ALASKA WORKERS' COMPENSATION BOARD

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

RICKY HANSON, Employee, Claimant, v. DOYON DRILLING, INC, Employer, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Insurer, and STATE OF ALASKA, SECOND INJURY FUND Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201405045 AWCB Decision No. 18-0024 Filed with AWCB Anchorage, Alaska on March 7, 2018

The Estate of Ricky Hanson's November 7, 2017 petition to approve the parties' unsigned compromise and release (C&R) agreement was heard on February 8, 2018 in Anchorage, Alaska. This hearing date was selected on November 30, 2017. Attorney Michael Jensen appeared and represented Ricky Hanson (Employee) and the Estate of Ricky Hanson (Estate). Attorney Aaron Sandone appeared and represented Doyon Drilling, Inc. and the Insurance Company of the State Of Pennsylvania (Employer). Velma Thomas appeared on behalf of the Alaska Second Injury Fund (SIF). Amandah Hanson was the only witnesses. The record closed at the hearing's conclusion on February 8, 2018.

ISSUES

The Estate contends Employee and Employer had reached an agreement to resolve all issues except medical benefits, but Employee died before he could sign the agreement. The Estate contends the regulation requiring parties' signatures on the agreement should be waived and the agreement approved. Employer and SIF oppose waiving the signature requirement and contend the agreement should not be approved.

1. Should the settlement agreement be approved?

The Estate contends its attorney provided valuable services and he should be awarded reasonable fees and costs. Employer and SIF contend that because the Estate should not prevail, its attorney is not entitled to fees or costs.

2. Is the attorney for Employee and the Estate entitled to an award of fees and costs?

FINDINGS OF FACT

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

1. On November 28, 2013, Employee was diagnosed with chronic obstructive pulmonary disease (COPD). (Providence Alaska Medical Center, Emergency Department Notes, November 28, 2013).
2. On January 20, 2014, Employee fractured his left ankle when he fell from a ladder after his foot slipped. (Report of Injury, January 21, 2014).
3. On January 21, 2014, Mark Caylor, M.D., performed open reduction and internal fixation surgery on Employee's ankle. (Providence Alaska Medical Center, Operative Report, January 21, 2014).
4. Employer accepted the claim and began paying Employee temporary total disability on January 21, 2014. (Subsequent Report of Injury, April 7, 2014).
5. On March 26, 2014, Employer notified SIF of a possible claim against the Fund. (Notice of Possible Claim, March 26, 2014).
6. On October 23, 2014, Employee was found eligible for reemployment benefits. (Reemployment Eligibility Letter, October 23, 2014).

7. On December 4, 2014, Dr. Caylor performed surgery to remove the hardware from Employee's ankle. (Alaska Surgery Center, Operative Report, December 4, 2014).
8. On January 13, 2015, Dr. Caylor stated the pain medication Employee took after his surgeries was a trigger for the exacerbation of his COPD. (Dr. Caylor, Responses to Written Questions, January 13, 2015).
9. David Mulholland, D.O., Alex Baskous, M.D. and Joyce Shotwell, M.D. agreed that pain medication and or anesthesia for surgery could have aggravated Employee's COPD. Brent Burton, M.D., opined there was no connection between Employee's use of pain medication and his COPD. (Medical Records).
10. On October 1, 2015, Employer controverted benefits related to Employee's COPD as well as PPI benefits in excess of 9 percent. (Controversion, October 1, 2015).
11. On November 4, 2015, the rehabilitation specialist informed the Reemployment Benefits Administrator that no reemployment plan could be developed due to Employee's physical restrictions. (L. Cortis, Letter, November 4, 2015).
12. On December 30, 2015, Employee filed a claim for permanent total disability (PTD) beginning November 4, 2015 as well as other benefits. (Claim, December 28, 2015).
13. On January 6, 2016, Employer controverted benefits related to Employee's COPD condition. (Controversion, January 6 2016).
14. On January 20, 2016, Employer filed its answer to Employee's December 28, 2015 claim, denying Employee was entitled to PTD benefits. (Answer, January 20, 2016).
15. On February 2, 2016, Employer controverted PTD and PPI benefits as well as some medical costs. (Controversion, February 2, 2016).
16. On July 22, 2016, SIF and Employer entered into a stipulation in which SIF agreed to reimburse Employer for disability benefits paid to Employee after January 27, 2016. (Stipulation, July 22, 2016).
17. On August 30, 2016, Employer controverted PTD benefits, PPI benefits, and some medical costs. (Controversion, August 30, 2017).
18. At some point in 2017, the parties began discussing settlement. On September 27, 2017, Employee's attorney made a counteroffer of $385,000.00 in exchange for a waiver of all benefits except future medical and medical transportation costs, and $43,576.80 for attorney fees and costs. At that time, Employee's attorney calculated the present value of PTD

payments for Employee's expected life to be approximately $780,000.00. (Employee Letter, September 27, 2017).

19. On September 29, 2017, Employee's attorney noted Employer had offered $360,000.00 plus $40,000.00 in fees and costs, and Employee had agreed. (M. Jensen, Time Slip Entry, September 29, 2017).

20. In an October 2, 2017, Employee's attorney wrote to Employer's attorney regarding the language of the settlement agreement. The letter concluded with:

> Since future medical and medical related transportation benefits are not waived, the agreement need not be submitted for Board approval. However, a stipulation for attorney's fees and costs must be submitted. My office will prepare this stipulation for your approval. (M. Jensen, Letter, October 2, 2017).

21. On October 18, 2017, Employer's attorney emailed Employee's attorney regarding the language of the agreement, stating he was working on getting the agreement to him. (A. Sandone, Email, October 18, 2017).

22. On October 27, 2017, Employer's attorney emailed the C&R to Employee's attorney for review. (A. Sandone, Email, October 27, 2017).

23. Relevant portions of the agreement include:

> 8. RELEASE OF CLAIM
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> In order to resolve all disputes between the parties with respect to compensation rate or compensation for disability under the Alaska Workers' Compensation Act including, but not limited to: I) claims for any and all kinds of disability benefits including temporary partial, temporary total, permanent partial and permanent total; 2) permanent partial impairment; 3) compensation rate adjustment; 4) interest; 5) penalties; 6) vocational rehabilitation/reemployment and .04l(k)/stipend benefits and 7) past and future medical benefits excepting those to the left ankle/foot; the employer and carrier/adjuster will pay to the employee THREE HUNDRED SIXTY THOUSAND and 00/100 DOLLARS ($360,000), for full consideration thereof. The employee accepts such compromise amount in full and final settlement and in payment of all compensation rate or compensation for disability under the Alaska Workers' Compensation Act including, but not limited to: 1) claims for any and all kinds of disability benefits including temporary partial, temporary total, permanent partial and permanent total; 2) permanent partial impairment; 3) compensation rate adjustment; 4) interest; 5) penalties; 6) vocational rehabilitation/reemployment and .041 (k)/stipend benefits; and 7) past and future medical benefits excepting those to the left ankle/foot, which the employee might be presently owed or to which the employee might become entitled at any time in the future pursuant to the terms of the Alaska Workers' Compensation Act. ·

It is agreed the employer and carrier/adjuster will be responsible under the terms of the Alaska Workers' Compensation Act for reasonable and necessary medical benefits and related travel expenses to the left foot/ ankle, which although incurred in the future, are attributable to the condition described herein. It is also agreed that the right of the employer and carrier/adjuster to contest liability for future medical benefits is not waived under the terms of this settlement agreement. Further, it is agreed that this Compromise and Release is not to be construed as a waiver of any past/future defenses available to the employer and carrier/adjuster under the Alaska Workers' Compensation Act, case law, and the Board's regulations.

. . . .

The parties agree that this $360,000.00 lump sum payment represents $2,317.67 per month in PTD after any social security offset that may apply pursuant to AS 23.30.225 and *Green v. Kake Tribal Corp.,* 816 P.2d 1363 (Alaska 1991) . . .

The Second Injury Fund has agreed to reimburse the employer and carrier/adjuster in the amount of $360,000. The first payment of $120,000.00 will be made to the employer and carrier/adjuster within 30 days of approval of this agreement. The second $120,000.00 reimbursement payment will be made to the employer and carrier/adjuster no later than November 5, 2018. The third $120,000 reimbursement payment will be made to the employer and carrier/adjuster no later than November 5, 2019. In exchange for this payment from SIF of $360,000.00 to the employer and carrier/adjuster, the employer and carrier/adjuster accept this payment as full liquidation of any SIF liability and in exchange the employer and carrier/adjuster release any and all claims they may have against SIF for reimbursement in this matter.

9. RELEASE OF FUTURE LIABILITY

It is the intent of the parties to this agreement to compromise all benefits which might be due to the employee pursuant to the terms of the Alaska Workers' Compensation Act, with the exception of future medical benefits as outlined above. To this end, and for such purpose, the parties agree that, upon approval of this Compromise and Release by the Alaska Workers' Compensation Board and payment of the amounts recited herein, this Compromise and Release shall be enforceable and shall forever discharge the liability of the employer and carrier/adjuster to the employee and the heirs, beneficiaries, executors, and assigns of the employee, for all benefits which could be due or might be due in the future, pursuant to the terms and provisions of the Alaska Workers' Compensation Act, with the exception of future medical benefits as outlined above.

. . . .

11. ATTORNEY'S FEES

> The employee retained the services of an attorney in connection with this compensation claim. It is agreed that such attorney has performed valuable services on behalf of the employee. As part of the consideration of this settlement, upon approval of this agreement, the employer and carrier/adjuster will pay to the employee's attorney, Law Office of Michael Jensen, the sum of $39,000 in attorneys' fees and $1,000 in attorney's costs, without any offset or reduction.
> (Proposed Compromise and Release Agreement).

24. The proposed C&R agreement includes lines for the signatures of Employee, his attorney, Employer's attorney, and Employer's adjuster. It also includes a brief Board Order finding the agreement to be in Employee's best interest and blanks for signatures by Board members. (Proposed Compromise and Release Agreement).
25. On October 31, 2017, Employee's attorney returned the C&R to Employer's attorney with several minor corrections. (M. Jensen, Email with Attachment, October 31, 2017). The bulk of the corrections address typographical or spelling errors, and four minor additions provide clarification, but do not change the substance of the agreement. (Observation, Experience).
26. Between October 30, 2017 and November 5, 2017, Employee's attorney or his paralegal called or emailed Employee six times, with no response. (Employee Attorney, Time Slips).
27. On November 6, 2017, Amandah Hanson called Employee's attorney and reported that her father, Employee, had passed away. (Employee Attorney; Amandah Hanson).
28. At hearing, Amandah Hanson stated she had been looking for a home in Oregon for her father, and had been in contact with him at least every three days, and sometimes several times in one day. A call on October 27, 2017 went unanswered, as did a later call. When she had not been able to reach him by November 1, 2017, she asked one of her father's neighbors to check on Employee. On November 4, 2017, Employee was found dead in his home. (Amandah Hanson).
29. Amandah Hanson is the personal representative of Employee's estate. (Amandah Hanson).
30. In most cases, compromise and release agreements are drafted, signed and filed within one to two weeks after the parties reach an agreement. (Observation; Experience). Here, the delays in drafting the agreement were primarily due to Employer's attorney's unavailability for personal reasons. (Parties' Correspondence).

31. At the February 8, 2018 hearing, SIF contended its signature was necessary before the proposed C&R could be effective, but it conceded it had agreed to reimburse Employer as the agreement states. (SIF Hearing Representations).
32. Employee filed an affidavit of attorney fees and costs detailing attorney fees of $37,400.00, paralegal fees of $12,285.00, and costs of $1,390.89. At hearing, Employee's attorney requested an additional $600.00, representing 1.5 hours for the hearing, for a total of $50,285.00 in fees and $1,390.00 in costs. Employee's attorney clarified that if the C&R agreement was approved, he was seeking fees as provided in the agreement plus actual fees since November 5, 2017. Of the total fees, the affidavit shows 19.7 hours of attorney time and 4.6 hours of paralegal time since November 5, 2017, for fees of $7,880.00 and $897.00, respectively. (Fee Affidavit, February 2, 2018; Hearing Representations).
33. Form 07-6117, addressed in 8 AAC 45.160(b) is a "Compromise and Release Agreement Summary." It requests basic information about injury, benefits the claimant was receiving, and the provisions of the C&R agreement. It cannot be used in place of the C&R Agreement itself. (Form 07-6117).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> 1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
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> 2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
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> 3) this chapter may not be construed by the courts in favor of a party;
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> 4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The Board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the Board's "experience, judgment, observations, unique or peculiar facts of

the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 2/8/747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.012. Agreements in regard to claims.
(a) At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter, but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose. Except as provided in (b) of this section, an agreement filed with the division discharges the liability of the employer for the compensation, notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245, and is enforceable as a compensation order.

(b) The agreement shall be reviewed by a panel of the board if the claimant or beneficiary is not represented by an attorney licensed to practice in this state, the beneficiary is a minor or incompetent, or the claimant is waiving future medical benefits. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter, and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. A lump-sum settlement may be approved when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

8 AAC 45.160. Agreed settlements
(a) The board will review a settlement agreement that provides for the payment of compensation due or to become due and that undertakes to release the employer from any or all future liability. A settlement agreement will be approved by the board only if a preponderance of evidence demonstrates that approval would be for the best interest of the employee or the employee's beneficiaries. The board will, in its discretion, require the employee to attend, and the employer to pay for, an examination of the employee by the board's independent medical examiner. If the board requires an independent medical examination, the board will not act on the agreed settlement until the independent medical examiner's report is received by the board.

(b) All settlement agreements must be submitted in writing to the board, must be signed by all parties to the action and their attorneys or representatives, if any, and must be accompanied by form 07-6117.

(c) Every agreed settlement must conform strictly to the requirements of AS 23.30.012 and, in addition, must

(1) be accompanied by all medical reports in the parties' possession, except that, if a medical summary has been filed, only those medical reports not listed on the summary must accompany the agreed-upon settlement;

(2) include a written statement showing the employee's age and occupation on the date of injury, whether and when the employee has returned to work, and the nature of employment;

(3) report full information concerning the employee's wages or earning capacity;

(4) state in detail the parties' respective claims;

(5) state the attorney's fee arrangement between the employee or his beneficiaries and the attorney, including the total amount of fees to be paid;

(6) itemize in detail all compensation previously paid on the claim with specific dates, types, amounts, rates, and periods covered by all past payments;

(7) include a written statement from all parties and their representative that

(A) the agreed settlement contains the entire agreement among the parties;

(B) The parties have not made an undisclosed agreement that modifies the agreed settlement;

(C) the agreed settlement is not contingent on any undisclosed agreement; and

(D) an undisclosed agreement is not contingent on the agreed settlement; and

(8) contain other information the board may from time to time require.

(d) The board will, within 30 days after receipt of a written agreed settlement, review the written agreed settlement, the documents submitted by the parties, and the board's case file to determine

(1) if it appears by a preponderance of the evidence that the agreed settlement is in accordance with AS 23.30.012; and

(2) if the board finds the agreed settlement

(A) is in the employee's best interest, the board will approve, file, and issue a copy of the approved agreement in accordance with AS 23.30.110(e); or

(B) lacks adequate supporting information to determine whether the agreed settlement appears to be in the employee's best interest or if the board finds that the agreed settlement is not in the employee's best interest, the board will deny approval of the agreed settlement, will notify the parties in writing of the denial, and will, in the board's discretion, inform the parties

(i) of the additional information that must be provided for the board to reconsider the agreed settlement; or

(ii) that either party may ask for a hearing to present additional evidence or argument for the board to reconsider the agreed settlement; to ask for a hearing under this paragraph, a party may write to the board or telephone the division; an affidavit of readiness for hearing is not required; the procedures in 8 AAC 45.070 and 8 AAC 45.074 do not apply to a hearing under this subparagraph unless a party requests a hearing by filing an affidavit of readiness for hearing. If a hearing is held under this section, the board will, in its discretion, notify the parties orally at the hearing of its decision or in writing within 30 days after the hearing; if after a hearing the board finds the preponderance of evidence supports the conclusion that the agreed settlement appears to be in the employee's best interest, the board will approve and file the agreed settlement in accordance with AS 23.30.110(e); the evidence is insufficient to determine whether the agreed settlement appears to be in the employee's best interest, the board will deny approval of the agreed settlement and request additional information from the parties; or the agreed settlement does not appear to be in the employee's best interest, the board will deny approval of the agreed settlement; the board will not prepare a written decision and order containing findings of fact and conclusions of law unless, within 30 days after the board's notification, a party files with the board a written request for findings of fact and conclusions of law together with the opposing party's written agreement to the request.

(e) An agreed settlement in which the employee waives medical benefits, temporary or permanent benefits before the employee's condition is medically stable and the degree of impairment is rated, or benefits during rehabilitation training after the employee has been found eligible for benefits under AS 23.30.041(g) is presumed not in the employee's best interest, and will not be approved absent a showing by a preponderance of the evidence that the waiver is in the employee's best interest. In addition, a lump-sum settlement of board-ordered permanent total disability benefits is presumed not in the employee's best interest, and will not be approved absent a showing by a preponderance of evidence that the lump-sum settlement is in the employee's best interests.

> (f) In single-employer, multi-carrier claims, when an employee's claims have been consolidated under 8 AAC 45.050, or when parties have been joined under 8 AAC 45.040, no agreed settlement will be approved unless all parties have agreed to and signed the agreed settlement document.
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> (g) The employee or the employee's beneficiaries and the employer may agree to partially resolve a claim or a single issue, such as the employee's gross weekly earnings under AS 23.30.220, and submit a partial agreed settlement for board approval under AS 23.30.012 to resolve only a part of the claim or a single issue.

A C&R is a contract and is subject to the same standards of interpretation as any other contract. Common law standards of contract formation apply to the formation of workers' compensation settlement contracts to the extent these standards are not overridden by statute. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093 (Alaska 2008).

Cole v. Ketchikan Pulp Co., AWCB Decision No. 90-0257 (October 24, 1990) involved facts similar to the present case, although at the time of the C&R, AS 23.30.012 required Board approval of all C&R agreements. Following several months of negotiation, the attorneys for the parties agreed to settle the employee's claim for $75,000.00 in telephone conversations. A few days later, the employee's attorney wrote to employer's attorney stating: "This is to confirm that we have agreed to settle this case for a gross settlement amount of $75,000.00. This amount will be allocated $68,500.00 to Mr. Cole and $6,500.00 for costs and attorney fees." About one week later, the employer's attorney sent a C&R to employee's attorney and asked that both the attorney and the employee sign the agreement. Neither the employer nor its attorney had signed the agreement. The employee's attorney signed the agreement and forwarded the agreement to the employee, but the employee died before receiving and signing the agreement. One of the issues in dispute was permanent partial disability (PPD) benefits, a benefit under the Act At the time of the employee's injury. PPD benefits were paid periodically, but terminated at the death of the employee. The Board refused to approve the agreement because it failed to meet the signature requirements of 8 AAC 45.160(b).

On appeal, the Supreme Court noted the Board had not addressed 8 AAC 45.195, which authorized the Board to waive the signature requirement to avoid a manifest injustice. The employer argued there could be no manifest injustice because the PPD benefits terminated at the

employee's death, and no further benefits were owed. Nevertheless, the Court remanded to the Board with instructions to consider whether the signature requirement should be waived, and if it found waiver was appropriate, it was to then consider whether the agreement otherwise conformed to the Act. *Cole v. Ketchikan Pulp Co.*, 850 P.2d 642, 643 (Alaska 1993).

In *Ambrosio v. Anderson Apartments*, AWCB Decision No. 95-0153 (June 5, 1995), an employee had signed and filed a C&R agreement which included reemployment benefits. The Board declined to approve without further information, and a hearing was scheduled, but the employee died before the hearing was held. *Ambrosio* cites *Cole* for the proposition that a C&R must conform to the Act at the time of Board approval. Because reemployment benefits end at death, and because the employer had paid all benefits due to the employee prior to death, *Ambrosio* held the agreement did not conform to the Act because no benefits were owed. At the time of *Ambrosio*, AS 23.30.012 still required Board approval of all C&R agreements.

Stenseth v. Municipality of Anchorage, 361 P.3d 898 (Alaska 2015), involved a settlement agreement that was not only unsigned, but had not even been reduced to its final form. The employer had filed a petition to recover benefits allegedly obtained by fraud. The parties agreed to settle at mediation, and a series of subsequent emails set out the terms of their agreement. The employer then declined to finalize the agreement after realizing its representative did not have adequate authority to resolve the case. The employee then sought to have the employer's fraud petition dismissed for breach of the settlement agreement. Applying general principles of contract law, the Board found the employer had made an offer, the employee had unequivocally accepted, and the offer and acceptance were supported by consideration. The Board found the parties had entered into a binding settlement agreement and dismissed the employer's petition. The Supreme Court upheld the Board's use of common law contract principles and clarified that because there was no "claim" at issue, AS 23.30.012 did not apply.

In *Seybert*, the employee was attempting to set aside a board-approved C&R, and one of his contentions was the Board had improperly approved a "lump-sum settlement." The Supreme Court clarified that for the purposes of AS 23.30.012, a "lump-sum settlement" is the

commutation of an award of ongoing benefits into a single payment. It does not include amounts received to settle a disputed claim. *Id*. at 1092.

> **AS 23.30.040. Second injury fund.**
> (a) There is created a second injury fund, administered by the commissioner. Money in the second injury fund may only be paid for the benefit of those persons entitled to payment of benefits from the second injury fund under this chapter. Payments from the second injury fund must be made by the commissioner in accordance with the orders and awards of the board.

> **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.
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> (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.

The Board's authority to award attorney fees is purely statutory. *M-B Contracting Co. v. Davis*, 399 P.2d 433 (Alaska (1965). In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which section of the 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 *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009), the commission stated "AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. 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*.

In determining a reasonable fee under AS 23.30.145(b), the Board is required to consider the contingent nature of the work for an employee in workers' compensation cases, the nature, length and complexity of the services performed, the resistance of the employer or carrier, and the benefits resulting from the services performed, *Wise Mech. Contractors v, Bignell*, 718 P.2d 971, 973, 975 (Alaska 1986).

When an employee is entitled to fees under both AS 23.30.145(a) and (b), the Board has awarded actual fees under subsection (b) and statutory fees under (a), if and when the statutory fees exceed the actual fees. *Porteleki v. Uresco Construction Materials, Inc.*, AWCB Decision No. 09-0210 (December 30, 2009); *Wolf v. Wolf Dental Services*, AWCB Decision No. 10-0126 (July 22, 2010).

AS 23.30.180. Permanent total disability.

(a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. If a permanent partial disability award has been made before a permanent total disability determination, permanent total disability benefits must be reduced by the amount of the permanent partial disability award, adjusted for inflation, in a manner determined by the board. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be

(1) area of residence;

(2) area of last employment;

(3) the state of residence; and

(4) the State of Alaska.

(b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not, by itself, constitute permanent total disability.

AS 23.30.205. Injury combined with preexisting impairment.
(a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.

(b) If the subsequent injury of the employee results in the death of the employee and it is determined that the death would not have occurred except for the preexisting permanent physical impairment, the employer or the insurance carrier shall in the first instance pay the compensation prescribed by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payable in excess of 104 weeks.

(c) In order to qualify under this section for reimbursement from the second injury fund, the employer must establish by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was retained in employment after the employer acquired that knowledge.

(d) The second injury fund may not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party or in relation to which the director was not notified at least three weeks before the award or adjudication that the fund might be subject to liability for the injury or death.

(e) An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier has knowledge of the injury or death.

> (f) In this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. A condition may not be considered a "permanent physical impairment" unless
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> (1) it is one of the following conditions:
> . . . .
> (Z) ruptured intervertebral disk,

Under the original 1959 Act, SIF was also liable for vocational training costs, including a stipend paid directly to employees. In 1968 the section was amended to remove that provision. Ch. 178 SLA 1968. In *Providence Washington Insurance Co. v. Busby*, 721 P.2d 1151 (Alaska 1986), an employer appealed a Board decision that ordered SIF to reimburse disability benefits, but not medical expenses or attorney fees. The court affirmed the Board, holding SIF was "a limited reimbursement scheme for disability payments *only*." *Busby*, at 1152 (emphasis original).

In *Miller v. Municipality of Anchorage*, AWCB Decision No. 13-0099, (August 20, 2013), the employer petitioned to set aside a stipulation that the employee was PTD in part because SIF had not signed the stipulation. SIF contended the stipulation should not be set aside because it was not a necessary party to the stipulation; its only obligation was to reimburse the employer. The stipulation was set aside, not because SIF had not signed the agreement, but because the agreement had been altered after it had been signed by the employer and the employee, and thus no longer represented their agreement.

> **8 AAC 45.195. Waiver of procedures**
> A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

1. Should the settlement agreement be approved?

Is SIF a necessary party to the agreement?

SIF contends it is a necessary party and the proposed C&R is only a draft, as it lacked any signature provision for SIF's approval. However, SIF's only obligation is to reimburse Employer for qualifying disability payments; SIF does not make payments directly to employees, and Employee cannot make a claim against SIF. SIF appears to have agreed to reimburse Employer the $360,000.00 to be paid under the proposed C&R, but whether it has or not, it does not affect Employer's liability. SIF's position here is directly opposite of the position it took in *Miller*, where it contended it was not a necessary party to a stipulation that the employee was PTD. SIF's argument in *Miller* better aligns with its "reimbursement only" role. SIF is not a necessary party to the proposed C&R, and its signature on the agreement is not necessary.

Do the parties have an agreement?

Before determining whether a settlement agreement is enforceable under the Act, it is necessary to determine whether the parties reached an agreement, and, if so, the terms of the agreement. *Seybert* reiterated that C&Rs are contracts, and clarified that standard common law principles apply to question of whether or not a contract was formed.

Common law requires that there be an offer, acceptance, and consideration to form a contract. The September 27, 2017 letter from Employee's attorney and his September 29, 2017 note indicated the parties had agreed to settle all non-medical benefits for $360,000.00 plus $40,000.00 in attorney fees and costs. However, despite later emails between the parties, there is nothing showing Employer agreed to these terms until it emailed the C&R to Employee's attorney on October 27, 2017. At that point, there is clear evidence Employer had made an offer, and Employee had accepted. Employee's agreement to forbear on his claim and Employer's promise to pay are sufficient consideration to support a contract. Additionally, Employer does not contend there was not contract between the parties; its argument is that the agreement is not enforceable under the Act. The parties had reached a settlement agreement by October 27, 2017, at the latest.

Is the parties' agreement enforceable under the Act?

The Act itself sets out only minimal requirements for C&Rs. Under AS 23.30.012(a), more than 30 days must have elapsed since the injury, and the agreement must be in a form prescribed by

the director. Unless the agreement falls within the requirements of AS 23.30.012(b), it is effective upon filing, and no Board review is required.

The first sentence of AS 23.30.012(b) sets out the situations in which a C&R must be reviewed by the Board: first, if the claimant is not represented by an attorney licensed in Alaska, second, if the claimant a minor or incompetent, and third, if the claimant is waiving future medical benefits. The remainder of section .012(b) addresses how an agreement is to be reviewed and the effect of approval.

The "form prescribed by the director" for C&Rs is set out in 8 AAC 45.160(b) and (c). Subsection (b) requires the agreements to be in writing, signed by the parties and their representatives, and be accompanied by a Compromise and Release Agreement Summary form. Subsection (c) states that the parties must file all medical reports and addresses the contents of the agreement itself, including the fact that the agreement include the total attorney fees to be paid to the employee's attorney. Here, the agreement was submitted in writing, but it was unsigned and no summary was filed. The agreement complies with all of the requirements of subsection (c). Specifically it states that all medical records have been filed and it includes the total attorney fees to be paid to Employee's attorney. Had it been signed and accompanied by the summary form, it would have been effective on filing because it does not meet the requirements for Board review in AS 23.30.012(b).

At the time *Cole* and *Ambrosio* were issued, AS 23.30.012 required the Board to review and approve all C&Rs. Because that is no longer the case, *Cole's* remand to determine whether the agreement conformed to the Act is no longer relevant to all C&Rs. The requirement that the Board only approve an agreement that conforms to the Act is found in AS 23.30.012(b); it does not apply to an agreement that does not require Board approval.

In *Cole*, the Supreme Court held the Board could rely on 8 AAC 45.195 to waive the regulation requiring C&Rs be signed to prevent manifest injustice. Employer argues that because Employee died, his right to PTD benefits ceased, and it would be manifestly unjust if was required to pay the $360,000.00. But Employer controverted PTD benefits, and the issue was

never resolved. As *Seybert* explains, the $360,000.00 here is not a lump-sum payment of board-ordered PTD; it is an amount to settle a disputed claim, and under the agreement, Employee waived more than PTD benefits – he waived everything except future medical and related transportation costs. Certainly, at the time the parties agreed to settle, the amount was not manifestly unjust as Employer was settling a potential $780,000.00 claim for $360,000.00. The fact of Employee's untimely death does not change that.

There is no suggestion Employer delayed the drafting of the agreement deliberate or done to gain any benefit, but the fact that it took far longer than is typical also weighs in the consideration. The delays were primarily for the convenience of Employer's attorney, and had the agreement been drafted within the typical time frame, it would almost certainly been presented to and signed by Employee before his death. It would be manifestly unjust to Employee and the Estate to allow Employer to avoid the settlement when the delays in getting Employee's signature were for Employer's benefit. The signature requirement of 8 AAC 45.160(b) will be waived to prevent a manifest injustice.

2. Is the attorney for Employee and the Estate entitled to an award of fees and costs?

The Estate contends its attorney performed valuable services resulting in both Employee and the Estate receiving benefits, and it is entitled to an award of attorney fees. Both Employer and SIF contend the Estate is not entitled to attorney fees because it should not prevail, but neither Employer nor SIF contest the reasonableness of the Estate's attorney's claimed fees.

A predicate to the award of attorney fees under AS 23.30.145(a) is that the employer must have controverted the employee's claim, either actually or in fact. Under AS 23.30.145(b), fees may be awarded when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. Both sections are relevant here.

Employer controverted Employee's claimed benefits on four occasions. As part of their agreement, the parties agreed to file a stipulation for $39,000.00 in attorney fees and $1,000.00 in costs. Although Employee's attorney's fee affidavit shows actual attorney fees are somewhat

higher, at hearing Employee's attorney clarified he was only seeking the stipulated fees for work before November 5, 2017. In accordance with the parties' stipulation, Employee will be awarded $39,000.00 in attorney fees and $1,000.00 in costs for work done before November 5, 2017.

After November 5, 2017, Employer resisted paying the amount agreed to in the C&R, and the Estate succeeded in enforcing the agreement. The Estate's attorney is entitled to fees under AS 23.30.145(b) for that time period. The attorney fee affidavit shows attorney and paralegal fees of $7,880.00 and $897.00 after November 5, 2017. In addition, the Estate's attorney requested an additional $600.00 for time spent at the hearing, for a total of $9,377.00. Because neither Employer nor SIF contested the reasonableness of the claimed fees, the Estate will be awarded $9,377.00 in attorney fees.

CONCLUSIONS OF LAW

1. The settlement agreement will be approved.
2. The attorney for Employee and the Estate is entitled to an award of fees and costs.

ORDER

1. The Estate's November 7, 2017 petition to approve the parties' unsigned C&R agreement is granted.
2. Employer shall pay the attorney for Employee and the Estate $39,000.00 in fees and $1,000.00 in costs pursuant to their stipulation. Employer shall also pay the attorney for Employee and the Estate fees of $9,377.00 for work done after November 5, 2017.

Dated in Anchorage, Alaska on March 7, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

(Term Expired)
Patricia Vollendorf, Board Member

/s/
Robert C. Weel, Board 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 RICKY HANSON, employee, / claimant; v. DOYON DRILLING INC, employer; INSURANCE COMPANY OF THE STATE OF PENNSLYVANIA, insurer / defendants; Case No. 201405045; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 7, 2018.

/s/
Nenita Farmer, Office Assistant