

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

ANDREW LAYMAN,)
)
Employee,)
and)
)
EDWARD BARRINGTON, D.C.,)
) FINAL DECISION AND ORDER
Claimant,)
) AWCB Case No. 201518372
v.)
) AWCB Decision No. 18-0059
BETHEL NATIVE CORPORATION,)
) Filed with AWCB Fairbanks, Alaska
Employer,) on June 25, 2018
and)
)
COMMERCE AND INDUSTRY)
INSURANCE COMPANY,)
)
Insurer,)
Defendants.)
)

Edward Barrington, D.C.'s (Claimant) August 9, 2017 claim was heard on May 10, 2018, in Fairbanks, Alaska, a date selected on March 7, 2018. Attorney John Franich appeared and represented Andrew Layman (Employee). Attorney Aaron Sandone appeared and represented Bethel Native Corporation and Commerce and Industry Insurance Company (Employer). Claimant represented himself. On April 16, 2018, Employer paid Claimant's initial claim for \$1,470. On May 4, 2018, Employer paid him \$46.72 in interest. Claimant asserted in his hearing brief he was entitled to penalties, additional interest and costs and the parties stipulated to addressing this issue at hearing. At hearing, Claimant offered to submit a more detailed cost breakdown after the hearing and Employer objected. An oral order granted Claimant's request

and the record remained open for two weeks post hearing, allowing Claimant one week to submit a detailed cost explanation and Employer a week to respond. Witnesses included Claimant and his office manager Maureen Wilson. The record closed on May 24, 2018, after the parties submitted their briefing.

ISSUES

Claimant contended he did not know he had to provide a formal cost break down. Claimant contended he spent a lot of time providing information to Employer in this case and objected to a decision that did not consider an explanation of his costs. Claimant contends the oral order which left the record open for two weeks post hearing, allowing Claimant one week to submit a detailed cost explanation and Employer a week to respond was proper.

Employer objected to additional briefing. Employer contended it asked how Claimant reached his costs before hearing. Employer contended Claimant stated he was ready to go hearing and therefore his costs should be denied.

1) Was the oral order leaving the record open for additional briefing correct?

Claimant contends he is entitled to penalties, additional interest and costs because he had to go beyond his normal efforts in securing payment for his claim.

Employee contends Claimant is entitled to a penalty based on the date the controversion was served and the fact that the Claimant provided medical treatment in good faith. Employee contends Claimant should receive interest on the penalty starting from the date the penalty was due. Employee took no position regarding costs.

Employer contends Claimant is not entitled to a penalty because a valid controversion was served upon him. It contends no penalty is owed until an order awards the penalty, so no interest can be due on a penalty. Employer contends Claimant is not entitled to costs because Claimant has not outlined the specific costs in accordance with 8 AAC 45.180(f).

2) Is Claimant entitled to penalties, additional interest and costs?

FINDINGS OF FACT

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

- 1) On July 15, 2015, Employee injured his left foot while working for Employer. (Report of Occupational Injury or Illness, November 20, 2015; Petition to Correct Date of Injury, September 26, 2017; Answer (Non-Opposition), October 16, 2017).
- 2) On January 24, 2017, Employee saw orthopedic surgeon Amit Sahasrabudhe, MD, for an employer's medical examination (EME). In response to Employer's question, "Do you anticipate that the work injury will result in any ratable permanent impairment?" Dr. Sahasrabudhe stated, "The work injury has not resulted in a ratable permanent impairment. The basis for this is the lack of any significant abnormal findings on examination." (EME, January 24, 2017).
- 3) On April 13, 2017, Employer sent Employee's treating physician, podiatrist Manx Quayle, DPM, a letter, asking, "Would you please provide your opinion as to whether you agree with Dr. Sahasrabudhe that [Employee's] work related injury with [Employer] did not result in any ratable impairment?" Dr. Quayle checked the "yes" box. (Letter, April 13, 2017).
- 4) Dr. Quayle did not actually exam and perform an impairment rating on Employee. (Record, Observation).
- 5) On May 2, 2017, Employer denied the following benefits: temporary total disability (TTD) benefits after January 24, 2017, permanent partial impairment benefits (PPI), and reemployment benefits. The denial cited the opinions of Dr. Sahasrabudhe and Dr. Quayle. (Controversion Notice, May 2, 2017).
- 6) On May 22, 2017, Employee, *pro se*, claimed PPI benefits, review of the reemployment eligibility decision and a second independent medical examination (SIME). (Claim, May 22, 2017).
- 7) On June 13, 2017, Employer filed an answer to Employee's May 22, 2017 claim and denied it again, citing the same reasoning given in the May 2, 2017 denial. (Answer; Controversion Notice, June 13, 2017).
- 8) On June 26, 2017, Employer specifically denied for the first time, the PPI rating itself, along with PPI benefits. Employer also denied all benefits related to the right lower extremity

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after June 24, 2016, and all benefits related to the left lower extremity after June 9, 2017. (Controversion Notice, June 26, 2017).

9) On July 5, 2017, Dr. Quayle referred Employee to Claimant. (Consultation Request, July 5, 2017).

10) On July 14, 2017, Employer filed another controversion. Claimant is listed on the certificate of service. However, Ms. Wilson testified Claimant's office did not receive this controversion. (Controversion Notice, June 14, 2017; Wilson, May 10, 2018).

11) Ms. Wilson's testimony is credible. It is possible the controversion was lost in the mail. (Observations; Inferences drawn from experience; Wilson, May 10, 2018).

12) On July 18, 2017, Claimant examined Employee and gave him a 1 percent whole person PPI rating for chronic left foot tendinosis. (Physician's Report, July 19, 2017).

13) On August 7, 2017, Claimant received a copy of the June 26, 2017 controversion. This is the first controversion notice Claimant received. (Observation; Wilson, May 10, 2018).

14) On August 10, 2017, Claimant filed a claim for \$1,470 in medical costs for the July 18, 2017 PPI rating. (WCC, July 18, 2017).

15) On August 29, 2017, Employer answered and denied Claimant's claim based on Drs. Sahasrabudhe's and Quayle's opinions that Employee did not sustain a PPI rating. (Answer; Controversion Notice, August 29, 2017).

16) On November 14, 2017, Employee saw Carol Frey, MD, for an SIME. Dr. Frey did not give Employee a PPI rating because she found he was not medically stable. Dr. Frey stated she does not agree with the EME's opinion the work injury resolved without any PPI as Employee is still suffering from peroneal tendon, longus, tendinosis, especially in the area of the cuboid tunnel. (SIME Report, December 12, 2017).

17) On March 7, 2018, the parties scheduled a hearing. The only issue for hearing was Claimant's \$1,470, July 18, 2017 bill for performing the PPI rating. (PHC Summary, March 7, 2017).

18) On April 16, 2018, Employer paid Claimant \$1,470. (Employer's Hearing Brief, May 3, 2017).

19) On April 23, 2018, Claimant acknowledged payment, but said he wanted to move forward regarding costs, and presented Employer a \$1,542 cost bill. (Cost Bill, April 23, 2017; Employer's Hearing Brief, May 3, 2017).

20) The April 23, 2018 Cost Bill (Cost Bill 1) lists the following costs: legal services (paralegal to prepare) \$1,000 and other expenses (paper, copies and time) \$542, totaling \$1,542. (Cost Bill 1, April 23, 2018).

21) On April 23, 2018, Employer asked Claimant who the paralegal was and whether they were employed by an attorney, and cited the costs regulations, 8 AAC 45.180(f). (Employer's Hearing Brief-Exhibit 7, May 3, 2017).

22) On May 1, 2018, Claimant filed a cost bill (Cost Bill 2) in the amount of \$932. The April 24, 2018 cost bill lists the following costs: \$367 in penalties, \$500 in costs, and \$65 in interest. (Cost Bill 2, April 24, 2018).

23) Claimant runs a medical office and while he is used to some delay in payment of workers' compensation claims because of the legal aspect of those claims, he had to go way beyond his normal efforts in securing payment for this claim. Claimant said Employee was sent to him on a referral from his treating provider and no matter what his findings were, the bill should have been paid in a timely fashion. Unfortunately, this has stretched on for a very long period. He is therefore seeking penalty, additional interest and costs, which he will leave to the board's discretion. He is not a law firm and may have erred in not securing a paralegal and struggling through this process, but everything is a learning experience. He has been awarded penalties in the past and thinks it is certainly appropriate in this case. (Claimant, May 10, 2018).

24) Ms. Wilson is Claimant's office manager. The \$367.50 in penalties is derived by charging 25 percent of the original bill. The \$500 in costs is derived from postage, copies, phone calls, and travel back and forth to the workers' compensation office in Anchorage to get information and to file papers, and participation in a prehearing. Ms. Wilson acknowledged she originally asked for more fees, but has rescinded that request after Employer told her she was not entitled to those fees because Claimant did not have an attorney or a paralegal. She then revised and re-submitted the cost bill. She does not have the qualifications of a "legal person." She has been doing this from the information she received from the workers' compensation office. The additional \$19.44 in interest is derived by charging 4.75 percent for nine months and is charging interest based on the \$367 penalty. Ms. Wilson testified she did not receive a controversion notice until August 7, 2017. She does not have the July 14, 2017 controversion notice in her file. She sent the bill out on July 21, 2017. Employer sent everything back without an explanation as to why they were not paying it. (Wilson, May 10, 2018).

25) When questioned on specific costs, Ms. Wilson offered to provide a better cost break down. Employer objected to this and contended Claimant stated he was ready to go to hearing and therefore if he did not provide an adequate cost break down, the costs should be denied. Ms. Wilson testified she was not informed she had to have a cost break down. Claimant contended he objected to a judgment that did not consider an explanation of his costs. Employer contended it provided the cost regulation to Claimant before hearing. (Hearing arguments, May 10, 2018).

26) Employer contends it issued a valid controversion and the controversion is still in effect denying all benefits. The controversion was filed on July 14, 2017, and sent to Claimant before he performed the PPI rating. Employer subsequently received a bill for Claimant's PPI rating on a case in which it had denied all benefits. The Employer also sent Claimant a copy of the June 26, 2017 controversion, which he received on August 7, 2017. Employer additionally sent Claimant another controversion on August 29, 2017. Employer's position is the injury resolved prior to Claimant's PPI evaluation. No decision has been rendered on the case's merits and the parties have a mediation scheduled for May 14, 2018. Employer decided to voluntarily pay the PPI bill and thought this hearing would be canceled. Claimant instead came back with penalty, additional interest, and costs. Employer contends penalties are not owed because a valid controversion was filed. Employer received Claimant's bill on July 28, 2017, and paid interest at 5 percent beginning 30 days from when it received the bill until the bill was paid on April 16, 2017, totaling \$46.72. Employer contends Claimant is not entitled to any costs because he did not comply with the regulation and just claimed a \$500 flat fee. Employer will reimburse proven postage and copy costs, but Claimant never previously provided appropriate evidence. Employer objected to Claimant's cost for participating in the prehearing and hearing on grounds it amounts to unauthorized practice of law and is not recoverable as a cost under the regulation. Additionally, it contends because a controversion had been issued, compensation is not due without an award and, therefore, no penalty is owed until awarded and no interest can be due. (Hearing arguments, May 10, 2018).

27) Employee contends a penalty is due. If the July 14, 2017 controversion had been mailed as Employer contends, given that July 14, 2017 is a Friday and the services were performed on Tuesday, July 17, 2017, it is possible the controversion did not reach Claimant before he provided the services, so Claimant acted in good faith. Employee contends Claimant should

receive interest on the penalty starting from the date the penalty was due. (Hearing arguments, May 10, 2018).

28) All witnesses were credible. (Experience and judgment, May 10, 2018).

29) The chair left the record open for two weeks to allow Claimant one week to submit a detailed cost explanation and to give Employer a week to respond. (Oral order, May 10, 2018).

30) On May 16, 2018, Claimant filed an additional cost explanation and requested \$550 in costs (Cost Bill 3). This is \$50 higher than Cost Bill 2. Cost Bill 3 breaks down as follows: \$150 for traveling to the hearing, \$25 in long distance calls (5 calls at \$5 per call), and copies and postage in the amount of \$375 (1,497 copies at .25 cents per copy and \$1 postage for mailing). The cost bill states these costs were arrived at by a fee schedule the office uses for legal participation. Travel to the hearing is a flat fee they charge for travel in the local vicinity. The fee for phone calls and copies is based on the Alaska Court System Model. (Cost Bill 3, May 16, 2018; Observation).

31) On May 23, 2018, Employer opposed Claimant's request for costs and renewed its objection that the costs have not been proven with any specificity or backed up with any receipts or documentation showing actual costs. It contends this was an opportunity to explain costs, not increase them. Employer contends there is no flat fee permitted under the regulation for someone traveling to prehearings and moreover, this hearing took place in Fairbanks and the parties participated telephonically. Further, any claims for "time" reimbursement would be considered unauthorized practice of law and not recoverable. Employer objects to a flat fee for phone calls as excessive and not supported by actual costs, as there were only two prehearings and one hearing. It also objects to the amount of copies as excessive and unreasonable given that Claimant filed a total of 60 pages worth of documents and filed those electronically. (Opposition, May 23, 2018).

32) None of the cost bills submitted by Claimant comply with 8 AAC 45.180(f). (Observations; Inferences drawn from experience).

33) On May 25, 2018, the day after the record closed, Claimant filed a reply to Employer's May 23, 2018 objection to those costs. (Cross Reply Brief on Costs for Layman, May 25, 2018; Observation).

34) On May 25, 2018, Employer objected to the cross reply brief and contends it is outside the responses ordered at hearing. (Objection, May 25, 2018).

35) Any briefing filed after the record closed on May 24, 2018, is untimely and this decision will not consider it. (Experience, judgment), May 10, 2018).

PRINCIPLES OF LAW

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.

AS 23.30.005. Alaska Workers' Compensation Board. . . .
....

(h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment....

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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 held the purpose of AS 23.30.155 is clear: “It is an incentive to employers to make prompt and timely compensation owing to employees. The importance to the worker, whose means of support is more often than not composed mainly of his wages, of receiving compensation without delay cannot be overemphasized. The injured worker, depending on his circumstances, typically cannot afford time away from the job without periodic and prompt compensation.” *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1191 (Alaska 1984).

For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the board would find that the claimant is not entitled to benefits. *Harp v. ARCO*, 831 P.2d 352 (Alaska 1992).

AS 23.30.190. Compensation for permanent partial impairment; rating guides....

.....(b) All determinations of the existence and degree of permanent impairment shall be made strictly and sole under the whole person determination set out in

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the American Medical Association Guides to the Evaluation of Permanent Impairment....

The cost of the PPI rating is a medical cost, and should be paid by the employer. *Nunn v. Lowe's Co.*, AWCB Decision No. 08-0241 (December 8, 2008); *Johnson v. Custom Interiors by Day*, AWCB Decision No. 07-0005 (January 8, 2007); *Taylor v. Unisea, Inc.*, AWCB Decision No. 02-0110 (June 19, 2002). The law allows an injured worker to obtain a PPI rating from his attending physician or from a physician to whom he is referred by his attending physician. *Settje v. Stonebridge Hospitality Associates, LLC*, AWCB Dec. No. 10-0089 (May 20, 2010); *Abdullah v. Westward Seafoods, Inc.*, AWCB Dec. No. 10-0069 (April 19, 2010).

The Court accepted the board's advice to a claimant stating there “is certainly no prohibition barring the employee to seek a referral from an attending physician to a physician who may provide a rating with a different result than that of an EME physician. *Griffiths v. Andy's Body & Frame*, 165 P.3d 619, 621 (Alaska 2007). The *Griffiths* board held the employee was free to seek a rating from his own treating physician and could move to modify a Board ruling denying him benefits based upon a 0% rating attributed to an EME opinion (*id.* at 624).

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. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

(b) The employer shall pay the interest

(3) on late-paid medical benefits to

(C) to the provider if the medical benefits have not been paid.

8 AAC 45.180 Costs and attorney's fees. . . .

....

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing

each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim.....

ANALYSIS

1) Was the oral order leaving the record open for an additional briefing correct?

Claimant requested time after the hearing to explain his costs. Employer objected to this and contended it had asked Claimant for this information previously and the Claimant had stated he was ready to go hearing. Claimant is *pro se*. Claimant and Ms. Wilson are not attorneys, are not well versed in the process and did not understand the filing requirement for costs. It is the legislature's intent that hearings in workers' compensation cases are impartial and fair to all parties and all parties are afforded due process and an opportunity to be heard and their arguments and evidence fairly considered. AS 23.30.001. It was therefore correct to leave the record open to allow Claimant to explain his costs.

2) Is Claimant entitled to penalties, additional interest and costs?

It is undisputed Claimant's original bill was paid with 5 percent interest. Claimant contends he is still entitled to penalties, additional interest and costs. Employer disputes anything else is owed. Employee contends Claimant is entitled to penalties based on the date he was paid. Employer contends it filed a timely, valid controversion.

Employers are liable for penalties and interest on compensation not timely paid or controverted when due. AS 23.30.155(a), (e). The controversion must be valid. *Harp*. Employer appears to be combining Employee's right to have a PPI rating with a doctor of his choosing on referral and have that examination paid for, with Employee's request to be paid for the 1 percent rating he was given. They are separate and distinct benefits. The first is a medical service under AS 23.30.095(a) and the second is a benefit under AS 23.30.190. While Employer's objection to the one percent rating is clear based on the opinion of Dr. Sahasrabudhe that Employee did not sustain a PPI and Dr. Quayle's concurrence with that opinion, it is unclear what basis Employer is denying Employee's right to have the rating itself. Dr. Quayle never rated Employee. Claimant's rating of Employee is the first physician of Employee's choosing to rate him.

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Employer's controversion does not serve to controvert Employee obtaining a rating and a penalty is due. *Harp*. Interest is additionally owed on the penalty because compensation was not paid when due. 8 AAC 45.142.

Claimant contends \$550 in litigation costs are due, citing travel, long distance calls, copies, and postage. Employer objects to these costs contending they have not been proven with any specificity and are excessive and unreasonable.

A claimant will be awarded necessary and reasonable costs relating to the preparation and presentation of the issues upon which the claimant prevailed at the hearing on the claim. 8 AAC 45.180(f). The claimant must file a statement listing each cost claimed, and an affidavit stating the costs are correct and were incurred in connection with the claim. *Id.* The cost regulation does not require receipts. However, costs need to be plead with some specificity in order to determine whether they are reasonable, necessary, and in connection with the claim. Claimant's costs do not explain how many miles he traveled, what exactly he made copies of, who he called, what the postage was for, etc. Despite allowing the Claimant additional time to explain and support his claim for costs, they still have not been detailed enough to determine whether they are necessary and reasonable. Costs will therefore not be awarded.

CONCLUSIONS OF LAW

- 1) The oral order leaving the record open for additional briefing was correct.
- 2) Claimant is entitled to penalty and additional interest.
- 3) Claimant is not entitled to costs.

ORDER

- 1) Claimant's August 9, 2017 medical provider claim is granted in part.
- 2) Employer shall pay Claimant a penalty of \$367.50.
- 3) Employer shall pay Claimant interest pursuant to the Act.

Dated in Fairbanks, Alaska on June 25, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Kelly A. McNabb, Designated Chair

/s/ _____
Togi Letuligasenoa, 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 Andrew Layman, employee and Edward Barrington, D.C., claimant v. Bethel Native Corporation, employer; Commerce And Industry Insurance Company, insurer / defendants; Case No. 201518372; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on June 25, 2018

/s/

Nenita Farmer, Office Assistant