ALASKA WORKERS' COMPENSATION BOARD

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

SHAWN MURPHY, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 199806756
FAIRBANKS NORTH STAR BOROUGH, Employer,	)	AWCB Decision No. 18-0043
and	)	Filed with AWCB Fairbanks, Alaska on May 9, 2018
FAIRBANKS NORTH STAR BOROUGH, Insurer, Defendants.	)	

Shawn Murphy's (Employee) September 5, 2017 claim was heard in Fairbanks, Alaska on March 22, 2018, a date selected on January 22, 2018. Attorney Andrew Wilson appeared telephonically and represented Employee. Attorney Zane Wilson appeared and represented Fairbanks Northstar Borough (Employer). Employer's former adjuster, Melody Kokrine, and its current adjuster, Nicole Hansen, testified on Employer's behalf. The record closed upon receipt of Employer's objections to Employee's supplemental fee affidavit on March 30, 2018.

ISSUES

As a preliminary matter, Employee objected to Employer's most recently filed amended answer asserting an AS 09.10.100 limitations defense. He contends Employer filed its amended answer in response to his hearing brief and Employer's defenses should be limited to those set forth in the prehearing conference summaries, which did not include any pleading asserting an AS 09.10.100 defense.

Employer contended it originally asserted an AS 23.30.105(a) limitations defense, and based on notice pleading principles, Employee was "on notice" it was relying on time-bar statutes as a defense, so it should be permitted to assert any statute of limitation defense.

1) May Employer's AS 09.10.100 defense be considered?

Employer contends it promptly paid Employee permanent partial impairment (PPI) benefits after he was rated by his treating physician in 2001. However, Employee did not assert an improper payment until 2017, long after the two-year limit for filing claims under AS 23.30.105 had expired. It further contends the "latent defects" exception to the statute is inapplicable because Employee claims he was rated under the wrong edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (*Guides*), but the *Guides* edition used for Employee's rating is set forth on the face of that document, so there is no latent defect. Finally, in response to Employee's contention AS 23.30.105 no longer applies to claims for permanent partial impairment, Employer alternatively contends Employee's claim for additional PPI would be barred by Alaska's "catch-all" statute of limitations, AS 09.10.100, since "there is a statute of limitations on everything."

Employee contends, under recent Alaska Supreme Court precedent, AS 23.30.105 cannot operate as a time-bar against his PPI claim because that statute only applies to claims for disability compensation and he is seeking an impairment benefit.

2) Is Employee's claim for additional PPI statutorily time-barred?

Employee contends he was medically stable when the fourth edition of *Guides* was in effect and relies on the 30 percent PPI rating from his surgeon in support of his contention he is owed seven percent additional PPI.

Employer contends Employee's treating physician documented improvement after Employee was rated by his surgeon, and this improvement indicates Employee was not medically stable

until he received a 23 percent PPI rating from his treating physician, when the fifth edition of the *Guides* were in effect, so no additional PPI is owed.

3) Is Employee entitled to additional PPI?

Employee generally contends he is owed penalties on late-paid transportation costs, but he advances no specific contentions in this regard.

Employer contends it timely paid Employee's transportation costs in accordance with Workers' Compensation Act statutes and regulations and it denies any penalties are due.

4) Is Employee entitled to penalties on late-paid transportation costs?

Employee's claims sought interest awards, and though he did not raise interest as a hearing issue, it will be considered on this panel's own motion.

It is presumed Employer opposes any interest award on the basis all benefits were timely paid.

5) Is Employee entitled to interest?

Employee contends he enlisted the services of an attorney, who assisted him in the successful prosecution of his claim, so he seeks an award of attorney fees and costs.

Employer contends, since Employee is not entitled to any further benefits, neither is he entitled to attorney fees and costs.

6) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:
1) In June 1995, Employee injured his lower back while working as a heavy vehicle mechanic. He was diagnosed with a right L4-5 extruded disk with nerve root impingement and spondylosis.

On June 19, 1995, he underwent right L4-5 laminotomy and discectomy. (Goldthwaite Disability Evaluation, February 5, 2001).

2) On July 8, 1996, John Joosse, M.D., evaluated Employee and rated his whole person permanent impairment at 10 percent under the Fourth Edition of the *Guides*. (Joosse Impairment Rating, July 8, 1996).

3) On July 15, 1996, Employer paid Employee's 10 percent whole person PPI. (Incident Claims and Expense Reporting System (ICERS) Payments, AWCB No. 199413059, July 16, 1996).

4) On April 9, 1998, Employee re-injured his back while changing winter tires at work and developed right leg pain with numbness and weakness. He also had foot drop. The following month, Employee underwent another lumbar surgery consisting of laminotomy and discectomy on the right at L5. (Goldthwaite Disability Evaluation, February 5, 2001).

5) On August 10, 1998, Employee underwent further surgery consisting of an interbody fusion with bone dowel grafts at L4-5 and L5-S1. (*Id*.).

6) On January 18, 1999, because of suspected recurring stenosis and settling of the bone grafts, Employee underwent lumbar laminectomy, discectomy, decompression, posterolateral fusion, and pedicle screw fixation at L4-5 and L5-S1. (*Id*.).

7) On February 5, 2001, Employee's surgeon, Noel Goldthwaite, M.D., recounted Employee's surgical history and noted Employee was "Permanent and Stationary" on December 30, 1999, "having plateaued in his improvement for several months and there being no further improvements anticipated." Dr. Goldthwaite rated Employee's whole person permanent impairment at 30 percent under the Fourth Edition of the *Guides*. (*Id*.).

8) On February 15, 2001, Employee began treating with Richard Cobden, M.D. in Fairbanks, who planned to perform a permanent partial impairment (PPI) rating once Employee's "old" medical records arrived. (Cobden chart notes, February 15, 2001).

9) Beginning on February 28, 2001, PPI ratings under the Workers' Compensation Act (Act) were to be calculated in accordance with the Fifth Edition of the AMA *Guides*. (Bulletin 00-14, December 15, 2000).

10) On March 29, 2001, Employee followed-up with Dr. Cobden, who reviewed Dr. Goldwaite's February 5, 2001 rating. Following Dr. Goldwaite's methodology, and then comparing the Fourth Edition of the Guides to the Fifth Edition, Dr. Cobden concurred Employee's total impairment "would be a minimum of 30 percent" under the former edition. Dr.

Cobden instructed Employee to return several weeks later "so that we can review these figures and . . . discuss any further problems with [Employee]. For example, [Employee] does have a residual right foot drop and has MRI evidence of a recurrent disc protrusion. We need to discuss these things before this report is finalized." (Cobden chart notes, March 29, 2001).

11) On April 19, 2001, Employee reported he had gradually improved since his last visit and his back pain had not worsened. Dr. Cobden thought Employee's back fusion had "taken successfully" and Employee was ready for a PPI rating. He assessed Employee a 23 percent whole person impairment based on the Fifth Edition of AMA *Guides*. (Cobden chart notes, April 19, 2001).

12) Employer paid Employee an additional 13 percent whole person PPI. (Compensation reports, October 10, 2000; December 18, 2001; Wilder letter, August 29, 2001; Kokrine).

13) From 2001 until 2016, there is a gap in case activity. (Record).

14) On April 26, 2016, Andrew Wilson entered his appearance as Employee's attorney.

15) On January 27, 2017, Employee claimed temporary total disability (TTD), temporary partial disability (TPD), medical costs, including pre-authorization of surgery, transportation costs, penalty, interest and attorney fees. He also contended he was underpaid PPI because it was paid according to the "wrong" edition of the *Guides*. Later, at hearing, Employee alternatively contended, it was not clear which of the two ratings was the "correct" rating. (Claim, January 27, 2017; record).

16) On February 21, 2017, Employer answered and controverted Employee's claim, contending all transportation costs were paid when owed and no further transportation costs were due. It also contended Employee's claim for PPI was time-barred by AS 23.30.105. (Employer's Answer, February 21, 2017).

17) On March 6, 2017, Employer amended its answer, contending Employee's claim was barred by AS 23.30.110, as well as, AS 23.30.105. (Employer's Amended Answer, March 6, 2017).

18) Between October 25, 2016 and May 14, 2018, Employee filed serial notices of intent to rely along with documents related to transportation and medical costs, including receipts for medical travel. (Employee's Notices of Intent, October 25, 2016; March 8, 2017; June 20, 2017; July 19, 2017; August 10, 2017; August 23, 2017; August 29, 2017; October 5, 2017; October 25, 2017; November 27, 2017; January 8, 2018).

19) On March 8, 2017, Employee emailed transportation expenses for a trip to his surgeon, Dr. Goldswaithe, requesting either reimbursement or a basis for denial. (Wilson email, March 8, 2017).

20) On March 10, 2017, Employer replied to Employee's request for reimbursements and reminded him he was required to use the "most reasonable and efficient means of transportation under the circumstances." Although it thought a car rental was reasonable, it questioned the rental of a 2017 Camaro convertible at three-times the cost of an economy rental vehicle, as well as gas receipts that appeared to be in excess of medical travel and an airline seat upgrade. Employer requested a receipt and itinerary for Employee's original airline ticket, an explanation for incurring the airline change fee and an accounting of actual mileage driven for medical related travel. (Doxey email, March 10, 2017; Employer's Hearing Brief, March 15, 2018).

21) On March 23, 2017, Employer wrote Employee and again reminded him he was required to use the "most reasonable and efficient means of transportation under the circumstances." It explained his car rental expenses had been reimbursed based on this requirement and further explained other expenses listed as "pending" would not be reimbursed until documentation from his attorney was received. Employer planned to issue a check for the remainder of Employee's travel expenses later that week. (Hansen letter, March 23, 2017).

22) On April 7, 2017, Employer controverted outstanding medical costs, contending there were none, as well as additional PPI. It cites its March 9, 2017 [sic] amended answer as the reason benefits were denied. (Controversion, April 7, 2017).

23) On July 28, 2017, the parties unsuccessfully attempted to mediate their disputes. (ICERS event entry, July 28, 2017).

24) On September 5, 2017, Employee amended his January 27, 2017 claim, requesting approval of medical treatment in excess of regulatory frequency standards. (Claim, September 5, 2017).

25) On September 25, 2017, Employer answered Employee's September 5, 2017 amended claim, and again contended Employee's claim was time-barred under AS 23.30.105 and AS 23.30.110. (Employer's Answer, September 25, 2017).

26) On October 12, 2017, Employer controverted an airline seat upgrade, a receipt from the Art of Reflexology and duplicate hotel bookings for the same night. (Controversion, October 12, 2017).

27) On November 29, 2017, Employer agreed to pay Employee $5,032.33 in attorney fees for work performed in "pursuit of reimbursement of transportation costs on behalf of Employee." (Stipulation, November 29, 2017).

28) On January 22, 2018, Employee's September 5, 2017 claim was set for hearing and issues were narrowed to include, PPI, penalty on reimbursed medical travel costs and attorney fees and costs. (Prehearing Conference Summary, January 22, 2018).

29) At a March 14, 2018 prehearing conference, Employer wanted to ensure its defenses, including its contention Employee's claim for PPI was untimely, were included as issues for hearing. Employee contended Employer's answer to the claim, including its defenses, are issues arising under the claim itself, so Employer's defenses would be included as issues for hearing. (Prehearing Conference Summary, March 14, 2018).

30) On March 15, 2018, the parties filed their hearing briefs. Based on the Supreme Court's holding in *Alaska Airlines v. Darrow*, 403 P.3d 1116 (Alaska 2017), Employee argued AS 23.30.105(a) does not bar his claim seeking additional PPI since PPI is not "compensation for disability," as stated in that statute. The following day, Employer filed an amended answer, contending Employee's claim for additional PPI is time-barred by either AS 23.30.105 or AS 09.10.100. (ICERS event entries, March 15, 2018; Employee's Hearing Brief, March 15, 2018; Employer's Amended Answer, March 16, 2018).

31) On March 16, 2018, Employee claimed $26,520.78 in attorney and paralegal fees and $364.53 in litigation costs. He utilized "block billing," so it is impossible to discern the amount of time spent on many tasks. Employee's statement also frequently fails to specify which issues for which an activity was undertaken, such as "Legal research," "benefits calculations," and "Phone call with [Employer's attorney]." Many entries are for "Email correspondence," but do not specify with whom the attorney is emailing or why. Some paralegal time is billed for work that is clearly clerical in nature, such as "Organize new file," "scan documents," and "Print documents." Other activities are cryptic, such as "case management," or for non-legal work, such as "staff instruction," "staff direction," and "staff discussion." Attorney and paralegal time following the parties' November 29, 2017 stipulation amounts to $6,791.25. (Employee's Affidavit, March 16, 2018; observations, experience).

32) In his hearing brief, "Employee contends late payment of travel expenses was paid without the requisite .155(d) late fee, in whole or in part. . . . The Board will be able to verify the dates

from the Notices of Intent and calculate the outstanding penalty." He attached a spreadsheet to his brief that sets forth his transportation costs. The spreadsheet is a very poor quality copy with small print and is largely illegible. (Employee's Hearing Brief, March 15, 2018; observations).

33) At hearing, Employee directed his opening and closing statements at the PPI issue. He did not set forth any specific contentions regarding penalty on late-paid travel costs. (Record).

34) At hearing, Employer offered Employee additional time following the hearing to respond to it's recently pleaded AS 09.10.100 defense. Employee declined Employer's offer. (*Id*.).

35) At hearing, Employer acknowledged limitations statutes are generally disfavored, but contends this case exemplifies why they were created. It contended Dr. Cobden is retired, Dr. Joosse is retired, and memories fade with time. Consequently, Employer contends this case involves a stale issue. (Record).

36) At hearing, Melody Kokrine, testified she was Employer's former adjuster and she adjusted Employee's claim. Employee had two different PPI ratings, the first was 30 percent under the fourth edition of the *Guides*, and the other was 23 percent under the fifth edition of the *Guides*. Ms. Kokrine considered the second rating an amendment by Dr. Cobden, Employee's treating physician. She thinks she paid the lower rating and does not recall if Employee complained at the time about being paid the lower rating. Her compensation reports would accurately reflect the amounts Employee was paid and the dates of those payments. She "might have" begun advance payments of PPI in September 2000 because Employee had undergone surgery and was in job retraining, and "perhaps" Employee had a doctor's visit around September 2000 where there was an indication Employee was medically stable. Ms. Kokrine thought it was appropriate to rely on the second rating by Dr. Cobden because "improvement can always happen," and because Dr. Cobden was Employee's treating physician. She also explained documents show she overpaid Employee's 23 percent PPI by $3,413.38 because she initially forgot to deduct Employee's prior 10 percent rating from his 23 percent rating. (Kokrine).

37) At various times during her testimony, Ms. Kokrine remarked, "It's been a lot of years," "Boy, you're going back a long way," and "this was a lot of years ago." (Record).

38) At hearing, Nicole Hansen testified she is Employer's current adjuster and has reviewed Employee's file, including past payments to Employee. She is currently responsible for payment of Employee's medical and transportation costs. She would consider Employee's second rating

to be the "correct" rating because it came from Employee's treating doctor. Ms. Hansen prepared a spreadsheet of Employee's claimed, medical travel costs, which were set forth in "blocks" based on the dates Employer received Employee's receipts. Most of Employee's travel costs were timely paid. Others were ultimately paid with penalty and interest since she was trying to resolve small issues in advance of mediation so Employer could focus on larger issues. Some costs presented problems, however. As represented in the first block of her spreadsheet, Ms. Hansen questioned whether an airline seat upgrade was an unnecessary or unreasonable cost and requested an explanation from Employee. Even though she never received an explanation from Employee, she ultimately reimbursed the cost of the $643.60 airline ticket, 120 days late under the Act, but not the seat upgrade, and did not add a penalty because of the lack of explanation from Employee. Employee submitted receipts for gasoline, but Employer does not reimburse for gasoline, only mileage. Ms. Hansen requested clarification on the number of miles Employee drove, but never received that clarification. Ultimately, she looked-up the mileage between Employee's hotel and his doctor's office, and reimbursed mileage based on calculations using that figure. Ms. Hansen did not pay a penalty on reimbursed mileage because of Employee never provided the requested clarification. Employee also submitted a chart of his transportation costs, including airport parking. Ms. Hansen reimbursed Employee twenty dollars based on his chart, but Employee's attorney later submitted documentation showing an additional six dollars was owed for that expense. Ms. Hansen paid the additional six dollars eight days after receiving legible documentation from Employee's attorney, but did not add penalty due to the poor quality copy of Employee's original chart, where the "6" looked like a "0." Ms. Hansen timely reimbursed Employee the economy car rate of $81.40 for his rental of a convertible Camaro because she did not think the convertible Camaro, which had a rate of $242.41, was a reasonable and necessary expense. Ms. Hansen also explained Employee claimed a penalty based on the amounts of all items in her first block, not just those that were untimely paid. The second block of Ms. Hansen's spreadsheet shows she underpaid reimbursements to Employee for "Pete's Coffee" by five cents, and airport parking by six dollars, due to poor copies of receipts submitted on a notice of intent. Later, when she was provided with legible documentation, she paid the additional $6.05 without penalty due to the poor quality of the original copies. Just as he did with items set forth in her first block, Employee also calculated penalty based on all items in the second block, not just the $6.05. Ms. Hansen's third block shows a discrepancy for an $11.64

expense from "Grilly's Mill Valley." She explained Employee paid a five-dollar tip in cash, which was not represented on the receipt. Nevertheless, Ms. Hansen reimbursed Employee for the five-dollar tip two days after receiving additional documentation from Employee, but did not add penalty because the receipt did not document the expense. Ms. Hansen's fourth block shows a 28 dollar unpaid item from the "Art of Reflexology." She investigated and found this business operates "massage parlors," typically out of locations in airports or strip malls. She challenged the medical necessity of such a charge, and it remains unreimbursed. It also contains two line items from "Mo'z Café Express." These discrepancies again represent tips, one in the amount of two dollars, and the other in an amount of six dollars, which were not shown on the receipts. There is also another eight-dollar discrepancy for airport parking, which was caused by the poor copy quality of the receipt, where the "8" looked like a "0." Employer resolved these discrepancies with Employee, as reflected by parties' stipulation for attorney fees. Ms. Hansen is not aware of any other expense item that has not been addressed. (Hansen).

39) Ms. Hansen's spreadsheet contains numerous annotations indicating dates on which she received documentation from Employee's attorney. Employee sought a grand total of $8,018.95 in travel reimbursements. (Hansen spreadsheet, undated).

40) Ms. Hansen presented as confident and competent and she testified spontaneously. She is credible. (Experience, judgment, observations, and inferences drawn therefrom).

41) On March 26, 2018, Employee supplemented his claimed attorney fees and costs, claiming an additional $1,845 in attorney and paralegal time, for a grand total of $28,365.78; and an additional $9.80 in litigation costs, for a grand total of $374.33. Employee's paralegals did not submit affidavits pursuant to regulation. Paralegal time after the parties' November 29, 2017 stipulation amounts to $993.75. (Employee's supplemental affidavit, March 26, 2018; record).

42) On March 30, 2018, Employer objected to Employee's attorney fees and contended Employee should only receive fees for those issues on which he prevailed. (Employer's Objection, March 30, 2018).

43) The Mayo Clinic explains: "Reflexology is the application of pressure to areas on the feet, hands and ears. Reflexology is generally relaxing and may be an effective way to alleviate stress." (https://www.mayoclinic.org/healthy-lifestyle/consumer-health/expert-answers/what-is-reflexology/faq-20058139).

44) Employee's spinal surgeon, Dr. Goldthwaite, practices at the Spinecare Medical Group in Daly City, California, which is adjacent to San Francisco. (Goldthwaite chart notes, February 28, 2017; observations).

PRINCIPLES OF LAW

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

> **AS 23.30.001. Intent of the legislature and construction of chapter.**
> It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . . .
>
> (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 crux of due process is the opportunity to be heard and the right to adequately represent one's interest. *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192 (Alaska 1980). The board's authority to hear and determine questions with respect to a claim is limited to the questions raised by the parties or the agency upon notice given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981). While the actual content of the notice is not dispositive in administrative proceedings, the parties must have adequate notice so they can prepare their cases: "[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings." *Groom v. State, Department of Transportation*, 169 P.3d 626, 635 (Alaska 2007) (quoting *North State Tel. Co. v. Alaska Pub. Util. Comm'n.*, 522 P.2d 711, 714 (Alaska 1974). Defects in administrative notice may be cured by other evidence that the parties knew what the proceedings would entail. *North State Tel. Co.*

The meaning of a statutory provision is determined by the language of the particular provision

construed in light of the purpose of the whole instrument. *Wien Air Alaska v. Arant*, 592 P.2d 352, 356 (Alaska 1979). The fundamental purpose of statutory interpretation is to ascertain and give effect to the intent of the legislature. *Seward Marine Services, Inc. v. Anderson*, 643 P.2d 493, 495 (Alaska 1982). Different provisions of the Alaska Workers' Compensation Act should not be interpreted to create inconsistency or invalidate one in favor of another, presuming "that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous." *Mechanical Contractors of Alaska, Inc. v. State*, 91 P.3d 240, 248 (Alaska 2004).

The legislature requires that "[t]echnical words and phrases and those that have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning." *Alaska Airlines v. Darrow*, 403 P.3d 1116 (Alaska 20117) (quoting AS 01.10.040(a)). At the same time, strict construction does not require that statutes receive the narrowest meaning allowed by their language. The court will give statutory language a "reasonable or common sense construction, consonant with the objectives of the legislature." *Mechanical Contractors.*

In *Darrow*, the Alaska Supreme Court approved of the commission writing an implied phrase into a statute in order to construe it, and said the commission's construction of the Act's Social Security offset statutes was consistent with "both the purpose of keeping an employee's benefits below wages and providing adequate compensation." *Id.* at 1123, 1125. *Darrow* also stated when construing a statute, "we must, whenever possible, interpret each part or section of a statute with every other partner section, so as to create a harmonious whole." *Id.* at 1127. Similarly, the Court further said, "When a statute or regulation is part of a larger framework or regulatory scheme, even a seemingly unambiguous statute must be interpreted in light of the other portions of the regulatory whole." *Id*.

It is assumed when the legislature amends or rewrites a workers' compensation statute, "the legislature has available other provisions of the Alaska Workers' Compensation Act." *Kennecott Creek Mining Co. v. Clark*, AWCAC Dec. No. 080 at 22 (citing 2B N. Singer, Sutherland Statutory Construction, § 51.01 (6th ed. 2000)).

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

(k) Benefits related to the reemployment plan may not extend past *two years* from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. [Emphasis added].
. . . .

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding *two years* from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the *two-year period* runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the *two-year period* is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . . [Emphasis added].

AS 23.30.097. Fees for medical treatment and services.
. . . .

(g) . . . . Unless the employer controverts a charge, an employer shall reimburse any transportation expenses for medical treatment under this chapter within 30 days after the employer receives the health care provider's completed report and an itemization of the dates, destination, and transportation expenses for each date of travel for medical treatment. If the employer does not plan to make or does not make payment or reimbursement in full as required by this subsection, the employer shall notify the employee and the employee's health care provider in writing that payment will not be made timely and the reason for the nonpayment. The notification must be provided not later than the date that the payment is due under this subsection.

AS 23.30.105. Time for filing of claims. (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within *two years* after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, and the right to compensation for death is barred unless a claim therefor is filed within one year after the death, except that, if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within *two years* after the date of the last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185,

> 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding. [Emphasis added].
> . . . .

In *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912-913 (Alaska 1996), the Court advised the defense of statute of limitations is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." The purpose of AS 23.30.105(a) is to "'protect the employer against claims too old to be successfully investigated and defended.'" *Morrison-Knudson Co. v. Vereen,* 414 P.2d 536, 538 (Alaska 1966) (citing 2 Larson, Workmen's Compensation s 78.20 at 254 (1961)). However, an employee must have "actual or chargeable knowledge of his disability and its relation to his employment" to start the running of the two year period under §105(a). *Collins v. Arctic Builders, Inc.,* 31 P.3d 1286, 1290 (Alaska 2001). In *Leslie Cutting Inc. v. Bateman*, 833 P.2d 691 (Alaska 1992), the Court clarified that when an injured worker believed a condition was controlled by medication, the statute of limitations at AS 23.30.105(a) started running only when the worker discovered the treatment no longer controlled the disability. *Id.* at 694. "The mere awareness of the disability's full physical effects is not sufficient" to trigger the running of the statute. *Id.* The statute is only triggered when "one knows of the disability's full effect on one's earning capacity." *Id.* Similarly, in *Egemo v. Egemo Construction Co*., 998 P. 2d 434 (Alaska 2000), the Court held the statute of limitations at AS 23.30.105(a) starts running only when the injured worker (1) knows of the disability, (2) knows of its relationship to the employment, and (3) must actually be disabled from work. *Id.* at 441. A claim is not "ripe," requiring filing under §105(a) until the work injury causes wage loss. *Id.* at 438-439.

The limitations period under AS 23.30.105(a) is an affirmative defense, which must be raised in response to a claim. *Horton v. Nome Native Community Enterprises*, AWCB Decision No. 94-0139 (June 16, 1994). In workers' compensation cases, the employer bears the burden of proof to establish the affirmative defense of failure to timely file a claim. *Egemo v. Egemo Construction Co.*, 998 P. 2d 434, 438 (Alaska 2000); *Anchorage Roofing Co., Inc. v. Gonzales*, 507 P.2d 501, 504 (Alaska 1973).

> **AS 23.30.110. Procedure on claims.**
> . . . .

> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within *two years* following the filing of the controversion notice, the claim is denied. [Emphasis added].
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> **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. . . .
>
> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

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

"resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-153.

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are also considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975.

Filing a controversion exposes an insurer to an attorney's fee award. *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 242 (Alaska 1997). An injured worker is entitled to reasonable attorney fees on issues prevailed upon. *Id*. at 241. Where an insurer resists payment, thus creating the need for legal assistance, the insurer is required to pay the attorney's fees relating to the unsuccessfully controverted portion of the claim. *Id*. Although attorney's fees should be fully compensatory so injured workers have competent counsel available to them, this does not mean an attorney automatically gets full, actual fees. *Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002). It is reasonable to award an employee half his attorney's fees when he does not prevail on all the issues raised by his claim. *Id*. at 147-148; *Bouse* at 242.

AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009) at 5, *see also Circle De Lumber v. Humphrey*, 130 P.3d 941 (Alaska 2006) (affirming award of attorney's fees based on 35 percent of award). 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.* Attorney's fees awarded under subsection (a) have also been based on a percentage of actual fees claimed, taking into account issues on which a claimant did

not prevail. *Soyoung Turner v. Aloha BBQ Grill*, AWCB Decision No. 16-0031 (April 19, 2016).

When an employee files a claim to recover controverted benefits, subsequent payments, though voluntary, are the equivalent of a board award, and attorney's fees may be awarded where the efforts of counsel were instrumental in inducing the payments. *Childs v. Copper Valley Electric Assoc.*, 860 P.2d 1184, 1190 (Alaska 1993). To recover fees under AS 23.30.145(b), an employee must succeed on the claim itself, not a collateral issue. *Childs* at 1193. "Prevailing party status [for civil Rule 82] does not automatically follow if the party receives an affirmative recovery but rather is based on which party prevails on the main issues." *Adamson v. University of Alaska*, 819 P.2d 886 (Alaska 1991)

Attorney fees and costs will be awarded for work expended on the issue decided. *McKinney v. Cordova*, AWCB Decision No. 05-0129 (May 13, 2005); *McCain v. Nana Regional Corp.*, AWCB Decision No. 11-0025 (March 4, 2011).

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
> . . . .
>
> (e) If any installment of compensation payable *without an award* is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.
> . . . .

The Alaska Supreme Court has consistently instructed the board to award interest for the time-value of money, as a matter of course. *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984).

At the time of Employee's injury, the Act provided:

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $135,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .

Under the current version of §190, adopted in 1988, the calculation of a permanent partial impairment is based on the whole person and is arrived at under the American Medical Association Guides to the Evaluation of Permanent Impairment. This represents a marked departure from the former version of the statute, which calculated permanent partial disability (PPD) based on a schedule of values for arms, fingers and legs. *Sumner v. Eagle's Nest Hotel*, 894 P.2d 628; 631 (Alaska 1995); *Lowe's HIW, Inc. v. Anderson*, AWCAC Decision No. 130 at 10-11 (March 17, 2010). *Darrow* concluded the terms "impairment" and "disability" have distinct meanings under the Act and the two terms are not interchangeable. *Id*. at 1128. "Compensation for impairment is awarded independent of earning capacity and for a different type of loss than . . . permanent disability compensation, which depends on a worker's inability to earn wages." *Id*. at 1130.

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .
>
> **8 AAC 45.050. Pleadings**
> . . . .
>
> (c) **Answers.**
> . . . .

(3) An answer must be simple in form and language. An answer must state briefly and clearly the admitted claims and the disputed claims so that a lay person knows what proof will be required at the hearing and, when applicable, state

. . . .

(B) whether the claim is barred under AS 23.30.022, 23.30.100, 23.30.105, 23.30.110, or otherwise barred by law or equity;

. . . .

(5) The evidence presented at the hearing will be limited to those matters contained in the claim, petition, and answer, except as otherwise provided in this chapter.

(6) Upon a verified petition of a party or upon its own motion, the board will, in its discretion, extend or postpone the time for filing an answer or otherwise continue the proceedings under such terms as may be reasonable.

. . . .

8 AAC 45.065. Prehearings

. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

. . . .

8 AAC 45.070. Hearings

. . . .

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

. . . .

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

. . . .

(c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.
. . . .

(e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.

8 AAC 45.142. Interest

(a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. . . .

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. . . .

(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk
. . . .

(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
. . . .

AS 09.10.100. Other actions in 10 years. An action for a cause not otherwise provided for may be commenced within 10 years after the cause of action has accrued.

ANALYSIS

1) May Employer's AS 09.10.100 defense be considered?

Employer's March 16, 2018, amended answer, asserting an AS 09.10.100 limitations defense, which it characterizes as the "catch all" statute of limitations, was clearly in response to Employee's brief, filed a day earlier. *Roger & Babler*. In his hearing brief, Employee contended Employer's AS 23.30.105 defense does not apply to his claim for additional PPI under *Darrow*, since the limitation set forth under AS 23.30.105 expressly applies to claims for "disability," and he is seeking an impairment benefit.

Workers' compensation litigants are entitled to due process, AS 23.30.001(4), and under most circumstances, the prehearing conference summary governs hearing issues, 8 AAC 45.065(c). Employee's claim was docketed for hearing at a prehearing conference held on January 22, 2018, during which the hearing issues were narrowed to Employee's entitlement to additional PPI, penalty on reimbursed travel expenses and attorney fees and costs. *Simon*. Employer later requested an additional prehearing conference, which was held on March 14, 2018, to ensure its defenses, including its contention Employee's claim for additional PPI was untimely, were included as issues for hearing. At that conference, Employee correctly contended Employer's answer to his claim, including its defenses, were issues arising under the claim itself, so Employer's defenses would be included as issues for hearing. 8 AAC 45.050(c)(5). Thus, Employee objects because, while Employer previously pleaded defenses based on AS 23.30.105 and AS 23.30.110, as required by regulation, it had not previously specified an AS 09.10.100 defense in its answers.

The crux of due process is the opportunity to be heard and the right to adequately represent one's interests. *Matanuska Maid*. Employer's February 21, 2017 answer, its March 6, 2017 amended answer, its September 25, 2017 answer, and the March 14, 2018 prehearing conference summary, all informed Employee Employer was relying time-bar defenses to Employee's claim for additional PPI, which is, after all, based on a 16-year-old rating. Under these circumstances, it is difficult to appreciate how Employee could not have understood the nature of the proceedings or prepared his case for hearing. *Groom*. This is especially true, considering AS 23.30.105 and AS 23.30.110 provide for 2-year limitation periods, while under AS 09.10.100, Employee would enjoy a far, more, generous, 10-year period to file his claim.

Additionally, a prehearing conference summary does not necessarily govern hearing issues if unusual circumstances exist. 8 AAC 45.070(g). The Merriam-Webster Dictionary (New ed. 2005) defines "unusual" as uncommon or rare. As far as it is known, Employee's *Darrow* defense to AS 23.30.105 is an issue of first impression. Given Employee's presentment, on the eve of hearing, of a novel defense to AS 23.30.105, fair play requires Employer should also be afforded an opportunity to assert a novel defense in response. AS 23.30.001(1), (4); AS 23.30.135(a); 8 AAC 45.050(c)(6). Moreover, even if Employee were, somehow, deprived of adequate notice, whatever due process infirmities he may have suffered were cured by Employer's offer of additional time for Employee to respond after the hearing, an offer Employee declined. *North State Tel. Co.* For each of the foregoing reasons, Employer's AS 09.10.100 defense may be considered.

2) Is Employee's claim for additional PPI statutorily time-barred?

Employee contends, under *Darrow*, AS 23.30.105 cannot operate as a time-bar against his PPI claim because the statute only applies to claims for disability compensation and he is seeking an impairment benefit. He raises a curious question involving statutory construction, since the legislature does require technical words and phrases be construed according to the peculiar and appropriate meaning, *Darrow*, and "disability" is one of those words, AS 23.30.395(16). However, the Act should not be construed to create an inconsistency or invalidate one provision in favor of another, yet Employee urges a construction that would do just that. *Mechanical Contractors*. He urges a strict and exclusive application of AS 23.30.395(16) at AS 23.30.105 to invalidate the limitation provisions of the latter statute.

The Alaska Supreme Court has cautioned against construing statutes too narrowly and provided for reasonable, common-sense statutory construction, so long as that construction is consistent with the legislature's objectives. *Mechanical Contractors*. The purpose of AS 23.30.105(a) is to protect employers from claims too old to be successfully defended. *Vereen*. Unless AS 09.10.100 were applied, as Employer alternatively contends, Employee's construction, if adopted, would leave PPI claims without any limitation whatsoever, an illogical result given "there is a statute of limitations on everything," as Employer stated at hearing. *Rogers & Babler*.

Professor Larson addressed this very situation, where disability is the starting point for a claim limitation period in his treatise:

> When it is said that the compensation claim period should not begin to run until the claim itself is compensable, this rule does not mean that the claim period never runs until the occurrence of actual disability . . . .
>
> The most self-evident example of this possibility is that of schedule injuries, as to which actual disability is immaterial. Since loss of work time is not an essential ingredient of the claim in schedule cases, it would plainly make no sense to say that the statute does not run until time is lost, since indeed this may never happen at all.

11 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.10 (2017); *see also Darrow*; *Sumner*; *Anderson* (contrasting disability and impairment benefits).

The meaning of a statutory provision is determined by the language of that particular provision construed in light of the purpose of the whole instrument, *Arant*, and the legislature has conspicuously expressed its intent for 2-year limitation periods on workers' compensation benefits throughout the Act, AS 23.30.041(k); AS 23.30.095(a); AS 23.30.105(a). Permanent total disability, temporary partial disability, temporary total disability, compensation for death, re-employment and medical benefits, all have two-year limitation periods. *Id.* There is also a two-year limitation period for filing claims. AS 23.30.110(c). The legislature's oft-iterated preference for two-year limitation periods is workers' compensation cases indicates a two-year period should apply to PPI benefits, and the ten-year limitation at AS 09.10.100 should not. *Darrow; Anderson*.

It is presumed "the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous." *Mechanical Contractors*. When the legislature replaced the former PPD benefit with the current PPI benefit in 1988, it is also presumed to have had knowledge of the limitations at AS 23.30.105. *Clark*. Yet, it nevertheless retained the specific reference to AS 23.30.190, the PPI statute, at AS 23.30.105(a), creating yet another indication it intended to continue

application of the two-year limitation period to the newly re-defined benefit. *Mechanical Contractors*.

In *Darrow*, the Supreme Court endorsed the Workers' Compensation Appeals Commission writing implied language into a statute in order to carry out the legislative intent. A similar approach is indicated here. Therefore, in consideration of this analysis, it is prudent to construe AS 23.30.105(a) to bar "compensation for disability [*or impairment*]," unless a claim is filed "within two years after the employee has knowledge of the nature of the employee's disability [*or impairment*] and its relation to the employment and after disablement [*or impairment*]." AS 23.30.105(a) (emphasis added). Such a construction gives effect to the legislative intent of both AS 23.30.395(16) and AS 23.30.105(a), and invalidates neither. *Anderson*; *Mechanical Contractors*. For these reasons, the two-year period at AS 23.30.105(a) is applicable to Employee's claim for additional PPI and AS 09.10.100 will not be applied.

Employee filed his initial claim for additional PPI some 16 years after the PPI ratings giving rise to this dispute. Employer acknowledges limitations statutes are generally disfavored, *Tipton*, but contends this case exemplifies why they were created, *Vereen*. It contends Dr. Cobden is retired, Dr. Joosse is retired, and memories fade with time. Consequently, it contends this case involves a stale issue that should be time-barred. *Horton*; *Egemo*; *Gonzales*. One need look no further than the testimony of Employer's former adjuster to understand Employer is correct, where she repeatedly remarked, "It's been a lot of years," "Boy, you're going back a long way," and "this was a lot of years ago." She testified she *thinks* she paid the lower PPI rating and *does not recall* if Employee complained at the time about being paid the lower rating. Other testimony elicited from Employer's former adjuster was speculative and of little use, *i.e.*, she "*might have*" begun advance payments of PPI in September 2000 because Employee had undergone surgery and was in job retraining, and "*perhaps*" Employee had a doctor's visit around September 2000 where there was an indication Employee was medically stable.

Neither is there any "latent defect" that would toll time, as Employee contends. *Collins*; *Bateman*. Employee initially claimed he was rated under the "wrong" edition of the *Guides*.

However, both Dr. Goldthwaite's and Dr. Cobden's ratings expressly cite the edition from which they were derived, and each was based on the appropriate edition at the time the ratings were performed. Later, at hearing, Employee alternatively contended, it was not clear which rating was the "correct" rating. However, it is immanently clear to anyone who is not under a legal disability, and even to most who are, that Dr. Cobden's 23 percent rating represents a lesser benefit than Dr. Goldthwaite's 30 percent rating, such that Employee should have sought assistance in determining which of the two was the "correct." *Rogers & Babler*. Had Employee done so, both Dr. Goldthwaite and Dr. Cobden would have been available to explain the basis of their opinions, and an SIME might have been of assistance in resolving disputes concerning medical stability and PPI. However, after the passage of so many years, and as demonstrated by the testimony of Employer's former adjuster, Employer's ability to defend Employee's claim has been prejudiced. *Vereen*. Employee's claim for additional PPI is time-barred by AS 23.30.105 and his claim for this benefit will be denied.

3) Is Employee entitled to additional PPI?

For the reasons just stated, Employee is not entitled to additional PPI.

4) Is Employee entitled to penalties on late-paid transportation costs?

Here, Employee makes only a general contention he is owed penalty on late-paid medical travel costs. He appended a spreadsheet to his hearing brief setting forth each travel cost he incurred, including line-items for meals, parking, gasoline, hotels, airline tickets, car rentals, etc., over the course of four separate trips to see his surgeon in California, and requests this panel "verify . . . and calculate the outstanding penalty." However, his spreadsheet is largely illegible. Employee does not articulate any specific argument why he would be owed penalty on even a single item on his spreadsheet, and according to Employer's adjuster, contends he is owed penalty on each and every travel expense, regardless of when reimbursements were actually made.

Unlike compensation payable under the terms of an award, when compensation is paid without an award, and regardless of controversion status, non-payment may be excused "after a showing

by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for payment." AS 23.30.155(e). The testimony of Employer's current adjuster made just such a showing, save for a single item. It was entirely appropriate for Employer to have questioned Employee's rental of a brand-new, convertible, Camaro while visiting the San Francisco on medical travel from Alaska, and an airline seat upgrade on that same trip. 8 AAC 45.084(c). It was equally appropriate for Employer to question the medical necessity of Employee getting an apparent foot message at the airport, AS 23.30.095(a), or the necessity of double-booked hotel rooms, 8 AAC 45.084(e). Employer's current adjuster requested explanations for these costs, which Employee has yet to provide, undoubtedly because no possible satisfactory explanations exist. Employer had no control over Employee incurring these costs or his inability to explain them, so its non-payment of these costs will excused. AS 23.30.155(e).

The rest of the disputed reimbursements are largely trivial, and all but one, are excusable. Items at issue include: a two-dollar tip, a five-dollar tip, a six-dollar tip, six dollars for airport parking, and most remarkable of all - a discrepancy of *five cents* at a coffee shop. The delay in payment for each of these items was due to either a lack of documentation from Employee or the poor quality copies he submitted, 8 AAC 45.084(e), also circumstances beyond Employer's control, AS 23.30.155(e). When legible documentation was provided, Employer timely paid these costs. AS 23.30.097(g).

The testimony of Employer's current adjuster evidences a basis for penalty on but one item – a $643.60 airline ticket. She testified she questioned whether an airline seat upgrade was an unnecessary or unreasonable cost and requested an explanation from Employee. Even though she never received an explanation from Employee, she ultimately reimbursed the cost of the $643.60 airline ticket, 120 days late under the Act, but not the seat upgrade, since Employee never provided an explanation for that cost. Employer's current adjuster did not add penalty to the airline ticket because of the lack of an explanation from Employee. Employer could have timely reimbursed the airline ticket while it inquired further about the circumstances of the seat upgrade. *Rogers & Babler*. Since it presented no evidence the airline ticket itself was not

properly reimbursable on a timely basis, a $160.90 penalty ($643.60 x 0.25) will be ordered on this item. AS 23.30.155(e).

5) Is Employee entitled to interest?

The Alaska Supreme Court has consistently instructed the board to award interest for the time-value of money, as a matter of course, *Rawls*, and interest awards are mandated by both statute and regulation, AS 23.30.155(p); 8 AAC 45.142(a). Accordingly, Employee will be awarded interest on the airline ticket.

6) Is Employee entitled to attorney fees and costs?

Employee initially claimed TTD, TPD, PPI, medical costs, including pre-authorization for surgery medical and treatment in excess of regulatory frequency standards, transportation costs, penalty and interest. Later, hearing issues were considerably narrowed to PPI and penalty on reimbursed medical travel costs. It is difficult to determine an appropriate fee award in a case such as this, where a claim is litigated for a year and a half, and after a full hearing, Employee is not awarded not a single benefit, and only a $160.90 penalty. Though Employee does not specify whether he is seeking attorney fees under AS 23.30.145(a) or (b), he apparently seeks $29,000 in attorney fees and costs under § 145(b) for the efforts of his attorney.

Determining an appropriate fee award is further exasperated by Employee's use of "block billing," so it is impossible to discern the amount of time spent on most tasks. Additionally, Employee's entries frequently fail to specify issues for which an activity was undertaken, such as "Legal research," "benefits calculations," and "Phone call with [Employer's attorney]." Moreover, many entries are for "Email correspondence," but do not specify whom the attorney is emailing or why. Furthermore, some paralegal time billed is for work that is clearly clerical in nature, such as "Organize new file," "scan documents," and "Print documents." Finally, other items are either cryptic, such as "case management," or for non-legal work, such as "staff instruction," "staff direction," and "staff discussion."

On November 29, 2017, Employer agreed to pay $5,032.33 in attorney fees for work performed in "pursuit of reimbursement of transportation costs on behalf of Employee." Those costs are the ones about which Employer's current adjuster testified, including the two-dollar tip, the five-dollar tip, the six-dollar tip, six dollars for airport parking, and the five-cent discrepancy from the coffee shop. Even when one considers Employee's success in obtaining reimbursement for the $643.60 airline ticket, this was not at all a good result in light of the other, highly valuable, benefits sought, yet the parties agreed Employee's fee award was appropriate for his efforts to date. *Childs*; *Adamson*. Similarly, at hearing, Employee sought a $9,450 PPI benefit ($135,000 x 0.07) and a $2,004.74 penalty on $8,018.95 in travel costs ($8,018.95 x 0.25), and was only awarded a $160.90 penalty. Again, not at all a good result, even though the hearing issues had been considerably narrowed. *Id.*; *McKinney*; *McCain*.

The nature, length and complexity of the professional services performed on Employee's behalf in this case was not great. *Bignell*; *Lewis-Walunga*. The award here simply resulted from Employee's attorney filing a claim, copying receipts from each of Employee's four trips, filing them on serial notices of intent, and then waiting for Employer's current adjuster to investigate and see which costs might have been unpaid, late-paid, or underpaid. Based on the number and amount of receipts filed, Employee was almost wholly unsuccessful in his efforts to secure penalties, and the results obtained required little legal expertise or work. It was only through Employer's current adjuster's diligent and time consuming investigation, and this panel efforts to "verify . . . and calculate the outstanding penalty," that a penalty was accessed.

On the other hand, attorneys' fees awards should ensure competent counsel is available to injured workers, especially in cases such as this, where there is a legitimate legal interest to be protected, but protection of that interest may result in a relatively modest award of penalties and interest. *Bignell*. From the date of the parties' stipulation, through hearing, Employee claimed an additional $8,636.25 in both attorney fees *and* paralegal costs. However, Employee's paralegals did not submit the requisite fee affidavits, and since some work performed was clearly clerical in nature, $993.75 in paralegal costs will be deducted, for a difference of $7,642.50. 8 AAC 45.180(f)(14)(C), (D). Based on the considerations set forth in the preceding paragraphs, Employee's attorney's fees will be reduced 50 percent and he will be awarded $3,821.25 in

attorney's fees, and all his costs of $374.33, for a total of $4,195.58. *Turner*; *McKinney*; *McCain*.

CONCLUSIONS OF LAW

1) Employer's AS 09.10.100 defense may be considered.

2) Employee's claim for additional PPI is statutorily time-barred.

3) Employee is not entitled to additional PPI.

4) Employee is entitled to penalty in the amount of $160.90.

5) Employee is entitled to interest on the $643.60 airline ticket.

6) Employee is entitled to $4,195.58 in attorney fees and costs.

ORDER

1) Employee's September 5, 2017 claim is granted in past and denied in part.

2) Employer shall pay Employee penalty and interest in accordance with this decision.

3) Employer shall pay Employee attorney fees and costs in accordance with this decision.

Dated in Fairbanks, Alaska on May 9, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Lake Williams, Member

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 SHAWN MURPHY, employee / claimant; v. FAIRBANKS NORTH STAR BOROUGH, employer; FAIRBANKS NORTH STAR BOROUGH, insurer / defendants; Case No. 199806756; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on May 9, 2018.

/s/
Ronald C. Heselton, Office Assistant II