ALASKA WORKERS' COMPENSATION BOARD

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

BRENDA DOCKTER, Employee, Claimant, v. S.E.A.R.H.C., Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201403022 AWCB Decision No. 16-0132 Filed with AWCB Juneau, Alaska on December 21, 2016

Brenda Dockter'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 to deliberate, 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) **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?**

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 strike Employee's November 14, 2016 response be granted?**

Employee contends he is entitled to an attorney fees and cost award because Employer resisted accepting responsibility for Employee's knee surgery and 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 February 5, 2014, Employee injured her left knee when she twisted her knee as she stood up from a chair while working for Employer. (First Report of Occupational Injury, February 12, 2014).

2) On August 6, 2014, Employee underwent arthroscopic surgery with meniscectomy of her left knee. (Cary S. Keller, MD Operative Report, August 6, 2014).

3) On February 25, 2015, Employer filed a notice of controversion denying total temporary disability (TTD), temporary partial disability (TPD), and permanent partial impairment (PPI) and all medical treatment related to chondromalacia of the left knee as of February 13, 2015, stating:

> There is substantial evidence the disability or need for medical treatment did not arise out of and in the course of employment.
>
> Employer relies on the opinion of Michael Fraser, MD, based on the evaluation of 2/13/15 Dr. Fraser opines that the chondromalacia noted within the left knee patella and medial femoral condyle is pre-existing in nature and unrelated to the work injury of 2/5/14.

(Controversion Notice, February 25, 2015)

4) On June 19, 2015, Employer filed a controversion notice denying "physical therapy, narcotics specifically Hydrocodone and cortisone injections as of 6/11/15." Employer stated,

> There is substantial evidence that the disability or need for medical treatment did not arise out of and in the course of employment. AS 23.30.010(a). Employer relies on the opinion of Lance Brigham, MD, based on the evaluation of 6/11/15. Dr. Bingham opines that the need for physical therapy, narcotics, cortisone injections and ACL reconstruction not indicated. Anti-inflammatories such as Meloxicam and viscosupplemental injections to the left knee would be indicated. The need for future total knee replacement would be related to the 2/5/14 work injury. She is medically stable with 5% PPI.

(Controversion Notice, June 19, 2015)

5) On August 12, 2015, Employee filed a claim seeking TTD from February 5, 2014, PPI, medical costs, transportation costs, and a compensation rate adjustment. (Claim, August 12, 2015).

6) On September 9, 2015, Employer filed an answer to Employee's claim contending Employee's physician and the employer's medical evaluation (EME) deemed her medically stable; further physical therapy would exceed treatment frequency standard of AS 23.30.095(c) and 8 AAC 45.082(f); the EME physician found no further therapy or hydrocodone is reasonable or necessary in connection with the work injury; Employee has not submitted the documentation required to determine whether transportation expenses are due; and Employee's compensation rate is based upon her work history predating the work injury and not upon subsequent work history. (Answer, September 9, 2015).

7) On September 25, 2015, Employer filed a controversion notice denying "physical therapy prescribed by Dr. Hunter and Dr. Lehman." Employer stated:

> Treatment exceeds frequency standards and a treatment plan has not been provided. Payment is no required. AS 23.30.095(c) Reg 8 AAC 45.082(f)
>
> Dr. Lehman, the designated attending physician, has referred the employee to Dr. Harrah for surgical consult. He has not indicated any further medical care other than the consult for the knee condition. Moreover, the prescribed physical therapy exceeds frequency standards but Dr. Lehman has not provided an adequate treatment plan required by AS 23.30.095(c). Nor did Dr. Hunter provide one with his prescription. (Controversion, September 25, 2015).

8) On October 6, 2015, Employee visited Daniel Harrah, MD and reviewed her MRI results. Dr. Harrah recommended an isolated medical unicompartmental knee arthroplasty with an anterior cruciate ligament (ACL) reconstruction and opined Employee was not yet medically stable. (Dr. Harrah Chart Note, October 6, 2015).

9) On November 24, 2015, the parties attended a prehearing conference (PHC). The summary provided:

> [Employee] has requested preauthorization for knee replacement surgery that has been recommended in one form or another by both the treating and [EME] physician. [Employer] stated that no controversion is in place regarding the knee injury/treatment. When asked why Employer will not pre-authorize the surgery, [Employer] stated that 'they were not saying that the surgery was not medically necessary, just that there is not yet any objective evidence to support the surgery.'

> Despite AS 23.30.095(a) seemingly unambiguously stating that the ER is responsible for medical expenses incurred as a result of a work injury, the Board designee ("designee") cannot order ER to preauthorize or pay for surgery, not even physician-recommended surgery and not even "medically necessary" surgery. That would need to be done at hearing (if the parties cannot come to an agreement prior thereto). ER stated that all discovery on this issue has been completed. Therefore, designee believes it is ripe for a hearing on the issue whether 1) EE is entitled to an order requiring ER to preauthorize and pay for the knee surgery and 2) ER's refusal to preauthorize the surgery constitutes a "controversion in-fact", allowing EE to file an additional claim for penalty, interest and/or unfair and frivolous controversion.

(Prehearing Conference Summary, November 24, 2015).

10) On December 4, 2015, Employer filed a letter objecting to the PHC summary and requesting clarification:

> Your summary seems to indicate an obligation on the part of the employer to preauthorize surgery when there is no statutory obligation to do so, as found by the Alaska Supreme Court on more than one occasion. Rather, an employer has the statutory right to take up to 30 days to consider whether payment or denial should issue after receipt of medical records and billing. My clients are simply choosing to exercise their statutory right to do so and should not be penalized for same, questioned for doing what the statute allows, or threatened with penalty like your summary seems to imply.

(Employer Letter, December 4, 2015).

11) On December 7, 2015, Employee's counsel filed an entry of appearance. (Notice of Entry of Appearance, December 7, 2015).

12) On December 7, 2015, Employee filed a claim seeking TTD from an unknown date to the present, medical costs, transportation costs, penalty, interest, unfair or frivolous controversion, and attorney fees and costs for an injury to her left knee on February 5, 2014. (Claim, December 7, 2015).

13) On December 21, 2015, Employee filed a letter responding to Employer's December 4, 2015 letter:

> [Employer's attorney] appears to provide inaccurate information when she states in her letter to you that there is no statutory obligation to preauthorize surgery, referring to unspecified Supreme Court decisions. Perhaps she is not aware that the Alaska Supreme Court just last year reaffirmed that the statute in issue must be construed to afford an EE the right to a prospective determination of

compensability of a proposed medical procedure and to allow imposition of a penalty where on a medical benefit that has been prescribed by not yet paid. See, *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014), where the Court stated:

> "We have previously recognized the importance of medical care in workers' compensation cases. In *Summers v. Korobkin Construction*, we held that "an injured worker who has been receiving medical treatment should have the right to a prospective determination of compensability," noting that "[i]njured workers must weigh many variables before deciding whether to pursue a certain course of medical treatment or related procedures. A salient factor in many cases will be whether the indicated treatment is compensable under [the act]." We later construed the penalty provision in AS 23.30.155 as including medical benefits because the threat of a penalty gives the insurer "an incentive" to pay medical bills promptly. The same policy consideration applies here. Without the possibility of a penalty, an insurer would be able to controvert expensive medical care for no reason and escape without sanction, even when the care is critical to an employee's health." [Citations omitted].

Thus, [Employer's attorney]'s clients can indeed be penalized for refusing to preauthorize this surgical procedure. It appears that the references made in the Prehearing Summary to an obligation on the part of the employer to preauthorize surgery is indeed a correct statement of the law, contrary to [Employer's attorney]'s unsupported assertion to the contrary. Indeed, imposition of a penalty would foster the purposes of the Act and is particularly compelling under the facts of this case: Both the treating and the [EME] physicians' reports agree that this surgery is medically necessary; ER has not filed a written controversion; and the prehearing summary indicates that ER does not dispute that the surgery is medically necessary, is related to this claim, and that all its discovery on this issue has been completed.

(Employee's Letter, December 21, 2015).

14) On December 29, 2015, Employer filed a controversion notice denying "TTD benefits other than those paid until and unless the employee undergoes further knee surgery; penalty; interest; declaration of unfair or frivolous controversion; attorney fees." Employer stated:

> All TTD benefits due have been paid during periods of disability and lack of medical stability. The employee has not shown a factual basis warranting further payment of these benefits at this time although further surgery is anticipated and [Employer] has committed to re-instituting payment of TTD benefits when and if surgery takes place.
>
> There is no factual basis for a claim for penalty or interest in this matter.

> All controversion issued by [Employer] have been reasonably based upon fact and/or law.
>
> There is no factual basis for an award of attorney fees.

(Controversion, December 29, 2015).

15) On December 29, 2015, Employer filed a five-page answer with accompanying compensation report in response to Employee's claim dated December 7, 2015. (Answer, December 29, 2015).

16) On January 7, 2016, Employer filed a controversion notice denying medical services provided December 18, 2015, and stated:

> Employee did not obtain written consent from the employer for more than one change of attending physician. AS 23.30.095(a)
>
> The employee has entered into a pain contract with Nurse Nichols. This is not a medical service prescribed by Dr. Lehman, the authorized attending physician, and hence, lacks the medical support warranting payment.

(Controversion, January 7, 2016).

17) On February 9, 2016, Employee filed an affidavit of readiness for hearing (ARH) on Employee's claim dated December 7, 2015, "as to predetermination of compensability of medical treatment." (ARH, February 9, 2016).

18) On February 9, 2016, Employee filed a request for conference to schedule a hearing on the ARH with a two-page attachment arguing Employer's failure to preauthorize the knee surgery constituted a controversion in fact. (Request for Conference, February 9, 2016; Attachment, February 9, 2016).

19) On February 9, 2016, Employee filed a notice of intent to rely, providing notice Employee intended to rely on seven letters from Employer's attorney to Employee and two physicians, including a letter dated November 20, 2015 from Employer's attorney to Employee. (Notice of Intent to Rely, February 9, 2016).

20) On February 18, 2016, Employer filed an opposition to Employee's ARH stating,

> [Employer] has been hesitant to actually preauthorize the surgery with Dr. Harrah because it appears to be at odds with other medical opinions. For example, he is the only physician who is recommending partial knee replacement to address subjective pain complaints rather than knee degeneration. He is the only physician who is recommending ACL repair when all objective medical testing

> shows the ACL to be intact. [Employer] has requested explanation but has not been provided any.
>
> Notwithstanding [Employer's concerns about the surgery recommendation, [Employer] agrees that were the employee to undergo the recommended surgery, it would be compensable and payable under the Act. Given this agreement on compensability, there is no need for an advisory ruling from the Board. The issue is effectively moot and the hearing request should, thus be denied.

(Opposition, February 17, 2016).

21) On February 18, 2016, Employer filed an affidavit of opposition to Employee's ARH arguing it is moot. (Affidavit of Opposition, February 18, 2016).

22) On March 1, 2016, Employee filed an affidavit objecting to Employee's use of a letter from Employer to Employee dated November 20, 2015 on the basis that it is "correspondence extending a settlement proposal to the employee. In accord with Evidence Rule 408 and regulations, documents pertaining to settlement are excluded for use at hearing." (Affidavit of Objection, March 1, 2016).

23) On March 14, 2016, Employer filed a letter clarifying "[Employer]'s position on payment for the knee surgery. It stated:

> Several months ago, [Employee] asked [Employer] to preauthorize the surgery; she wanted [Employer] to guarantee payment for same. [Employer] declined to do so because all doctors previously and the objective medical evidence showed no basis for the recommended surgery. It appeared to [Employer] that the recommended surgery was to address subjective complaints only and was medically unnecessary. For these reasons, it was hesitant to preauthorize the surgery.
>
> Earlier this year, [Employee] filed a Petition seeking an advisory ruling from the Board as to whether the surgery would be compensable. In Answer, [Employer] conceded the Board would likely issue an advisory ruling that the surgery would be compensable; the recommendation fell within the first two years of treatment. This Answer made the Petition moot and apparently was sufficient for Dr. Harrah to agree to proceed with surgery. When we met at the prehearing conference, there was no need for a hearing to be set on the Petition.
>
> [Employer] has not affirmatively preauthorized surgery. Nor has [Employer] agreed to pay for the surgery at this point. It is exercising its statutory right to await records and the billing to determine whether to pay or controvert. At this point, though, [Employer] has acknowledged that it will not deny payment on the basis the surgery is not compensable. Some other reason would need to arise to form the basis of denial and neither party anticipates that happening at this point.

(Employer Letter, March 14, 2016).

24) On March 28, 2016, Employee underwent a left medial unicompartmental knee arthroplasty and ACL reconstruction. (Daniel Harrah, MD, Operative Report, March 28, 2016).

25) Employer paid for the March 28, 2016 knee surgery. (Record).

26) On June 24, 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).

27) 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).

28) On August 4, 2016, the board approved a C&R which paid Employee $122,500.00 to resolve all disputes with respect to all medical and related transportation benefits, compensation rate, TTD, TPD, PPI or PTD, penalties, interest and reemployment benefits apportioning $20,000.00 in disputed past and future TTD benefits; $8,850.00 in additional PPI benefits; $13,300.00 in stipend under AS 23.30.041(k); $5,000.00 for future medical transportation costs; and $73,350.00 for medical benefits. (*Id*.).

29) 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).

30) On September 28, 2016, Employer filed an offer of judgment in the amount of $20,000.00 for attorney fees and costs. (Offer of Judgment, September 28, 2016).

31) On October 12, 2016, Employee filed documentary evidence. (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 moderate complexity of the claims; the aggressive defense by Employer, including its resistance to provide preauthorization for the knee surgery; 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's hearing brief, 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. Discovery issues;
b. The predetermination of compensability issue;
c. The issue of whether a finding of medical instability after an EME finding of stability required the resumption of TTD; and
d. The complex factual and legal issue surrounding the adjustment to the wage rate, including analysis of the yet evolving legal question of the applicability of a *pseudo-Gilmore* adjustment that is the subject of conflicting board decisions. (*Id.*).

34) Employee argued these issues required complex factual and/or legal analysis and the time required to address each of the issue was reasonable and necessary to fully develop and settle the claims. Employee argued Employer created the complexities and substantially increased the number of hours reasonably required to pursue the claims. 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, 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 Employee should not be awarded fees for time spent addressing preauthorization of medical care for the knee surgery because it was not an issue upon which Employee prevailed, it was not an issue upon which Employee would have prevailed at hearing under the Act, Employee only filed a petition for an advisory opinion after Employer explained the process to Employee, and Employer should not be responsible for fees "incurred in pursuing an erroneous course of action." Employer

contended if the board awards fees for time spent on the preauthorization issue, the fees should be restricted to the time taken to prepare the petition for an advisory opinion. 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).

36) 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).

37) On October 20, 2016, Employee filed an affidavit outlining his attorney fees and costs from October 28, 2015 through October 20, 2016 billed at $425 per hour for a total of 180.00 hours, totaling $76,500.00. Employee's affidavit documented $218.40 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. Employee filed a witness list in both

cases containing four of the same witnesses and the same proposed testimony for the same four witnesses. (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 outcome of her case. She testified she would not have been able to have the second knee surgery and receive the settlement she received without counsel. (Employee).

44) At hearing on October 25, 2016, Employee's attorney contended Employee was in a "catch 22" because Employee's physician opined Employee needed surgery, Employer would not preauthorize the surgery, and Employee's physician refused to perform the surgery without a preauthorization. Employee contended Employer placed Employee in an extremely difficult financial situation because Employee could not work and Employer had not paid Employee TTD. Employee argued Employer's refusal to preauthorize the surgery constituted a controversion in fact and Employer paid for the surgery after Employee hired counsel as a result of Employee's attorney's efforts. Employee argued the claimed hours were reasonable because Employer's timesheets listed 156.00 hours leading up to mediation and Employee claimed

131.75 hours leading up to mediation. Employee contended Employer made an ethically impermissible global settlement offer including attorney fees. (Employee).

45) At hearing on October 25, 2016, Employer contended Employer was not required to preauthorize the knee surgery under the Act and had a statutory right to assess medical necessity when it receives the surgery report and bill. Employer acknowledged preauthorization was an issue in the case but was not necessary to resolve it. Employer argued the awarded fee should be determined by the benefits awarded in the C&R which were claimed and actually disputed. Employer argued time loss benefits, specifically TTD, were in dispute and could fall within those benefits claimed, disputed and awarded; but PPI and reemployment benefits were never in dispute. Employer argued Employee was not successful in obtaining medical benefits because the prior settlement offer to Employee provided $80,000.00 and left knee replacement open. Employer stated the case was not complex and the law was well established on the issues. 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 claimed hourly rate was too high based on Employee's attorney's workers compensation experience. 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 $82,662.50 in attorney fees and $473.40 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 52 entries totaling 67.25 hours. Employer made specific objections to each remaining entry and based on those objections, argued Employee should be awarded 79.25 total hours at an hourly rate of $275, equaling $21,793.75; and for administrative tasks Employee should be awarded 2.20 hours, at $130 per

hour, equaling $286.00. Employer agreed Employee's claimed costs of $218.40 are awardable. Employer's brief included 23 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 10.25 hours at an hourly rate of $275, equaling $2,818.75 as Employer did not object to five entries totaling 5.50 hours and made specific objections to the two remaining entry totaling 9.00 hours, reducing the entries to 4.75 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. 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
December 4, 2015	5.50	2.50	3.00
January 10, 2016	1.50	0.50	1.00
March 7, 2016	2.50	1.50	1.00
May 4, 2016	2.50	1.00	1.5
May 9, 2016	0.50	0.30	0.20
June 19, 2016	2.50	1.50	1.00
Totals	15.00	7.30	7.70

(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
October 28, 2015	1.50	0.00	1.50
October 30, 2015	0.75	0.35	0.40
December 1, 2015	2.50	1.00	1.50
December 7, 2015	1.50	1.00	0.50
December 9, 2015	0.50	0.20	0.30
December 17, 2015	0.25	0.15	0.10
December 20, 2015	2.25	1.75	0.50
December 29, 2015	0.75	0.45	0.30
January 4, 2016	1.25	0.85	0.40
January 19, 2016	0.25	0.15	0.10
February 1, 2016	7.75	6.75	1.00
February 4, 2016	1.00	0.60	0.40
March 30, 2016	0.50	0.30	0.20
March 31, 2016	2.00	1.80	0.20
April 1, 2016	1.75	0.75	1.00
April 5, 2016	1.75	1.35	0.40
April 6, 2016	1.25	0.75	0.50
April 7, 2016	1.75	0.75	1.00
May 30, 2016	1.00	1.00	0.00
October 3, 2016	0.25	0.15	0.10
Totals	30.50	19.10	11.40

(*Id*.).

56) Employee claimed 5.00 hours for "tcw client; review documents; outline action plan; prep retainer agreement; discovery requests and notice of appearance" on December 2, 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 is reasonable for this telephone call. Preparation of a notice of appearance is a paralegal task and 0.2 hours is reasonable to complete this task. The reasonable time for this entry is 1.5 hours, including 1.3 attorneys fee hours and 0.2 paralegal hours. (*Id*.).

57) Employee claimed 0.25 of an hour to "Staff case with CP" on December 8, 2015. This is an administrative task which is not awardable under the Act; therefore, no hours are reasonably claimed. (*Id*.).

58) Employee claimed 4.25 hours for "Review of Discovery received; research re predetermination of compensability; prep draft ARH" on January 31, 2016. This entry contains block-billing making it difficult to determine how much time was spent on each task.

Preparation of an ARH is a paralegal task and 0.2 of an hour is reasonable. The reasonable time for this entry is 3.2 hours, including 3.0 attorneys fee hours and 0.2 paralegal hours. (*Id*.).

59) Employee claimed 8.25 hours to "Prep email and TC client re response to 2/1 ltrs; prep draft ARH and addendum; Add'l research re medical stability and continue work on TTD ltr to ER" on February 5, 2016. This entry contains block-billing making it difficult to determine how much time was spent on each task; 0.4 is reasonable for the email and telephone call. Claiming additional time to draft the letter and prepare the ARH is unreasonable. The reasonable time for this entry is 1.4 hours. (*Id*.).

60) Employee claimed 7.00 hours to "Continue prep ARH, Addendum, and request for emergency prehearing; draft notice of intent to rely; Update medical chronology from discovery received" on February 8, 2016. This entry contains block-billing making it difficult to determine how much time was spent on each task; claiming additional time to prepare an ARH and addendum is unreasonable. Preparing a request for a prehearing conference and a notice of intent to rely are paralegal tasks and 0.6 of an hour is reasonable to complete both. The reasonable time for this entry is 1.6 hours, including 1.0 attorneys fee hours and 0.6 paralegal hours. (*Id*.).

61) Employee claimed 8.25 hours for "Add'l research on TTD offsets, finalize ARH, Addendum, Request for Prehearing, & update general chronology from discovery received; prep amended notice intent to rely" on February 9, 2016. Claiming additional time to prepare an ARH and addendum, a request for prehearing, a notice of intent to rely, and examine discovery is excessive and unreasonable. Therefore, no hours are reasonably claimed. (*Id*.).

62) Employee claimed 0.50 of an hour for "tc worker's comp rep Brian re scheduling prehearing" on February 16, 2016. Scheduling a prehearing is a paralegal task; 0.2 of an hour is reasonable for the telephone call. (*Id*.).

63) Employee claimed 0.75 hours to "Prep amended claim" on April 12, 2016. Employee did not file an amended claim. Therefore, any hours claimed for preparing an amended claim that was not filed is unreasonable. (*Id*.).

64) Employee claimed 1.5 hours for "Research re ethics of attorney fee negotiations" on April 20, 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*.).

65) Employee claimed 0.75 of an hour to "Review emails re termination" on May 6, 2016. The legality of Employee's termination was not an issue to be decided by the board. Therefore, any hours claimed for this task are unreasonable. (*Id*.).

66) Employee claimed 1.25 hours for "Partial review deposition and Prep deposition summary" on May 12, 2016. This is a paralegal task and 1.25 paralegals hours are reasonable to complete this task. (*Id*.).

67) Employee claimed 1.25 hours for "Research re Gilmore wage rate adjustment" on May 16, 2016. Employee did not successfully prosecute a compensation rate adjustment claim; therefore, no time is awardable. (*Id*.).

68) Employee claimed 4.75 hours to review and finalize the C&R after mediation from July 19, 2016 to July 25, 2016. Employer prepared the C&R and sent it to Employee for review; the final C&R is 10 pages long; and the parties had already agreed on the benefits awarded in the agreement. Therefore, the time claimed is excessive and reduced by 2.25 hours; 2.5 hours are reasonable. (*Id*.).

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

70) 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*.).

71) 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. Employee claimed time to complete an outline of witness testimony for both hearings on October 25, 2016 and the outlines in both hearings contained four of the same witnesses and provided the same proposed testimony for the four witnesses. It is unreasonable to claim time to complete the same tasks on the same issues in both cases; therefore, 0.1 of an hour is reasonably claimed. (*Id*.).

72) 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 1.75 of an hour; 0.5 of an hour is reasonable. (*Id*.).

73) 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. Employee claimed time to complete an prepare outline of witness testimony for both hearings on October 25, 2016 and the outlines in both hearings contained four of the same witnesses and provided the same proposed testimony for the four witnesses. The claimed time is reduced by 2.55 hours; 0.2 of an hour is reasonable. (*Id*.).

74) 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*.).

75) 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).

76) 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*.).

77) 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).

78) Employee itemized the following costs which are reasonable costs for Employee's attorney:

Table III

Date	Cost	Amount
May 05, 2016	Deposition Copy	$218.40
October 24, 2016	Airfare to/from Hearing	$180.00
October 24, 2016	Lodging/Meal for Hearing	$75.00
Total		$473.40

(*Id*.).

79) 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).

80) 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 IV

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*.).

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. In *Kamitchis v. Swan Employer Services*, AWCB Decision No. 14-0039 (March 24, 2014), attorney's fees and costs were awarded under AS 23.30.145(b) when the employer resisted an employee's right to compensation of benefits by refusing to controvert or preauthorize surgery.

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.*, AWCB 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.*, AWCB 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*, AWCB 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, AWCB 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 strike 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?

Employer resisted payment of the second knee surgery when it did not controvert or preauthorize the surgery. AS 23.30.145(b); *Kamitchis*. Employee is entitled to fees under AS 23.30.145(b) because Employee hired an attorney who successfully prosecuted her claim. Obtaining the second knee surgery and the benefits in the C&R are of significant benefit for Employee and were the result of Employee's attorney's efforts. *Id.*

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(c)(1); 8 AAC 45.180(d)(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 issues were not complex or novel and legal issues were of average complexity. The parties disputed whether Employer was required to preauthorize the second knee surgery and whether Employee was entitled to TTD when Employee's physician opined Employee was not medically stable and recommended the disputed second knee surgery. Employee prevailed on the primary dispute, which was for Employer to pay for Employee's second knee surgery. Employee's counsel had pursued this case for approximately nine months 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 underwent the second knee surgery and received a substantial settlement as a result of Employee's attorney's efforts.

Employee is entitled to reasonable attorney fees. AS 23.30.145(b). However, Employee's affidavits of attorney fees included unreasonable 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 Employee successfully prosecuted. Due to the excessive time spent on tasks listed in entries containing block-billing, Employee's requested attorney's fees will be reduced by 7.30 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. *Rogers & Babler*. Due to excessive time spent on relatively simple tasks, Employee's requested attorney's fees will be reduced by 19.10 hours in accordance with factual finding 55 above.

Employee also claimed unreasonable time in 21 of other entries for several reasons, including time spent on paralegal tasks; time spent on administrative tasks; time spent on unnecessary tasks; time spent on an amended claim never filed; excessive time claimed for preparation of an

ARH, notice of intent to rely, and request for a prehearing; excessive time claimed for C&R review; and time spent on issues not prevailed at hearing. In accordance with factual findings 56-76 above, Employee's claimed hours will be reduced by 50.80 hours. Employee's attorney will be awarded $34,455.00 (114.85 X $300 = $34,455.00) in attorney's fees under AS 23.30.145(b).

In accordance with factual findings 77-78, Employee will be awarded $473.40 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, 58, 60, 63, and 66 above, Employee will be awarded $318.50 for time Employer's attorney spent on paralegal work (2.45 x $130.00 = $318.50). *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 $35,246.90 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 December 7, 2015 claim for attorney fees and costs is granted.
2) Employer is ordered to pay Employee $34,455.00 in attorney fees.
3) Employer is ordered to pay Employee $791.90 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 BRENDA DOCKTER, employee / claimant; v. S.E.A.R.H.C., employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 201403022; 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