

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

SHAWN C. BREKKE, )  
)  
Employee, )  
Claimant, ) INTERLOCUTORY  
) DECISION AND ORDER  
v. )  
) AWCB Case No. 201610408  
ROBINSON BROTHERS, )  
) AWCB Decision No. 19-0093  
Employer, )  
and ) Filed with AWCB Fairbanks, Alaska  
) on September 6, 2019  
OHIO CASUALTY INSURANCE )  
COMPANY, )  
)  
Insurer, )  
Defendants. )  
)

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Franich Law Office's February 5, 2018 claim was heard on April 11, 2019, in Fairbanks, Alaska, a date selected on January 14, 2019. An October 3, 2018 Affidavit of Readiness gave rise to this hearing. Attorney John Franich appeared and represented the Franich Law Office (Franich), and testified on its behalf. Robert Bredesen appeared telephonically and represented Shawn C. Brekke (Employee), who appeared telephonically and testified on Franich's behalf. Rebecca Holdiman Miller appeared and represented Robinson Brothers and its insurer (Employer). Berni Seever, Employer's adjuster, testified on Employer's behalf. The record closed on April 18, 2019, upon receipt of Employer's post-hearing brief. The hearing was held before a two-member panel, a quorum under AS 23.30.005(f).

ISSUE

Franich contends it provided legal representation to Employee and was instrumental in securing valuable benefits on his behalf. It seeks the higher of either statutory minimum fees, or reasonable attorney fees, but acknowledges it did not know which of the two was “higher.”

Employer generally contends there is no connection between work performed by Franich and benefits obtained by Employee and the only issue on which Franich “could conceivably” prevail is preauthorization of Employee’s cervical surgery. However, it also cites AS 23.30.097(d) and contends preauthorization is not required under the Act. It contends there is no evidence Employee’s surgeon required preauthorization and there is no evidence it resisted paying benefits, so Franich should not be awarded attorney fees and costs.

**Is Franich entitled to attorney fees and costs?**

FINDINGS OF FACT

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

- 1) On April 24, 2016, Employee was working for Employer as a mechanic and reported injuring his lower back and neck when he caught his foot and tripped while stepping out of a truck on which he was working. (First Report of Occupational Injury, July 16, 2016).
- 2) On July 1, 2016, Employee sought treatment for his neck and back. X-rays showed no acute fractures or dislocations. Employee was referred to a spine specialist for further evaluation. (Steese Immediate Care chart notes, July 1, 2017).
- 3) On July 13, 2016, Employee was having some low back pain but his primary complaint was cervical pain that was causing bilateral hand numbness. A nerve conduction study to rule out bilateral carpal tunnel syndrome was considered and a magnetic resonance imaging (MRI) to rule out cervical etiology was ordered. (Spine Care Specialists of Alaska chart notes, July 13, 2016).
- 4) On July 15, 2016, Employee claimed medical costs, compensation rate adjustment and penalty. (Workers’ Compensation Claim, July 15, 2016). Employer contended it was timely paying all benefits and Employee’s compensation rate had been accurately calculated based upon “existing information.” (Answer and Controversion Notice, August 11, 2018).

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- 5) On July 26, 2016, Employer began paying temporary total disability (TTD) benefits. (Secondary Report of Injury (SROI), August 3, 2016).
- 6) On August 30, 2016, Employee consulted with John Lopez, M.D. to discuss his surgical treatment options. Dr. Lopez reviewed the MRI, which showed a large disc bulge at C6-7 and a large disc bulge at L5-S1, and thought Employee would do well with both neck and back surgery. He urged Employee to lose weight and discussed an anterior cervical discectomy and fusion, as well as artificial disc replacement surgery. (Lopez chart notes, August 30, 2016).
- 7) On October 17, 2016, Employee continued discussing cervical surgery with Dr. Lopez, who advised him to lose 20 pounds. (Lopez chart notes, October 17, 2016).
- 8) On November 16, 2016, in response to an inquiry from Employer's insurer, Dr. Lopez indicated Employee was medically stable as of October 27, 2016 and did not anticipate Employee having a permanent partial impairment resulting from the work injury. (Lopez responses, November 16, 2016).
- 9) On November 29, 2016, Employee decided he would like to proceed with anterior cervical discectomy and fusion surgery, which was scheduled for January 19, 2017. (Spine Care Specialists chart notes, November 29, 2016). That same day, Dr. Lopez also amended his November 16, 2016 responses to indicate Employee was not medically stable and stated it was unknown whether Employee would incur a permanent partial impairment until after surgery. Dr. Lopez noted he would "reevaluate after surgery 1/19/17." (Lopez amended responses, November 29, 2016).
- 10) On December 7, 2016, Employer filed a medical summary containing Dr. Lopez's November 29, 2016 amended responses. (Medical Summary, December 6, 2016).
- 11) On January 16, 2017, Employee was prepared to proceed with his cervical surgery on January 19, 2017. (Spine Care Specialists of Alaska chart notes, January 16, 2017).
- 12) On January 18, 2016, Employee had completed his pre-op exam, made childcare arrangements and was prepared to go forward with surgery. He received a call from either the surgery center or Dr. Lopez's office informing him that a down payment was required to proceed with his surgery the following day. (Brekke). That same day, Franich entered its appearance as Employee's attorney. (Entry of Appearance, January 18, 2017). The following day, Franich also claimed medical and transportation costs, interest and attorney fees and costs. The stated reason for filing the claim was, "Controversion in fact. Er [sic] has resisted payment of medical benefits by not approving surgery that has been recommended by treating physician until after an EIME."

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The claim expressly cites *Summers v. Korobkin*, 814 P.2 1369 (Alaska 1991), and *Bockus v. First Student Services*, 384 P.3d 801 (Alaska 2016). (Workers' Compensation Claim, January 19, 2016 [sic]).

13) Employer controverted disability benefits based on Employee's failure to sign and return an employment release. (Controversion Notice, February 2, 2017). It, nevertheless, continued paying Employee TTD. (SROI, December 14, 2017).

14) On February 9, 2017, Employer answered Employee's January 18, 2017 claim. Citing AS 23.30.095(c) and AS 23.30.097, Employer admitted it was liable for reasonable and necessary medical benefits "for which supporting documentation exists," and denied it was liable for medical benefits "for which documentation does not exist," "to include pre-authorization for medical treatment." Employer further contended, it had never denied payment of medical benefits and had paid all medical benefits for which supporting documentation had been received. It continued, "In regards to pre-authorization, for medical treatment, the employer is not obligated to pre-authorize medical expenses. The employer's responsibility rests with payment or controversion upon receipt of billing and medical records pursuant to AS 2[3].30.097(d). As such, refusal to pre-authorize medical treatment is not a 'controversion in fact.'" (Answer, February 9, 2017).

15) On March 2, 2017, R. David Bauer, M.D., evaluated Employee on Employer's behalf and diagnosed cervical radiculopathy and L5-S1 disc herniation, both of which he thought were substantially caused by the work injury. He agreed Employee was a candidate for anterior cervical discectomy and fusion, which would improve Employee's radicular pain. Dr. Bauer opined Employee's lumbar condition was medically stable and his cervical condition would be medically stable three to six months after the recommended surgery. (Bauer report, March 2, 2017).

16) On April 12, 2017, in response to an inquiry from Employer's attorney, Dr. Bauer indicated Employee would be medically stable if he did not proceed with anterior cervical discectomy and fusion surgery. (Bauer response, April 12, 2017).

17) On April 14, 2017, Employer controverted TTD on the basis of Dr. Bauer's April 12, 2017 opinion that Employee's cervical condition was medically stable on account of his failure to proceed with surgery. (Controversion Notice, April 14, 2017). It also amended its February 2, 2017 answer to Employee's January 19, 2017 claim to include Dr. Bauer's opinion. (Amended Answer, April 17, 2017).

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- 18) On April 18, 2017, Dr. Lopez performed an anterior cervical discectomy and fusion at C6-7. His operative report states, “[Employee] has been trying to get surgery for many months now and seems [sic] to finally be happening for him. He is wanting surgery.” (Operative Report, April 18, 2017).
- 19) On May 22, 2017, the parties were discussing whether a hearing in Employee’s case was necessary. (Prehearing Conference Summary, May 22, 2017).
- 20) On May 25, 2017, Employee was doing very well following surgery. (Lopez chart notes, May 25, 2017).
- 21) The June 12, 2017 prehearing conference summary noted, “Employee underwent surgery. Counsel for employee is going to send employer an attorney fee affidavit.” (Prehearing Conference Summary, June 12, 2017).
- 22) On June 16, 2017, Dr. Lopez predicted Employee would have the physical capacities to return to a previously held occupation. (Lopez responses, June 16, 2017).
- 23) On September 7, 2017, Employee was found not eligible for reemployment benefits on the basis of Dr. Lopez’s June 16, 2017 prediction. (Torgerson letter, September 7, 2017).
- 24) On September 19, 2017, Employee petitioned for review of the Reemployment Benefits Administrator’s September 7, 2017 eligibility determination. (Petition, September 18, 2017).
- 25) On December 6, 2017, Dr. Lopez responded to inquiries from Employer and opined the work injury was the substantial cause of Employee’s need for medical treatment. He also indicated Employee’s cervical condition was medically stable and his lumbar condition was medically stable “at this time unless and until he proceeds with lumbar surgery.” (Lopez responses, December 6, 2017).
- 26) On December 11, 2017, Employer controverted TTD on the basis of Dr. Lopez’s December 6, 2017 medical stability opinion. (Controversion Notice, December 11, 2017).
- 27) On December 14, 2017, Employer reported it had suspended Employee’s benefits and had paid him TTD benefits from July 13, 2016 through December 6, 2017, for a total of 73 weeks, one day. Total TTD payments amounted to \$77,796.01. (SROI, December 14, 2017).
- 28) On January 30, 2018, Employee filed a medical summary containing amendments to Dr. Lopez’s December 6, 2017 responses, indicating Employee’s cervical and lumbar conditions were not medically stable. (Medical Summary, January 30, 2018).

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29) On February 1, 2018, Dr. Lopez decided to keep Employee off work until his next evaluation on February 26, 2018. (Work Status Report, February 1, 2018).

30) On February 2, 2018, Employee claimed TTD and attorney fees and costs for the following reason:

ER 12/11/17 Controversion Notice was based on a medical opinion that was issued by John A. Lopez in error. Dr. Lopez corrected his medical opinion about medical stability of EE's cervical and lumbar conditions on December 6, 2017. . . . On 2/1/18 Dr. Lopez confirmed that EE is to be off work from 7/13/16 until his next evaluation on 2/26/18.

(Workers' Compensation Claim, February 2, 2018).

31) On February 5, 2018, Franich withdrew as Employee's attorney. (Notice of Withdrawal, February 5, 2018). He also claimed attorney fees and costs under AS 23.30.145(a) and contended its actual fees and costs to date were \$11,776.50, plus another \$100 in other litigation expenses. (Workers' Compensation Claim, February 5, 2018).

32) On February 23, 2018, Employer answered Employee's February 2, 2018 claim and denied it owed TTD above amounts already paid, citing Dr. Bauer's medical stability opinion. It also denied it owed attorney fees and contended it had never denied payment of medical expenses and alleged there was no nexus between benefits paid to Employee and the work performed by his attorney, though it acknowledged Dr. Lopez's medical stability opinions were "contradictory and unclear." (Answer, February 23, 2018; Controversion Notice, February 23, 2018).

33) On February 14, 2018, Employer reported it had reinstated Employee's TTD benefits. (SROI, February 14, 2018).

34) On February 26, 2018, Dr. Lopez opined Employee's cervical condition was medically stable, but his lumbar condition was not, and took Employee off work for an additional two months. Dr. Lopez thought Employee might benefit from a L5-S1 microdiscectomy but remained concerned about Employee's weight and urged him to lose 50 pounds. (Work Status Report, February 26, 2018; Lopez chart notes, February 26, 2018, Lopez responses, February 26, 2018).

35) On March 2, 2018, James Schwartz, M.D., evaluated Employee on Employer's behalf and diagnosed C6-7 disc herniation and a lumbar strain, both of which he thought were related to the work injury. Dr. Schwartz opined work hardening would be better treatment for Employee's lumbar condition than surgery, which he thought would be "detrimental." Employee would then be medically stable six weeks after beginning work hardening. Dr. Schwartz also disagreed with

Dr. Lopez's February 26, 2018 plan to keep Employee off work and thought, "There is no indication for keeping [Employee] off work while waiting for him to lose weight." (Schwartz report, March 2, 2018).

36) On March 28, 2018, Employer controverted all medical benefits other than six weeks' work hardening based on Dr. Schwartz March 2, 2018 report. (Controversion Notice, March 28, 2018).

37) On April 6, 2018, the parties agreed Employee's benefits would continue until after an upcoming appointment with Mark Flanum, M.D. Employee also stated he "questions the amount of attorney's fees listed" in Franich's February 5, 2018 claim. (Prehearing Conference Summary, May 4, 2018).

38) On April 16, 2018, Employee was now having left, as well as right, sided radicular symptoms from his low back. He was evaluated by Dr. Flanum, M.D., and updated imaging was ordered. (Flanum chart notes, April 16, 2018).

39) An April 26, 2018 lumbar MRI showed a worsened disc herniation at L5-S1 producing impingement upon the right L5 and bilateral S1 nerve roots. (MRI report, April 26, 2018).

40) On May 4, 2018, Employer agreed to continue Employee's benefits until Dr. Flanum opined on Employee's participation in work hardening. (*Id.*).

41) On May 10, 2018, Employee petitioned for a secondary independent medical evaluation (SIME). (Petition, May 10, 2018).

42) On May 29, 2018, Employee contended he had talked with Dr. Flanum, who, after reviewing the MRI, thinks he needs surgery. Employer contended it was sending the MRI to its medical evaluator for his opinion on the proposed surgery. (ICERS event entry, May 29, 2018).

43) On May 31, 2018, Robert Bredesen entered his appearance as Employee's attorney and filed a petition for seeking authorization for surgery. (Entry of Appearance, May 31, 2018; Petition, May 31, 2018).

44) On August 23, 2018, the parties agreed to undertake an SIME. (Prehearing Conference Summary, August 23, 2018).

45) On September 27, 2018, Employer agreed to pay for Employee's lumbar surgery and Employee agreed to cancel the SIME. The parties' stipulation did not provide for attorney fees to Mr. Bredesen. (Stipulation, September 27, 2017; observations).

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- 46) On October 3, 2018, Mr. Bredesen sent an email message to Franich, which stated, “FYI, the employer caved and agreed to authorize the lumbar surgery. . . . Your fee claim now appears ripe.” (Bredesen email, October 3, 2018).
- 47) On November 2, 2018, Franich’s February 5, 2018 attorney fee claim was set for hearing on January 17, 2019. That hearing date was later vacated and a new hearing date was set for April 11, 2019. (Prehearing Conference Summary, November 2, 2018).
- 48) On December 4, 2018, Employee underwent bilateral L5-S1 micro-decompression surgery with Dr. Flanum. (Operative report, December 4, 2018).
- 49) On December 20, 2018, Franich filed its affidavit of attorney fees and costs. (Affidavit of Attorney Fees, December 20, 2018).
- 50) On April 3, 2019, Employer reported Employee had returned to work and had been paid TTD benefits from July 13, 2016 through March 31, 2019, for a total of 141 weeks, five days. Total TTD payments amounted to \$157,676.24. Employee’s weekly compensation rate was \$1,164.92. (SROI, April 3, 2019).
- 51) On April 3, 2019, Franich filed Employee’s hearing brief and supplemented its previously claimed attorney fees. (Supplemental Affidavit of Attorney Fees, April 3, 2019). (Franich Hearing Brief, April 3, 2019). The following day, Employer filed its hearing brief. (Employer’s Hearing Brief, April 4, 2019).
- 52) On April 8, 2019, Franich filed a “supplemental” hearing brief, wherein it responded to many of Employer’s contentions set forth in its hearing brief. (Franich Hearing Brief, April 8, 2019; observations). That same day, Employer petitioned to have Mr. Franich’s supplemental hearing brief stricken from the record on the basis it was untimely filed. (Employer’s Petition, April 8, 2019). The parties’ dispute was resolved at hearing whereby Employer chose to file a post-hearing brief in response to Franich’s April 8, 2019 supplemental brief.
- 53) Just prior to the hearing, Franich revised its previously filed attorney fee affidavit to include paralegal costs consistent with a decision and order in another case. (Attorney fee affidavit, April 11, 2019; Record).
- 54) Employee’s cervical surgery was originally scheduled for January 2017 and he was prepared to go forward with the surgery on that date. He had completed his pre-op exam and had made childcare arrangements for the surgery’s date. A day before the scheduled surgery, the surgery center called to inform him it would require a down payment from him in order for the surgery to



take place the following day. Employee later attended the EME in March 2017 and underwent the cervical surgery in April 2017. He agrees with Dr. Lopez's April 18, 2017 characterization of wanting surgery for many months. Employee recalls conversations with Franich's paralegal about issues such as a late check from Employer, his out of pocket expenses being paid, as well as unpaid medical expenses and Employer's December 2017 controversy. He stopped receiving TTD checks in December 2017 and discussed that issue with the paralegal. Mr. Franich filed another claim in early February 2018 to get the benefits reinstated. On February 5, 2018, Employee instructed Mr. Franich to withdraw as his attorney. The parties had a dispute over the medical stability of his lower back in February 2018. Employee later hired Mr. Bredesen to represent him. He thinks his TTD benefits were reinstated in February 2018. The medical stability dispute was later resolved with a stipulation and Employee underwent lumbar spine surgery. He is now back at work. Employee has not had PPI rating yet and has not been paid PPI benefits. On cross-examination, Employee testified he initially wanted his cervical surgery, but when he found out about the EME, he thought, "more information is better," so "that's the approach [he] took." He worked with Employer's adjuster to schedule his cervical surgery although he was uncertain at the time in what capacity she was acting. He also worked with Employer's adjuster on his travel arrangements. Dr. Lopez did not tell him he could not undergo surgery until the EME took place, rather he thought "that's just how it goes," and "[the EME] was just part of the process." The paralegal told him he had to attend the EME. Employee does not remember who called him regarding surgery cancellation because Dr. Lopez and the surgery center are in the same building. "Somebody from that building" called him to tell him the surgery was not approved unless he could come up with a down payment. It could have been the surgery center, rather than Dr. Lopez' office, who called him. (Employee).

55) At hearing, Franich testified concerning reductions to the paralegal rates in his most recent fee affidavit. He also referenced billing entries relating to the termination of Employee's TTD benefits. (Franich).

56) At hearing, Berni Seever testified she has been an adjuster for 35 years and was the adjuster on Employee's case. She took over the case as the adjuster on December 6, 2016 at which time Employee's cervical surgery had already been approved. She contacted Dr. Lopez's office that same day to see if his office needed any additional information. The office did not seek preauthorization from her at that time. Based on the previous adjuster's notes, she believed

Employee's surgery was going to proceed in January. Her next communication with Dr. Lopez's office was on December 12, 2016, when she returned a call from that office seeking information on whether there were any pending controversions or EMEs in the case. She left a message with the office notifying them of the scheduled EME. No one from the office asked her for a preauthorization, preapproval or a payment guarantee. She became aware Employee's surgery did not occur when Employee told her there was a "hold" on the surgery. She did not cancel Employee's surgery. It is her understanding Dr. Lopez's office cancelled the surgery. On cross-examination, Ms. Seever testified her next contact with Dr. Lopez's office was May 15, 2017 regarding Employee's follow-up care. When Ms. Seever left her December 12, 2016 voice mail message with Dr. Lopez' office, she did not offer any assurance that they should go forward with the surgery or that there were no impediments to paying for it.

57) On August 15, 2019, the two-member panel concluded the record was incomplete and further testimony was needed from Employee, Berni Seever and the person or persons at Dr. Lopez's office who cancelled Employee's January 19, 2017 surgery, and re-scheduled it for April 18, 2017, in order to ascertain the parties' rights. They decided to re-open the record in order to receive these witnesses' testimony. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

58) On August 16, 2019, the hearing chair notified the parties the two-member panel could not reach a consensus following two rounds of deliberations, so he was appointing a third panelist. (Vollmer letter, August 16, 2019).

59) Neither party objected to the third panelist appointed. (Record).

PRINCIPLES OF LAW

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

....

(f) Two members of a panel constitute a quorum for hearing claims and the action taken by a quorum of a panel is considered the action of the full board.

....

(h) . . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and

may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute.

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).

**AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

The board has broad statutory authority in conducting its investigations and hearings. *Tolson v. City of Petersburg*, AWCB Decision No. 08-0149 (August 22, 2008); *De Rosario v. Chenenga Lodging*, AWCB Decision No. 10-0123 (July 16, 2010). The statute gives panels "free rein in making its investigations and in conducting its hearings, and authorizes it to receive and consider . . . any kind of evidence that may throw light on a claim pending before it." *Cook v. Alaska Workmen's Compensation Board*, 476 P.2d 29, 32 (Alaska 1970) (quoting with approval *Carroll v. Knickerbocker Ice Company*, 218 N.Y. 435, 113 N.E. 507 (1916)).

**AS 23.30.155. Payment of compensation.**

. . . .

(h) The board may upon its own initiative at any time in a case in which payments are being made . . . where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended . . . make the investigations . . . or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

**8 AAC 45.070. Hearings.** (a) Hearings will be held at the time and place fixed . . . the board . . . . A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

. . . .

(j) If the hearing is not completed on the scheduled hearing date and the board determines that good cause exists to continue the hearing for further evidence, legal

memoranda, or oral arguments, the board will set a date for the completion of the hearing.

(k) The board will, in the board's discretion, permit a member

....

(2) who did not attend a hearing before a two-member panel to review the written record, evidence, and hearing recording and to deliberate with

(A) a deadlocked two-member panel to make a decision . . . .

(l) Before the member is added to the panel under (k) of this section, the board will write to the parties, stating the member's name, and give the parties an opportunity to request the member's disqualification from the panel in accordance with AS 44.62.450(c).

### ANALYSIS

#### **Is Franich entitled to attorney fees and costs?**

A workers' compensation panel is expressly authorized to conduct its own investigations in order to ascertain the parties' rights. AS 23.30.135(a); AS 23.30.155(h). On August 15, 2019, the two-member panel concluded the record was incomplete and further testimony was needed from Employee, Shawn Brekke; Employer's adjuster, Berni Seever; and the person or persons at Dr. Lopez's office who cancelled Employee's January 19, 2017 surgery, and re-scheduled it for April 18, 2017, in order to decide the issue presented. *Id.*; 8 AAC 45.070(a), (j). It decided to re-open the record in order to receive additional testimony from these witnesses. *Id.*

Additional testimony is specifically needed to "throw light" on: the precise termination and reinstatement dates of Employee's TTD; persons or entities privy to Dr. Bauer's EME report following his March 2, 2017 evaluation, and when those persons or entities had access to the report; the identity of agents, other than Berni Seever, who may have interacted with either Dr. Lopez's office or the surgery center on behalf of the Ohio Casualty Insurance Company, between December 12, 2016 and April 18, 2017; events or persons that may have caused the cancellation of Employee's January 19, 2017 surgery; the precise date on which Employee's January 19, 2017 surgery was cancelled, as well as the precise date on which it was re-scheduled; interactions

between agents of the Ohio Casualty Insurance Company and either Dr. Lopez's office or the surgery center, between April 12, 2017 and April 18, 2017. *Cook; Carroll.*

Additionally, on August 16, 2019, the hearing chair notified the parties the two-member panel could not reach a consensus following two rounds of deliberations, so he was appointing a third panelist. 8 AAC 45.070(k). Neither party objected to the third panelist appointed. 8 AAC 45.070(l). Case materials, including the parties' hearing briefs and an audio recording of the April 11, 2019 hearing, were provided to the third panelist so he could join the panel upon the hearing's resumption and participate in subsequent deliberations.

The parties will be ordered to produce their respective witnesses upon the hearing's resumption. AS 23.30.005(h); AS 23.30.135(a); AS 23.30.155(h); 8 AAC 45.070(j). They will also be ordered to request a prehearing conference, the purpose of which will be to schedule the hearing's continuation and to ascertain whether either party intends on producing the person or persons at Dr. Lopez's office who cancelled Employee's January 19, 2017 surgery, and re-scheduled it for April 18, 2017, in order to decide the issue presented. *Id.*

#### CONCLUSION OF LAW

The record is insufficient to determine whether Franich is entitled to attorney fees and costs.

#### ORDERS

- 1) The hearing record is re-opened to receive additional testimony from Employee, Berni Seever and the person at Dr. Lopez's office who is responsible for scheduling and cancelling his surgeries.
- 2) The parties shall request a prehearing conference, the purpose of which is set forth above.

Dated in Fairbanks, Alaska on September 6, 2019.

ALASKA WORKERS' COMPENSATION BOARD

\_\_\_\_\_  
/s/  
Robert Vollmer, Designated Chair

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/s/  
Sarah Lefebvre, 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 SHAWN C. BREKKE, employee / claimant v. ROBINSON BROTHERS, employer; OHIO CASUALTY INSURANCE COMPANY, insurer / defendants; Case No. 201610408; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 6, 2019.

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/s/  
Ronald C. Heselton, Office Assistant II