

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

HANS JACOBSON,)
) INTERLOCUTORY
 Employee,) DECISION AND ORDER
 Claimant,)
) AWCB Case No. 201612284
 v.)
) AWCB Decision No. 18-0105
 FAIRBANKS NORTH STAR BOROUGH,)
) Filed with AWCB Fairbanks, Alaska
 Self-Insured Employer,) October 15, 2018
 Defendant.)
)

Hans Jacobson's June 29, 2018 claim for attorney fees and costs was heard on September 13, 2018, in Fairbanks, Alaska, a date selected on August 20, 2018. Attorney John Franich appeared and represented Hans Jacobson (Employee). Attorney Michael Budzinski appeared and represented Fairbanks North Star Borough (Employer). On June 28, 2018, *Jacobson v. Fairbanks North Star Borough*, AWCB Decision No. 18-0063 (June 28, 2018) (*Jacobson I*) ordered a Second Independent Medical Examination (SIME). Employee seeks attorney fees and costs in connection with that decision. The record closed at the hearing's conclusion on September 13, 2018.

ISSUE

Employee contends he is entitled to attorney fees and costs because he was successful in obtaining an SIME over Employer's objection.

Employer contends Employee is not entitled to attorney fees and costs because although the SIME was ordered by the board, Employee's petition was denied as untimely. Employer also

contends attorney fees and costs should be awarded at the end of the case if Employee is successful on his claim.

Is Employee entitled to an award of attorney fees and costs at this time?

FINDINGS OF FACT

The following facts and factual conclusions are either undisputed, found by a preponderance of the evidence, or are reiterated from *Jacobson I*:

- 1) On August 12, 2016, Employee was working as a park ranger and reported his right knee buckled while running after trash. (Report of Occupational Injury or Illness, August 15, 2016).
- 2) On August 17, 2017, Employee, *pro se*, claimed temporary total disability benefits (TTD), permanent partial impairment (PPI), medical costs, and requested an SIME. (Workers' Compensation Claim, August 17, 2017).
- 3) On September 8, 2017 and September 12, 2017, Employer answered the claim and denied any benefits were due, and specifically denied an SIME was needed. (Answer, September 8, 2017; Controversion, September 12, 2017).
- 4) Employee subsequently hired counsel and on November 6, 2017, John Franich filed an entry of appearance for Employee. (Observation; Entry, November 6, 2017).
- 5) On April 16, 2018, Employee, now through counsel, filed a petition for an SIME. (Petition, April 16, 2018; Observation).
- 6) On April 23, 2018, Employee amended his claim to include attorney fees & costs. (Amended Claim, April 23, 2018).
- 7) On May 3, 2018, Employer opposed Employee's petition for an SIME. (Answer, May 3, 2018).
- 8) On June 1, 2018, Employer filed a hearing brief in *Jacobson I*. One of the arguments was that Employee's petition for an SIME was untimely. (Employer's Hearing Brief, June 1, 2018).
- 9) On June 4, 2018, Employee filed an affidavit of attorney fees in the amount of \$4,580. (Affidavit, June 4, 2018).
- 10) On June 7, 2018, a hearing was held on Employee's April 16, 2018 petition for SIME. At hearing, Employer objected to addressing Employee's affidavit for attorney fees at an interlocutory hearing and argued it should be addressed at the end of the case. The parties

stipulated to addressing attorney fees and costs after a decision had been issued on Employee's petition for SIME. (*Jacobson I*).

11) On June 28, 2018, *Jacobson I* issued and ordered an SIME. *Jacobson I* denied Employee's petition as untimely, but ordered an SIME under 8 AAC 45.092(g)(3)(B), finding the disputes to be significant and the case to be medically complex. (*Id.*).

12) On June 29, 2018, Employee filed a claim for attorney fees and costs in connection with *Jacobson I*. (Claim, June 29, 2018).

13) On July 9, 2018, Employee filed a supplemental affidavit of attorney fees, stating he has spent 5.8 hours solely on his prosecution of the SIME. He also requested 8.3 hours in paralegal costs and \$30 in costs for a copy of the file in the total amount of \$3,807.50. (Supplemental Affidavit, July 9, 2018).

14) On July 19, 2018, Employer denied the request for attorney fees and costs. (Answer, July 19, 2018).

15) On September 13, 2018, a hearing was held on Employee's June 29, 2018 claim for attorney fees and costs. (Record).

16) Employee contends attorney fees and costs are mandatory under AS 23.30.145(b) because he achieved an SIME over the objection of Employer and an SIME is a related benefit to Employee under AS 23.30.395(26). While the board procedurally denied the petition as untimely, the board would not have ordered an SIME, but for Employee taking the SIME petition to hearing. Another example where it is appropriate to award attorney fees during the case, is if counsel were to get a reemployment evaluation over Employer's resistance, even if Employee were found ineligible. Counsel was careful to include the work that was just related to the SIME petition in his supplemental affidavit. He spent an additional one hour reading Employer's brief, preparing for the hearing, and attending the hearing and would like to amend his request to include that hour. (Employee's Hearing Arguments).

17) Employer contends the petition for SIME was denied and the board ordered it on its own motion, so even if fees are awarded, they should be substantially reduced. Employer acknowledges that the board has awarded attorney fees in cases like this in the past, but argues that that does not make sense in a contingency fee system where the rates are enhanced, because the real claim in this case is the merits of the work injury. Employer contends SIME is not a benefit in the sense of the award of fees, because it is something either party can ask for, as it is a

discovery matter. However, Employer concedes that if Employee is successful in the end, he would be entitled to attorney fees on this issue, despite the definition of “medical and related benefits.” Employer contends it is no comfort to an Employee for their attorney to receive fees, when the Employee may not receive any benefits. Employee does not object to counsel adding an hour to the requested fees. Employer does not object to the fees as unreasonable. The only objection is the entry related to filing a medical summary, as that is a mandatory requirement and is not necessarily related to the SIME petition. (Employer’s Hearing Brief, September 5, 2018; Employer’s Hearing Arguments).

18) The June 29, 2018 supplemental affidavit of attorney fees contains a May 18, 2018 entry regarding the filing of a medical summary in the amount of \$140.00. (Supplemental Affidavit, July 9, 2018; Observation).

19) Employee’s counsel charges \$400 per hour. (Record; Observation).

20) The amount requested by counsel in attorney fees and costs before the hearing was \$3,807.50. If one hour of attorney fees at \$400 per hour is added per counsel’s request for hearing preparation and attendance, the total would be \$4,207.50. If the entry for preparing the medical summary was not awarded, as not part of the SIME petition, \$140 would be subtracted, resulting in the total amount of \$4,067.50. (Supplemental Affidavit, July 9, 2018; Observation; Inferences drawn from Experience, Judgment).

21) Many attorneys will not take cases before an Employee attends an SIME. (Observation; Inferences drawn from Experience, Judgment).

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;

(2) workers’ compensation cases shall be decided on their merits except where otherwise provided by statute.

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 23.30.005. Alaska Workers’ Compensation Board. . . .

. . . .

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

AS. 23.30.145. Attorney fees. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

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

AS 23.30.260. Penalty for receiving unapproved fees and soliciting. (a) A person is guilty of a misdemeanor and, upon conviction, is punishable for each offense by a fine of not more than \$1,000, or by imprisonment for not more than one year, or by both, if the person

(1) receives a fee, other consideration, or a gratuity on account of any services rendered for representation or advice with respect to a claim, unless the consideration or gratuity is approved by the board or the court....

AS 23.30.395. Definitions. In this chapter,

....

(26) "medical and related benefits" includes but is not limited to physicians' fees, nurses' charges, hospital services, hospital supplies, medicine and prosthetic devices, physical rehabilitation, and treatment for the fitting and training for use of such devices as may reasonably be required which arises out of or is necessitated by an injury, and transportation charges to the nearest point where adequate medical facilities are available....

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

In *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), the Alaska Supreme Court held "attorney's fees in workers' compensation cases should be *fully* compensatory and reasonable, in order that injured workers have competent counsel available to them." Nonetheless, when Employee does not prevail on all issues, attorney's fees should be based on the issues on which Employee prevailed.

In *McCain v. NANA Regional Corp.*, AWCB Decision No. 11-0025 (March 4, 2011), the board awarded attorney fees at the interim level under AS 23.30.145(a) for a successful request for an SIME, "Employee seeks actual fees under AS 23.30145(a) for the successful request for an SIME. Employer controverted Employee's claim and resisted Employee's request for an SIME. Because Employee's request for an SIME under AS 23.30.095(k) is granted here, an award fees and costs is proper under AS 23.30.145."

In *Stepanoff v. Bristol Bay Native Corp.*, AWCB Decision No. 09-0041 (February 26, 2009), the board awarded attorney fees at the interim level under AS 23.30.145(b) for a successful request

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for an SIME, “Under AS 23.30.145(b), attorney fees shall be awarded where “an employer . . . otherwise resists ... related benefits.” AS 23.30.145(b) does not limit the “related benefits” to those that benefit the employee. The board has awarded attorney fees in cases where an employer unsuccessfully resisted an SIME.” *See also, MacConnell v. Testamerica Laboratories Inc.*, AWCBC Decision No. 09-0156 (September 30, 2009) and *Crawford v. Graft Contracting LLC*, AWCBC Decision No. 10-00038 (February 23, 2010), where attorney fees were awarded at the interim level for prosecution of an SIME under AS 23.30.145(b).

In *Worman v. Wal-Mart*, AWCBC Decision No. 11-0026 (March 11, 2011), the board awarded fees under AS 23.30.145(b) for successful defense of an SIME request, “AS 23.30.145(b) does not limit attorney fee awards to only those cases where an employer resists paying compensation. Attorney fees are payable where an employer resists “related benefits” under the Act, and an employee hires an attorney who successfully defends on his or her behalf. The board has previously awarded attorney fees in cases where an employer unsuccessfully resisted an SIME. No persuasive argument has been made an injured worker is not entitled to the same relief when an employer unsuccessfully instigates and prosecutes a petition for SIME, particularly under the circumstances here, where Employer's EME ultimately confirmed the petition was baseless. Compensation is thereby due Claimant under AS 23.30.145(b) for her attorney's reasonable efforts in successfully defending against Employer's Petition for SIME, for an additional \$3,220.00.”

In *Gillion v. the Northwest Company International*, AWCAC Decision No. 253 (August 28, 2011), the Commission ordered attorney fees in relation to an SIME form dispute, “Until the Board ruled on the disputed separate SIME forms there was no jointly signed stipulation as required by the statute and, therefore, the SIME process could not have moved forward.... This resolution was required before the SIME could go forward. Having determined the two separate forms were equivalent to the required single form, the Board incorrectly decided Mr. Gillion was not entitled to attorney fees since he had not prevailed on having his requested language included on the form. Nonetheless, he did prevail on getting the Board to order the SIME process to move forward. Without his seeking a Board decision on the need for one jointly signed stipulation, the SIME process could not have taken place because there was no jointly signed stipulation.

Therefore, Mr. Gillion should be held to be the prevailing party on the issue of the SIME. He should be awarded attorney fees for the work in obtaining the ordered SIME.”

ANALYSIS

Is Employee entitled to an award of attorney fees and costs at this time?

AS 23.30.145(b) awards attorney fees when an Employer resists medical and related benefits. In this case, the Employer twice resisted Employee’s request for an SIME. Employee first requested an SIME when he was *pro se*. Employer denied this request. Employee then hired counsel, who filed a petition for an SIME, had to take the petition to hearing, in which an SIME was ultimately ordered. While the actual petition was procedurally denied as untimely, *Jacobson I* ordered an SIME as a direct result of Employee filing the SIME petition and taking it to hearing. *Rogers & Babler*. Employee presented the medical disputes for hearing and was instrumental in getting the SIME before a hearing on the merits. His efforts are distinguishable from a *sua sponte* SIME order at a hearing on the merits. *Id.*

Employer next contends an SIME is not a “related benefit” under AS 23.30.395(26). “Medical and related benefits” includes “but is not limited to” enumerated medical services. *Id.* Employee contends an SIME falls into this category because while the statute defines certain benefits, it leaves it open to include others by stating “includes but is not limited to.” *Id.* However, Employer concedes Employee would be entitled to attorney fees related to the SIME if he were successful on the merits of his claim, despite this definition.

Attorney fees have been granted previously at the interim level under AS 23.30.145(b) for successful prosecution of an SIME. *Stefano; MacConnell; Crawford*. Attorney fees have also been awarded for defense of an SIME request. *Worman*. Attorney fees have also been awarded for a dispute regarding an SIME form. *Gillion*. Attorney fees have also been granted previously under AS 23.30.145(a) for successful prosecution of an SIME. *McCain*.

Attorney fees are routinely awarded by stipulations throughout cases on interim issues. *Rogers & Babler*. Many attorneys will not take cases before an Employee attends an SIME. If an Employee is not successful in getting an SIME on their own, they may have to hire counsel. If Employer does not agree to pay attorney fees for the successful prosecution of an SIME petition, they must be ordered by the board. AS 23.30.260. Employee’s counsel was necessary in getting the SIME. Attorney fees in workers' compensation cases should be *fully* compensatory and

reasonable, in order to ensure injured workers have competent counsel available to them. *Childs*. An award of attorney's fees and costs is appropriate in this case.

Employee claims a total of \$4,207.50 in attorney fees and costs. Employer objects to \$140.00 of the paralegal costs for filing a medical summary and argues this is a mandatory action and not related to the prosecution of the SIME petition. This action, while necessary for the case as a whole, is not specific to the SIME prosecution. This \$140.00 paralegal cost shall be subtracted, resulting in the total award of \$4,067.50 in attorney fees and costs.

CONCLUSION OF LAW

Employee is entitled to an award of attorney fees and costs in accordance with this decision.

ORDER

Employee is awarded \$2,720 in attorney fees and \$1,347.50 in paralegal and other costs in the total amount of \$4,067.50.

Dated in Fairbanks, Alaska on October 15, 2018.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/
Kelly McNabb, Designated Chair

_____/s/
Togi Letuligasenoa, Member

_____/s/
Jacob Howdeshell, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of HANS JACOBSON, employee / claimant; v. FNSB, employer; FAIRBANKS NORTH STAR BOROUGH, insurer / defendants; Case No(s). 201612284; dated

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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 October 15, 2018.

/s/
Ronald C. Heselton, Office Assistant II

