ALASKA WORKERS' COMPENSATION BOARD

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

JOHN R. WOZNIAK,	)	
	)	
Employee,	)	FINAL DECISION AND ORDER
Claimant,	)	
	)	AWCB Case No. 201303191
v.	)	
	)	AWCB Decision No. 19-0044
STATE OF ALASKA,	)	
	)	Filed with AWCB Anchorage, Alaska
Self-insured Employer,	)	on April 5, 2019
Defendant.	)	
	)	

A remaining issue from John Wozniak's (Employee) April 18, 2018 claim was heard on March 7, 2019, in Anchorage, Alaska, a date selected on December 6, 2018. Employee's December 6, 2018 oral request for a hearing gave rise to this hearing. Attorney Burt Mason appeared and represented Employee who appeared by telephone. Attorney Adam Franklin appeared and represented the State of Alaska (Employer). Before hearing, the parties resolved all issues in Employee's April 18, 2018 claim except for attorney fees and costs. As preliminary matters at hearing, Employee did not object to supplemental evidence Employer filed on March 6, 2019, and Employer did not object to Employee's supplemental attorney fee affidavit filed at hearing, though both parties reserved their rights to disagree with the evidence's content. There were no witnesses. The record closed at the hearing's conclusion on March 7, 2019.

ISSUES

At hearing, Employee contended Employer's hearing brief contains confidential settlement discussions. He contends settlement discussions are not probative and are inadmissible as evidence. Employee seeks an order keeping this information out.

Employer concedes there are references to settlement discussions in its brief and oral argument. It contends the information is relevant and included only to show Employee's attorney's lack of credibility on the attorney fee issue, and is not offered for evidence of settlement discussions.

1) Should any settlement discussions be considered on the attorney fee and cost issue?

Employee contends his attorney performed valuable services in this somewhat complicated case. He contends his hourly rate and amount charged are reasonable and fully compensatory though he admits he may have made some arithmetic errors in his calculations. He seeks an order awarding full, reasonable attorney fees and costs.

Employer contends it does not dispute Employee is entitled to an attorney fee and cost award and the parties agree Employer has already sent Employee's attorney a check for $25,000. However, Employer contends this was not a complicated case, and Employee's attorney's billing practices are faulty, resulting in him charging attorney fees on dates when he actually did not perform any lawyer's services on this case. It contends the amount billed is excessive, Employee's lawyer made math mistakes in his affidavit and the attorney fee request overall is not reasonable. It seeks an order denying any additional attorney fees above the $25,000 already paid.

2) Is Employee entitled to attorney fees or costs?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On February 17, 2015, Employee sought permanent total disability benefits, temporary total disability benefits, past and future medical care, permanent partial impairment benefits when rated, and attorney fees and costs. (Workers' Compensation Claim, February 13, 2015).

2) On April 1, 2015, Employer denied Employee's claim, including specifically denying his claim for permanent total disability benefits. (Controversion Notice, April 1, 2015).

3) On February 17, 2016, the board approved a stipulation between the parties in which Employer stipulated to pay $13,022 to Employee, representing all past-due temporary total disability benefits plus penalties and interest. The stipulation also required Employer to initiate paying temporary total disability benefits effective February 26, 2016, and continue to pay these benefits in accordance with the Act. The parties stipulated to withdraw all previous claims and controversions effective February 17, 2016. The stipulation and order also required Employer to pay Mason $21,620 in attorney fees and costs through February 17, 2016, at a $400 per hour rate. (Stipulation Regarding the Payment of Benefits and Attorney Fees; Findings and Decision of the Alaska Worker's Compensation Board, February 17, 2016).

4) The parties agree all compensation was paid pursuant to the approved stipulation and order. (Parties' hearing arguments, March 7, 2019).

5) Between February 17, 2016 and March 8, 2018, Employer filed numerous medical summaries and Employee filed one on March 8, 2018. Employee filed no other documents during this period. (ICER's database, February 17, 2016 through March 8, 2018).

6) Between February 17, 2016 and February 15, 2019, vocational rehabilitation and reemployment efforts were underway. Mason filed a response he received from Employee's attending physician stating Employee was not currently able to participate in a reemployment plan. Employer's counsel communicated with the reemployment specialist assigned to create a retraining plan for Employee and eventually asked for an informal reemployment conference. The various entries during this period reflect Employer's efforts to move Employee's reemployment plan development forward. There is no evidence Employer was resisting paying reemployment-related benefits to Employee and no evidence Employee was moving the reemployment process forward or obstructing it. (ICERS Reemployment, February 17, 2016 through February 15, 2019).

7) Between February 17, 2016 and March 26, 2018, Employer had no controversion in effect, having withdrawn all controversions effective February 17, 2016, and was not resisting any benefit payments to which Employee might have been due. (Stipulation Regarding the Payment of Benefits and Attorney Fees; Findings and Decision of the Alaska Worker's Compensation Board, February 17, 2016; agency file; observations).

8) On April 9, 2018, Mason received a letter from Employer's lawyer rejecting his proposal to have Employer accept Employee as permanently and totally disabled. (Statement of Legal Services Rendered, February 28, 2019).

9) On April 9, 2018, Employer began resisting accepting Employee as permanently and totally disabled. (Experience, judgment, observations and inferences drawn from the above).

10) On April 18, 2018, Employee claimed permanent total disability or in the alternative temporary total disability or permanent partial impairment benefits as well as medical care, interest and attorney fees and costs. Employee based his claim on his contention there was no realistic treatment options available and he was, therefore, totally disabled. (Workers' Compensation Claim, April 18, 2018).

11) On April 24, 2018, Employer in response to the claim said, among other things, "Employer denies no realistic treatment options exist for Employee"; "Employer denies Employee is totally disabled"; "Employer denies Employee cannot participate in reemployment"; "Employer denies Employee cannot be gainfully employed"; and "Employer maintains Employee may have unreasonably refused to submit to medical treatment." (Employer's Answer to Employee's April 18, 2018 Claim, April 24, 2018).

12) Between April 24, 2018 and February 26, 2019, Employee filed no documents with the board in this case but contends his attorney continued developing his claim. (ICER's database; Employee's hearing arguments, March 7, 2019).

13) On or about February 26, 2019, Employer "accepted Employee is permanently and totally disabled." (Notice Regarding Issues for Hearing, February 26, 2019).

14) On February 28, 2019, Mason filed a fee affidavit totaling 130.6 hours at $400 per hour requesting $52,240 in total attorney fees and $727.91 in litigation costs. Mason's attorney fee affidavit spanned from February 19, 2016 through February 28, 2019. (Statement of Legal Services Rendered, February 28, 2019).

15) During the times requested in the February 28, 2019 fee affidavit, Mason performed some duties secretarial or paralegal in nature. Some entries were block billed making it difficult to determine how much time Mason spent on any particular task. Some requested hours will be reduced to reflect either secretarial or paralegal duties or block billing. The June 19, 2018 request for eight hours for attending his client's deposition is reduced based on Mason's admission at hearing that he probably should have brought additional work with him to do after Employee's

deposition was over. Based on experience, judgment, observations and inferences drawn from all the above, the following fully compensable attorney fees were reasonably and necessarily incurred in obtaining benefits for Employee during a period while Employer otherwise resisted payment of permanent total disability compensation:

Table I

Date Services Rendered	Explanation	Hours Requested	Hours Awarded
4/9/18	Review letter from ER rejecting offer	.2	.2
4/17/18	T/C with EE re-rejection of offer; file PTD claim; review file; prepare claim and summary	2.8	2.8
4/18/18	Review letter from RBA; letter to RBA; review email re-EME; T/C with EE	1.4	1.4
4/23/18	Extended T/C with EE; review letter re-EME; review medical summary and records	1.1	1.1
4/25/18	Review letter re-EME; review plan update; review pleadings from oh/C; T/C with EE	1.3	1.3
4/30 - 5/1/18	Emails to and from oh/C; review medical summary and records	.6	.6
5/7/18	Review demo notice; T/C with O/C; T/C with EE	.5	.5
5/14/18	Receive medical summary and review records	.3	.3
6/3/18	Receive medical summary and review EME report	1.4	1.4
6/17/18	Travel to Kenai for EE deposition	3.5	3.5
6/18/18	Prepare for deposition of EE; review case	3.8	3.8
6/19/18	Participate in EE's deposition; review file and conference with client	8.0	3.0
6/20/18	Return travel from EE's deposition	3.5	3.5
7/26/18	Review file; T/C with EE; research on surgical issues	3.8	2.0
7/28/18	Review meds summary and records; research on surgical issues	1.8	.5
9/26/18	T/C with EE re-claim status, surgery, settlement and hearing	.4	.4
10/24/18	Review file and prepare ARH for PTD claim	1.2	.5
11/11/18	Review opposition to ARH	.1	.1
11/12/18	Review copy of letter to Tamara and meds summary; study and make notes to file regarding impact on settlement; extended T/C with EE	2.5	1.0
11/14/18	Review file; prepare request for conference	.3	.3
12/6/18	Prepare for and attend PHC; T/C with EE	1.2	1.2
12/12/18	Review PHC; no deadlines; counter PHC	.6	.6
1/4/19	Receive letter with emails; review objections PHC; letter to O/C; T/C with EE; review compensation report	1.8	1.8

1/9/19	Review medical summary and records	.3	.3
1/17/19	Review email from oh/C re-EME; T/C with EE; T/C with O/C	.8	.8
1/24/19	T/C with EE re-EME; T/C to O/C; notes to file	.5	.3
1/25/19	Review file and prepare for hearing; outline hearing brief; T/C with O/C; T/C with EE	3.7	3.7
2/5/19	Review email; T/C with EE resettlement; prepare stipulation to resolve PTD; email to O/C	1.8	1.8
2/7/19	Receive email from O/C re-stipulation; some reply	.3	.3
2/13/19	T/C with O/C re-stipulation versus C&R; revised stipulation; email to O/C	.9	.9
2/14/19	T/C with EE re-rehab conference; participate in rehab conference; notes to file an emails to and from O/C	.9	.9
2/15/19	Emails to and from O/C resettlement; T/C with EE	.5	.5
2/16/19	Review file re-billings; detailed email to O/C	1.3	1.3
2/26/19	Review file; outline hearing brief; draft hearing brief	1.5	1.5
2/27/19	Work on hearing brief; research	5.0	5.0
2/28/19	Finished brief	2.3	2.3
Total awarded			**51.4**

16) On March 6, 2019, Employer filed several documents for consideration at the March 7, 2019 hearing. These documents, to which Employee had no procedural objection, include:

- Mason's supplemental fee schedule.
- Franklin's October 24, 2018 letter to Elisa Lear-Rayborn, DPM, seeking referral to a medical professional to treat Employee's injury.
- Franklin's October 24, 2018 letter to Jennifer Jansma, DPM, seeking referral to a medical professional to treat Employee's injury.
- A November 5, 2018 email from Franklin to Alaska Neurology Center asking if the clinic can perform diagnostic testing on Employee.
- A November 6, 2018 email from "Rose" at Alaska Neurology Center to Franklin stating her clinic could perform certain testing for Employee.
- Franklin's November 8, 2018 letter to PA-C Tamara Brothers-McNeil, seeking information about potential, evidenced side effects from Employee's medications.
- Franklin's November 8, 2018 letter to Jared Kirkham, M.D., inquiring if Dr. Kirkham can evaluate Employee's peroneal nerve or refer him to someone who can.

- A November 13, 2018 letter from Shawn Johnston, M.D., to Franklin recommending Employee go to a tertiary care center like the University of Washington for additional testing and possible surgery.
- Franklin's November 28, 2018 letter to Jeffrey Jarvik, M.D., inquiring if Dr. Jarvik can evaluate Employee's peroneal nerve or refer him to someone who can.
- Franklin's December 10, 2018 email to Mason listing physicians who said they would evaluate and possibly treat Employee's peroneal nerve issue and offering to pay costs related to such evaluation.
- Franklin's December 10, 2018 email to Mason asking him to respond to his same-dated email within two weeks.
- Franklin's December 26, 2018 letter to Mason following up on his December 10, 2018 letter discussing an appointment for Employee to obtain additional evaluation and testing.

17) On March 6, 2019, Mason intended to file a supplemental attorney fee itemization, to which Employer ultimately had no procedural objection, but accidentally refiled his April 18, 2018 claim. (Employee's hearing arguments; experience, judgment and inferences drawn from the above).

18) At hearing on March 7, 2019, Mason submitted an affidavit for additional attorney fees. Employer did not object to these. Amounts in the right column are found reasonable:

TABLE II

Date Services Rendered	Explanation	Hours Requested	Hours Awarded
3/4/19	Read and study ER's hearing brief; make notes re-objections	1.7	1.7
3/5/19	Prepare opening and closing argument	1.3	1.3
3/6/19	Review *Harnish*; modify closing argument	.4	.4
Total		**3.4**	**3.4**

(Supplemental Statement of Legal Services Rendered, March 6, 2019).

19) Employee contends though Employer paid benefits under the February 17, 2016 stipulation, his leg condition "had a future that had not been resolved." He contends Employer previously controverted his claim for permanent total disability benefits and clearly Employer did not consider him permanently and totally disabled. Mason contends he spent considerable time counseling with Employee, who takes blood thinners, to determine whether or not surgery on his knee was the best option given risks associated with bleeding. Mason contends he did significant Internet research

attempting to identify a physician who could perform peripheral sensory nerve repair on Employee's knee. He was unsuccessful in locating a surgeon who would perform the procedure. Meanwhile, Employee contends Employer moved ahead with reemployment plan development, which also proved unsuccessful. When evidence showed Employee might be permanently totally disabled, Mason attempted to obtain agreement from Employer on Employee's status. When this proved unsuccessful, Employee filed his April 18, 2018 claim. Employee contends, even after receiving an unfavorable evaluation from its physician, Employer continued to resist paying him permanent total disability benefits. Eventually, Employer sent Mason an email accepting Employee as permanently and totally disabled. (Employee's Hearing Brief, February 28, 2019).

20) Employer contends it has not controverted Employee's most recent claim or failed to pay any benefits. Employer paid Mason $25,000 in attorney fees and costs for his representation since February 16, 2016. Thus, Employer contends the real issue is whether Mason is entitled to additional fees for services rendered after February 16, 2016. It contends Mason did nothing to assist Employee in obtaining any reemployment benefits. Similarly, Employer contends Mason did nothing to communicate Employee had no desire or ability to complete the plan or that he could not participate in one. It contends Employee's real claim, and the only claim on which Employee's attorney obtained a benefit, is that Employer did not voluntarily convert Employee from temporary total disability benefits to permanent total disability benefits in April 2018. Employer contends it could not convert Employee to permanent total disability status any sooner than it has, as a matter of law. Specifically, it contends Employee elected to pursue reemployment benefits and pursuant to statute, employer could not consider him permanently and totally disabled so long as he was involved in the reemployment process. Employer contends Mason made no attempt to terminate the reemployment process or even ask the specialist to close his file. It also contends Employee was not permanently totally disabled earlier because his doctors recommended additional medical treatment that may have changed his medical status and ability to work. Specifically, Employee's treating physicians recommended an evaluation for peroneal nerve release surgery. Employer contends not only did Employee never state he did not want to obtain the surgery, he stated at deposition in response to Mason's question that he wanted to be evaluated for the surgery. Employer contends Employee and his attorney made no attempt to pursue this treatment or obtain an evaluation. Consequently, Employer contends it undertook a search for a medical provider but could find none. It contends that once it found no medical provider willing

to treat Employee it "gave up" on helping Employee obtain medical treatment to resolve his chronic nerve pain and converted him to permanent total disability status. Employer contends Mason should not be compensated for answering Employee's questions or providing "medical advice." Employer further contends Mason's fees are not reasonable or commensurate with any benefits obtained and do not represent Mason's actual hours worked. It contends Mason overcharges per hour and should be limited to $375 rather than the requested, new $400 per hour rate for work on this case. It concedes while Mason has considerable experience in workers' compensation law, he has not been representing injured workers the entire time. Further, Employer contends Mason should not bill paralegal or legal secretary duties at an attorney rate. Lastly, Employer contends Mason "churned hours" and his billing practices "lack credibility." It specifically objects to numerous entries, as set forth in Employer's brief. The objections range from "churning" fees to spending too much time on a simple issue, to performing secretarial or paralegal duties to claiming fees when no work was done, as on the date Employer took Employee's deposition which Employer contends took only 2.5 hours and Mason billed eight hours on that date. (Employer's Hearing Brief, February 28, 2019).

21) Mason was licensed to practice law in 1979 and began representing insurance companies in workers' compensation cases in 1980, which is 39 years ago. He contends Joe Kalamarides is the only practicing attorney with more experience in workers' compensation law in Alaska than he has. Mason's fees are contingent because in this practice area, you "win some and you lose some." He spends "an awful lot of time" speaking to potential clients. Mason tries to help injured workers understand the law but frequently ends up not representing them; he gets no attorney fees for these cases. He represents clients statewide; some he has never met. Injured workers in Alaska have difficulty finding an attorney to represent them in their claims. Mason contends he represents some people he probably should not represent because their cases are "not that good." Nevertheless, he contends he provides a valuable service to injured workers who would otherwise go without advice or get no "cash in their pockets." In some cases, he contends his net fee may be $20 to $40 per hour. On the other hand, Mason contends when he has a "strong case," and the employer concede benefits, he "gets paid handsomely" at $400 per hour. Mason does not take many cases to hearing because he believes "a bird in the hand is worth two in the bush." He contends injured workers take a significant risk by putting their fate in the hands of a three-member board panel at hearing. Therefore, even in good cases if his client is willing to give up a little bit,

he is willing to give up some of his attorney fees, and they settle the case. Mason contends, even in these cases, when he gives up some fees he is compensated closer to $200 per hour rather than $400 per hour. Employee contends in this case, Employer controverted his claim for permanent total disability benefits in 2015, and never rescinded the controversion until Employer stipulated to begin paying Employee's temporary disability benefits on February 17, 2016. Nevertheless, Employee contends Employer continued to resist his permanent total disability claim until Employer gave up resisting on or about February 26, 2019. (Employee's hearing arguments).

22) Mason contends the rehabilitation specialist's activities in this case complicated it. The specialist contacted Employee while he was hospitalized recovering from a medical procedure and tried to push the rehabilitation process forward, even though Employee's physician said he was not able to participate. Mason contends he had to become involved to "put the brakes on" this process as well, increasing attorney fees. When a medical procedure did not help Employee's symptoms, Mason contends he became involved with his physician and wrote letters obtaining an opinion stating Employee was permanently totally disabled. When Employer rejected his settlement offer to accept Employee as permanent and totally disabled, Mason filed a claim. (*Id.*).

23) Mason concedes he received a check from Employer for $25,000. Mason contends he has not deposited the check because he needs board approval before actually accepting the attorney fees, to avoid violating the law. (*Id.*).

24) Employer contends it is not calling Mason a liar, a bad person or dishonest. Rather, it contends Mason's billing practices are improper and inaccurate. To further clarify, Employer contends the sheer amount of hours billed are excessive, Mason makes mathematical errors in his Itemization and he charged successively for participating in a deposition in Kenai, Alaska. Employer contends it only takes "3 to 3.5 hours" to drive from Eagle River, Alaska to Kenai. Once Mason arrived there, Employer contends Mason only asked a handful of questions. Yet Mason billed for eight hours on the deposition day, even though it only lasted approximately "2.5 hours." Employer contends the itemization for the deposition travel and attendance is simply not accurate. When confronted, Mason explained he blocked out the entire day for the deposition and conceded he perhaps should have brought extra work with him to do during the day before he returned to Anchorage after the deposition. Employer contends Mason therefore billed "5.5 hours" on the deposition date for doing no legal work on this case. (Employer's hearing arguments).

25) Mason contends it took him "3.5 hours" to travel to Kenai for the deposition. Once there, he extensively reviewed the file to prepare for and attend the deposition. He spent "an extended amount of time" with Employee who "has a lot of questions." The next day, Mason appeared for the deposition and further prepared his client for his deposition. Mason concedes the deposition and preparation did not take eight hours, but during his entire practice he has always billed a full eight hour day when he is out of the office for an entire day on a case. Mason clarified that he drove a motorhome to Kenai on that occasion, which probably took more than five hours. The day following the deposition, Mason returned to Anchorage and billed "3.5 hours." Mason contends he added up his itemized billings three times and came up with what he showed on his affidavit. He concedes, however, the math "is what it is" and accepts any further calculations if his turn out to be wrong. As for Employer's excessive time allegation, Mason contends this was not a standard knee injury. Employee's injury was to a peroneal nerve, which Mason had never heard of prior to this case. Employee's physician tried several techniques to relieve his pain, but nothing worked, even though some of the techniques were unusual in Mason's experience. This was also a permanent total disability claim, and Mason contends he spent considerable time assisting Employee in locating and potentially obtaining medical care to avoid becoming permanently and totally disabled. (Employee's hearing arguments).

26) Employer agrees the case was "rather complicated" at least as to what the next step would be for Employee's medical treatment. However, it contends Employee's lawyer is not a physician or surgeon and it was not his role to find a doctor who could assist in relieving Employee's pain. From a legal perspective, this case was not very complicated in Employer's view. (Employer's hearing arguments).

27) Employee's attorney clarified abbreviations in his itemized statement: "HTP" means "how to proceed"; "T/C" means "teleconference"; and "O/C" means "opposing counsel." In his February 28, 2019 attorney fee itemization, Mason set forth by year, month and day the hours expended and the extent and character of the work he performed. On this itemization, Mason calculated 130.6 hours at $400 per hour totaling $52,240 in attorney fees, and $727.91 in costs. His claim for attorney fees and costs begins on February 19, 2016, and extends through the hearing date. At hearing on March 7, 2019, Mason submitted a supplemental itemization and attorney fee affidavit from March 4, 2019 through March 6, 2019, in which he set forth by year, month and day the hours expended and the extent and character of the work he performed. He claimed an

additional 3.4 hours for this time. At hearing Employee requested an additional one hour and 20 minutes for Mason to account for hearing preparation on the hearing date. (Employee's hearing arguments).

28) A review of attorney fees awarded in decisions and orders to attorney Mason as the Employee's representative in other cases reveals the following, beginning with the earliest case:

Table III

Client's Name	Date Awarded	Hourly Rates Requested	Hourly Rate Awarded
Steffey	June 15, 1995	$175	$125
Steffey	February 12, 1996	$175	$140
Bergh	September 11, 2003	Undeterminable	Undeterminable
Gillespie	July 9, 2004	$250	$225
Norton	September 8, 2004	$250	$250
Gillespie	August 3, 2005	$250	$250
Iversen	November 19, 2007	$275	$275
Worman	January 2, 2008	$275	$275
Gerald	July 15, 2008	$275	$275
Griffiths	November 19, 2008	$250	$250
Fortner	June 18, 2009	$275/$300	$275/$300
Worman	March 11, 2011	$350	$350
Frank	March 21, 2011	$350	$350
Geary	March 31, 2011	$350	$350
Wozniak	June 14, 2012	$350	$350
Benedict	August 7, 2012	$350	$350
Ragan	April 23, 2013	$350	$350
Fruichantie	June 6, 2014	$375	$375
Worman	April 22, 2016	$425	$375

29) Former experience as a defense counsel in workers' compensation claims can be beneficial to an attorney who switches sides and represents injured workers. For example, an attorney experienced in defending against workers' compensation cases may be more familiar with tactics and strategies used to defeat injured workers' claims. Former defense attorneys may also have a

better understanding of negotiation tactics that employer's use during settlement discussions and what discovery should be obtained from the employer and adjuster. (Experience and judgment).

30) Once Employer rejected Employee's settlement proposal on April 9, 2018, Employer vigorously defended against Employee's permanent total disability claim. Mason provided valuable legal services to Employee once Employer resisted his request for permanent total disability benefits. He succeeded in obtaining these benefits for Employee, which will continue until his disability status changes. While the nature, length and complexity of the services performed were not unusual, the benefits resulting from Mason's services are significant as Employee will continue to receive permanent total disability benefits while he remains in that status. Given the relative shortage of competent attorneys available to represent injured workers, and given Mason's prior awards, $400 per hour for the periods beginning in 2018 awarded in this case is a reasonable and fully compensable attorney fee rate. (Experience, judgment, observations and inferences drawn from the above).

PRINCIPLES OF LAW

The board may base its decision 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).

> **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. . . .

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. (*Id*. at 973). The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. (*Id*. at 973, 975).

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," so injured workers have "competent counsel available to them." Nonetheless, when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed.

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 152-53. An award under AS 23.30.145(a) may include continuing fees on future benefits.

Hanson v. Municipality of Anchorage, AWCB Decision No. 10-0175 (October 29, 2010), discussed the effect of *Harnish* on a request for attorney fees under AS 23.30.145(b):

> AS 23.30.145(b) applies when an employer "fails to file timely notice of controversy," "controversy" not being a term of art in the Act or the case law, but *Harnish* fails to discuss whether §145(b) applies if an employer files a timely notice of controversion after an employee filed a "claim." It also applies if an employer "fails to pay" medical or other benefits within 15 days of the date they become due, and applies if the employer "otherwise resists" paying compensation. *Harnish*, because of its facts, does not stand for the idea an injured worker may not seek and obtain fees under AS 23.30.145(b) in a case in which the employer timely controverted a workers' compensation "claim" and the employee's attorney successfully prosecuted the claim.

In *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011), the appeals commission addressed the employer's claim the board erred by awarding attorney fees under both §§145(a) and (b). Though the commission vacated the board's decision on other grounds, it discussed attorney fee awards anticipating the issue would arise again:

> The board awarded reasonable fees under AS 23.30.145(b), but concluded "the employee is entitled to mandatory statutory minimum attorney fees under AS 23.30.145(a) when, and if, the statutory minimum amount based on the payment of past and future medical, indemnity, and all other benefits exceeds the attorney fee awarded under AS 23.30.145(b)" (footnote omitted). Although the Supreme Court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (footnote omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (footnote omitted). Subsection (b) may apply to fee awards in controverted claims, (footnote omitted) in cases in which the employer does not controvert but otherwise resists, (footnote omitted) and in other circumstances (footnote omitted). It is undisputed that Uresco controverted Porteleki's claim. Thus, we see no reason his attorney could not seek fees under either AS 23.30.145(a) or (b) and find no error in the board's decision to award fees under the higher of (a) or (b).

> **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
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> (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; or. . . .

> **Alaska Rule of Evidence 408. Compromise and Offers to Compromise**. Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.

In *Lopez v. Administrator, Public Employees' Retirement System*, 20 P.3d 568 (Alaska 2001), the Alaska Public Employees' Retirement Board (PERS board) refused to admit into evidence a compromise and release agreement from the injured worker's workers' compensation case. In the agreement, the employer, against whom Lopez had also filed an occupational disability claim, admitted her injury was work-related. Lopez sought to admit this evidence as an admission by a party opponent against its interest. The Alaska Supreme Court in affirming the board's decision referenced Evidence Rule 408, which bars admission of compromises between parties. The court further noted compromised settlements are ordinarily of little probative value as they reflect the litigants' "desire for peace rather than any concession of a weak position." (*Id.* at 575). The PERS board had a regulation, 2 AAC 35.160(c), similar to 8 AAC 45.120(e), which stated:

> The hearing will not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence, including hearsay evidence, will be admitted if it is evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Irrelevant and unduly repetitious evidence will be excluded or curtailed.

Lopez held the PERS board did not abuse its discretion by excluding the compromise release agreement from evidence. (*Id.* at 575-76).

An attorney fee case, *Hobart v. Silver Bay Logging*, AWCB Decision No. 98-0072 (March 25, 1998) rejected the employee's reliance on Evidence Rule 408 to keep out certain evidence discussing settlement. *Hobart* noted evidence in workers' compensation cases is not governed by the Alaska Rules of Evidence. It further noted the board panel hearing a claim is "not a lay jury"

from which certain evidence needs to be withheld to avoid error because the experienced panel, unlike a lay jury, can "disregard irrelevant evidence." (*Id*. at 4).

> **8 AAC 45.120. Evidence**. . . .
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. . . . The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

ANALYSIS

1) Should any settlement discussions be considered on the attorney fee and cost issue?

Technical rules regarding evidence, with few exceptions, do not apply in these cases. 8 AAC 45.120(e). Generally speaking, settlement offers are not admissible as evidence. This general rule is to protect parties' ability to negotiate in good faith, make settlement offers and resolve cases to reduce litigation. Alaska Rule of Evidence 408. Though evidence rules do not generally apply in these cases, the Alaska Supreme Court has held it was not an abuse of discretion by the Public Employees' Retirement Board to disallow reference to a settlement agreement in an administrative claim. *Lopez*. On the other hand, some administrative decisions have declined to apply Evidence Rule 408, relying on 8 AAC 45.120(e). *Hobart*. Nonetheless, the settlement offers referenced in this case, with one exception, do not need consideration to resolve the attorney fee issue. The only reference to "settlement" relevant and admissible is Employer's April 9, 2018 rejection of Employee's request for a stipulation stating Employee was permanently and totally disabled. Employer began resisting his request for permanent total disability status on that date. The fact Employer rejected the offer evidences the start of its resistance and the beginning point for an attorney fee award to Employee. No other settlement discussions will be considered.

2) Is Employee entitled to attorney fees or costs?

Employee is entitled to attorney fees if Employer controverted or controverted-and-fact Employee’s right to benefits or if Employer “otherwise resisted” paying compensation and Mason succeeded in obtaining benefits for his client. AS 23.30.145(a), (b). In the parties’ February 17, 2016 stipulation, Employer agreed to pay and paid Mason over $21,000 in attorney fees and costs for work previously done. In the February 17, 2016 stipulation, Employer also withdrew its prior controversions, including those that previously denied permanent total disability benefits and Employee withdrew his prior claims, including one for permanent total disability benefits. Once Employer withdrew its controversions effective February 17, 2016, and began paying Employee temporary total disability benefits in conformance with the stipulation, Employer no longer controverted any benefits and resisted paying none. Vocational rehabilitation and reemployment benefits continued as well, and Employer did not resist paying any reemployment-related benefits. In fact, Employer pursued plan development to move the reemployment and rehabilitation process forward. Employer never controverted Employee’s right to benefits between February 17, 2016 and the March 7, 2019 hearing. There was no controversion-in-fact or any resistance from Employer to paying any benefits during that period. Therefore, without a controversion, controversion-in-fact or resistance to paying some benefits, there is no statutory basis for awarding Employee any attorney fees between February 17, 2016, and the date Employer either controverted Employee’s right to permanent total disability benefits, controverted-in-fact or otherwise resisted paying those benefits. Thus, Mason’s claim for attorney fees, which begins with an entry on February 19, 2016, and continuing through March 30, 2017, for additional reasons discussed below, will be denied. AS 23.30.145(a), (b).

On April 9, 2018, Mason received notice from Employer rejecting Employee’s offer to change his status to permanent and total disability. Therefore, on April 9, 2018, Employer controverted-in-fact and began resisting Employee’s status change from temporary total to permanent total disability. This prompted Employee to file a claim on April 18, 2018, which Employer answered on April 24, 2018, denying Employee was permanently and totally disabled. Thanks to Mason’s continued efforts in the case, Employer eventually “gave up” and agreed to begin paying Employee permanent total disability benefits. Thus, April 9, 2018, marks the date Employee’s right to attorney fees began because on that date Employer’s resistance began. AS 23.30.145(a), (b).

Employer objects to specific attorney fee requests for various reasons including Mason billed for secretarial or paralegal services, "churned" attorney fees, or claimed attorney fees on dates and times he did not perform legal services on this case. Table I, above, sets forth the reasonable and fully compensatory attorney fees awarded beginning April 9, 2018 through February 28, 2019, the end date for Mason's first attorney fee affidavit. *Bignell*; *Harnish*; *Hansen*. While most attorney fee entries were reasonable, some were not. This decision reduces the June 19, 2018 request by five hours because Mason agreed he probably should have brought work from other cases with him to work on after the parties completed Employee's deposition on that date. Pursuant to Table I, other entries were reduced somewhat to reflect Mason performing secretarial or paralegal duties. The total attorney fee hours awarded from Mason's first attorney fee affidavit totals 51.4 hours.

Pursuant to Table II, Mason's supplemental attorney fee affidavit claimed 3.4 hours. Employer did not object. An additional one and one-half hour will be added for Mason's attendance at the March 7, 2019 hearing. The total attorney fee hours awarded from Mason's second attorney fee affidavit and for his time attending the hearing total 4.9 hours (3.4 + 1.5 = 4.9). Considering the nature, length and complexity of Mason's services, and the benefits resulting to Employee, reasonable and fully compensable attorney fees for obtaining permanent total disability benefits for Employee equal 57.8 hours (51.4 + 4.9 = 56.3). AS 23.30.145(a); *Bignell*; *Harnish*; *Hansen*.

Mason is an experienced lawyer who has worked on "both sides" in workers' compensation matters. His former experience as a defense attorney in these cases is valuable because he is more familiar with tactics and strategies employers use in these claims. Table III, above, shows hourly awards to Mason in prior decisions. There are currently relatively few competent attorneys available to represent injured workers in these cases. *Childs*. Mason succeeded in obtaining permanent total disability benefits for Employee, which will continue unless and until his disability status changes. This is a significant benefit to Employee. Pursuant to Table III, decisional attorney fee awards to Mason, as opposed to amounts parties may have stipulated to pay him in settlement agreements, have not increased in three years. The last decision awarded him $375 per hour. Given the above, $400 per hour for periods beginning in 2018 awarded in this case is a reasonable and fully compensable hourly rate for Mason. *Rogers & Babler*; *Childs*. Mason is entitled to $22,520 in attorney fees under AS 23.30.145(a) (56.3 hours x $400 per hour = $22,520).

Because permanent total disability benefits continue during the continuance of Employee's disability, Mason is also entitled to a statutory minimum attorney fee on ongoing permanent total disability benefits because Employer controverted-in-fact paying permanent total disability compensation and Employee prevailed on his claim. AS 23.30.145(a); *Porteleki*. Employer will pay Mason statutory minimum fees on ongoing permanent total disability benefits, during the continuance of those benefits, beginning with the next payment following this decision and order.

It is undisputed Employer already paid Mason $25,000 voluntarily, and he has not deposited this check. Mason is correct in stating all attorney fee awards must be approved and an attorney may not accept an attorney fee without approval. AS 23.30.145(a); AS 23.30.260. Employer's $25,000 payment to Mason will be approved. This results in Mason currently being overpaid $2,480 in attorney fees. Employer will offset this overpayment against future statutory minimum attorney fees it will pay to Mason on Employee's ongoing permanent total disability benefits. Employer did not object to Employee's costs. This decision will award him $727.91 in costs.

CONCLUSIONS OF LAW

1) One settlement discussion will be considered on the attorney fee and cost issue.
2) Employee is entitled to attorney fees and costs.

ORDER

1) Employee's request for attorney fees and costs is granted in part and denied in part.
2) Employee's attorney is awarded $22,520 in attorney fees and $727.91 in costs through March 7, 2019.
3) Employee's attorney is awarded ongoing, statutory minimum attorney fees on Employee's permanent total disability benefit payments for as long as Employee remains in permanent total disability status.
4) Employer's previous $25,000 payment to Employee's attorney is approved.
5) Employer is entitled to a $2,480 credit against ongoing statutory minimum attorney fees awarded in this decision and order on Employee's permanent total disability benefits.

Dated in Anchorage, Alaska on April 5, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Bronson Frye, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of John R. Wozniak, employee / claimant v. State of Alaska, self-insured employer / defendants; Case No. 201303191; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on April 5, 2019.

/s/
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