended a subacromial steroid injection and an intraarticular glenohumeral injection under fluoroscopy. (CT report, January 2, 2013; Heald report, January 4, 2013).

10) On January 15, 2013, a designee for the Reemployment Benefits Administrator (RBA) found Employee ineligible for reemployment benefits based on Dr. Manion's prediction he

would have the physical capacities to return to his job at the time of injury. (RBA letter, January 15, 2013).

11) On February 6, 2013, Employee reported continued right shoulder pain along with significant neck stiffness. Dr. Manion was "really concerned" about Employee's cervical spine and ordered an MRI, which showed severe bilateral foraminal stenosis at C4-5 and mild annular bulges at C3-7. (Manion report, February 6, 2013; MRI report, February 6, 2013).

12) On February 15, 2013, James Eule, M.D., evaluated Employee's cervical condition on referral from Dr. Manion. Dr. Eule ordered a CT myelogram to further evaluate surgical options. (Eule report, February 15, 2013).

13) A February 27, 2013 CT myelogram showed multilevel degenerative disease throughout Employee's cervical spine, which was most pronounced at C3-7. (CT report, February 27, 2013).

14) On March 13, 2013, Dennis Chong, M.D., performed an employer's medical evaluation (EME). He diagnosed: 1) right shoulder labral tear with chronic impingement, status post historical previous rotator cuff repair, related to the March 8, 2012 injury; 2) status post right shoulder reconstructive surgery, related to the March 8, 2012 injury; 3) learned voluntary chronic contraction of right shoulder girdle musculature; and 4) chronic preexisting multilevel cervical spine degenerative disease with presumptive diagnosis of spinal stenosis, unrelated to the March 8, 2012 work injury. Dr. Chong did not think Employee's right shoulder was medically stable and cautioned against a third arthroscopic shoulder procedure since Employee's recovery from his March 22, 2012 surgery was unsuccessful. (Chong report, March 13, 2013).

15) On March 21, 2013, Dr. Eule recommended a four-level cervical decompression and fusion to Employee. During the visit, Employee told Dr. Eule he had reported neck pain to Dr. Manion at the time of the March 8, 2012 work injury and asked Dr. Eule for his opinion on whether the work injury met the "State's definition" of "the substantial factor" for his need for cervical treatment. (Eule report, March 21, 2013).

16) On March 22, 2013, Employer controverted benefits related to Employee's cervical condition based on Dr. Chong's March 13, 2013 EME report. (Controversion Notice, March 22, 2013).

17) On March 26, 2013, in response to an inquiry from Employer's adjuster, Dr. Eule opined the March 8, 2012 work injury was not the substantial cause of Employee's need for cervical spine treatment. (Eule responses, March 26, 2013).

18) On April 11, 2013, Dr. Chong issued an addendum to his March 13, 2013 EME report clarifying that, despite likely preexisting rotator cuff pathology, the March 8, 2012 injury resulted in the "final tear," which resulted in Employee's disability and need for treatment. (Chong addendum, April 11, 2013).

19) On April 24, 2013, in response to an inquiry from Employer's adjuster, Dr. Manion indicated he was recommending Employee continue with physical therapy and possible diagnostic arthroscopic surgery. He opined the March 8, 2012 work injury was not the substantial cause of Employee's current need for shoulder treatment, but rather were caused by the September 2012 trip and fall. Dr. Manion also thought Employee's right shoulder condition was medically stable. (Manion responses, March 26, 2013).

20) On May 17, 2013, Employee saw Dr. Eule for a preoperative visit in advance of a four-level cervical fusion. Dr. Eule discussed potentially using Infuse, a bone grafting agent, during Employee's surgery and potential swallowing problems associated with its use. (Eule report, May 17, 2013).

21) On May 20, 2013, Dr. Eule performed anterior cervical decompressions and fusions at C3-7 and bone grafts using Infuse. Dr. Eule's report indicates he had again discussed potential complications with using Infuse, including severe swelling of the throat and difficulty swallowing and breathing, with Employee prior to surgery. (Operative report, May 20, 2013).

22) On May 30, 2013, Dr. Chong issued an addendum to his March 13, 2013 EME report. In response to Dr. Manion's April 24, 2013 treatment recommendations, Dr. Chong opined Employee's need for further shoulder treatment was likely a result of the September 2012 trip and fall, and also thought Employee's right shoulder was medically stable as a result of the March 8, 2012 work injury. Dr. Chong rated Employee's right shoulder permanent impairment as a two percent whole person impairment. (Chong addendum, May 30, 2013).

23) On June 4, 2013, Employee was seen at Dr. Eule's office for a post-operative visit. Employee was "still having some difficulty swallowing," but appeared "to be doing well." (Moates-Atkins report, June 4, 2013).

24) On July 9, 2013, Employee saw Dr. Eule for a post-operative visit. Employee reported he felt "dramatically better." He still had "a little bit" of pain in his shoulder, "but it feels like it is actually in his shoulder now." Dr. Eule opined Employee was doing "reasonably well." (Eule report, July 9, 2013).

25) On August 20, 2013, Employee saw Dr. Eule for a follow-up visit and reported stepping backwards into a hole, which "really jarred his neck and he was pretty sore for a couple of days, but that got better." Dr. Eule noted Employee's trachea moved well during swallowing and he hoped Employee's swallowing would continue to improve. Dr. Eule also was "a little bit concerned" about apparent "toggling" around the screws at C6-7 that appeared on x-rays that day. Dr. Eule thought it would now be safe for Employee to see Dr. Manion for his shoulder complaints. (Eule report, August 20, 2013).

26) On August 26, 2013, Employee saw Dr. Manion for further evaluation of his right shoulder. Employee reported he was having some difficulty swallowing, as well as breathing difficulty when he tilted his head back. Dr. Manion discussed a possible diagnostic arthroscopy and biceps tenotomy, but did not want to proceed while Employee was still healing from his neck surgery. (Manion report, August 26, 2013).

27) On October 22, 2013, Employee saw Dr. Eule for a follow-up visit and complained of swallowing difficulties and reported choking "pretty regularly." Employee appeared grossly intact neurologically, and his balance and coordination seemed to be improved. X-rays that day showed "good solid fusion" at all levels with no loss of instrumentation fixation. Dr. Eule thought Employee should begin physical therapy to improve his range of motion and referred Employee to a speech therapist for a swallow evaluation. He also encouraged Employee to speak to his ear, nose and throat (ENT) doctor about his swallowing problems. (Eule report, October 22, 2013).

28) On November 21, 2013, Employee was diagnosed with dysphagia at the Mat-Su Regional Medical Center. (Hays report, March 26, 2014).

29) On December 6, 2013, Employee was seen at Dr. Eule's office for a follow-up. He reported falling and landing on the back of his head about two or three weeks previously. Employee sought treatment at the local emergency room, but was still concerned about having problems with his balance and coordination. Employee also reported falling two or three more times since his initial fall. He felt a little bit clumsy in general. Dr. Eule decided to monitor

Employee's gait and balance abnormalities, and contemplated ordering an MRI and a neurological referral if these abnormalities trended downward. (Eule report, December 6, 2013).

30) On January 29, 2014, Employee saw Dr. Eule for increasing neck pain after falling in early December, and reported worsening right shoulder pain as well. Dr. Eule noted there might be "a little bit" of motion at C5-6 on the flexion and extension films taken that day and decided to order a CT myelogram to evaluate whether there was any fracture or pseudoarthrosis that was "adding to the problem." (Eule report, January 29, 2014).

31) A February 4, 2014 cervical CT myelogram showed lucencies around fixation screws at and lucency in the center aspect of the fusion hardware at C7. The report states: "Please correlate for interval injury that may account for these findings." There was no evidence of vertebral body fracture. (CT report, February 4, 2014).

32) On February 18, 2014, Employee saw Dr. Eule for a follow-up after the cervical CT myelogram. Dr. Eule had "some concern" for pseudoarthrosis at C6-7 and he did not see "any good bridging bone there." He also had "some concern" that C5-6 may not be healed as well. Dr. Eule thought C3-4 and C4-5 appeared to be "somewhat healed, not robustly, but at least reasonably." He opined Employee might have "just stirred things up" after his fall and contemplated adding posterior cervical instrumentation to get Employee's fusion to heal the rest of the way. (Eule report, February 18, 2014).

33) On March 27, 2014, Dr. Manion performed a right shoulder diagnostic arthroscopy along with extensive debridement of the glenohumeral joint and subacromial space. (Operative report, March 27, 2014).

34) On April 8, 2014, Employee resumed physical therapy sessions at First Choice for his right shoulder. Physical therapy sessions were conducted two and three times per week. (First Choice report, April 8, 2014 to September 16, 2014).

35) On April 15, 2014, Employee followed-up with Dr. Eule for continuing neck pain. Dr. Eule ordered a left-sided intralaminar injection at C7-T1. (Eule report, April 15, 2014).

36) On April 22, 2014, Employee received a left C7-T1 epidural steroid injection. (Levine report, April 22, 2014).

37) On May 7, 2014, Employee saw Dr. Manion for a follow-up visit on his right shoulder and reported continued trapezial discomfort and neck pain. Dr. Manion thought there was nothing

further he could do for Employee's right shoulder from a surgical standpoint, and thought some of Employee's complaints were related to his cervical pathology. (Manion report, May 7, 2014).

38) On May 30, 2014, Dr. Eule spent "a lot of time" reviewing x-rays and the CT myelogram with Employee. He thought Employee had "a very difficult problem," and he "hate[d]" to think about considering surgery again," but thought Employee was running out of options since he had failed to improve with conservative treatment. Dr. Eule considered performing a posterior fusion and ordered an MRI "to look for soft tissue things" he may have missed. (Eule report, May 30, 2014).

39) On June 13, 2014, a cervical MRI showed improved alignment and significantly improved canal diameter compared to a prior study. Previously noted C3-4 and C4-5 stenosis was no longer present. However, neural foraminal stenosis was noted at C3-4. (MRI report, June 13, 2014).

40) On July 3, 2014, Employee followed-up with Dr. Eule after his June 13, 2014 cervical MRI. After reviewing the films with Employee, Dr. Eule thought the "good new [was] there [was] nothing dramatically wrong with [Employee's] neck, but the bad news [was] that he is still having pain." Dr. Eule decided to order a C3-4 transforaminal epidural steroid injection. (Eule report, July 3, 2014).

41) On July 10, 2014, Employee received a left C3-4 epidural steroid injection. (Gevaert report, July 10, 2014).

42) On September 10, 2014, Dr. Manion ordered a work hardening program for Employee's right shoulder. (Manion order, September 10, 2014).

43) On September 18, 2014, Employee began daily work hardening sessions at First Choice. (First Choice reports, September 18, 2014 to October 9, 2014).

44) On October 2, 2014, Employee followed-up with Dr. Eule for neck pain and reported the last injection had provided him with dramatic relief on his left side but he was still having pain on the right shoulder and behind the shoulder blade on the right side. Employee also reported "tweaking his back" while doing work hardening. Dr. Eule thought Employee's neck was "reasonably stable" at that point and did not think Employee's symptoms were coming from his neck. He also doubted Employee's ability to return to work and questioned whether work hardening was going to be a "valid" effort for him. (Eule report, October 2, 2014).

45) On October 10, 2014, Employee saw James Glenn PA-C, who performed a "Medicaid Consultation" for lower back pain. Employee reported he was performing work hardening about a week-and-a-half previously, when he had an immediate onset of pain "in the small of [his] back and bilateral butt cheeks." He also reported left foot numbness and tingling pain into his right posterior thigh and knee. After reviewing x-rays taken that day, PA Glenn thought Employee might have a wedge compression fracture at his L1 vertebra. He ordered an MRI and a discontinuation of Employee's work hardening. (Glenn report, October 10, 2014).

46) An October 17, 2014 lumbar MRI showed an anterior compression fracture of the superior end plate of L1, which was likely chronic, and a small diffuse disc bulge at L5-S1 without significant canal stenosis, but moderately severe bilateral neural foraminal stenosis. (MRI report, October 17, 2014).

47) On October 21, 2014, Employee returned to see PA Glenn who, after reviewing the MRI and consulting with a radiologist, also thought Employee's fracture was old and ordered resumption of Employee's work hardening program. (Glenn report, October 21, 2014).

48) On October 17, 2014, Employee saw Dr. Manion for a follow-up visit. Dr. Manion noted Employee was "a very sickly gentleman," was "still deconditioned," and had "multiple other issues going on." He thought nothing further could be done for Employee's right shoulder from a surgical standpoint, and planned to refer Employee to a pain management program, "once he gets his back sorted out." Dr. Manion did not think Employee's "constellation of problems" was still related to the work injury, and opined Employee might need job retraining or require permanent disability. (Manion report, October 17, 2014).

49) On November 20, 2014, Employee followed up with PA Glenn for his lower back pain. PA Glenn ordered an epidural steroid injection. (Glenn report, November 20, 2014).

50) On November 21, 2014, Employee resumed his work hardening program at First Choice. (First Choice report, November 21, 2014).

51) On December 3, 2014, Employee received an L5-S1 interlaminar epidural steroid injection. (Johnson report, December 3, 2014).

52) On January 12, 2015, Employee saw Dr. Manion for a "Medicaid Established Patient New Condition." Employee reported increased pain and grinding in his left shoulder after starting his work hardening program. "He [was] also complaining of left wrist pain from a work injury." Dr. Manion noted Employee's appointment was listed under Medicaid, but Employee contended

it should be through workers' compensation. Dr. Manion advised Employee to file a claim "to make sure that happens." X-rays taken that day showed significant AC joint arthrosis. Dr. Manion reminded Employee to make sure he gets his left wrist "worked up through Workmen's Compensation and as far as the shoulder is concerned, to make sure that is Workmen's Compensation as well." (Manion report, January 12, 2015).

53) On January 12, 2015, Duane Heald, PA-C, who works in Dr. Manion's practice, provided responses to two sets of questions posed by Employee. The first set of questions inquires about Employee's "current left shoulder, left arm and/or back symptoms and/or conditions." The second set of questions asks about Employee's "right shoulder symptoms and/or conditions." Both sets of questions purportedly relate to Employee's "May 18, 2012" injury. Following each question, two lines, labeled "YES" and "NO," were provided for PA Heald to indicate his responses, as well as spaces for "COMMENTS." Without comments, PA Heald marked "Yes" lines indicating Employee's "May 18, 2012" injury was the substantial cause of his "current left shoulder, left arm and/or back symptoms and/or conditions"; Employee would not be suffering his "current left shoulder, left arm and/or back symptoms or conditions" if he had not been injured on "May 18, 2012"; Employee's "left shoulder, left arm and/or back symptoms or conditions" required ongoing medical treatment; Employee's "left shoulder, left arm and/or back symptoms or conditions" had not reached medical stability; and Employee's "left shoulder, left arm and/or back symptoms or conditions" will result in a whole person permanent partial impairment. Similarly, PA Heald also checked the corresponding "YES" lines on the "right shoulder symptoms and/or conditions" questionnaire indicating the "May 18, 2012 injury and the resulting December 11, 2012 physical therapy incident" were the substantial cause of Employee's "current right shoulder symptoms and/or conditions"; Employee would not be suffering his "current right shoulder symptoms and/or conditions if it had not been for the "May 18, 2012 injury" and the "resulting December 11, 2012 physical therapy incident"; Employee's "right shoulder symptoms or conditions" required ongoing medical treatment; Employee's "right shoulder symptoms or conditions" had not reached medical stability; and Employee's "right shoulder symptoms or conditions" will result in a whole person permanent partial impairment. (Heald responses, January 12, 2015).

54) On January 13, 2015, Employer controverted "medical treatment and related benefits for Employee's "back condition" on the basis his work injury involved his right shoulder. (Controversion Notice, January 13, 2015).

55) On January 20, 2015, First Choice wrote a "To Whom It May Concern" letter that contends Employee aggravated a pre-existing back condition while participating in work hardening for his right shoulder injury. The letter references numerous chart notes documenting Employee's back complaints. It also contends, "[o]n November 25, 2014 [Employee] said he had been in Anchorage to talk to the workers' compensation company and his lawyer. He told us 'I think my shoulder, my back, my neck and my other shoulder and wrist were all work related. I found claim numbers for all of it.'" (First Choice Physical Therapy letter, January 20, 2015).

56) On January 21, 2015, a left shoulder MRI showed a near circumferential labral tear and nearly a full thickness tear of the supraspinatus muscle. (MRI report, January 21, 2015).

57) On January 22, 2015, Dr. Chong performed an employer's medical evaluation (EME) and diagnosed: 1) status post right shoulder rotator cuff repair, related to the March 8, 2012 work injury; 2) status post right shoulder reconstructive surgery, related to the March 8, 2012 work injury; 3) aggravation of right shoulder subsequent to trip and fall over log in September 2012, unrelated to the March 8, 2012 work injury; 4) chronic, preexisting multilevel cervical spine degenerative disease, unrelated to the March 8, 2012 work injury; 5) status post anterior cervical discectomy and fusion C3-7 with plating, unrelated to the March 8, 2012 work injury; 6) dysphagia with massive weight loss as a complication of anterior cervical discectomy and fusion, unrelated to the March 8, 2012 work injury; 7) likely preexisting multilevel lumbar spine degenerative disease with spondylosis, unrelated to the March 8, 2012 work injury; and 8) chronic low back subsequent to fall in mud with twisting injury while fishing in August 2014, unrelated to the March 8, 2012 work injury. Dr. Chong opined Employee had recovered from his work-related, right shoulder injury by September 2013, or six months after the surgical repair in March of 2012. Dr. Chong thought Employee's severe emaciation as a result of his dysphagia substantially affected his right shoulder function, but the March 2014 surgery resulted from physical therapy to address his neck pain and severe deconditioning, not the March 8, 2012 work injury. Although Employee's right shoulder impairment had substantially increased since 2013, Dr. Chong attributed any increase in impairment to severe deconditioning and emaciation resulting from dysphagia. He also thought the reasonableness of Employee's physical therapy

was "questionable" given his severely emaciated state. The only work restriction Dr. Chong attributed to the March 8, 2012 work injury was light-duty work with a 35-pound lifting restriction and "rare overhead shoulder activities." (Chong report, January 22, 2015).

58) On January 26, 2015, First Choice Physical Therapy filed claim seeking medical costs for Employee's right shoulder injury. The provider also included an annotation on its claim form that states: "* 9-22-14 patient said back was hurting him * addendum to shoulder claim due to exacerbation of old back injury." It also filed its January 20, 2015 "To Whom it May Concern" letter along with its claim. (First Choice Claim, January 26, 2015; First Choice Physical Therapy letter, January 20, 2015).

59) On February 2, 2015, Employee filed a claim seeking ongoing temporary total disability benefits (TTD) from March 8, 2012 for injuries to his right shoulder, left shoulder, left wrist, low back and neck. He attached a letter explaining the injuries for which he sought compensation. Employee contended he injured his left shoulder 10 to 12 years previously when he fell through a "crawl hole" on a "demo" project; he injured his back stacking pallets in 2009; he injured his wrist when he struck it with a hammer in 2010; he injured his back, right leg and foot while carrying timber in 2011; he injured his right shoulder lifting a paint bucket in 2012; and he aggravated a 1982 neck injury while he was wearing a shoulder sling for his right shoulder injury and this aggravation necessitated cervical fusion. Employee concluded his explanation with: "These have all been bothering me since they happened and I am filing for disability." (Employee's Claim, undated).

60) On February 2, 2015, Employer controverted "medical treatment and related benefits for: aggravated right shoulder of Sept. 2012 personal injury – cervical spine – lumbar spine – chronic low back pain – dysphagia." It cited various portions of Dr. Chong's January 22, 2015 EME report as bases for its controversion. (Controversion Notice, February 2, 2015).

61) On February 26, 2015, Employer controverted Employee's claimed TTD on the basis of causation, medical stability and several statutes of limitations defenses. (Controversion Notice, February 26, 2015).

62) On March 19, 2015, Employee, now represented by an attorney, served a claim seeking TTD from April 25, 2013 to March 26, 2014, and from September 11, 2014 continuing, permanent partial impairment (PPI) beyond two percent, medical and related transportation

costs, interest, reemployment benefits and attorney's fees and costs for "cumulative trauma" to his left shoulder, left arm and low back. (Claim, March 19, 2015).

63) At a March 25, 2015 prehearing conference, Employee's attorney clarified his March 19, 2015 claim was intended to supersede Employee's February 2, 2015 claim, rather than amending or supplementing it. He also proposed a second independent medical evaluation (SIME), which Employer opposed. The parties agreed to a May 21, 2015 hearing on the SIME issue. (Prehearing Conference Summary, March 25, 2015).

64) On March 27, 2015, Employee completed an SIME form, which sets forth disputed medical opinions based on PA Heald's January 12, 2015 responses. The form lists body parts in dispute as left shoulder, left arm, low back, right shoulder, left wrist and neck. (Employee's SIME form, March 27, 2015).

65) On April 14, 2015, Employer controverted benefits sought in Employee's March 19, 2015 claim, including: TTD; PPI beyond two percent; medical and transportation costs that were unnecessary, unreasonable or unrelated to Employee's March 8, 2012 work injury; attorney's fees and costs "beyond reasonable fees and costs related to the reemployment issue"; and interest "beyond reinstatement of stipend." It also answered Employee's March 19, 2015 claim, denying benefits as set forth in its controversion that same day. Employer also set forth a number of "Affirmative Defenses" in its answer, which included "[t]he employer will stipulate for a remand of the ineligibility determination back to the RBA, in light of new medical information." Employer attached a cover letter to its answer and controversion, which states:

> Enclosed is your copy of the answer and controversions filed in response to your recent claim. You will notice that ARCTEC will agree to a remand of the reemployment ineligibility determination to the RBA, in light of new medical opinion. . . . Reemployment stipend will also be paid retroactive to mid-September, with interest. This claim remains under investigation and the employer reserves the its right to declare an overpayment on this or any prior compensation paid to Mr. Hays.
>
> At this point it appears . . . the reemployment process will soon resume. . . .
>
> I look forward to hearing from you soon. . . .

(Controversion Notice, April 14, 2015; Employer's Answer, April 14, 2015; Employer's cover letter, April 14, 2015).

66) On April 16, 2015, Employee served an affidavit of readiness for hearing (ARH) on specified issues in his March 19, 2015 claim, including vocational rehabilitation benefits, attorney's fees and costs, interest, and an SIME. (Employee's ARH, April 16, 2014).

67) On April 24, 2015, Employer served an affidavit of opposition to Employee's April 16, 2015 ARH, opposing a hearing on numerous bases, including its contention it has not been afforded adequate time to complete discovery and was still awaiting records from its discovery requests. (Employer's Affidavit of Opposition, April 24, 2015).

68) Both parties continued to file medical reports leading up to the May 21, 2015 hearing. (Record; *Hays I*).

69) On May 21, 2015, a hearing was held on Employee's March 25, 2015 oral petition for an SIME. (Record).

70) On May 26, 2015, Employer controverted PPI beyond two percent based on Dr. Chong's rating of that percentage set forth in his May 30, 2013 report. (Controversion Notice, May 26, 2015).

71) At a June 18, 2015 prehearing conference, Employee contended he was seeking attorney's fees and costs based on the RBA remand and reinstatement of stipend benefits. The parties agreed to a July 17, 2015 hearing on Employee's oral petition for attorney's fees and costs. (Prehearing Conference Summary, June 18, 2015).

72) On July 1, 2015, Employee served an affidavit of attorney's fees and costs, which contains an itemized statement that shows 3.9 hours of attorney time, billed at a rate of $400 per hour, and 3.4 hours of paralegal time, billed at a rate of $195 per hour, for total fees of $2,223. (Employee's Affidavit of Fees and Costs, July 1, 2015).

73) On July 16, 2015, Employee served a supplemental affidavit of attorney's fees and costs, which contains an itemized statement that shows 2.1 hours of additional attorney time, billed at a rate of $400 per hour, and 0.6 hours of additional paralegal time billed at a rate of $195 per hour, for total fees of $957. The grand total of Employee's July 1, 2015 and July 16, 2015 affidavits is $3,180. (Employee's Supplemental Affidavit of Fees and Costs, July 16, 2015; observations).

74) On August 5, 2015, *Hays I* issued, denying Employee's March 25, 2015 oral petition for an SIME because of vagueness in medical opinions used to establish the purported physician disputes as well as conflicting information in the record concerning what body parts or conditions Employee was claiming benefits for. It also concluded performing an SIME was

premature because both parties had continued to file additional medical reports in the days leading up to hearing. (*Hays I*).

PRINCIPLES OF LAW

AS 23.30.041. Rehabilitation and reemployment of injured workers.
. . . .

(c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. . . .

(d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits.

(g) Within 30 days after the employee receives the administrator's notification of eligibility for benefits, an employee shall file a statement . . . to notify the administrator and the employer of the employee's election to either use the reemployment benefits or to accept a job dislocation benefit . . . .

(h) Within 90 days after the rehabilitation specialist's selection under (g) of this section, the reemployment plan must be formulated and approved. . . . .

(k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first . . . . If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process . . . . The fees of the rehabilitation specialist . . . shall be paid by the employer and may not be included in the cost of the reemployment plan.

(l) The cost of the reemployment plan incurred under this section shall be the responsibility of the employer, shall be paid on an expense incurred basis, and may not exceed $13,300.
. . . .

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 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). Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* In this latter scenario, reasonable fees may be awarded. *Id.* at 152-153.

When an 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 under AS 23.30.145(a) 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). An employee may, at the same time, also be entitled to recover reasonable attorney's fees under AS 23.30.145(b) where the employer fails to pay compensation due or resists paying compensation. *Id.* at 1191.

A controversion in fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation. *Underwater Const. v. Shirley*, 884 P.2d 156, 159 (Alaska 1994). To determine whether there has been a controversion in fact, the board needs to look at the employer's answer to a claim for benefits and its actions taken after the claim is filed. *Moore*

at 152. "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.*

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

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. Although attorney's fees should be fully compensatory so injured workers have competent counsel available to them, this does not mean an attorney automatically gets full, actual fees. *Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002). It is reasonable to award an employee half his attorney's fees when he does not prevail on all the issues raised by his claim. *Id*. at 147-148; *Bouse v. Fireman's Fund*, 932 P.2 222; 242 (Alaska 1997). In order to recover fees under AS 23.30.145(b), an employee must succeed on the claim itself, not a collateral issue. *Childs v. Copper Valley Elect. Ass'n.*, 860 P.2d 1184; 1193 (Alaska 1993). Interest awarded on belated TTD payments is a collateral issue. *Id*.

> **8 AAC 45.050. Pleadings.**
> . . . .
>
> (c) **Answers.**
> . . . .
>
> (3) An answer must be simple in form and language. An answer must state briefly and clearly the admitted claims and the disputed claims so that

8 AAC 45.180. Costs and attorney's fees.

(a) This section does not apply to fees incurred in appellate proceedings.

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

. . . .

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

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

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

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

. . . .

ANALYSIS

Is Employee entitled to attorney's fees and costs?

Employee contends Employer's voluntary remand of his eligibility determination and its voluntary stipend payments entitle him to attorney's fees and costs. He seeks both statutory minimum fees on all past and continuing reemployment benefits, including stipend and plan costs, and reasonable attorney fees attributable to litigating this issue. Employer contends the Alaska workers' compensation scheme is a voluntary pay system and its voluntary payment of stipend benefits should not be construed as an admission of liability for benefits. It contends it neither controverted Employee's reemployment benefits, nor resisted paying Employee stipend, so there is no basis for a fee award. However, it does not oppose some payment of fees to "provisionally compensate" Employee's attorney, and proposes quarterly payments of statutory minimum fees.

Attorney's fees may be awarded under AS 23.30.145(a) when there is either a controversion or a controversion in fact. *Moore*. A controversions in fact occurs when an employer does not "unqualifiedly accept" and employee's claim for benefits. *Shirley*. In order to determine whether there has been a controversion in fact, one must at the employer's answer to a claim for benefits and the actions taken after the claim is filed. *Moore*. 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.*

On March 19, 2015, Employee's attorney served a claim seeking benefits, which included claims for reemployment benefits, interest and attorney's fees and costs. Employer answered Employee's claim on April 14, 2015, denying attorney's fees and costs "beyond reasonable fees and costs related to the reemployment issue," denying interest "beyond reinstatement of stipend," and also setting forth a number of "Affirmative Defenses," which included "[t]he employer will stipulate for a remand of the ineligibility determination back to the reemployment benefits administrator (RBA), in light of new medical information." It also served a cover letter along with its answer, clarifying it would agree to a remand of Employee's ineligibility determination

and begin paying Employee stipend. Employer's letter further anticipated the resumption of the reemployment process "soon."

Employee's petition for attorney's fees raises a couple of interesting issues under the facts presented. Reemployment benefits are actually a package of potential benefits, which may include far more than just a stipend. They can include either a job dislocation benefit or reemployment benefits. AS 23.30.041(g). If an employee elects reemployment benefits, benefits include a reemployment plan, AS 23.30.041(h), a stipend during the plan, AS 23.30.041(k), rehabilitation specialist fees, *id*., and plan costs, AS 23.30.041(l).

A defense, affirmative or otherwise, is not the same as an admission, 8 AAC 45.050(c)(3), and remanding Employee's ineligibility determination back to the RBA, where Employee can again be found ineligible, is not the same as actually providing the benefits claimed, AS 23.30.041(d). This is especially true since an "employer may *stipulate* to the employee's eligibility *at any time*." AS 23.30.041(c) (emphasis added). Employer's agreed-upon remand merely presents an additional, time consuming, administrative hurdle Employee has to clear before he can begin receiving other reemployment benefits, in addition to stipend, to which he may be entitled. AS 23.30.041(d). Therefore, although Employer's failure to stipulate to Employee's eligibility for all reemployment benefits, rather just agreeing to the provisional payment of stipend, may amount to a controversion in fact of those other reemployment benefits under §145(a), or "resistance" to paying them under §145(b), as Employer points out, those other reemployment benefits have yet to be "awarded" under §145(a), or "ordered" under §145(b), and as such, cannot serve as a basis for an award of fees.

As for the provisional stipend payments, once Employee claimed reemployment benefits, Employer immediately began paying stipend. Even though Employer acknowledges Employee's attorney was instrumental in inducing it to begin such payments, it is impossible to identify any Employer resistance to paying stipend under §145(b), or point to any legally cognizable controversion in fact of stipend payments under §145(a). Although the Alaska Supreme Court established in *Childs* an employer's voluntary benefit payment can be the equivalent of a board award, unlike that case, here Employer never controverted Employee's entitlement to the benefit.

Rather, Employee was previously found ineligible for reemployment benefits by the RBA, so stipend and other reemployments benefits were never subsequently forthcoming.

Nevertheless, §145(a) does provide payment of attorney's fees, in the absence of a controversion, when bona fide legal services have been rendered. Employer's acknowledgement of Employee's attorney contribution to its deciding to initiate provisional stipend payments is sufficient to establish that bona fide legal services were provided, which resulted in payment of a benefit to Employee. Therefore, Employee's petition for statutory minimum fees on stipend payments will be granted. Furthermore, Employer's cover letter to its answer anticipates resumption of the reemployment process "soon," and it does not oppose an award of additional statutory minimum fees, paid on a quarterly basis, on all potential, future, reemployment benefits. Employer's proposal is a reasonable one, which acknowledges the continuing contributions of Employee's attorney, and it will be adopted.

Employee also seeks an award of reasonable attorney's fees for litigating his instant petition, but he does not state whether he seeks an award of such fees under §145(a) or §145(b). As previously set forth, since reemployment benefits have neither been awarded, nor ordered, Employee's petition is premature in those regards. Nevertheless, as the Alaska Supreme Court made clear in *Lewis-Walunga,* §145(a) establishes a minimum fee, but not a maximum fee. Therefore, reasonable attorney's fees may still be available under that section, in addition to the statutory minimum fees that will be awarded below. 8 AAC 45.180(b). However, by his own account, Employee secured the provisional stipend payments, a fraction of the reemployment benefits claimed, by merely filing an additional 295 pages of medical records. Consequently, after considering the nature, length, and complexity of the services performed, and the resulting benefit to Employee, it is again decided that Employee's petition for reasonable fees is premature, and they will not be awarded at this time. However it is significant to note, Employer does not ultimately oppose an award of "reasonable fees and costs related to the reemployment issue," and Employee's attorney is encouraged to renew his petition in the event the parties are unable to come to terms on reasonable attorney's fees once Employee has either been found eligible for other reemployment benefits in addition to stipend, or once Employer begins to voluntarily provide them.

CONCLUSION OF LAW

Employee is entitled to statutory minimum fees based on Employer's voluntary, provisional stipend payments.

ORDERS

1) Employee's June 18, 2015 oral petition for attorney's fees and costs is granted in part, and denied in part.

2) Employer shall pay Employee statutory minimum fees based on its voluntary, provisional stipend payments.

3) Employer shall pay Employee statutory minimum fees on other, future, reemployment benefits to which Employee might become entitled.

4) Employer's statutory minimum fee payments on reemployment benefits shall be made on a quarterly basis.

Dated in Fairbanks, Alaska on October 8, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Sarah Lefebvre, Member

/s/_____
Rick Traini, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of CHARLIE HAYS, employee / petitioner; v. ARCTEC ALASKA, employer; ARCTIC SLOPE REGIONAL CORP., insurer / respondents; Case No. 201203775; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on October 8, 2015.

/s/_____
Jennifer Desrosiers, Office Assistant II