ALASKA WORKERS' COMPENSATION BOARD

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

STEVEN HIBORIK,	)	
	)	
Employee, Claimant,	)	
	)	FINAL DECISION AND ORDER ON RECONSIDERATION
v.	)	
	)	
WESTSIDE FLOORING, LLC,	)	AWCB Case No. 201911330
	)	
Employer, and	)	AWCB Decision No. 20-0093
	)	
AMERICAN FIRE AND CASUALTY COMPANY,	)	Filed with AWCB Anchorage, Alaska on October 13, 2020
	)	
Insurer, Defendants.	)	

Steven Hiborik's (Employee) September 15, 2020 petition for reconsideration or clarification of *Hiborik v. Westside Flooring, LLC*, AWCB Decision No. 20-0074 (August 31, 2020) (*Hiborik III*) was heard on the written record on September 24, 2020, in Anchorage, Alaska, a date selected on September 24, 2020. On September 25, 2020, *Hiborik v. Westside Flooring, LLC*, AWCB Decision No. 20-0074 (September 25, 2020) (*Hiborik IV*) granted reconsideration solely to allow Westside Flooring, LLC (Employer) to respond. Attorney Elliott Dennis represents Employee. Attorney Adam Sadoski represents Employer. There were no witnesses. The record closed on October 9, 2020, after the panel reviewed Employer's responsive briefing and deliberated.

ISSUE

Employee seeks reconsideration contending *Hiborik III* mistakenly found he failed to identify unpaid medical expenses, and erred by failing to award attorney fees and costs related to a physician's deposition. He also seeks clarification of Employer's obligation to pay legal fees.

Employer contends Employee failed to identify unpaid medical expenses at the July 30, 2020 hearing. It contends *Hiborik III* correctly awarded attorney fees and costs and does not require clarification. Employer contends Employee's petition for reconsideration should be denied.

Should *Hiborik III* be reconsidered or clarified?

FINDINGS OF FACT

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

1) On June 3, 2019, Employee, while working for Employer, fell off a portable classroom roof in Wasilla, Alaska and was seriously injured. (Employee's Hearing Brief, January 15, 2020; Hearing Brief of Westside Flooring, LLC and Liberty Mutual, January 17, 2020).

2) On August 30, 2019, Employee claimed temporary total disability (TTD) benefits, a compensation rate adjustment, attorney fees and costs, medical and related transportation costs, a late-payment penalty and interest. Employee filed his claim because "no benefits paid by Workers' Compensation insurer." Employee did not request the greater of actual or statutory minimum attorney fees. (Claim for Workers' Compensation Benefits, attachment, August 30, 2019).

3) On October 1, 2019, Employer denied "all benefits," but only on grounds Employee was not entitled to the statutory presumption of compensability because his injury did not arise out of and in the course of his employment, was proximately caused by his intent to injure another and was therefore not covered under the Act. (Controversion Notice, October 1, 2019).

4) On November 20, 2019, the parties met before a board designee and set a hearing for January 23, 2020, on the preliminary question of whether or not Employee's injury arose out of and in the course of his employment. Vocational reemployment benefits was not listed as an issue in Employee's merits claim. (Prehearing Conference Summary, November 20, 2019).

5) Between January 3, 2020 and January 16, 2020, Employee filed and served various documents including medical billing records from several sources and Medicaid lien information. (Notices of Intent to Rely, January 3, January 13, and January 16, 2020).

6) On January 7, 2020, the parties met with a board designee; the preliminary January 23, 2020 hearing was still on the calendar and vocational reemployment benefits was still not listed as an issue for a future merits hearing. (Prehearing Conference Summary, January 7, 2020).

7) On January 15, 2020, Employee requested, "Statutory attorney's fees based on AS 23.30.145(a) and Reasonable actual fees pursuant to AS 23.30.145(b)." He further explained:

> Hiborik requests an award of attorney's fees pursuant to AS 23.30.145(a), statutory fees, since the employer controverted the case. Also, he seeks an award of actual reasonable fees. AS 23.30.145(b) Fees based on actual time expended in this matter are supported by the attorney's fees affidavits filed with the Board, and any post hearing supplemental affidavit. Hiborik also requests statutory attorney fees based on all unpaid past benefits and all future benefits awarded to Hiborik. The rationale for awarding attorney fees pursuant to AS 23.30.145(a) and (b), as discussed in *Wozniak v. State*, AWCB No. 19-0044 (April 5, 2019) should be applied in this case. (Employee's Hearing Brief, January 15, 2020).

8) On February 20, 2020, *Hiborik v. Westside Flooring, LLC*, AWCB Decision No. 20-0007 (February 20, 2020) (*Hiborik I*), held Employee's June 3, 2019 injury arose out of and in the course of employment with Employer and was not excluded from coverage under the Act. (*Hiborik I*).

9) On March 9, 2020, Employer petitioned the appeals commission to review *Hiborik I* solely on grounds the designated chair had a conflict of interest. (Petition for Review; Motion and Memorandum for Stay, March 9, 2020).

10) On April 29, 2020, the commission found workers' compensation in Alaska is voluntary, "meaning that once an injury is found to be within the course and scope of employment there is an automatic duty on the part of the employer to pay benefits." The commission also affirmed *Hiborik I*. (Order on Petition for Review; AWCAC Appeal No. 20-005 (April 29, 2020) (*Hiborik II*)).

11) On May 8, 2020, the parties met with a board designee to discuss setting a merits hearing. The designee did not set a hearing but Employee added reemployment benefits as an issue in his merits claim. (Prehearing Conference Summary, May 8, 2020).

12) On June 11, 2020, Employer's and Employee's attorneys had the following email exchanges:

> [From Sadoski]: My client has agreed to pay all back disability benefits from the date they were terminated (terminated on 9/27, will start 9/28) through today's date, with interest, and start ongoing payments. I do not have a specific amount yet, but I should by Tuesday of next week. Will you please confirm Mr. Hiborik's current address to which payments should be sent? Can you also tell me where you are on outstanding fees, taking into account the payments already made to you? We are aware our/your work is not done, but my client would like to be able to have a more accurate estimate of potential exposure.
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> With benefits being initiated, I don't know there is a need for the hearing on 7/30. Once Mr. Hiborik receives back benefits, let's take a look and see if we can cancel it.
>
> [From Dennis]: Thanks for the email. I will let Mr. Hiborik know that money will be coming his direction. Can you tell me when?
> . . . .
>
> I will get back to fees and costs after we make sure all time and expenses have been imput (sic). Can you send me verification that medical treatment will be taken care of (sic). He has a meeting with Dr. Haughom tomorrow.
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> [From Sadoski]: Thank you. The adjuster is out of the office after today until Tuesday. She has asked me to calculate interest before she returns as she plans on inputting the check request as soon as she gets back. Checks generally issue a short time after they are entered, which I would anticipate before the end of next week. They come from the east coast, so they can take some time to arrive. I would say Mr. Hiborik can expect his check as early as 6/24. It could be a little later. My client wants to get this to him ASAP.
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> [From Sadoski]: Sorry, I neglected the question regarding medical costs. These are not controverted and will be paid or denied in accordance with the Act. I do not mean to write this in an ambiguous way. We are not denying medical benefits at this time. I am merely preserving my client's rights in case there are any problems with the billing or in the event evidence supporting a controversion is developed in the future. (Employer's Hearing Brief, Exhibit I, July 23, 2020).

13) On June 11, 2020, Employer effectively withdrew its October 1, 2019 controversion notice. (Experience; judgment; inferences drawn from the above).

14) On June 26, 2020, Employee started arranging to depose Bryan Haughom, M.D. (Petition for Reconsideration, September 15, 2020).

15) On July 7, 2020, Mat-Su Emergency Medical Physicians sent Dennis a letter with attached "denial letters" from Employer stating bills for Employee's treatment were filed late; the provider was filing appeals with the insurer. This provider stated it was notified on "06/24/2020 of the existence of a worker's comp coverage." Attached to the provider's letter are explanation of benefit (EOB) forms stating the workers' compensation insurer had paid nothing on the bills because this provider did not submit them to the insurer within 180 days after the service date pursuant to AS 23.30.097(h)(1). (Notice of Intent to Rely, Exhibits 745-750, July 10, 2020).

16) On July 9, 2020, Employer formally withdrew its October 1, 2019 controversion notice. (Employer's Notice of Withdrawal of Controversions, July 9, 2020).

17) On July 10, 2020, Employer filed and served EOBs from the carrier regarding non-payment of charges from Alaska Colorectal Surgery based on late filing under §097(h)(1). (Notice of Intent to Rely, Exhibits 528-562, 745-750, July 10, 2020).

18) On July 27, 2020, Employee requested "statutory and hourly attorney fees" and explained:

> Hiborik seeks attorney fees pursuant to section AS 23.30.145(a) based on employer's actions which constitute a controversion in fact from the beginning of the litigation and AS 23.30.145(b) because employer vigorously resisted the case upon filing a formal controversion notice terminating all benefits. The award of fees pursuant to sections 145(a) and (b) is permissible; the sections are not mutually exclusive. An employee's counsel can be paid under both sections when the facts justify the payment. The court in *Rusch v. Southeast Alaska Regional Health Consortium,* 453 P.3d 784, 794 (Alaska 2019), quoting from *Circle De Lumber Co. v. Humphrey*, 130 P.3d 941, 952 (Alaska 2006) said "[i]n a controverted case, the claimant is entitled to a percentage fee under section (a) but may seek reasonable fees under subsection (b).
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> . . . .
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> Under 145(a) the statutory minimum of attorney's fees is equal to 25% of the first $1,000 of benefits and 10% of the subsequent benefits resulting from the attorney's work. The Board has authority to apply a larger percentage than is set forth in the statute. . . . In short, this board has discretion to increase the percentage of contingent fees pursuant to section 145(a) if necessary to reasonably compensate employees (sic) counsel.
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> . . . .
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> So, pursuant to AS 23.30.145(a) the claim was controverted from the very beginning. Had the employer completed its investigation and accepted the claim, employee's counsel would have been entitled to the minimum fee provided for in the statute even if he had to do no additional work. But that is not what happened.

> Instead, on October 1, 2019 the insurer formally controverted all benefits asserting the injury did not occur in the course of employment. The insurer vigorously fought Hiborik's case. Consequently, employees (sic) counsel has engage (sic) in very time consuming litigation as is reflected in the Board's file and his attorney fee affidavit. Therefore, he should be compensated for this additional time and effort pursuant to AS 23.30.145(b), based on employer's resistance of the claim.
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> The employee's counsel should be fully compensated for investment of his time and his costs and assuming the risks associated with representing employee. Failure to award attorney fees pursuant to section 145(b) as well as section 145(a) will inadequately compensate employee's counsel for his time and effort.

Employee also contended "the current amount of unpaid past medical charges is unknown since the insurer is now processing medical claims." Though Employee's brief attached previously filed EOBs showing the carrier had denied some payments because they were late, at hearing Employee did not address this issue and presented no evidence addressing or refuting the EOB timeliness decisions. (Employee's Hearing Brief Regarding July 30, 2020 Hearing, July 27, 2020; record).

19) In its July 23, 2020 brief, Employer said it "does not object to a referral for a reemployment benefits eligibility evaluation." It also said "a provider must predict the employee will incur some ratable permanent impairment as a result of the injury that will permanently prevent him from returning to work in the position at the time of injury. . . [t]here is no medical opinion to this effect. Employee is not currently eligible for reemployment benefits. Employer reserves the right to assert defenses related to this benefit in the future." (Employer's Hearing Brief, July 23, 2020).

20) On July 29, 2020, Employee took Dr. Haughom's deposition. He testified in brief summary: Employee is "physically impaired" by the work injury; he will likely have issues with his leg in the future; he will have a hard time with manual labor as a profession but could perform job-related activities with less physical constraints, which may require retraining; he has physical limitations. (Videoconference Deposition of Bryan Haughom, M.D., July 29, 2020).

21) At hearing on July 30, 2020, Employer stipulated Employee is entitled to a vocational reemployment benefits eligibility evaluation. (Record, July 30, 2020).

22) Employee claimed both statutory minimum fees and actual fees on the same benefits; which he said was "unique." Dennis focused on his 42 years plus practicing law on both plaintiff

and defense sides and his itemized attorney fee affidavits. He contended his statutory attorney fees were triggered by Employer's failure to properly investigate the case or pay disability benefits or a penalty on its controversion-in-fact. Under AS 23.30.145(a), he contended he is entitled to statutory minimum fees on all benefits resulting from his work, including TTD benefits and medical expenses. In addition, he sought actual attorney's fees under AS 23.30.145(b) for the insurer's failure to properly evaluate the case and accept it as work-related. When asked to clarify his attorney fee claim, Dennis agreed he wanted actual attorney fees on all benefits he obtained for Employee and also wanted statutory minimum attorney fees "on top of the actuals." Employer had paid Dennis no attorney fees or costs for his board work. Dennis did not say he wanted the greater of actual or statutory minimum attorney fees on benefits he obtained for Employee up to the hearing date. (Dennis; record, July 30, 2020).

23) Employer contended Employee can get either statutory minimum or actual attorney fees on the same past benefits, not both; it called his claim "preposterous." (Record, July 30, 2020).

24) To date, Employee has incurred over $1 million in work-related medical expenses, not yet adjusted under the medical fee schedule. (Agency file).

25) At hearing, Employee supplemented his itemized attorney fees and costs. His requested total for actual attorney fees and costs was $78,597.16, including $1,500 for Dr. Haughom's deposition witness fee, $571.20 for court reporter services for it and 2.8 attorney hours ($1,106) related to the deposition. He contended Dr. Haughom's deposition was reasonable and necessary to establish the June 3, 2019 work injury was still the substantial cause of Employee's need for treatment and disability; he had not reached medical stability; he needed ongoing medical treatment; he is physically impaired and will have difficulty with manual labor in the future; and because Employee underwent an employer's medical evaluation (EME) on July 7, 2020, but since Employee had no resultant report, Dr. Haughom's deposition would protect Employee against any surprise medical defense at hearing; it would support a vocational reemployment eligibility evaluation and prove the medical necessity for Employee's ongoing medical care. (Supplemental Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees, and Costs; Supplemental Affidavit for Award of Paralegal Fees Performed by Shona Embs, July 30, 2020).

26) Effective July 30, 2020, Employee's work injury had rendered him totally disabled from his work at the time of his injury for 423 consecutive days; Employer has paid TTD benefits for

that time. (Observations; inferences drawn from the above; Payments tab, agency file, July 2, 2020).

27) On August 5, 2020, Employer objected to Employee's requested attorney fees and costs. It contended Employee should receive no attorney fees or costs for the July 30, 2020 hearing unless he prevailed on something. Employer objected to all fees and costs related to Dr. Haughom's deposition; it contended this deposition was unreasonable and unnecessary and occurred after Employer had withdrawn its controversion. (Employer's Opposition to Employee's Attorney's Fees and Costs, August 5, 2020).

28) To date there is no EME report in Employee's agency file. (Agency file).

29) On August 31, 2020, *Hiborik III* analyzed Employee's attorney fee request and in part stated:

> Employee prevailed on compensability and his request for payment to his providers, interest and penalty on Employee's past medical bills and obtained a stipulation from Employer that he is entitled to a vocational reemployment benefits eligibility evaluation. The evaluation has value to him, whether he is found eligible or not. The only major issue Employee did not succeed on was his compensation rate adjustment claim. The amount at issue in the rate adjustment claim was not 'minor,' as he would have been entitled to a significant sum if he won. However, the 'compensability' win is responsible for all benefits to which he is now entitled and to which he may be entitled in the future; legal services put into the compensation rate adjustment issue were relatively minor; only Employee's testimony was offered to support this claim. Therefore, Employee's attorney fee and cost award will not be reduced because he did not prevail on his compensation rate adjustment claim. *Porteleki*.
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> Employee is entitled to statutory minimum fees on the value of Employee's ongoing benefits because all future benefits derive from Dennis' efforts. *Wozniak*. Employer will be directed to pay Employee statutory minimum attorney fees on his continuing TTD benefits and on any future medical or other benefits to which he may be entitled under the Act. Employee's request for both actual attorney fees and statutory minimum attorney fees on all past benefits will be denied.

Hiborik III made the following legal conclusions and orders:

> CONCLUSIONS OF LAW
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> 1) The oral order declining to require Employer to present its adjuster for examination was correct.

2) Employee is not entitled to a compensation rate adjustment.
3) Employee is entitled to an award regarding medical care.
4) Employee is not entitled to past transportation expenses for his medical care.
5) Employee is entitled to 'penalties' and interest.
6) Employee is entitled to an attorney fee and cost award.

ORDER

1) Employee's claim for a compensation rate adjustment on TTD benefits is denied.
2) Employer shall pay Employee's medical providers directly for all medical services incurred for his June 3, 2019 work injury, in accordance with the medical fee schedule and this decision.
3) Employer shall pay Medicaid interest on all amounts Medicaid paid on Employee's behalf for his June 3, 2019 work injury, in accordance with this decision.
4) Employer shall pay Employee's providers interest on the difference between all amounts Medicaid paid those providers on Employee's behalf for his June 3, 2019 injury, and the amount Employer must now pay those same providers under the medical fee schedule, in accordance with the Act, regulations and this decision.
5) Employee's claim for past personal transportation expenses for his medical care is denied.
6) Employee's request for "penalties" and interest is granted. Employer shall pay §070(f) and §155(e) penalties to Employee's medical providers directly, in accordance with this decision.
7) Employee's request for interest is granted. Employer shall pay interest to Medicaid and Employee's medical providers directly, in accordance with this decision.
8) Employee's request for enhanced attorney fees on the same benefits is denied.
9) Employee's request for actual attorney fees for his attorney's services up to the July 30, 2020 hearing is granted in part. Employer shall pay Dennis $70,987.46, in accordance with this decision.
10) Employee's request for statutory minimum attorney fees on all ongoing benefits that Employee incurs or to which he is entitled after July 30, 2020, is granted. Employer shall pay Dennis statutory minimum attorney fees on all benefits provided to Employee from July 30, 2020, and continuing, including but not limited to, medical care and vocational reemployment services. (*Hiborik III* at 42-43).

30) On September 15, 2020, Employee timely requested reconsideration and clarification of *Hiborik III* on three grounds: (1) The decision incorrectly found he identified no unpaid medical expenses; (2) Dr. Haughom's deposition was necessary and the decision improperly denied related attorney fees and costs; and (3) *Hiborik III* needed to clarify Employer's obligation to pay

attorney fees. As support for point (1), Employee cites documents he filed and served in January and July 2020 showing Medicaid's lien amount and Alaska Regional Hospital, Mat-Su Emergency Medical Physicians and Alaska Colorectal Surgery billing records; he also cites additional EOBs Employee has received since the July 30, 2020 hearing. Supporting point (2), he quotes Dr. Haughom's deposition opinions about Employee's ability to work and physical limitations. As for point (3), he cites *Hiborik III* and seeks clarification on what "activates the employer's obligation to pay statutory fees." (Petition for Reconsideration, September 15, 2020).

31) Discussing these three points, Employee contends: (1) Unpaid medical expenses were "in a state of flux" at the July 30, 2020 hearing and remain so; while "significant" medical expenses were unpaid on that date, the precise amount "was unknown." Nevertheless, he contends that on July 30, 2020, $1,561 from Alaska Colorectal Surgery and $2,822 from Mat-Su Emergency Physicians had been denied because they were not billed within 180 days of the injury. He thus concludes it was "not accurate to say there was no evidence of outstanding billings." Employee points to additional EOBs he has received since the July 30, 2020 hearing to demonstrate questions remain concerning unpaid medical bills. He reserves his "right to seek modification" once he can determine what medical bills have and have not been paid. (2) Employee contends Dr. Haughom's deposition caused Employer's hearing-date stipulation that he was entitled to a vocational reemployment eligibility evaluation. He notes Employer's hearing brief previously disputed "Employee's entitlement to reemployment benefits." Employee contends *Hiborik III* should not deny attorney fees and costs related to a deposition that in his view led to a hearing stipulation resolving an issue in dispute; in other words, the stipulation meant he prevailed on the vocational reemployment eligibility evaluation issue. (3) Employee interprets *Hiborik III* to mean statutory minimum attorney fees will be owed on all benefits "paid after July 30, 2020 hearing." He acknowledges the actual attorney fees he was awarded as "compensation for the work performed before the July 30, 2020 hearing." Employee concludes "if penalties and interest and medical expenses are paid after July 30, 2020, he is entitled to statutory fees on those amounts." He contends *Hiborik III* could also be interpreted to mean the actual attorney fees it awarded are "intended to compensate for the legal work done to recover all benefits incurred by the employer, but not paid, up to and through the July 30, 2020 hearing date." Employee contends if this is *Hiborik III*'s intention, Employee's lawyer "may be undercompensated for his

efforts." Employee notes his medical expenses, interest and penalties accrued before July 30, 2020 may exceed $1 million. Consequently, he notes statutory fees to obtain those benefits "would be $100,000." Thus, Employee reasons that *Hiborik III*'s $70,987.46 actual attorney fee award undercompensated him by $30,000. He now contends he "should be entitled to the greater of actual fees or statutory." (Petition for Reconsideration, September 15, 2020).

32) September 15, 2020 was the first time Employee requested the greater of actual or statutory minimum attorney fees on benefits incurred before July 30, 3030. (Agency file; record).

33) In the five prehearing conferences held in this case, Employee never said he was seeking the greater of actual or statutory minimum attorney fees. (Prehearing Conference Summary, November 20, 2019, January 7, 2020, January 22, 2020, May 8, 2020 and May 22, 2020).

34) On September 25, 2020, *Hiborik IV* granted Employee's petition for reconsideration solely to allow Employer to respond to it before the appeal deadline passed. (*Hiborik IV*).

35) On October 5, 2020, Employer opposed Employee's petition for reconsideration, addressing his three points in turn: (1) Employee has still not identified unpaid medical bills. Employer contends it paid the Alaska Colorectal Surgery bill on July 15, 2020; it paid the Mat-Su Emergency Medical Physicians bills on July 13 and July 15, 2020. As for bills from Alaska Imaging Associates or other providers, Employer was unable to locate corresponding documents in the record prior to July 30, 2020 hearing; it contends it is therefore not possible for it to address these bills. Further, Employer contends the board also lacks evidence necessary to rule on them and Employee's request for reconsideration based on them should be denied. (2) Employer had formally withdrawn its only controversion on July 9, 2020, and had effectively withdrawn it and had begun paying benefits earlier. Thus, it contends Dr. Haughom's deposition was unnecessary and did not affect any issue at the July 30, 2020 hearing. (3) Employee's attorney fee arguments are frivolous; Employer contends Employee continues to argue he should be awarded "both statutory and actual attorney's fees on the same benefits." Employer concedes both actual and statutory minimum attorney fees can be awarded in the same case and contends *Hiborik III* did so appropriately by bifurcating awarded benefits between those obtained by legal services performed through the hearing date versus additional benefits that may be obtained in the future through his attorney's services. It contends medical costs Employee obtained prior to the hearing are "finite and defined benefits" regardless of whether or not they are paid before or

after the hearing; these are different from benefits that may be provided in the future. Employer contends even if Employee produces additional evidence showing unpaid pre-July 30, 2020-hearing medical costs, these should not be considered now because there is no reason he could not have obtained this information and argued it at the July 30, 2020 hearing or at least before the record closed. It contends Employee is inappropriately seeking statutory minimum attorney fees on medical benefits that were incurred prior to the July 30, 2020 hearing, but may not be paid until some point in the future; Employer contends fees on those were compensated in the actual attorney fee award. Employer contends Employee's request for "synthetically exaggerated" attorney fees should be rejected and his petition for reconsideration and clarification denied. (Employer's Opposition to Petition for Reconsideration, October 5, 2020).

36) Employer never controverted Employee's case under AS 23.30.022, 23.30.100, 23.30.105, and 23.30.250 or 8 AAC 45.510(b). (Agency file).

PRINCIPLES OF LAW

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

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
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> > (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
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> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
> . . . .
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> (c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. . . . If the employee is totally unable to return to the employee's employment at the time of injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. . . .
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> **AS 23.30.097. Fees for medical treatment and services**. . . .
> . . . .

(h) A provider of medical treatment or services may receive payment for medical treatment and services under this chapter only if the Bill for services is received by the employer within 100 days after the later of

(1) the date of service; or
(2) the date that the provider knew of the claim and knew that the claim related to employment.

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. . . . 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. . . .

State of Alaska, Department of Corrections v. Wozniak, AWCAC Decision No. 276 (March 26, 2020), held that if an award under §145(a) and (b) is reasonable, then an award of statutory fees on benefits awarded divided between actual fees through time of hearing and fees on future benefits is also reasonable. Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990).

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

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

> **8 AAC 45.522. Ordering an eligibility evaluation without a request.** (a) For injuries occurring on or after November 7, 2005, if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation, unless the employer controverts on grounds identified under AS 23.30.022, 23.30.100, 23.30.105, and 23.30.250, or 8 AAC 45.510(b). . . .
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> **8 AAC 45.525. Reemployment benefit eligibility evaluations.** (a) If an employee is found eligible for an eligibility evaluation . . . under AS 23.30.041(c), the rehabilitation specialist . . . shall
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> (1) interview the employee and the employer and review all written job descriptions existing at the time of injury that describe the employee's job at the time of injury;
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> (2) review the appropriate volume listed in (A) or (B) of this paragraph and, based on the description obtained under (1) of this subsection, select the most appropriate job title or titles that describe the employee's job; if the employee's injury occurred
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> . . . .
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> (3) submit all job titles selected under (2) of this subsection to the employee's physician, the employee, the employer, and the administrator.
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> . . . .
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> (f) The rehabilitation specialist . . . shall document whether a permanent impairment is identified or expected at the time of medical stability. This documentation may be either a physician's rating . . . or a physician's statement that an impairment rating is or is not expected. . . .

ANALYSIS

Should *Hiborik III* be reconsidered or clarified?

Employee raises three bases for his petition for reconsideration: (1) The decision incorrectly found he identified no unpaid medical expenses; (2) Dr. Haughom's deposition was necessary and the decision improperly denied related attorney fees and costs; and (3) *Hiborik III* needs to clarify Employer's obligation to pay attorney fees.

(1) Hiborik III correctly found Employee identified no unpaid medical expenses.

On February 20, 2020, *Hiborik I* found Employee's injury arose out of and in the course of his employment with Employer and came under the Act's coverage. On April 29, 2020, the commission in *Hiborik II* held workers' compensation in Alaska is self-executing and once an injury is found compensable "there is an automatic duty on the part of the employer to pay benefits," and affirmed *Hiborik I*. On June 11, 2020, Employer effectively withdrew its only controversion in this case when it told Employee it was calculating and paying his past benefits. *Rogers & Babler*. As for medical care, on that same date Employer's counsel said they would be paid in accordance with the Act and said, "We are not denying medical benefits at this time."

On July 7, 2020, Mat-Su Emergency Medical Physicians sent Dennis a letter with EOBs from the carrier declining payment for bills provided outside the timely filing limit; the provider was appealing these denials under AS 23.30.097(h). On July 10, 2020, Employee filed EOBs for services rendered at Alaska Colorectal Surgery, which had also been declined due to late filing. In Employee's brief for the July 30, 2020 hearing, he admitted "the current amount of unpaid past medical charges is unknown. . . ." Employee attached various EOBs to his brief but did not address them or present argument or evidence at hearing refuting the EOBs' timeliness decisions. *Hiborik III* ordered Employer to pay Employee's medical providers directly for *all* medical services incurred for his work injury, in accordance with the medical fee schedule, including those already paid by Medicaid. Without identifiable evidence and appropriate arguments, *Hiborik III* could not have ordered Employer to pay allegedly untimely billings, or unidentified but unpaid bills that had not yet been filed or served, in accordance with the Act. In his September 15, 2020 petition for reconsideration, Employee admitted unpaid medical expenses were "in a state of flux" on the hearing date and remain so today. He further admitted though "significant" medical expenses were unpaid as of July 30, 2020, he conceded the precise amount "was unknown" and he did not specifically identify what those expenses were. This may explain why *Hiborik III* could not identify any specific, unpaid medical bills and direct Employer to pay them.

Employee points to bills from Alaska Colorectal Surgery and Mat-Su Emergency Physicians that had been denied as tardy and contended it was therefore incorrect to conclude there was no evidence of outstanding medical billings. But Employer correctly contends Employee has still

not identified unpaid medical bills; he identified incurred medical bills from various sources all of which Medicaid already paid. Further, Employer paid the Alaska Colorectal Surgery bill on July 15, 2020, and the Mat-Su Emergency Physicians bills on July 13 and 15, 2020, according to uncontradicted evidence offered at hearing. Employer could not locate other allegedly unpaid bills Employee referenced in his pleadings. It was incumbent upon Employee to present evidence at hearing of any unpaid medical bills related to his work injury and to provide proof showing when he served the bills and related medical records on Employer. Employer had already paid the only identifiable bills he referenced in his hearing brief that were served on Employer. Thus, *Hiborik III* will not be reconsidered on this basis.

In the event Employee discovers pre-July 30, 2020-hearing medical bills that, for any reason, he contends could not have been discovered, filed and served prior to the July 30, 2020 merits hearing, he can file a claim for those bills subject to Employer's defenses.

(2) Dr. Haughom's deposition was unnecessary and Hiborik III properly denied related attorney fees and costs.

Employer only controverted Employee's right to benefits once, based on its defense that his injury did not arise out of and in the course of employment, and was thus not covered under the Act. *Hiborik I* rejected that contention. Employee has been totally disabled from his work at the time of injury since the injury; Employer has paid him TTD benefits accordingly. Effective April 29, 2020, when *Hiborik II* affirmed *Hiborik I*, Employee's right to benefits became self-executing absent a new controversion; Employer never controverted his benefits again. *Hiborik I* and *II* eliminated the only controversion notice filed in this case. Employer effectively withdrew its controversion and any implied resistance to Employee's claims by email on June 11, 2020, and formally withdrew it on July 9, 2020.

Most notably, effective July 30, 2020 hearing, Employee had been disabled for 423 consecutive days; 90 days post-injury, his right to a reemployment eligibility evaluation became automatic. AS 23.30.041(c); 8 AAC 45.522(a). At hearing and in its brief, Employer only stipulated to Employee's right to an eligibility evaluation, not his eligibility; its hearing stipulation and briefing merely stated the obvious. Employer's hearing stipulation that Employee was entitled to

an eligibility evaluation was meaningless since he was already entitled to an evaluation as a matter of law. The specialist will send an inexpensive questionnaire to Employee's doctor addressing the information needed to determine Employee's eligibility. AS 23.30.041(c); 8 AAC 45.525(a), (f). Employer must pay for this "reasonable cost." AS 23.30.001(1). Dr. Haughom's deposition was not necessary to obtain a vocational reemployment eligibility evaluation or a stipulation for one from Employer. 8 AAC 45.180(f). *Hiborik III* will not be reconsidered on this basis.

(3) Hiborik III clarified Employer's obligation to pay attorney fees.

Employee's request for attorney fees has been difficult to understand almost from this case's inception. Through all prehearing conferences, hearings, briefs and arguments in this case, Employee never requested the greater of actual attorney's fees or statutory minimum fees until September 15, 2020, when he petitioned for reconsideration. In his January 15, 2020 hearing brief, Employee said he wanted actual and statutory minimum attorney fees based on the *Wozniak* rationale. AS 23.30.145(a). *Wozniak* awarded actual attorney fees for work the employee's attorney did prior to the hearing, and awarded continuing, statutory minimum fees, on all benefits the injured worker would be entitled to in the future. AS 23.30.145(b). Employee's initial *Wozniak* attorney fee request made perfect sense. In fact, *Hiborik III* awarded Employee's attorney fees based upon the *Wozniak* rationale.

However, Employee's July 27, 2020 hearing brief, July 30, 2020 arguments and Dennis' testimony were not so clear. At hearing, when asked to clarify his attorney fee request, Dennis unequivocally said he wanted actual and statutory minimum attorney fees on the same past benefits. Employer understood this was the claim and called it "preposterous." When injured worker requests statutory minimum attorney fees on benefits accrued and awardable prior to hearing, there is no need to file an affidavit itemizing attorney fees; the attorney fees are simply a percentage of the total amounts ultimately awarded; actual fees are irrelevant. Dennis filed extensive attorney fee affidavits and supplemented his time and expenses at hearing and after. Employee cited no statute or case law suggesting he could receive statutory minimum attorney fees on all benefits he obtained through the hearing date and also receive his actual attorney's fees on the same benefits on top of that.

Employee's attorney has been fully and reasonably compensated through actual attorney fees for legal efforts resulting in all benefits accrued and awarded prior to the July 30, 2020 hearing regardless of whether the benefits are paid after that date. He is also entitled to continuing, statutory minimum attorney fees on any and all additional benefits to which he may be entitled in this case going forward. *Cortay*. Employee has not demonstrated any legal error in how his attorney fees were calculated and awarded. Therefore, *Hiborik III* needs no clarification on the attorney fee award. Employee's request for reconsideration and clarification will be denied.

CONCLUSION OF LAW

Hiborik III will not be reconsidered or clarified.

ORDER

Employee's September 15, 2020 petition for reconsideration and clarification is denied.

Dated in Anchorage, Alaska on October 13, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

/s/
Bronson Frye, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order on Reconsideration in the matter of Steven Hiborik, employee / claimant v. Westside Flooring, LLC, employer; American Fire and Casualty Company, insurer / defendants; Case No. 201911330; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on October 13, 2020.

/s/
Nenita Farmer, Office Assistant