

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

SANDRA RUSCH,)	
Employee,)	
Claimant,)	FINAL DECISION AND ORDER
)	
v.)	AWCB Case No. 201210128
)	
S.E.A.R.H.C.,)	AWCB Decision No. 16-0131
Employer,)	
)	Filed with AWCB Juneau, Alaska
and)	on December 21, 2016
)	
ALASKA NATIONAL INSURANCE,)	
Insurer,)	
Defendants.)	
)	

Sandra Rusch's (Employee) claim for attorney fees and costs was heard in Juneau, Alaska on October 25, 2016, a hearing date selected on September 28, 2016. Attorney David Graham appeared and represented Employee, who appeared and testified. Attorney Theresa Hennemann appeared and represented Southeast Alaska Regional Health Consortium and Alaska National Insurance Company (Employer). As a preliminary issue, Employer objected to Employee's witness list which included five witnesses. Four oral orders sustained Employer's objection for four witnesses and another oral order allowed one witness to testify. The record was held open at the hearing's conclusion for Employee to supplement his attorney's fees and costs, to receive Employer's response to Employee's affidavit of attorney's fees and costs and supplemental affidavit, and to allow Employee to reply to Employer's responses. Following the hearing, further litigation ensued over whether Employee's reply to Employer's responses was timely. The panel consisted of two members, a quorum under AS 23.30.005(f). The record closed on December 6, 2016, when the panel met for final deliberations, after the filing deadlines passed

and the panel reviewed the parties' post-hearing documents. This decision also examines the preliminary issue and post-hearing issue presented on their merits.

ISSUES

Employee contended the substance of the four witnesses' expected testimony is relevant.

Employer contended the substance of the four witnesses' expected testimony is irrelevant or unduly repetitious and objected to each witness's testimony.

1) Was the oral orders sustaining Employer's objection to Employee's three witnesses' testimony and overruling Employer's objection to one witness's testimony correct?

Employer contended Employee's response to Employer's attorney fee affidavit objections should be stricken from the record because Employee filed it late, three days after the deadline set at hearing.

Employee contended his response was timely because the deadline for the response was set on a holiday and he submitted the response on the next business day after the holiday.

2) Should Employer's November 28, 2016 objection to Employee's November 14, 2016 response be granted?

Employee contends he is entitled to an attorney fees and cost award because the parties settled all remaining benefits in a board approved compromise and release (C&R) settlement agreement. He requests an order awarding attorney fees and costs.

Employer contends Employee is entitled to an award of attorney fees and costs. Employer contends the attorney fees and costs awarded should be reduced to reflect the issues which were in dispute and upon which Employee was successful. Employer further contends Employees award should be reduced because Employee block-billed and billed by a quarter of an hour rather than a tenth of an hour. Employer contends the hourly rate claimed is excessive and the claimed time grossly exceeds the time incurred in defending the claim. Employer contends the

complexity and nature of the disputes of the claim and the benefits awarded in the C&R do not warrant an award of high fees and provides specific objections to each entry in dispute.

3) Is Employee entitled to attorney's fees and costs? If so, in what amount?

FINDINGS OF FACT

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

- 1) On June 21, 2012, Employee injured her lower back lifting a box while working for Employer. (Report of Occupational Injury, January 14, 2015).
- 2) On November 7, 2013, Employer filed a controversion notice, denying Temporary Total Disability (TTD) and Temporary Partial Disability (TPD) benefits as of October 18, 2013, PPI benefits above a 5% rating and physical and massage therapy after November 5, 2013, contending Employee's low back condition had reached medical stability by October 18, 2013 and a Permanent Partial Impairment (PPI) rating of 5% was already paid. (Controversion, November 7, 2013).
- 3) On January 9, 2013, Employee underwent back fusion surgery. (Chart Note Stephen C. Houston, MD, January 9, 2013).
- 4) On April 12, 2014, Employee fell and injured her left wrist and arm in Anchorage, Alaska. (Employee Deposition, February 19, 2016, p 102).
- 5) On April 28, 2014, Employer filed a controversion notice, denying all benefits associated with Employee's fall, contending it occurred outside the course and scope of her employment. (Controversion, April 28, 2014).
- 6) On June 3, 2014, Employee visited Patrick E. Ballard, DO. He noted Employee fell earlier this year and "fractured her wrist and aggravated her back injury." (Dr. Ballard Chart Note, June 3, 2015).
- 7) On September 17, 2014, Employee returned to Dr. Ballard. He noted Employee "is here to discuss further follow up and discussion about her low back surgery and workman's comp case." (Dr. Ballard, Chart Note, September 16, 2014).
- 8) On August 12, 2015, Employee filed a 25-page medical summary. Susan Royce signed certifying service. (Medical Summary, August 12, 2015).

9) On June 25, 2015, Employee filed a claim seeking TTD, PPI, medical costs, transportation costs, review of reemployment benefit eligibility decision, penalty, interest, unfair or frivolous controvert, and attorney fees and costs. (Claim, June 25, 2015).

10) On June 26, 2015, Employee's attorney filed an entry of appearance. (Entry of Appearance, June 26, 2016).

11) On July 22, 2015, Employer controverted Employee's June 26, 2015 claim and filed a four page answer denying benefits. Employer contended:

- (1) Employee was not entitled to TTD after the date of medical stability and Employee's condition was medically stable;
- (2) Employee was not entitled to PPI benefits above the 5% already paid;
- (3) Employer has either paid or denied all outstanding medical costs in connection with the work injury that it was aware of;
- (4) No further medical care has been recommended or undertaken in connection with the work injury;
- (5) The fall which aggravated Employee's lower back occurred outside the course and scope of employment and the medical bills for the fall have not been paid;
- (6) Employee has not specified the transportation costs requested and a transportation log had not been submitted;
- (7) There was no eligibility determination from which to seek review as Employee was not totally disabled for more than 90 consecutive days;
- (8) Penalty and interest are not owed as all benefits have been timely paid or controverted;
- (9) All controversions are reasonably based upon fact or law;
- (10) No attorney fees or costs are due because there is no nexus between benefits paid to Employee and work performed by Employee's attorney.

(Controversion, July 22, 2015).

12) On August 11, 2015, Employee filed a medical summary containing medical records for medical treatment received for the fall which occurred on April 12, 2014; the person certifying service was "Susan Royce." (Medical Summary, August 11, 2015).

13) On August 18, 2015, Employer objected to the August 11, 2015 medical summary, contending the medical records are irrelevant and unrelated to the work injury. Employer requested withdrawal of the records. (Objection, August 18, 2015).

14) On December 11, 2015, Employee filed a petition "to extend benefits", contending she had yet to achieve recovery from her work injury, and required further medical treatment. (Petition, December 11, 2015).

15) On December 11, 2015, Employee filed a petition to “compel acceptance of Employee’s current treating physicians.” Employee contended she had to change her physician as Dr. Ballard refused to schedule any follow-up visits due to outstanding medical bills. (Petition, December 11, 2015).

16) On December 21, 2015, Employer answered Employee’s December 11, 2015 petition to extend benefits. Employer contended the only medical benefits at issue are those provided by Dr. Ballard in connection with a fall that occurred outside the course and scope of employment. (Answer, December 21, 2015).

17) On December 29, 2015, Employer objected to Employee’s December 11, 2015 petition to compel. (Objection, December 29, 2015).

18) On January 8, 2016, Employer filed a medical summary with 309 pages. (Medical Summary, January 8, 2016).

19) On January 29, 2016, Employer petitioned to compel Employee to attend a deposition. (Petition, January 29, 2016).

20) On February, 3, 2016, Employee agreed to attend a deposition on February 19, 2016 at 11:00 am at the Travelodge in Juneau, Alaska. (Prehearing Conference Summary, February 3, 2016).

21) On February 18, 2016, Employer filed a medical summary with four pages. (Medical Summary, February 18, 2016).

22) On February 19, 2016, Employee was deposed, beginning at 11:00 a.m. and concluding at 4:33 p.m. (Deposition Transcript, February 19, 2016).

23) On April 16, 2016, Employer filed a controversion notice, denying payment for physical therapy provided on February 22, 2016. Employer contended the physical therapy was prescribed by an unauthorized medical provider and exceeded the treatment frequency standard and is therefore not payable under the Act. (Controversion, April 16, 2016).

24) On May 2, 2016, Employee filed a claim seeking:

- (1) TTD from April 27, 2013 through May 11, 2013; May 19, 2013 through June 8, 2013; June 16, 2013 through October 18, 2013;
- (2) TPD from May 24, 2012 through April 12, 2013;
- (3) Permanent Total Disability (PTD) from April 13, 2013 and ongoing;
- (4) PPI;
- (5) Medical costs;
- (6) Transportation costs;
- (7) Review of reemployment benefit eligibility decision;
- (8) Penalty;

- (9) Interest;
- (10) Unfair or frivolous controvert;
- (11) Attorney fees and costs
- (12) Other.

(Claim, May 2, 2016).

Employee filed an addendum explaining each benefit claimed, stating:

Employee “was not informed by the adjuster or its agents that she had the option to elect to receive TTD payments instead of unemployment compensation or that she could repay any unemployment benefits received to eliminate any disqualification from receiving TTD” and she was “denied TTD benefits because of receipt of unemployment benefits.”

Employee contended she did not reach medical stability by October 18, 2013. Employee contended the back fusion surgery was unsuccessful and her condition and symptoms continue to disable her from returning to work.

Employee contends she was terminated from her employment because she was unable to continue to work due to her work-injury restrictions and have precluded her from obtaining alternative employment.

Employee requested her PTD be adjusted and no credit be given for any PPI payments. Employee contended she has not receiving an impairment rating by a physician of her own choice due to Employer’s interference with her selection of physicians and should be allowed to obtain a PPI rating from a physician of her choosing.

Employee contends Employer failed to pay for medical costs for treatment of her work related injury with Dr. Ballard, for out of pocket medical costs, and for recommended treatment and therapies, and attempted to influence the medical opinions of treating and EME physicians. Employee contends Employer denied \$31.23 in transportation costs and has selectively prepaid transportation costs for some treatments while not doing so for others which precluded Employee from receiving necessary medical care.

Employee contends she was not informed by Employer of her eligibility for reemployment benefits and was misled by Employer into believing she had applied for these benefits.

Employee claimed penalty and interest for all past due amounts of TTD and TPD.

Employee asserted most, if not all, of Employer’s controversions were either unfair or frivolous. For the “Other” claim, Employee requested Employer “be precluded from rebutting the presumption of compensability as to all claims and for such other and further relief as may be deemed proper once the full extent of

Employer's" interference with the selection of physicians and improperly attempting to influence physician's medical opinions has been discovered.

(Addendum, May 2, 2016).

25) On May 23, 2016, Employer answered Employee's May 2, 2016 claim, contending the claim for TTD is time barred and no benefits are due after medical stability; Employee did not provide evidence of lost earning capacity for TPD and it is time barred; Employee did not provide evidence of permanent disability for PTD and has demonstrated the ability to perform at least light duty work and is time barred; Employee failed to identify medical costs being requested and Employer was only aware of the two bills for Dr. Ballard which were rejected for non-work related conditions; Employee failed to identify the transportation costs claimed and to Employer's knowledge all transportation costs due have been timely paid; Employee did not sustain more than 90 consecutive days of TTD documented by a medical provider so she is not entitled to an eligibility evaluation and her request for an evaluation is time barred; Employee failed to identify the basis of her claims for penalty and interest; Employee failed to identify which controversion is frivolous or unfair and any and all of Employer's controversions have been reasonably based upon fact or medical opinion; and Employer reserved the right to dispute the factual assertions in the addendum. (Answer, May 19, 2016).

26) On May 24, 2016, Employer filed a medical summary with 42 pages. (Medical Summary, May 24, 2016).

27) On June 23, 2016, the parties participated in mediation with a division hearing officer and reached a settlement on all disputed issues except attorney fees and costs. (Record).

28) On July 29, 2016, the parties filed a C&R. The C&R required board approval because Employee was waiving future medical benefits. (C&R, July 29, 2016).

29) On August 4, 2016, the C&R was approved. The settlement agreement paid Employee \$100,000.00 to resolve all disputes with respect to medical and transportation benefits; TTD, TPD, PPI and TPD; penalties; interest; and reemployment benefits, apportioning \$40,000.00 for medical costs, \$40,000.00 in AS 23.30.041(k) stipend benefits and \$20,000.00 in disputed TTD benefits. The C&R provided that Employer pay up to \$1,000.00 for outstanding medical bills for services provided by Dr. Ballard for Employee's fall. (*Id.*).

30) On September 28, 2016, a hearing was scheduled on October 25, 2016 on Employee's claim for attorney fees and costs. The prehearing officer notified the parties they would each be

allowed 30 minutes for opening and closing statements. (Prehearing Conference Summary, September 28, 2016).

31) On October 12, 2016, Employee filed documentary evidence, including a draft of a settlement agreement received by Employee before retaining counsel. (Employee's Documentary Evidence, October 12, 2016).

32) On October 19, 2016, Employee filed a hearing brief in support of his claim for attorney fees and costs under AS 23.30.145(b). Employee argued full and actual attorney fees and costs are reasonable due to the high to moderate complexity of the claims; the aggressive defense by Employer; the contingent nature of attorney fees in workers' compensation cases and the objective of ensuring competent counsel is available to represent employees; Employee attorney's legal experience; and the amounts involved and the benefit which resulted. Employee contended his hourly requested rate is appropriate based on his 35 years of experience representing injured people in civil tort and workers' compensation cases; his almost 20 years of experience representing injured workers in Alaska workers' compensation cases; his ability to earn fees in the Alaska marketplace at a rate equal to or higher than the hourly rate awarded in this case doing other work than representing claimants in Alaska workers' compensation cases; his willingness to handle cases in Southeast Alaska, and the fact the board has awarded fees to other attorneys working in more metropolitan areas of Alaska with equal to or less experience at an hourly rate of \$400 or more. (Employee's Legal Memorandum, October 19, 2016).

33) Employee cited several evidentiary and procedural issues as indicative of the complexity of this case: Specifically, Employee referenced the following:

- a. The October 5, 2012 controversy, contending it was unfair and frivolous because Employer stated no evidence had been received to support disability beyond the three date waiting period yet Employee had attended at least 34 medical provider visits and late penalty and interest was not paid on TPD;
- b. Employer's failure to reports its first EME records review;
- c. Employer's excessive and illegal changes of physician;
- d. Employer's misrepresentation to Employee about the cause of her termination, unemployment insurance benefits and retraining benefits;
- e. Employer's interference with Employee's medical case by scheduling a follow up appointment after surgery with Employee's physician;

- f. Employer's failure to inform Employee of her physician's referral to a specific doctor for a PPI rating;
- g. Employer's assertion there was no evidence of a failed fusion;
- h. Employer's assertion Employee made an excessive change of physician after it agreed Employee's physician change would not count as a change of physician;
- i. Employer's failure to provide complete discovery and subsequent deposition of Employee; and
- j. Employer's intention to make an ethically impermissible global settlement offer covering all claims, including attorney fees and costs. (*Id.*).

34) Employee argued these issues required extensive review of documents, multiple discovery requests, research into issues related to the production of documents and discovery violations, and fact investigation. Employee stated it prepared a 30-page cross-referenced chronology and a 41-page mediation brief discussing fourteen separate legal issues at length. Employee also cited the Alaska Code of Professional Responsibility, DR 2-106(B), arguing full and actual attorney fees is reasonable because acceptance of this case would limit or preclude his obtaining work on behalf of Southeast Alaska Regional Health Consortium and Alaska National Insurance Company and workers' compensation representation is similar to providing legal representation in tort cases in Southeast Alaska and the full and actual fee is similar to or lower than the fee that could be realized from handling a similarly situated tort claim. (*Id.*).

35) On October 19, 2016, Employee filed a witness list:

- (1) Employee will testify concerning any fact at issue in this hearing, including but not limited to her experience based on her participation in these proceedings, her expectations, and her level of satisfaction with the results obtained.
- (2) Employee's attorney will testify concerning any matter at issue in this hearing.
- (3) Jack G. Poulsen, Esq., will testify concerning his knowledge of the experience and abilities of Employee's attorney, the fees earned by personal injury attorneys practicing in Southeast Alaska, and his experience with requests for representation in and the reasons why he declines to accept Alaska compensation cases.
- (4) Steve Constantino, Esq., will testify concerning his knowledge of hourly rates received by experience Alaska compensation attorneys, the contingent nature of fees in compensation practice, the practical difficulties employees face when seeking legal representation, the percentage of employees who are unable to

obtain representation, his experience that the process is fairer and smoother where employees are able to obtain representation, his impressions about the difficulties faced and the results obtained in this case, and his experience in working on cases where Employer's attorney is defending.

(5) Robert J. Malone, Esq., will testify concerning his knowledge of Employee's attorney's legal abilities and experience and his demonstrated ability to earn large fees handling personal injury cases.

(Witness List, October 19, 2016).

36) On October 19, 2016, Employer filed a hearing brief acknowledging Employee was entitled to attorney fees and costs under AS 23.30.145(a). Employer contended time incurred by Employee's attorney in arguing or processing undisputed or unsuccessful claims is not awardable; Employee's anticipated hourly rate is excessive; and Employee's anticipated time claimed is grossly excessive. Employer anticipated an objection based upon block-billing and for quarter hour billing instead of tenth of an hour billing. Employer argued the complexity and nature of the disputes and the settlement achieved do not warrant an award of high fees. Employer included its claimed hours in this case as an exhibit. (Employer's Hearing Brief and Exhibits, October 19, 2016).

37) On October 20, 2016, Employee filed an affidavit outlining his attorney fees and costs from April 28, 2015 through October 20, 2016 billed at \$425 per hour for a total of 277.55 hours, equaling \$117,958.75. Employee's affidavit documented \$670.00 in total costs. (Attorney Fee Affidavit, October 20, 2016).

38) On October 25, 2016, Employee's attorney participated in two hearings before the board against Employer in Juneau, Alaska, including the hearing this decision addresses. The total time spent on both hearings was approximately 5.7 hours. (Record).

39) At hearing on October 25, 2016, deadlines for post-hearing documents were set. The deadline for Employee's supplemental affidavit for attorney fees was October 28, 2016. The deadline for Employer's response to Employee's affidavit of attorney fees and supplemental affidavit of attorney fees was November 4, 2011. Employee requested leave from the panel to submit a reply to Employer's responses and Employer did not object. The deadline for Employee's response was set for November 11, 2016. The parties agreed to serve the board and the other party the post-hearing documents by email. (Record).

40) November 11, 2016, Veteran's Day, was a state holiday in Alaska. (Observation).

41) At hearing on October 25, 2016, Employee sought to submit a declaration for hearing. Employer had no objection and Employee was permitted to submit it as evidence. The declaration contains statements from Employee's attorney attesting to the following:

I have been continuously engaged in the private practice of law since my admission to the Colorado Bar in 1981. I have been a member of the Alaska Bar since February of 1997.

Throughout my career I have derived the majority of my revenues from representing personal injury and workers' compensation claimants on a contingent fee basis. I have formally represented hundreds of personal injury clients and dozens of worker compensation clients. I estimate in my career I have tried more than fifty cases to verdict and written the briefs in more than two dozen reported appellate decisions.

I estimate that I have personally reviewed the status and the legal and factual issues of more than 500 Alaska workers' compensation claimants over the last 20 years. In many of these cases I have provided a number of hours of my time, almost all of it on a pro bono basis, in an effort to assist the claimants with their understanding of the process and procedures. For a number of reasons, not the least of which is the difficulties presented for earning a fee, I have been very selective in entering my appearance in these cases, and have done so in only about a dozen of them. I have been very successful in resolving those cases I have accepted, and therefore had few opportunities to participate in hearings before the Alaska Workers' Compensation Board.

For the last 4 or 5 years, I have requested and been approved for payment of my fees at the rate of \$350 per hour in the Alaska Workers' Compensation cases I have settled. Since the beginning of 2016, I have requested \$400 per hour for my services in these cases, to try to keep my fee in line with increases in insurance and other overhead costs.

I believe however, that a rate of \$425 per hour is a fair market rate today for payment of these contingent fees to an attorney with more than 35 years of experience practicing in this specialized area of the law. I believe that the market hourly rate for attorneys who represent personal injury and worker compensation claimants on a contingent basis is or should be about twice the hourly rate of defense attorneys. This is because the pay for defense counsel is guaranteed, there is no risk of nonpayment, and payment promptly follows the work. Claimants' attorneys, by contrast, rarely earn a fee until the case is resolved, typically bear the risk of non-payment in the event their client does not prevail, finance their case costs themselves, and pay their own ongoing expenses and overhead costs while working the case towards resolution. These are significant risks which represent substantial costs.

(Record; Declaration, October 25, 2016).

42) At hearing on October 25, 2016, the panel overruled Employer's objection to Employee's testimony. The panel found Employee's testimony regarding the success achieved by Employee's attorney relevant. The panel sustained Employer's objection to witnesses Poulsen and Malone as it found the testimony irrelevant. The panel sustained Employer's objection to witness Constantino as it found the testimony irrelevant and unduly repetitious. The panel sustained Employer's objection to Employee's attorney testimony as it found Employee was provided sufficient time and opportunity in additional argument time and its briefs and post-hearing documents to address any matter at issue in this hearing. (Record).

43) At hearing on October 25, 2016, Employee credibly testified she was satisfied with the lump sum she received and felt her attorney successfully resolved her case. She stated she settled for more than she was offered by Employer before she retained counsel. She testified she would not have received the amount in the settlement without counsel and retaining counsel allowed her to reach her successful result. (Employee).

44) At hearing on October 25, 2016, Employee's attorney contended he should be awarded an hourly rate of \$425 because he has been a practicing attorney for 35 years in three different states and in federal court. Employee stated he has practiced workers' compensation in Colorado, New Mexico, and Alaska. Employee stated his primary specialty is personal injury cases. Employee argued this case involved a fairly complicated medical issue due to the medical films showing a lack of incorporation after the back fusion surgery. Employee also argued there was a significant discovery dispute and Employee uncovered missing evidence and statutory violations by Employer. Employee contended Employer's own actions caused fees to increase and the fees claimed are a direct result of Employer's resistance. Employee argued the claimed hours were reasonable because Employer's attorney timesheets listed 222 leading up to mediation and Employee claimed 217 hours leading up to mediation. Employee acknowledged he billed in quarter-hour increments but argued it does not enlarge attorney fees because if he spent 18 minutes on a task, he would bill for only 0.25 of an hour and not 0.50 of an hour. Employee contended Employer unethically made a global settlement offer including attorney's fees. (Employee).

45) At hearing on October 25, 2016, Employer contended Employee's claimed hourly rate was egregious based on Employee's attorney's workers compensation experience. Employer argued the awarded fee should be determined by the benefits awarded in the C&R which were claimed

and actually disputed. Employer contended Employee was not successful in obtaining time loss benefits because Employee was awarded the same amount of time loss benefits in the C&R as was offered in a previous settlement offer before Employee retained counsel, acknowledged Employee was successful on reemployment benefits and argued Employee was not successful on medical benefits because the prior settlement offer to Employee provided \$20,000.00 in medical benefits and left medical open for a back fusion for one year. Employer stated the case was not complex or complicated and resolved in approximately one year. Employer contended the failed back surgery was never at issue because there was no evidence of a failed back fusion and Employer only refuted medical benefits associated with Employee's fall. Employer argued Employee's quarter-hour billing increments increased the claimed hours because the smallest billing increment was larger than the customary billing increment in workers' compensation of a tenth of an hour. Employer contended Employee's brief contains factual allegations demonstrating intent to disparage Employer. Employer argued it did not make an impermissible unethical global settlement offer; it proposed a settlement on attorney's fees at mediation, as it did for other benefits claimed by Employee. (Employer).

46) On October 28, 2016, Employee filed a supplementary affidavit of attorney fees and costs from October 21, 2016 through October 27, 2016 billed at \$425 per hour for a total of 14.50 hours, equaling \$6,162.50. Employee's supplemental affidavit documented \$255.00 in total costs. (Supplemental Attorney Fee Affidavit, October 28, 2016).

47) In summary, Employee documented \$124,121.25 in attorney fees and \$925.00 in costs. (Attorney Fee Affidavit, October 20, 2016; Supplemental Attorney Fee Affidavit, October 28, 2016; Employee's Hearing Brief, October 19, 2016).

48) On November 4, 2016, Employer filed an objection to Employee's October 20, 2016 affidavit of attorney fees and costs. Employer did not object to 37 entries totaling 47.70 hours and objected to the remaining entries totaling 229.85 hours. Employer made specific objections to each remaining entry and based on those objections, argued Employee should be awarded 92.08 total hours at an hourly rate of \$275, equaling \$25,322.00; and for administrative tasks Employee should be awarded 0.65 hours, at \$130 per hour, equaling \$84.50. Employer also argued Employee's costs should be limited to \$320 upon presentation of travel receipts. Employer's brief included 32 exhibits containing the letters, emails and pleadings concerning its specific objections. (Objections to Employee's Affidavit, November 4, 2016).

49) On November 4, 2016, Employer filed an objection to Employee's supplemental affidavit dated October 28, 2016. Employer argued no supplemental fees should be awarded unless the board awards greater fees than those offered in mediation or with the offer of judgment because the services will not have resulted in greater success. In the event Employee is awarded a greater amount than previously offered, Employer argued Employee should be limited to an award of 8.75 hours at an hourly rate of \$275, equaling \$2,406.25 as Employer did not object to two entries totaling 1.25 hours and made specific objections to each remaining entry totaling 13.25 hours, reducing the entries to 7.5 hours. Employer argued Employee's costs should be limited to \$255 upon presentation of receipts. (Objection to Employee's Supplemental Affidavit, November 4, 2016).

50) On November 14, 2016, Employee filed a response to Employer's objections. Employee argued the hourly rate of \$425 is appropriate because Employee's attorney has represented other employees and an hourly rate of \$350 has been approved in C&Rs; the effects of inflation; his additional workers' compensation experience since the approval of C&Rs including an hourly rate of \$350; attorneys with less experience, specifically Eric Croft, have received an hourly rate of \$400; and the additional costs inherent in workers' compensation practice in Southeast Alaska. Employee also argued awarding fees at \$275 per hour as Employer suggests would have a chilling effect on attorneys representing other employees in the future. Employee argued the presumption of compensability applies and Employer failed to provide substantial evidence sufficient to overcome the presumption the fees are reasonable. (Response, November 14, 2016).

51) On November 14, 2016, Employer filed an objection to Employee's response arguing Employee's response was untimely because it was three days late. (Initial Objection, November 14, 2016).

52) On November 18, 2016, Employee filed a response to Employer's initial objection. Employee argued Employer's initial objection is "yet another example of one of the primary reasons why there have been so many hours spent on this case, as yet again the employer follows its pattern of misstating either the facts, the law, or both." Employee contended November 11, 2016 was Veteran's Day, a state holiday and Rule 6 of the Alaska Rules of Civil Procedure states if a deadline falls on a Saturday, Sunday or state holiday, the deadline is automatically extended

to the following business day. Employee requested the record be closed and any further submissions by Employer should not be accepted. (Objection, November 14, 2016).

53) On November 28, 2016, Employer filed a final objection to Employee's November 14, 2016 response. Employer agrees the recent pleadings are an example of why "the claimed fees in this matter are exorbitant and expended on unnecessary and unreasonable efforts" by Employee's attorney. Employer argued the response should be stricken from the record as "Rule 6 of civil procedures and other practices followed by the Board are intended to allow automatic extensions when general filings cannot be accomplished on a particular day due to holiday and accompanying board office closure." Employer further contended "This automatic extension does not as a matter of law or rule of practice, extend when the Board sets a date certain for filing." Employer also argued the response contained unresponsive argument, Employee either reiterates his arguments at hearing or raises new argument, and should be disallowed. (Final Objection, November 28, 2016).

54) Employee's attorney fee affidavits contain block-billing making it difficult to determine how much time he spent on each task listed in each entry and if time spent on each task was reasonable. Employee's affidavits also failed to include sufficient detail to determine whether specific tasks were related to issues prevailed upon or benefits which were controverted and awarded. Employee also billed in quarter-hour increments, whereas workers' compensation attorneys customarily bill in tenth hour increments. The following reduced hours account for entries containing excessive time claimed as a result of Employee's billing methods for the tasks listed:

Table I

Date	Hours Claimed	Hours Reduced	Hours Remaining
April 28, 2015	1.50	0.90	0.60
May 25, 2015	2.25	1.35	0.90
July 29, 2015	3.00	1.50	1.50
July 31, 2015	1.25	0.55	0.70
August 3, 2015	3.50	3.10	0.40
August 24, 2015	3.00	1.70	1.30
August 26, 2015	1.00	0.70	0.30
September 2, 2015	1.75	1.55	0.20
September 23, 2015	1.00	0.20	0.80
September 29, 2015	0.50	0.30	0.20
September 30, 2015	0.75	0.65	0.10
October 19, 2015	0.75	0.45	0.30

December 11, 2015	3.25	1.95	1.30
January 14, 2016	0.75	0.55	0.20
January 19, 2016	0.75	0.35	0.40
January 23, 2016	0.75	0.45	0.30
January 24, 2016	1.00	0.70	0.30
January 26, 2016	3.50	2.80	0.70
January 27, 2016	5.00	3.00	2.00
January 28, 2016	4.75	3.45	1.30
February 2, 2016	2.00	1.40	0.60
February 18, 2016	8.25	6.25	2.00
February 20, 2016	2.50	2.00	0.50
March 11, 2016	1.25	0.75	0.50
March 23, 2016	2.50	1.00	1.50
March 24, 2016	2.50	2.50	0.00
April 5, 2016	3.00	1.80	1.20
April 10, 2016	3.50	0.80	2.70
April 11, 2016	2.25	2.05	0.20
May 4, 2016	2.25	1.85	0.40
May 11, 2016	1.50	1.50	0.00
May 22, 2016	2.75	1.25	1.50
October 3, 2016	0.25	0.15	0.10
Totals	74.50	49.50	25.00

(Attorney Fee Affidavit, October 20, 2016; Experience, judgment, and observations).

55) Employee billed an excessive amount of time for relatively simple tasks. The following reduced hours account for entries containing unreasonable time spent on relatively simple tasks:

Table II

Date	Hours Claimed	Hours Reduced	Hours Remaining
July 6, 2015	0.25	0.15	0.10
July 25, 2015	0.50	0.20	0.30
October 9, 2015	0.50	0.30	0.20
October 19, 2015	0.75	0.75	0.00
December 16, 2015	0.50	0.20	0.30
December 31, 2015	0.75	0.55	0.20
January 5, 2016	0.75	0.45	0.30
January 8, 2016	0.75	0.45	0.30
January 29, 2016	1.00	0.90	0.10
February 21, 2016	1.00	0.30	0.70
March 2, 2016	0.75	0.55	0.20
April 18, 2016	0.50	0.30	0.20
May 16, 2016	0.75	0.75	0.00
Totals	8.75	5.85	2.90

(Id.)

56) Employee claimed 3.5 hours for “Detailed Review of medical records and medical research; prep. of summary” on June 22, 2015. This entry contains block-billing; the last task, “prep. of summary” refers to the medical summary dated August 11, 2015, as it is the only medical summary Employee filed. Employee’s attorney did not certify service of the medical summary. The preparation of this simple medical summary is a paralegal task and 0.2 hours is reasonable to complete this task. The first task does not clearly distinguish the medical records reviewed or research conducted and does not state which issue the medical records and research addressed. The remainder of time is unreasonable. (*Id.*)

57) Employee claimed 3.50 hours for “TC client; Prep claim; prep notice appearance; review SSI information” on June 24, 2015. This entry contains block-billing making it difficult to determine how much time was spent on each task; Employee failed to provide the issue or benefit addressed in the telephone call; 0.2 hour is reasonable for this telephone call. Employee prepared the claim filed June 25, 2015 and 1.0 hour is reasonable to prepare the two page claim. Preparation of a notice of appearance is a paralegal task and 0.2 hours is reasonable to complete this task. SSI or social security information was not at issue and the time claimed to review it is unreasonable. The reasonable time for this entry is 1.4 hours, including 1.2 attorneys fee hours and 0.2 paralegal hours. (*Id.*)

58) Employee’s attorney claimed 1.50 hours and \$200.00 in costs to travel to Klawock for a conference on July 29, 2015 with Employee. Employee’s attorney did not explain why he needed to meet with Employee in person rather than confer with Employee by telephone. The time and costs claimed are unnecessary and unreasonable. (*Id.*).

59) Employee claimed 0.25 of an hour for “emails to/from Nina Bingham re depo” on January 21, 2016. Scheduling a deposition is a paralegal task and 0.25 of an hour is a reasonable paralegal cost. (*Id.*).

60) Employee claimed 12.00 hours for “travel to/fr Juneau; prep for deposition; multiple conf with client; attend deposition on February 19, 2016. This entry contains block-billing making it difficult to determine how much time was spent on each task. The deposition took 5.6 hours and travel to and from Juneau takes less than 2.0 hours. The remaining hours are reduced by 4.0 hours; 8.0 hours is reasonable in light of Employee’s previous preparation for deposition. (*Id.*)

61) Employee claimed 2.50 hours for “prep draft letter to [Employer] re issues” on February 28, 2016; 0.75 hour for “tc client re settlement proposal” on February 29, 2016; and 2.25 hours to

“prep draft of settlement ltr to [Employer] and prep email to client” on March 2, 2016. Employer did not receive any settlement letter from Employee at this time and Employee did not provide any letter or proof of service of any such letter. Any hours claimed for preparing a draft settlement letter not provided to Employer are unreasonable; therefore no hours are reasonably claimed. (*Id.*).

62) Employee claimed 1.25 hours to “prep an email to [Employer]” on March 31, 2016. Employer did not receive any email on this date and Employee did not provide proof of any email sent on this date. Therefore, no hours are reasonably claimed. (*Id.*).

63) Employee claimed 4.25 hours to “Prep email to [Employer]; Review email from [Employer]; Review add'l discovery; prep SDT and depo notices” on April 4, 2016. This entry contains block-billing making it difficult to determine how much time was spent on each task. Employee did not file and serve a subpoena duces tecum on Employer; claiming any time spent on this task is unreasonable. Therefore, the hours are reduced by 1.45 hours; 2.80 hours is reasonable. (*Id.*).

64) Employee claimed 2.75 hours for “Depo notice; email to TH; review duces tecum rules” on April 6, 2016. Employee already requested time to prepare depo notice; Employee did not file and serve a subpoena duces tecum. Therefore, 0.1 of an hour is reasonably claimed. (*Id.*).

65) Employee claimed 1.50 hours for “TC [Hearing Officer] re various, inc. ethical issues, discovery; amended claim research; TC court reporter” on April 12, 2016. Scheduling or arranging a deposition is a paralegal task; 0.2 of an hour is reasonable for the telephone call with the court reporter as a paralegal cost. (*Id.*).

66) Employee claimed 2.25 hours to “Prep for deposition, email w/ court reporter” on April 14, 2016. Scheduling or arranging a deposition is a paralegal task; 0.1 of an hour is reasonable for the email with the court reporter. (*Id.*).

67) Employee claimed 1.25 hours to “Review updated medical summary with SEARHC medical records” on April 29, 2016. However, the last medical summary was filed on February 18, 2016 and did not contain SEARHC medical records. The next medical summary was filed by Employer on May 25, 2016. Neither Employee nor Employer filed any such documentation to the board at this time. Therefore, any hours claimed for reviewing a document that does not exist are unreasonable. (*Id.*).

68) Employee claimed 3.5 hours on May 1, 2016 to “Prep and research for Amended Claim/Addendum and discovery;” and 5.25 hours on May 2, 2016 to “Prep email to [Employer],

finalize Amended Claim/Addendum; prep Notice of Change of Physician.” Employer submitted an amended claim and four page addendum providing specific information on the benefits and issues in the amended claim. The amount of time spent on the amended claim and addendum is excessive. The hours are reduced by 6.75 hours; 2.0 hours are reasonable. (*Id.*).

69) Employee claimed 1.5 hours for “Ethics research and tcw bar counsel Maria Bahr” on May 5, 2016 and 1.00 hour for “Research re ethical attorney fee negotiation” on May 16, 2016. Researching an ethical issue with the bar is an issue between the bar and counsel and not an issue to be decided by the board. Therefore, any hours claimed for this task are unreasonable. (*Id.*).

70) Employee claimed 62.25 hours to prepare for mediation, research and write a 41-page brief for mediation on 14 issues, and schedule mediation on numerous dates from May 22, 2016 through June 23, 2016. The requested time is excessive; Employee failed to allocate the time spent preparing for mediation on benefits awarded. Employee was awarded three controverted benefits in the C&R. Therefore, the hours are reduced by 49.85 hours; 12.0 hours are reasonable. (*Id.*).

71) Employee claimed 9.5 hours to review and finalize the C&R after mediation from June 24, 2016 to June 27, 2016. Employer prepared the C&R and sent it to Employee for review; the final C&R is 10 pages long; and the parties already agreed on the benefits awarded in the agreement. Therefore, the time claimed is excessive and reduced by 5.0 hours; 4.5 hours are reasonable. (*Id.*).

72) Employee claimed 10.25 hours to prepare a mediation brief on attorney fees after mediation ended on several dates from August 3, 2016 through August 12, 2016. Employee’s hours will be reduced by 10.25 hours to reflect preparation of an unnecessary mediation brief. (*Id.*).

73) Employee claimed 0.10 hour for a telephone call with a division hearing officer in two different entries for the date of August 25, 2016 on page 5 of his affidavit in lines 19 and 12. This appears to be a duplicate entry, only one will be included in the calculation of attorney fees. (*Id.*).

74) Employee claimed 0.5 hour to “Research re attorneys with history with [Employer attorney]” on September 30, 2016. Employee did not prevail on admitting testimony on this topic at hearing; therefore, no time is awardable. (*Id.*).

75) Employee claimed 0.5 hour for “TC Mike Jensen; TC Steve Constantino; outline testimony of witnesses” on October 4, 2016. This entry contains block-billing making it difficult to

determine how much time was spent on each task; Employee did not prevail on Constantino's testimony. The time is reduced by 0.30 of an hour; 0.2 of an hour is reasonable. (*Id.*).

76) Employee claimed 2.25 hours to "Review documents for exhibit list; research; TC pot witnesses x3" on October 6, 2016. This entry is block-billed making it difficult to determine how much time was spent on each task; Employee failed to provide the issue researched and Employee was successful on admitting testimony for only one witness. The time is reduced by 0.75 of an hour; 1.5 hours are reasonable. (*Id.*).

77) Employee claimed 2.75 hours to "Prep witness outline/exhibits' TC pot witnesses x 9; TC AWCB" on October 7, 2016. This entry contains block-billing making it difficult to determine how much time was spent on each task; and Employee was successful on admitting testimony from only one witness and failed to provide the witnesses contacted in the telephone calls. The claimed time is reduced by 2.0 hours; 0.75 is reasonable. (*Id.*).

78) Employee claimed 0.75 hours for "TC with S. Constantino; work on strategy for fee hearing" on October 10, 2016. This entry is block-billed and Employee was unsuccessful in admitting Constantino's testimony at hearing. Time is reduced by 0.25 hour; 0.50 is reasonable. (*Id.*).

79) Employee claimed 3.00 hours to "Prep argument and exhibits; travel to Juneau for hearing" on October 24, 2016. Employee traveled to Juneau to attend two hearings before the board against the same Employer and claimed travel time to Juneau for both. Travel to Juneau from Sitka takes approximately one hour by plane. Employee can only claim time for such travel once, either claiming the total in one case or splitting it between the two hearings with the whole equaling the total time spent in travel. The only exhibit Employee entered was the two-page declaration. The claimed time is excessive and is reduced by 1.00 hour; 2.00 hours are reasonable. (Supplemental Attorney Fee Affidavit, October 28, 2016; Experience, judgment, and observations).

80) Employee claimed 6.0 hours to "Prep for/attend oral hearing in Juneau; travel to Sitka" on October 25, 2016. This entry contains block-billing making it difficult to determine how much time was spent on each task. Employee traveled to Juneau to attend two hearings before the board against the same Employer and claimed travel time to Sitka. Travel to Sitka from Juneau takes approximately one hour by plane. Employee can only claim time for such travel once, either claiming the total in one case or splitting it between the two hearings with the whole equaling the total time spent in travel. The two hearings lasted a total of 5.7 hours;

approximately half is attributable to this hearing. The claimed time is excessive and is reduced by 2.00 hours; 4.00 hours are reasonable. (*Id.*).

81) Employee itemized the following costs:

Table III

Date	Cost	Amount
July 29, 2015	Travel for Conference	\$200.00
February 19, 2016	Airfare for Employee Deposition	\$320.00
February 19, 2016	“Per Diem” for Deposition	\$100.00
June 22, 2016	Meal Conference	\$50.00
October 24, 2016	Airfare to/from Hearing	\$180.00
October 24, 2016	Lodging/M meal for Hearing	\$75.00
Total		\$925.00

82) Employee did not explain the “per diem” expense on February 19, 2016. (Observation).

83) Round-trip airfare from Sitka to Juneau is approximately \$380.00. Employee attended two hearings in Juneau on October 25, 2016; \$180.00 is reasonable. (Experience, observations).

84) Reasonable costs for Employee’s attorney are as follows:

Table IV

Date	Cost	Amount
February 19, 2016	Airfare for Employee Deposition	\$320.00
October 24, 2016	Airfare to/from Hearing	\$180.00
October 24, 2016	Lodging/M meal for Hearing	\$75.00
Total		\$575.00

85) Employee’s attorney previously represented seven cases at hearing before the board in the 19 years he has practiced in Alaska workers’ compensation. Employee’s attorney entered his appearance before the board in 13 other claims for other injured workers; nine of those resolved through settlements and one by hearing. He was awarded minimum attorney fees under AS 23.30.145(a) in one case, *Bauder v. Alaska Airlines, Inc.*, Decision Number 99-0144 (July 6, 1999). (Westlaw; ICERS; Division’s Legal Database).

86) Below is a visual comparison of the awarded hourly rate of attorneys handling Alaska workers’ compensation cases based on appearances entered in a case:

Table V

Attorney Name	Clients Represented	Years WC Experience	Awarded Hourly Rate
Chancy Croft	2,168	40+	\$400
Joseph Kalamarides	1,494	40+	\$400
Robert Rehbock	1,342	30+	\$400
Michael Patterson	977	30+	\$400
Michael Jensen	317	30+	\$400
John Franich	303	30+	\$400
Robert Beconovich	148	16+	\$400
Kennan Powell	121	11+	\$400
Eric Croft	95	6+	\$400
Steve Constantino	153	18+	\$395
Burt Mason	80	20+	\$375
Elliot Dennis	66	15+	\$330
Heather Brown	1	1	\$275

(*Id.*).

87) Back injuries are the most common injuries claimed by injured workers. (2015 Workers' Compensation Annual Report).

PRINCIPLES OF LAW

AS. 23.30.135. Procedure before the board.

(a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.

....

8 AAC 45.120. Evidence.

(a) . . . The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . .

....

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not

sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

. . . .

8 AAC 45.063. Computation of time.

(a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.

b) Upon petition by a party and for good cause, the board will, in its discretion, extend any time period prescribed by this chapter.

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

AS 23.30.145. Attorney fees.

(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

. . . .

8 AAC 45.180. Costs and Attorney's Fees.

....

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

- (1) costs incurred in making a witness available for cross-examination;
- (2) court reporter fees and costs of obtaining deposition transcripts;
- (3) costs of obtaining medical reports;
- (4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;
- (5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;
- (6) costs for telephonic participation in a hearing;
- (7) costs incurred in securing the services and testimony, if necessary, of vocational rehabilitation experts;
- (8) costs incurred in obtaining the in-person testimony of physicians at a scheduled hearing;
- (9) expert witness fees, if the board finds the expert's testimony to be relevant to the claim;
- (10) long-distance telephone calls, if the board finds the call to be relevant to the claim;
- (11) the costs of a licensed investigator, if the board finds the investigator's services to be relevant and necessary;
- (12) reasonable costs incurred in serving subpoenas issued by the board, if the board finds the subpoenas to be necessary;
- (13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;
- (14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk
 - (A) is employed by an attorney licensed in this or another state;
 - (B) performed the work under the supervision of a licensed attorney;
 - (C) performed work that is not clerical in nature;
 - (D) files an affidavit itemizing the services performed and the time spent in performing each service; and
 - (E) does not duplicate work for which an attorney's fee was awarded;
- (15) duplication fees at 10 cents per page, unless justification warranting awarding a higher fee is presented;
- (16) government sales taxes on legal services;
- (17) other costs as determined by the board.

....

The Alaska Supreme Court has repeatedly and consistently recognized the importance of providing attorney's fees for injured workers' attorneys. In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 973 (Alaska 1986), the Court observed the objective in workers' compensation cases "is to make attorney fee awards both *fully compensatory and reasonable* so that competent counsel will be available to furnish legal services to injured workers" (emphasis in original). See also, *Bouse v. Fireman's Fund Insurance Co.*, 932 P.2d 222 (Alaska 1997); *Childs v. Copper Valley Electric Association*, 860 P.2d 1184 (Alaska 1993). In *Bustamante v. Alaska Workers' Compensation Board*, 59 P.3d 270 (Alaska 2002), the Court recognized, referring to the injured worker: "Without counsel, a litigant's chance of success on a workers' compensation claim may be decreased." (*Id.* at 274).

Recognizing claimants' attorneys only receive fee awards when they prevail on the merits of a claim, the board is required to consider the contingent nature of workers' compensation cases when awarding fees to employees' attorneys in workers' compensation cases. *Bignell* at 973. The board must consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney's fees for the successful prosecution of a claim. *Id.* at 973, 975.

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

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). 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.*

Under Civil Rule 82, the Alaska Supreme Court held “a table with short descriptions of work performed, arranged by billing attorney and date” without requiring greater specificity, is an adequate itemization of time spent in a case to support an award of attorney fees. *Matanuska Elec. Ass’n v. Rewire the Board*, 36 P.3d 685, 698 (Alaska 2001) (finding affidavit of counsel adequate to support attorney fee claim under Civil Rule 82); *Lawrence v. Channel Sanitation Corp.*, AWCBS Dec. No. 97-0121 (May 30, 1997). However, block-billing may require the board to determine whether the time spent on each task in the entry was reasonable and attributable to issues prevailed or awarded. See e.g., *Lavallee v. Bucher Glass Inc.*, AWCBS Decision No. 16-0055 (July 8, 2016). Where time spent on tasks listed in block-billing entries is excessive, hours or hourly billing rates will be reduced. *Mullen v. Municipality of Anchorage*, AWCBS Decision No. 10-0172 (October 14, 2010) at 18.

Attorneys in workers’ compensation cases that perform their own paralegal work are awarded fees at a reduced rate. See e.g., *Baker v. Pro West Contractors, LLC*, AWCBS Decision No. 15-0069 (July 16, 2015) (\$180 per hour awarded to a licensed attorney with ten year’s workers’ compensation experience for time spent performing her own paralegal work).

ANALYSIS

1) Were the oral orders sustaining Employer’s objection to Employee’s three witnesses’ testimony and overruling Employer’s objection to one witness’s testimony correct?

Employee’s proposed testimony is relevant as to the degree of success of Employee’s attorney’s representation in her workers’ compensation claim. The oral order overruling Employer’s objection to Employee’s proposed testimony was correct.

Employer’s objection to Employee’s attorney testimony was sustained because Employee was provided sufficient time and opportunity in additional argument time and its briefs and post-

hearing documents to address any matter at issue in this hearing. Employee submitted a hearing brief and affidavit of attorney fees and costs and has been provided the opportunity to submit a supplemental affidavit and response to Employer's objections, all of which Employee's attorney could use to argue any matter at issue in this hearing. Employee was provided 30 minutes for opening and closing arguments, 10 minutes more than is required under the Act, and Employee could use the time to argue and include information on any matter at issue in this hearing. The oral order sustaining Employer's objection to Employee's attorney's proposed testimony was correct.

Poulson's proposed testimony is irrelevant and unduly repetitive. His knowledge of the fees earned by personal injury attorneys practicing in Southeast Alaska is irrelevant as such fees have no bearing on fees in workers' compensation claims. His experience with requests for representation in and the reasons why he declines to accept Alaska workers' compensation cases is irrelevant as it also has no bearing on determining the award of fees and costs in this claim. Poulson's knowledge of Employee's attorney's experience and abilities is unduly repetitive as Employee's attorney can provide information on his own experience and abilities. The oral order sustaining Employer's objection to Poulson's proposed testimony was correct.

The proposed testimony of Constantino is irrelevant and unduly repetitive. Constantino's experience in working on cases where Employer's attorney is defending and his impressions about the difficulties faced and the results obtained in this case is irrelevant because it has no bearing on the award of attorney fees and costs. Constantino's knowledge of the hourly rates received by experienced Alaska workers' compensation attorneys, the contingent nature of fees in compensation practice and the practical difficulties employees face when seeking legal representation is unduly repetitive. As the board determines and awards in hearings and also approves attorney fees and costs when stipulated, it is already aware of the hourly rates awarded to Alaska workers' compensation attorneys. The importance of considering the contingent nature of employee attorney representation in workers' compensation cases when determining the awardable fees to ensure adequate representation of employees has been consistently recognized in prior case law. *Bignell; Bouse; Childs*. Constantino's experience that the process is smoother and fairer when employees are able to obtain representation is also unduly repetitive because it

has already been recognized by the board. *Bustamante*. The percentage of other employees who are unable to obtain representation is irrelevant as it has no bearing on the award of attorney fees and costs in this claim. The oral order sustaining Employer's objection to Constantino's proposed testimony was correct.

The proposed testimony of Malone is irrelevant. His knowledge of Employee's attorney's legal abilities and experience and his demonstrated ability to earn large fees handling personal injury cases is irrelevant. Workers' compensation and personal injuries cases are distinct areas of the law and Employee's attorney's legal abilities and experience and fees in personal injury cases has no bearing on the award of attorney fees and costs in this claim. The oral order sustaining Employer's objection to Malone's proposed testimony was correct.

2) Should Employer's November 28, 2016 objection to Employee's November 14, 2016 response be granted?

November 11, 2016 was Veteran's Day, a state holiday; the next business day was November 14, 2016. Under 8 AAC 45.063(a), a holiday is not included in a calculation of timeliness. Therefore, Employee's response was timely filed on November 14, 2016. Employee's response should not be stricken from the records as untimely.

Employer also argued Employee's response was unresponsive because Employee simply reiterated argument from its hearing brief and hearing and because Employee added a new argument regarding the "chilling effect on attorneys representing other employees in the future." Any prejudice to Employer is slight. Employer's objection is overruled.

3) Is Employee entitled to attorney's fees and costs? If so, in what amount?

Employee's attorney is entitled to fees under AS 23.30.145(a) because Employer controverted medical benefits, including the outstanding medical bills for treatment for Employee's fall, TTD and reemployment benefits and Employee was awarded \$40,000.00 for medical benefits, \$20,000.00 for TTD and \$40,000.00 reemployment benefits in the settlement agreement and Employer agreed to pay up to \$1,000 for outstanding medical bills for Employee's fall.

Employee waived future medical treatment, all future disability benefits, reemployment benefits, and a compensation rate adjustment. Employee spent a significant amount of time on issues he did not prevail upon, such as interference with selection of physician, improper influence of physician's medical opinion, unemployment benefits, excessive change of physician, and the ethics of attorney fee negotiation in mediation. Employee is not entitled to the full and actual attorney fees claimed as Employee is not entitled to fees on issues not prevailed upon or on issues not controverted and awarded. However, in this case awarding statutory minimum fees would be inadequate to compensate Employee's attorney for work performed.

An attorney requesting attorney fees must include an itemized affidavit showing the hours expended, as well as the extent and character of the work performed. 8 AAC 45.180(b); 8 AAC 45.180(c)(1). Employer objected to Employee's attorney's hourly rate, claimed hours and costs. Employee's attorney fee affidavits do not appear reasonably commensurate with the actual work performed, given the nature, length and complexity of the services performed and the actual benefits resulting to Employee from the services. *Lewis-Walunga*.

While Employee's attorney began handling workers' compensation cases over 19 years ago, compared to the other attorneys awarded an hourly rate of \$400, he has represented considerably fewer Alaska workers' compensation clients. Employee's attorney's experience representing claimants in civil litigation and workers' compensation cases in other states has no weight in determining his hourly rate and will not be considered. Employee's attorney's fees are contingent. His requested \$425 per hour rate will be reduced to \$300 per hour.

Employee's medical and legal issues were not complex or novel. Back injuries are the most common injuries claimed by injured workers. The parties disputed whether Employee's back fusion was solid, whether or when Employee became medically stable, whether Employee's fall was related to her work injury and whether Employee was totally disabled for more than 90 consecutive days. Employee's counsel pursued this case for approximately one year and one month when he successfully obtained valuable benefits to Employee in the parties' approved C&R. Employer's competent counsel vigorously defended against Employee's claim. Employee received a substantial settlement as a result of Employee's attorney's efforts.

Employee is entitled to fees and costs for services provided on medical benefits, TTD and reemployment benefits. AS 23.30.145(a). However, Employee's affidavits of attorney fees were not helpful in determining reasonable time spent on those benefits because of Employee's billing methods which included block-billing, quarter hour billing increments, and failure to provide specific detail to determine whether specific tasks were related to issues prevailed or benefits which were controverted and awarded. Due to the excessive time spent on tasks listed in entries containing block-billing, Employee's requested attorney's fees will be reduced by 49.50 hours in accordance with factual finding 54 above. *Mullen*. Employee is encouraged to use task billing or clumped billing methods, bill in tenth hour increments, and provide greater specificity in future fee affidavits. *Lavallee*.

Employee spent an excessive amount of time on relatively simple tasks in several entries. *Rogers & Babler*. For example, Employee spent 0.50 hour reviewing Employer's two page controversion and four page answer on July 25, 2016. Due to excessive time spent on relatively simple tasks, Employee's requested attorney's fees will be reduced by 5.85 hours in accordance with factual finding 55 above.

Employee also claimed unreasonable time in 25 other entries for several reasons, including a duplicate entry, time spent on paralegal tasks, time spent on unnecessary documents, time spent on letters or emails not received by Employer, time spent on topics not at issue or issues not prevailed, failing to include sufficient detail to determine whether specific tasks were related to issues prevailed or benefits which where controverted and awarded, time spent on unnecessary travel, time spent reviewing a medical summary not on record, and excessive time claimed for claim preparation and C&R review. *Id.* In accordance with factual findings 56-80 above, Employee's claimed hours will be reduced by 104.45 hours. Employee's attorney will be awarded \$39,390.00 (131.30 X \$300 = \$39,390.00) in attorney's fees under AS 23.30.145(b).

Employee claimed \$100.00 in "per diem" expense for the deposition of Employee on February 19, 2016 without explanation. *Id.* Employee claimed \$50.00 for a meal conference on June 22,

2016; this cost is not awardable. 8 AAC 45.180(f)(1)-(17). In accordance with factual findings 58 and 81-84, Employee's will be awarded \$575.00 in requested costs.

Employer argued Employee should be awarded \$130.00 per hour for time spent on administrative or paralegal tasks in its hearing brief. Employee did not address this issue in the hearing brief, at hearing or in the response. A reasonable rate for Employee's attorney to perform his own paralegal work is \$130 per hour based on his previously stated experience in workers' compensation. In accordance with factual findings 56, 57, 59, 65 and 66 above, Employee will be awarded \$123.50 for time Employer's attorney spent on paralegal work ($0.95 \times \$130.00 = \123.50). *Id.*

Considering the nature, length and complexity of the case and services performed, and the benefits resulting to Employee from the services obtained, Employee is awarded \$40,088.50 in reasonable attorney fees and costs. *Lewis-Walunga*.

CONCLUSIONS OF LAW

1. The oral orders sustaining Employer's objection to Employee's three witnesses' testimony and overruling Employer's objection to one witness's testimony was correct.
2. Employer's objection to Employee's November 14, 2016 response is overruled.
3. Employee is entitled to attorney fees and costs.

ORDER

- 1) Employee's June 25, 2015 claim for attorney fees and costs is granted.
- 2) Employer is ordered to pay Employee \$39,390.00 in attorney fees.
- 3) Employer is ordered to pay Employee \$698.50 in paralegal fees and other costs.

Dated in Juneau, Alaska on December 21, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Kathryn Setzer, Designated Chair

/s/

Bradley Austin, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of SANDRA RUSCH, employee / claimant; v. S.E.A.R.H.C., employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 201210128; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties on December 21, 2016.

/s/ _____
Dani Byers, Workers' Compensation Technician