

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

KENNETH KVERNVIK,)	
)	
Employee,)	
Claimant,)	
)	
v.)	FINAL DECISION AND ORDER
)	
HAMMER & WIKAN, INC.,)	AWCB Case No. 202121981
)	
Employer,)	AWCB Decision No. 22-0001
and)	
)	Filed with AWCB Juneau, Alaska
THE OHIO CASUALTY INSURANCE)	on January 3, 2022
COMPANY,)	
)	
Insurer,)	
Defendants.)	

Kenneth Kvernvik's (Employee) August 10, 2021 claim was heard on December 7, 2021, in Juneau, Alaska, a date selected on October 18, 2021. An October 5, 2021 request gave rise to this hearing. Attorney Keenan Powell appeared telephonically and represented Kenneth Kvernvik, who appeared telephonically and testified. No representative appeared for Hammer & Wikan, Inc. and The Ohio Casualty Insurance Company (Employer). As a preliminary issue, the panel issued an order to proceed in Employer's absence. The record closed at the hearing's conclusion on December 7, 2021. This decision examines the order to proceed, and decides Employee's claim.

ISSUES

A representative for Employer did not appear. Employee requested the hearing proceed in Employer's absence as it had been properly noticed.

It was assumed Employer opposed the request. An oral order issued to proceed with the hearing.

1) Was the decision to proceed with the hearing in Employer's absence correct?

Employee contends he is entitled to a compensation rate adjustment based upon his 2020 wage information. He contends Employer began paying him temporary total disability (TTD) benefits at the minimum rate and failed to timely pay him the correct compensation rate after he provided his wage information.

It is unknown if Employer opposes this request; it will be assumed Employer opposes it.

2) Is Employee entitled to a compensation rate adjustment?

Employee contends he is entitled to TTD benefits from August 3 to 31, 2021. He concedes two checks were returned by the post office, but he told Employer his address was correct and told the post office to stop returning his mail. Employee contends he never received checks for those missing installment payments after his mail issue was exposed and addressed.

It is unknown if Employer opposes this request; it will be assumed Employer opposes it.

3) Is Employee entitled to TTD benefits?

Employee contends he is entitled to medical and transportation reimbursements for prescription and travel costs he incurred to obtain medical treatment.

It is unknown if Employer opposes this request; it will be assumed Employer opposes it.

4) Is Employee entitled to medical and transportation costs?

Employee contends he is entitled to interest on TTD benefits and transportation costs.

It is unknown if Employer opposes this request; it will be assumed Employer opposes it.

5) Is Employee entitled to interest?

Employee contends Employer unfairly and frivolously controverted-in-fact when it failed to pay TTD benefits, failed to timely pay the correct compensation rate and underpaid transportation and medical costs. He requests an order finding Employer unfairly or frivolously controverted benefits.

It is unknown if Employer opposes this request; it will be assumed Employer opposes it.

6) Did Employer unfairly or frivolously controvert benefits?

Employee contends he is entitled to a penalty on past TTD, unpaid TTD benefits and underpaid transportation and medical costs.

It is unknown whether Employer opposes this request; it will be assumed Employer opposes it.

7) Is Employee entitled to penalties?

Employee contends he is entitled to an attorney fee award because Employer resisted paying benefits when it underpaid TTD benefits, failed to pay TTD benefits and underpaid transportation and medical costs. He requests an order awarding full, actual fees and statutory fees on any benefits paid in the future.

It is unknown whether Employer opposes this request; it will be assumed Employer opposes it.

8) Is Employee entitled to attorney fees?

FINDINGS OF FACT

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

- 1) On June 22, 2021, Employee injured his calf muscle while pushing a heavy pallet up a ramp at work. He lived in Petersburg, was married and had no dependents. (Employee Report of Occupational Injury or Illness to Employer, June 22, 2021).
- 2) On July 2, 2021, Employee underwent magnetic resonance imaging (MRI) of his right lower leg at Juneau Bone and Joint Center. (MRI report, July 2, 2021).

- 3) On July 6, 2021, Employee had surgery on his right Achilles tendon at Bartlett Regional Hospital. (Operative Note, July 6, 2021).
- 4) On July 7, 2021, Employer reported Employee injured his right leg on June 22, 2021, while pushing a heavy pallet up a ramp at work. It provided Melanie Prestidge as “Claim Administrator Claim Representative,” her email address and the address for the insurer. (First Report of Occupational Injury, July 7, 2021).
- 5) On July 12, 2021, Ms. Prestidge asked Jean Hammer at Hammer & Wikan, Inc., for Employee’s most recent wage statements. (Email, July 12, 2021).
- 6) On July 21, 2021, Ms. Hammer, the Human Resource and Safety Coordinator for Employer, with written authorization from Employee, emailed Ms. Prestidge Employee’s 2019 1099-Misc for F/V Odin, Inc., with proceeds totaling \$42,753.24; 2020 1099-Misc for F/V Odin, Inc., with proceeds totaling \$40,155.44; and 2020 W-2 for Hammer & Wikan, Inc., with wages totaling \$6,559.51. She also emailed prescription receipts totaling \$101.87 for medications purchased on July 12, 2021, for \$39.36 and July 19, 2021, for \$36.41 and \$26.10; Mi Casa Restaurant receipts; a \$40 taxi receipt on July 1, 2021; booking confirmation for a trip with Alaska Seaplane from Juneau to Petersburg on July 2, 2021, for \$15; Travelodge hotel receipts dated July 2 and 3, 2021; and Wells Fargo activity printout for Employee’s bank account for transactions at Mi Casa, Alaska Air, dated from July 6 to 9, 2021. The table below demonstrates the transactions for transportation and meal costs from the receipts and bank account activity:

Table One. Prescription and Transportation Costs

Transactions Date	Description	Amount
July 2, 2021	Glacier Taxi - Hotel to Hospital	\$40.00
July 2, 2021	Alaska Seaplanes Juneau to Petersburg	\$15.00
July 3, 2021	Alaska Air	\$182.60
July 3, 2021	Alaska Air	\$182.60
July 3, 2021	Alaska Seaplanes	\$448.00
July 2, 2021	Mi Casa Restaurant	\$27.59
July 2, 2021	Mi Casa Restaurant	\$49.31
July 2, 2021	Mi Casa Restaurant	\$59.31
July 5, 2021	Mi Casa Restaurant	\$26.20
July 5, 2021	Mi Casa Restaurant	\$37.14
July 5, 2021	Mi Casa Restaurant	\$47.14
July 5, 2021	Mi Casa Restaurant	\$31.20

July 7, 2021	Mi Casa Restaurant	\$17.82
July 7, 2021	Mi Casa Restaurant	\$25.82
July 1, 2021	Travelodge	\$181.26
July 2, 2021	Travelodge	\$181.26
	Total	\$1,512.25

(Email, July 21, 2021).

7) On September 23, 2021, Employer reported it paid Employee \$8,103.66 in TTD benefits from June 23 through September 15, 2021. (Second Report of Injury (SROI), September 23, 2021).

8) On August 10, 2021, Employee sought TTD benefits, a compensation rate adjustment, a penalty for late paid compensation, interest, a finding of unfair or frivolous controvert and attorney fees and costs for his snapped Achilles tendon. (Claim for Workers' Compensation Benefits, August 10, 2021). Employee also filed and served on Ms. Prestidge a copy of the Online Benefit Calculator showing a TTD weekly benefit is \$634.64 based upon a gross weekly wage of \$934.29 and single with one exemption using his 2020 earnings ($\$40,155.44 + \$6,559.51 = \$46,714.95 / 50 = \934.29). (Certificate of Service and Email, August 10, 2021).

9) On August 13, 2021, the Division served the claim by certified mail to the insurer's address of record. (Claim Served and Letter, August 13, 2021; Envelope with United States Postal Service (USPS) Tracking Number 9171082133393760448582).

10) On August 16, 2021, William Noe picked up Employer's copy of the served claim. (Proof of Delivery for USPS Tracking Number 9171082133393760448582, August 16, 2021).

11) On September 20, 2021, Ms. Prestidge emailed Employee's attorney from her email address of record and stated,

I recently received your notice of representation and wanted to provide you a brief summary of the claim to date . . .

- Accepted body parts: right Achilles rupture
- Denied body parts: none
- Time loss benefits: Time loss being paid as of 06/23/21; weekly benefit rate is \$667.36
- Medical:
 - Treatment Summation:
 - 07/06/21 Right Achilles tendon open repair
 -

Outstanding Issues:

- Your client's payments are being returned as undeliverable. We have a mailing address of [Employee's Petersburg address of record] which is also what your claim for benefits reads. Please confirm this address with your client and if it is correct, the only other option would be setting your client up for Direct Deposit which can be done by accessing our online Injured Worker Toolkit at <https://myclaim.libertymutual.com/en-US/landing>. I'd like to get the last two payments that have been returned sent back out, I just need to confirm the address first.
- Your client had to travel for diagnostics and surgery; I have issued appropriate reimbursement for travel & per diem except for one item that I need clarification on.
 - Can you please confirm with your client if they spent 1 or nights in Juneau on/around 7/1/21? The receipts got a bit confusing and once I know how many nights, I can issue that portion of the reimbursement.
(Email, September 20, 2021).

12) On September 22, 2021, Employee's attorney emailed Ms. Prestidge, "For some bizarre reason, someone at [the post office] thought my client had left town and was returning his mail. You have the correct address. I'll inquire as to remaining issues." (Email, September 22, 2021).

13) On October 5, 2021, Employee requested a hearing on his August 10, 2021 claim. (Affidavit of Readiness for Hearing (ARH), October 5, 2021).

14) Employer did not answer Employee's claim or controvert it and did not oppose the ARH. (Agency file).

15) No representative entered an appearance on behalf of Employer. (Agency file).

16) On October 6, 2021, the Division served notice for an October 18, 2021 prehearing conference upon the insurer by first-class mail to its address of record. (Prehearing Conference Notice Served, October 6, 2021).

17) Ms. Prestidge was the "claim representative" on all SROIs and each SROI included her email address of record. (SROI, August 2, 2021, August 18, 2021, and September 23, 2021).

18) On October 7, 2021, Employee filed and served evidence upon Employer at Ms. Prestidge's email address of record, including the September 20, 2021 email from Ms. Prestidge; copies of the following checks from Employer: numbers 05092711, 05113310, 05127101, 05135586, 05135587, 0515596, 05202447, 0521787 and 05155962; and a copy of an envelope addressed to Employee from Employer dated August 13, 2021. Check Number 05155962 was dated August 12, 2021, and reimbursed "Pharmacy" and "Travel" expenses in the "Service Description" in the

total amount of \$1,183, including \$101.87 for pharmacy and \$1,081.46 for travel for separate payments of \$365.20, \$15.00, \$181.26, \$40.00 and \$480.00. Employee also provided tables of all TTD benefit checks he received and calculations of unpaid TTD benefits, penalties on underpaid or unpaid TTD benefits and underpaid medical and travel benefits. (Email and Certificate of Service, October 7, 2021).

19) On October 28, 2021, the Board Designee attempted to call the claims adjuster, Ms. Prestidge, and left a voicemail message requesting a call back to participate in the prehearing conference. The Designee proceeded with the prehearing conference after receiving no return call. Employee orally amended his claim to include medical and transportation costs. Employer was instructed to file a formal written answer within 20 days of the prehearing conference. The Designee scheduled an oral hearing on Employee's August 10, 2021 claim for December 7, 2021, and listed the following issues: TTD, compensation rate adjustment, medical and transportation costs, penalties for late paid compensation, interest, unfair and frivolous controvert, attorney fees and costs. The Designee also set deadlines for briefs, witness lists and evidence and directed parties to file and serve those pleadings by the deadlines. (Prehearing Conference Summary, October 28, 2021).

20) On October 29, 2021, the Division served Employer with the October 28, 2021 prehearing conference summary and the December 7, 2021 hearing notice by certified mail to the insurer's address of record. (Prehearing Conference Summary Served and Hearing Notice Served, October 29, 2021; Envelope USPS Tracking Number 9171082133393760450882, October 29, 2021).

21) On November 2, 2021, an individual picked up Employer's copy of the served October 28, 2021 prehearing conference summary and the December 7, 2021 hearing notice. (Proof of Delivery for USPS Tracking Number 9171082133393760450882, November 2, 2021).

22) On November 30, 2021, Employee contended the weekly TTD benefit of \$667.36 is acceptable. (Employee's Hearing Brief, November 30, 2021).

23) On November 30, 2021, Employee requested \$6,805 for actual attorney fees. His attorney billed \$1,280 for 3.2 hours of work through August 12, 2021, at \$400 per hour (3.2 hours x \$400/hour) and \$5,525 for 13 hours of work after August 12, 2021 at \$425 per hour (13 hours x \$425/hour). Employee's attorney addressed required factors from Rule 1.1(a) supporting her

request for reasonable fees. (Affidavit of Counsel Regarding Fees and Costs, November 30, 2021).

24) Employer did not file evidence or a brief to be considered at hearing. (Agency file).

25) At hearing on December 7, 2021, the chair called Ms. Prestidge several times and left a voicemail message on her voicemail requesting a call back to participate in the hearing; Ms. Prestidge did not return the chair’s call. (Record).

26) At hearing, Employee testified in August 2021, there was turnover at the post office and all of his mail was returned to sender but he does not know why. He had to go to the post office and tell them to stop returning his mail. Employee believed Employer likely mailed the missing checks for the August 4 through August 31, 2021 TTD benefit payments but the post office probably returned the checks. However, he submitted copies of all the checks he received to date. Employee has not received TTD benefit checks for August 4 through August 31, 2021. He flew from Petersburg to Juneau on July 1, 2021, for his July 2, 2021 MRI. Employee’s return flight was cancelled so he stayed an extra night and flew back to Petersburg on July 3, 2021. He flew from Petersburg to Juneau on July 5, 2021, for the July 6, 2021 surgery and returned to Petersburg on July 7, 2021. (Employee).

27) At hearing, Employee’s attorney requested \$7,400 in actual fees (\$6,805 + \$595); included in the \$595 additional fees were 1.4 hours at \$425 per hour (.2 hour to review for hearing, .1 hour for a call with Employee and 1.1 hours to attend the hearing = 1.4 hours). (Employee’s attorney).

28) Based upon the check copies provided by Employee, Employer paid the following TTD benefits:

Table Two. TTD Benefit Checks Employee Received.

Check Date	Check Number	Service Description Period Covered	Rate	Amount
July 2, 2021	0509271	June 23 - 25, 2021 June 26 - July 6, 2021	\$110	\$0.00 \$172.81
July 16, 2021	05113310	July 7 - 20, 2021	\$110	\$220.00
July 26, 2021	05127101	June 26 - July 20, 2021	\$154	\$157.19
July 30, 2021	05135586	July 21 - Aug. 3, 2021	\$154	\$308.00
July 30, 2021	05135587	June 23 - 25, 2021	\$154	\$22.00
August 12, 2021	05155965	June 23 - Aug. 3, 2021	\$667.36	\$3,124.16
September 10, 2021	05202447	September 1 - 14, 2021	\$667.36	\$1,334.72
September 21, 2021	05217872	September 15, 2021	\$667.36	\$95.34

			Total	\$5,434.22
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(Agency file).

29) Employee’s 2020 earnings totaled \$46,714.95 (\$40,155.44 + \$6,559.51). His TTD weekly benefit is \$660.72 based upon a gross weekly wage of \$934.30 and married with one exemption (\$46,714.95 / 50 = \$934.30). Employer should have paid Employee \$8,023.03 in TTD benefits by September 21, 2021:

Calculation One. Unpaid TTD Benefits
 June 26 - September 15, 2021 = 12 weeks, 1 day
 \$660.72/week x 12 weeks, 1 day = \$8,023.03
 Amount Paid \$5,434.22
 \$2,588.81

Table Three. How TTD Benefits Should Have Been Paid

Payment Date	Period	Rate	Paid
July 2, 2021	June 23 - 25, 2021	\$110	\$0.00
	June 26 - July 6, 2021		\$172.81
July 16, 2021	July 7 - 20, 2021	\$110	\$220.00
July 30, 2021	June 23 - 25, 2021	\$660.72	\$283.17
July 30, 2021	July 21 - Aug. 3, 2021	\$660.72	\$1,321.44
Subtotal			\$1,997.42
July 30, 2021	Adjustment Payment for June 23 - Aug. 3, 2021	\$660.72	\$1,966.90
Subtotal			\$3,964.32
Aug. 13, 2021	Aug. 4 - Aug. 17, 2021	\$660.72	\$1,321.44
August 27, 2021	Aug. 18 - 31, 2021	\$660.72	\$1,321.44
Sept. 10, 2021	Sept. 1 - 14, 2021	\$660.72	\$1,321.44
Sept. 21, 2021	Sept. 15, 2021	\$660.72	\$94.39
Total			\$8,023.03

(Experience, judgment, observations).

30) Employer paid the compensation rate adjustment late on August 13, 2021, because it was due on July 30, 2021, and Employee has not received TTD benefits for August 4 - 30, 2021. It also underpaid and overpaid benefit payments at times due to incorrect compensation rates. Accordingly, Employer paid \$5,673.13 in TTD benefits late and the penalty on the late amount is \$1,418.29:

Table Four. 25% Penalties on Underpaid or Unpaid TTD Benefits.

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Period	Date Paid	Date Due	Paid	Due	Total Due to Date	Total Paid to Date	Over-or Under-Paid	Late-Over-or Under-Paid to Date
June 26 - July 6, 2021	July 2, 2021	July 2, 2021	\$172.81	\$172.81	\$172.81	\$172.81	\$0.00	\$0.00
July 7 - 20, 2021	July 16, 2021	July 16, 2021	\$220.00	\$220.00	\$392.81	\$392.81	\$0.00	\$0.00
June 26 - July 20, 2021	July 26, 2021	July 30, 2021	\$157.19	\$0.00	\$392.81	\$550.00	\$0.00	\$0.00
June 23 - 25, 2021	July 30, 2021	July 30, 2021	\$22.00	\$283.17	\$675.98	\$572.00	U \$262.17	O \$103.98
July 21 - Aug. 3, 2021	July 30, 2021	July 30, 2021	\$308.00	\$1,321.44	\$1,997.42	\$880.00	U \$1,103.44	U \$1,117.42
June 23 - Aug. 3, 2021	Aug. 13, 2021	July 30, 2021	\$3,124.16	\$1,966.90	\$3,964.32	\$4,004.16	O \$1,127.26	O \$39.84
(\$3,124.16 – \$39.84 or \$1,117.42 + \$1,966.90) Subtotal Paid Late							\$3,084.32	
Aug. 4 - 17, 2021		Aug. 13, 2021	\$0.00	\$1,321.44	\$5,285.76	\$4,004.16	U \$1,321.44	L \$1,281.60
Aug. 18 - 31, 2021		Aug. 27, 2021	\$0.00	\$1,321.44	\$6,607.20	\$4,004.16	U \$1,321.44	L \$2,603.04
Sept. 1 - 14, 2021	Sept. 10, 2021	Sept. 10, 2021	\$1,334.72	\$1,321.44	\$7,928.64	\$5,338.88	O \$13.28	L \$2,589.76
Sept. 15, 2021	Sept. 21, 2021	Sept. 21, 2021	\$95.34	\$94.39	\$8,023.03	\$5,434.22	O \$0.95	L \$2,588.81
(\$1,281.60 + \$1,321.44 - \$13.28 - \$0.95) Subtotal Paid Late							\$2,588.81	
Total Paid Late							\$5,673.13	
25% Penalties							\$1,418.29	

(Experience, judgment, observations and inferences drawn from the above).

31) Employee submitted \$1,512.25 in meal and transportation costs required for medical care travel. Employer reimbursed \$1,081.46 but did not explain how it determined that amount was computed.

Calculation Two. Transportation and Meals Costs Unpaid and Unexplained.
Total Amount Submitted \$1,512.25 - Amount Paid \$1,081.46 = \$430.79

(Experience, judgment, observations and inferences drawn from the above).

32) Employer reimbursed Employee in-full for the prescription receipts submitted. (Experience, judgment, observations and inferences drawn from the above.).

33) The parties do not dispute Employee's entitlement TTD benefits from June 23 through September 15, 2021. (Agency file).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

....

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The general purpose of workers' compensation statutes is to provide workers with a simple, speedy remedy to be compensated for injuries arising out of their employment. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978). 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 23.30.097. Fees for medical treatment and services. . . .

(g) Unless the employer controverts a charge, the employer shall reimburse an employee's prescription charges under this chapter within 30 days after the

employer receives the health care provider's completed report and an itemization of the prescription charges for the employee. Unless the employer controverts a charge, an employer shall reimburse any transportation expenses for medical treatment under this chapter within 30 days after the employer receives the health care provider's completed report and an itemization of the dates, destination, and transportation expenses for each date of travel for medical treatment. If the employer does not plan to make or does not make payment or reimbursement in full as required by this subsection, the employer shall notify the employee and the employee's health care provider in writing that payment will not be made timely and the reason for the nonpayment. The notification must be provided not later than the date that the payment is due under this subsection.

....

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

The board's credibility finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

AS 23.30.155. Payment of compensation. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .

....

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid. . . .

(o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

(p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.

The Alaska Supreme Court has taken a broad reading of the term “controverted,” and has held a “controversion in fact” can occur when an employer did not file a formal controversion. *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978). A controversion-in-fact can occur when an employer does not “unqualifiedly accept” an employee’s claim for compensation, *Shirley* at 159, or when an employer consistently denies and litigates its obligation to pay an increase in benefits. *Wien Air Alaska v. Arant*, 592 P.2d 352 (Alaska 1979). A controversion-in-fact also occurs when an employer does not file a controversion notice but denies liability for benefits in its answer to a claim. *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007). To determine whether there has been a controversion-in-fact, an employer’s answer to a claim for benefits and its actions after the claim is filed must be examined. *Id.* at 152. Resistance before the filing of a claim cannot serve as a basis for a controversion-in-fact. *Id.* For there to be a controversion in fact, an employer must take some action in opposition to a claim after it is filed. *Id.*

A controversion notice must be filed “in good faith” to protect an employer from a penalty under AS 23.30.155(e) or to avoid referral to the Division of Insurance under AS 23.30.155(o). *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). “For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits.” *Harp* at 358.

In *Phillips v. Nabors Alaska Drilling, Inc.*, 740 P.2d 457, 461 (Alaska 1987), the Court further explained that if compensation was paid based on the facts presented to the employer, a penalty was not appropriate merely because the Board could award higher compensation based on other facts.

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.

.....

Attorney's fees in Alaska workers' compensation cases should be "fully compensatory and reasonable" to ensure injured workers have "competent counsel available to them." *Childs v. Copper Valley Elec. Ass'n.*, 860 P.3d 1184, 1190 (Alaska 1993); *Wise Mechanical Contractors v. Bignell*, 718 P.3d 971 (Alaska 1986). The factors set out in ARPC 1.5(a) are reviewed to determine attorney's fee awards. *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.2d 784, n. 51 (Alaska 2019). Those factors are:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Each factor is to be considered and findings or explanation made as to why the factor was not relevant. The presumption of compensability does not apply to the amount of fees and their reasonableness. *Rusch*. If an attorney's fee award under AS 23.30.145(a) and (b) is reasonable, then an award of statutory fees on benefits awarded and divided between actual fees incurred

through hearing and fees on future benefits is also reasonable. *State of Alaska v. Wozniak*, AWCAC Dec. No. 276 (March 26, 2020).

AS 23.30.220. Determination of spendable weekly wage. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

(4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;

....

In *Williams v. Abood*, 53 P.3d 134 (Alaska 2002), the Court held the compensability presumption does not apply to a compensation rate adjustment claim. In *Rockney v. Boslough Construction Co.*, 115 P.3d 1240, 1243 (Alaska 2005), the Court said the presumption did not apply to a vocational rehabilitation plan, since the parties did not dispute the employee's entitlement to a plan or the employer's liability to pay for it and he was not seeking "coverage" for it. They were only disputing the plan's details under which his benefits would be provided. The Court in *Burke v. Houston NANA, LLC*, 222 P.3d 851, 861 (Alaska 2010), discussed other instances in which the presumption analysis did not apply and said:

The presumption analysis does not apply to every possible issue in a workers' compensation case. We have previously held the presumption of compensability inapplicable when evaluating a reemployment plan because the parties agreed that the employee's claim was covered by the provisions of the workers' compensation statute and applying the presumption did not "promote the goals of encouraging coverage and prompt benefit payment" (footnote omitted).

Here, the board did not use the presumption analysis in evaluating Burke's chiropractic care claim. The presumption analysis might apply to the question whether *any* chiropractic care was necessary because that would raise the issue whether part of the claim was covered at all. It could also apply if a conforming treatment plan had been filed because the regulation related to excess treatment requires a factual determination about the efficacy of the treatment (footnote omitted). But we cannot see how the presumption analysis can be used to defeat the explicit statutory provision about frequency of treatment. . . .

In *Rusch*, the Court held the presumption did not apply to the amount of attorney's fees because the employer did not dispute the employee's right to attorney's fees; they disputed the fees' reasonableness. A claimant who bears the burden of proof must "induce a belief" in the minds of the fact-finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

AS 23.30.395. Definitions. In this chapter,

....

(22) "gross earnings" means periodic payments, by an employer to an employee for employment before any authorized or lawfully required deduction or withholding of money by the employer

....

8 AAC 45.070. Hearings (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). 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.

....

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

(1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the claim or petition;

(2) dismiss the claim or petition without prejudice; or

(3) adjourn, postpone, or continue the hearing.

....

8 AAC 45.074. Continuances and cancellations. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

....

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

....

8 AAC 45.084. Medical travel expenses. . . .

(b) Transportation expenses include. . . .

(2) the actual fare for public transportation if reasonably incident to the medical examination or treatment. . . .

(e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.

ANALYSIS

1) Was the decision to proceed with the hearing in Employer's absence correct?

Regulations set a discretionary course of action for the panel to take when a party served with notice of a hearing does not appear for it. The preferred action is for the panel to proceed with the hearing in the party's absence and to decide the issues presented. 8 AAC 45.070(f)(1). On October 29, 2021, notice of the December 7, 2021 hearing was sent to Employer by certified mail, and it was picked up on November 2, 2021. This clearly shows Employer had notice of the hearing.

The next choice is to dismiss the claim without prejudice. This does not apply because dismissing his claim would penalize Employee for Employer's failure to appear. 8 AAC 45.070(f)(2).

The final choice is to adjourn, postpone or continue the hearing. 8 AAC 45.070(f)(3). Hearings will be held at the time and place fixed by notice served and continuances may only be granted in accordance with the Act. 8 AAC 45.070(a). Continuances are not favored will not be routinely granted. 8 AAC 45.074(b). “Good cause” is required to grant a continuance and provides different situations that constitute good cause. 8 AAC 45.074(b)(1). Employee contends Ms. Prestidge, the claims adjuster, is not a material witness as the issues may be resolved without her testimony. Employer presented no argument and there is no evidence the issues cannot be resolved without Ms. Prestidge. There is not sufficient evidence to merit a continuance under 8 AAC 45.074(b)(1)(A). The designated chair called Ms. Prestidge during the hearing, normal business hours, and left a message; there was no call back. It is unknown why Employer was unavailable for hearing. Therefore, there is not sufficient evidence to merit a continuance under 8 AAC 45.074(b)(1)(B), (C). Good cause for a continuance exists when despite a party’s due diligence, they may suffer irreparable harm if the continuance is not granted. 8 AAC 45.074(b)(1)(N). There is no evidence regarding Employer’s diligence respecting the hearing, though it has not be diligent in other respects: it has not responded to the claim or ARH, did not file a brief and never requested a continuance. Thus, there is not sufficient evidence to merit a continuance under 8 AAC 45.074(b)(1)(N). The panel properly proceeded with the hearing in Employer’s absence.

2) Is Employee entitled to a compensation rate adjustment?

Employee contends he is entitled to a compensation rate adjustment. Ms. Hammer provided Employee’s wage information to the adjuster by email on July 21, 2021. Employer first paid Employee a weekly TTD benefit rate of \$110. He filed a compensation rate adjustment claim on August 10, 2021. Employer began paying the higher compensation rate of \$667.36 in the check mailed on August 13, 2021, for TTD benefits from June 23 through August 3, 2021. Employee contended he accepts \$667.36 as the weekly TTD benefit rate. As there are no factual disputes surrounding the issue to be decided, the statutory presumption analysis need not be applied. *Abood; Rockney; Rusch*. However, the wage information submitted by Employee for 2019 and 2020 supports a gross weekly wage of \$934.30, which results in a weekly TTD benefit rate of \$660.72 as he was married with one exemption. *Saxton*. Therefore, Employee is entitled to a

compensation rate adjustment for a weekly TTD benefit rate of \$660.72. Employer will be ordered to pay Employee a weekly TTD benefit rate of \$660.72.

3) Is Employee entitled to TTD benefits?

Employee contended he is entitled to an award of TTD benefits for August 4 to 31, 2021. He contends he received TTD benefit payments totaling \$5,434.22 (see Table Two) and never received payment for August 4 to 31, 2021. As there are no factual disputes surrounding the issue to be decided, the statutory presumption analysis need not be applied. *Abood; Rockney; Rusch*. While the September 23, 2021 SROI states Employer paid TTD benefits for the subject time period at \$667.36 per week, Employee credibly testified and provided documentary evidence that he has not received payment for TTD benefits from August 4 through August 31, 2021. AS 23.30.122; *Smith*. Employee met his burden to prove Employer failed to pay the TTD benefits from August 4 to 31, 2021. *Saxton*. Employer should have paid Employee \$8,023.03 in TTD benefits from June 23 to September 15, 2021 (see Calculation One). Employee is entitled to TTD benefits. Therefore, Employer will be ordered to pay Employee \$2,588.81 in TTD benefits from August 4 to August 31, 2021.

4) Is Employee entitled to medical and transportation costs?

Employee contends he is entitled to medical costs for prescriptions he paid out-of-pocket and transportation costs he incurred to obtain medical treatment. As there are no factual disputes surrounding the issue to be decided, the statutory presumption analysis need not be applied. *Abood; Rockney; Rusch*. Employee submitted prescription receipts totaling \$101.87. Check Number 05155962 dated August 12, 2021 indicated it was issued for “pharmacy” and “travel” in the “Service Description” and included \$101.87 for pharmacy. Therefore, Employer fully reimbursed Employee for the prescription costs and his claim for these costs will be denied.

Employee submitted \$1,512.25 in transportation costs. Employer reimbursed \$1,081.46 for travel costs, with itemization of separate payments of \$365.20, \$15.00, \$181.26, \$40.00 and \$480.00. As there are no factual disputes surrounding the issue to be decided, the statutory presumption analysis need not be applied. *Abood; Rockney; Rusch*. Employer reimbursed

Employee for the \$40.00 taxi cost; one night at the Travelodge Hotel for \$181.26; the \$15.00 flight by Alaska Seaplanes from Juneau to Petersburg; and two Alaska Air flights (\$182.60 x 2 = \$356.20). It is unclear which travel costs the \$480 payment reimbursed Employee for as Employer failed to provide an explanation. Employer paid \$430.79 less than the total travel costs Employee claimed (see Table One and Calculation Two).

Employee flew to Juneau on July 1, 2021, for his July 2, 2021 MRI. He credibly testified he stayed two nights at a hotel in Juneau for the July 2, 2021 MRI because his original flight on July 2, 2021, was cancelled and he returned to Petersburg on July 3, 2021. AS 23.30.122; *Smith*. Employer reimbursed him for one night lodging and will be ordered to reimburse him for the second night in Juneau. 8 AAC 45.084(e). Employee flew to Juneau again on July 5, 2021, for the July 6, 2021 surgery and he returned to Petersburg on July 7, 2021. Therefore, Employer will also be ordered to reimburse Employee the actual airfare for the four flights, two to Juneau and two returning to Petersburg. 8 AAC 45.084(b)(2); *Saxton*. The remaining travel costs Employee seeks include meals. He is entitled to per diem for meals, not actual meal costs. 8 AAC 45.084(e). It is unclear which travel costs, including the \$448 airfare, per diem meal costs, and \$181.26 July 2, 2021 lodging expense, the \$480 payment reimbursed Employee for as Employer failed to provide an explanation. But \$480 is clearly not sufficient to cover all unpaid travel costs Employee is entitled to. Therefore, he is entitled to unpaid transportation costs and Employer will be ordered to reimburse Employee for the \$448 flight, the remaining \$181.26 lodging expense and per diem amounts for meals while traveling to Juneau for medical treatment from July 1 to July 3, 2021, and from July 5 to July 7, 2021, less \$480 in travel costs it already paid. 8 AAC 45.084(b)(1), (e).

5) Is Employee entitled to interest?

Employee contends he is entitled to interest on TTD benefits paid at the higher compensation rate, as Employer failed to pay benefits when due, and on TTD benefits that remain unpaid from August 4 through August 31, 2021. Employer did not answer Employee's claim for interest. As there are no factual disputes surrounding the issue to be decided, the statutory presumption analysis need not be applied. *Rockney*. Ms. Hammer provided Employee's wage information by email to the adjuster on July 21, 2021. Payment was due on the date the subsequent

compensation payment was due. AS 23.30.155(b). Employer began paying at the higher \$667.36 compensation rate on the check issued August 12, 2021, and mailed August 13, 2021 for the period from June 23 through August 3, 2021. Payment was due 14 days after receipt of the wage information and subsequent compensation was due every 14 days. AS 23.30.155(b). There, the difference between the amounts of TTD benefits paid and the total TTD benefits under the new compensation rate for June 23, 2021 through August 3, 2021, was due on July 30, 2021, the date the next installment was due (see Table Three; July 2 + 14 days = July 16, 2021; July 16 + 14 days = July 30, 2021). *Id.* Employee has met his burden to prove Employer failed to pay the compensation rate adjustment installment when it was due on July 30, 2021. *Saxton.* Additionally, Employer paid TTD benefits using an incorrect compensation rate in checks issued on July 26 and 30, 2021 (see Tables Two, Three and Four). Consequently, based upon the correct compensation rate and the TTD benefits amounts Employer paid, Employee is entitled to interest on \$3,084.32 in TTD benefits from June 23 through August 3, 2021. (*Id.*).

Employee contends he is entitled to interest on TTD benefits that remain unpaid from August 4 through 31, 2021. Employer provided no information indicating it mailed Employee checks for the time period and that Employee received and cashed them. As there are no factual disputes surrounding the issue to be decided, the statutory presumption analysis need not be applied. *Abood; Rockney; Rusch.* While the September 23, 2021 SROI states Employer paid TTD benefits for the subject time period, Employee credibly testified and provided documentary evidence proving he has not received TTD benefits from August 4 through August 31, 2021. AS 23.30.122; *Smith.* Payment was due 14 days after receipt of the wage information and subsequent compensation was due every 14 days. AS 23.30.155(b). Payment for TTD benefits from August 4 through 17, 2021 was due on August 13, 2021 (see Table Three; July 2, 2021 + 14 days = July 16, 2021; July 16, 2021 + 14 days = July 30, 2021; July 30, 201 + 14 days = August 13, 2021). *Id.* Payment for TTD benefits from August 18 through 31, 2021, was due on August 27, 2021 (see Table Three; August 13, 2021 + 14 days = August 27, 2021). *Id.* Employee credibly testified he has not received the payments even after his lawyer's September 22, 2021 email addressed the post office issue. AS 23.30.122; *Smith.* Therefore, Employee is entitled to interest on TTD benefits that remain unpaid from August 4 through 31, 2021. *Saxton.* However, Employer overpaid Employee TTD benefits on August 13, 2021, and on September 10

and 21, 2021, for TTD benefits from September 1 to 15, 2021, when it paid at an incorrect compensation rate (see Table Four). Consequently, based upon the correct compensation rate and the TTD benefit amounts Employer paid, Employee is entitled to interest on \$2,588.81 for TTD benefits from August 3 to 31, 2021. Employer will be ordered to pay Employee \$1,418.29 in interest on \$5,673.13 of TTD benefits from June 23 to August 31, 2021 ($\$5,673.13 \times 25\% = \$1,418.29$).

Employee contends he is entitled to interest on the travel costs that remain unpaid. Ms. Hammer provided Employee's travel costs by email to the adjuster on July 21, 2021. Because Employer received the documentation regarding those expenses on July 21, 2021, payment was due on August 20, 2021. As determined above, Employer timely paid some of the travel expenses on August 12, 2021. Employee is entitled to interest on unpaid travel expenses. AS 23.30.155(p). Employer will be ordered to pay interest on the remaining balance after it reimburses Employee for the \$448 flight, the remaining \$181.26 lodging expense and per diem amounts for meals while traveling to Juneau for medical treatment from July 1 to 3, 2021 and from July 5 to 7, 2021, less \$480 in travel costs it already paid. 8 AAC 45.084(b)(1), (e).

6) Did Employer unfairly or frivolously controvert benefits?

Benefits under the Act must be either paid promptly or controverted. AS 23.30.155(a). Employee contends Employer frivolously or unfairly controverted the compensation rate adjustment, TTD benefits from August 4 to 31, 2021, travel costs, interest and penalties. He filed a claim seeking a compensation rate adjustment and TTD benefits on August 10, 2021, which Employer did not deny in a controversion or an answer. *Moore*. On August 13, 2021, Employer paid Employee a compensation rate adjustment for benefits through August 3, 2021, and it paid TTD benefits for September 1 to 15, 2021 at the higher compensation rate. It accepted the compensation rate adjustment after Employee filed his claim. *Id.* Therefore, Employer did not frivolously or unfairly controvert the requested compensation rate adjustment. However, Employer failed to provide evidence showing when it initially paid TTD benefits for August 4 through 31, 2021, and if or when it re-mailed the payments after the post office issue was discovered. It also failed to provide evidence showing Employee cashed checks for those benefits. Employee credibly testified he has not received payment for those periods. AS

23.30.220; *Smith*. Therefore, Employer did not “unqualifiedly accept” his claim and controverted-in-fact TTD benefits from August 4 through 31, 2021. *Houston; Shirley; Arant; Moore*. Employer unfairly or frivolously controverted-in-fact because it provided no basis for its failure to pay TTD benefits from August 4 through 31, 2021. *Harp*. A Director’s referral to the Division of Insurance will be ordered.

Employee filed a claim seeking transportation costs. As determined above, Employer timely paid some travel expenses on August 12, 2021, including the \$40.00 taxi cost; one night at the Travelodge Hotel for \$181.26; the \$15.00 flight by Alaska Seaplanes from Juneau to Petersburg; and for two Alaska Air flights ($\$182.60 \times 2 = \356.20). It is unclear which travel costs the \$480 payment reimbursed Employee for, including the \$448 airfare, per diem meal costs and the \$181.26 July 2, 2021 lodging expense, as Employer failed to provide an explanation of what it paid. Clearly, \$480 is not sufficient to cover all travels costs to which Employee is entitled. On September 21, Ms. Prestidge emailed Employee’s attorney with a question regarding the July 2, 2021 lodging receipt; there is no evidence he provided an explanation regarding the July 2, 2021 lodging receipt until the hearing. Nonetheless, Employer never explained its failure to pay the travel costs because it failed to deny them in controversion notice or an answer to his claim. Therefore, Employer has unfairly or frivolously controverted-in-fact unpaid travel costs because it did not “unqualifiedly accept” his claim and pay them. *Houston; Shirley; Harp*. A Director’s referral to the Division of Insurance will be ordered.

Employee also sought interest and penalties in his August 10, 2021 claim, which Employer did not deny in a controversion notice or an answer to his claim. *Moore*. Employer also has not paid Employee interest or penalties. The facts in this case are not in dispute. There is no basis offered for Employer’s failure to pay interest and penalties. *Rogers & Babler*. Employee was found entitled to interest and penalties in this decision. Employer has controverted-in-fact interest and penalties because it did not “unqualifiedly accept” his claim and pay them. *Houston; Shirley*. Therefore, Employer unfairly or frivolously controverted-in-fact interest and penalties. *Harp*. A Director’s referral to the Division of Insurance will be ordered. AS 23.30.155(o).

7) Is Employee entitled to penalties?

Employee seeks a penalty under AS 23.30.155(e). Unlike *Phillips*, he is seeking a penalty for late paid compensation based upon his gross earnings provided to Employer on July 21, 2021, which he contends Employer paid late; he is not seeking a higher compensation rate based upon other facts. Penalties are due if compensation payable without an award is not paid or controverted within seven days after it became due unless the nonpayment is excused. AS 23.30.155(e). As determined above, payment for the difference between TTD benefits paid and total TTD benefits due under the new compensation rate for June 23, 2021 through August 3, 2021, was due on July 30, 2021. AS 23.30.155(b). Employer never denied the compensation rate adjustment in a controversion notice or an answer to the claim. Therefore, penalties are due if the compensation was not paid by August 6, 2021 (July 7, 2021 + 7 days = August 6, 2021). Employer paid benefits on August 13, 2021, according to the envelope provided by Employee, which showed the August 12, 2021 check was mailed August 13, 2021. Thus, Employer paid compensation fourteen days after compensation was due and Employee is entitled to penalties. AS 23.30.155(b), (e). Employer paid TTD benefits using an incorrect compensation rate in checks issued on July 26 and 30, 2021 (see Tables Two, Three and Four). Consequently, based upon the correct compensation rate and the TTD benefits amounts Employer paid, Employee is entitled to a penalty on \$3,084.32 of TTD benefits from June 23 through August 3, 2021. Employer will be ordered to pay penalties on \$3,084.32 of TTD benefits from June 23 through August 3, 2021.

As determined above, payment was due on August 13, 2021, for TTD benefits from August 4 through 17, 2021, and on August 27, 2021 for TTD benefits from August 18 through 31, 2021. AS 23.30.155(b). Ms. Prestidge's September 20, 2021 email stated Employee's last two checks were returned by the post-office and Employee's testimony confirmed the post-office had returned his mail in error, which is clearly a condition Employer could not control. AS 23.30.155(e). However, Employer failed to present evidence showing when it made those payments. Furthermore, Employer was informed the address was correct on September 22, 2021, and payment should have been re-mailed. Employer failed to present evidence showing if or when it re-mailed those payments. Employee credibly testified and provided evidence that he has not received the payments. AS 23.30.122; *Smith*. Therefore, Employee is entitled to

penalties on TTD benefits from August 4 through 31, 2021. However, Employer overpaid Employee TTD benefits on August 13, 2021, and on September 10 and 21, 2021, for TTD benefits from September 1 to 15, 2021 when it paid at an incorrect compensation rate (see Table Four). Consequently, based upon the correct compensation rate and the TTD benefit amounts Employer paid, Employee is entitled to penalty on \$2,588.81 for TTD benefits from August 3 to August 31, 2021. Employer will be ordered to pay penalties on \$2,588.81 for TTD benefits from August 3 to 31, 2021.

As determined above, Employer timely paid some of the travel expenses on August 12, 2021, including the \$40.00 taxi cost; one night at the Travelodge Hotel for \$181.26; the \$15.00 flight by Alaska Seaplanes from Juneau to Petersburg; and for two Alaska Air flights ($\$182.60 \times 2 = \356.20). It is unclear which travel costs, including the \$448 airfare, per diem meal costs and the \$181.26 July 2, 2021 lodging expense, the \$480 payment reimbursed Employee for as Employer failed to provide an explanation. The amount paid is clearly not sufficient to cover all travels costs to which Employee is entitled. Therefore, as Employee is entitled to unpaid transportation costs, Employer will be ordered to Employee penalties on the unpaid travel cost, which includes the \$448 flight, the remaining \$181.26 lodging expense and per diem amounts for meals while traveling to Juneau for medical treatment from July 1 to 3, 2021 and from July 5 to 7, 2021, less \$480 in travel costs it already paid.

8) Is Employee entitled to attorney fees?

Employee requests full attorney fees and under AS 23.30.145(b) as he contends Employer resisted paying compensation by paying the compensation rate adjustment late, failing to pay TTD benefits from August 4 to 31, 2021, underpaying transportation costs and not paying interest and penalties without an order. He also requests statutory fees under AS 23.30.145(a) for future TTD benefits and medical and transportation costs. Employer never filed a controversion notice or an answer denying benefits.

The statutory presumption of compensability does not apply to attorney fee amounts or reasonableness. *Rusch*. Attorney fees should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Cortay*. An injured worker may be entitled to

statutory minimum attorney fees on part of an award and actual attorney fees on another part. *Wozniak*. Employee's attorney documented \$7,400 in actual fees incurred representing Employee in his successful claim. Employer did not object to the time spent on the case or the hourly rate. His attorney addressed the required factors supporting her request for reasonable fees from Rule 1.1(a). Based upon Employee's attorney's representations, the time spent and hourly rate is reasonable and necessary. *Rusch*.

Employee's attorney's representation was instrumental in obtaining benefits for Employee as Employer paid the over-due compensation rate adjustment installment after his attorney filed his claim. AS 23.30.145(a). Employee is entitled to statutory minimum fees on compensation rate adjustment issue because all future TTD payments derive from his attorney's efforts. *Wozniak*. Employer will be ordered to statutory minimum attorney fees on the difference between the minimum TTD benefit compensation rate and the compensation rate awarded here for all future TTD benefits.

Employee's attorney also successfully prosecuted his claim because this decision awarded past TTD benefits, which was also dependent upon the compensation rate adjustment issue, interest and penalties and found Employer unfairly and frivolously controverted. AS 23.30.145(b). Therefore, Employee is entitled to actual fees. *Wozniak*. Employee's request for attorney fees will be granted and Employer will be ordered to pay \$7,400 in actual attorney fees.

CONCLUSIONS OF LAW

- 1) The decision to proceed with the hearing in Employer's absence was correct.
- 2) Employee is entitled to a compensation rate adjustment.
- 3) Employee is entitled to TTD benefits.
- 4) Employee is not entitled to medical costs but is entitled transportation costs.
- 5) Employee is entitled to interest.
- 6) Employer frivolously and unfairly controverted benefits.
- 7) Employee is entitled to penalty.
- 8) Employee is entitled to attorney fees and costs.

ORDER

- 1) Employee's August 10, 2021 claim is granted.
- 2) Employer is ordered to pay Employee past and future TTD benefits at the weekly compensation rate of \$660.72.
- 3) Employer is ordered to pay Employee \$2,588.81 in TTD benefits from August 4 to 31, 2021
- 4) Employer is ordered to reimburse Employee for the \$448 flight, the remaining \$181.26 lodging expense and per diem amounts for meals while Employee traveled to Juneau for medical treatment from July 1 to 3, 2021 and from July 5 to 7, 2021, less \$480 for travel costs it paid.
- 5) Employer is ordered to pay Employee \$1,418.29 in interest on \$5,673.13 of TTD benefits from June 23 to August 31, 2021.
- 6) Employer is ordered to pay interest on the remaining balance of travel costs after Employer reimburses Employee for the \$448 flight, the remaining \$181.26 lodging expense and per diem amounts for meals while traveling to Juneau for medical treatment from July 1 to July 3, 2021 and from July 5 to 7, 2021, less \$480 in travel costs it already paid.
- 7) Employer is ordered to pay a penalty on \$3,084.32 in TTD benefits from June 23 through August 3, 2021.
- 8) Employer is ordered to pay a penalty on \$2,588.81 in TTD benefits from August 3 to August 31, 2021.
- 9) Employer is ordered to pay Employee a penalty on the unpaid travel costs, which includes the \$448 flight, the remaining \$181.26 lodging expense and per diem amounts for meals while traveling to Juneau for medical treatment from July 1 to 3, 2021 and from July 5 to 7, 2021, less \$480 in travel costs it already paid.
- 10) Employer is ordered to pay \$7,400 in actual attorney fees.
- 11) Employer is ordered to pay statutory minimum attorney fees on the difference between the minimum TTD benefit compensation rate and the compensation rate awarded in this decision for all future TTD benefits.
- 12) Employee's request for a finding and referral under AS 23.30.155(o) is granted. Staff will provide a copy of this decision to the Director for him to forward to the Division of Insurance for investigation.

Dated in Juneau, Alaska on January 3, 2022.

