

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

TERRY BRYANT,)
)
Employee,)
Claimant,)
)
) FINAL DECISION AND ORDER
v.)
) AWCBC Case No. 201617107
RAVN AIR GROUP,)
) AWCBC Decision No. 22-0076
Employer,)
and)
) Filed with AWCBC Anchorage, Alaska
) on December 22, 2022
COMMERCE AND INDUSTRY)
INSURANCE COMPANY,)
)
Insurer,)
Defendants.)
)

Terry Bryant's (Employee) September 19, 2018 claim for attorney fees and costs was heard on December 1, 2022, in Anchorage, Alaska, a date selected on October 11, 2022. An October 11, 2022 request gave rise to this hearing. Attorney Eric Croft appeared and represented Employee. Attorney Krista Schwarting appeared by telephone and represented Ravn Air Group and its insurer (Employer). There were no witnesses. The record remained open until December 5, 2022, so Employer could file a response to Employee's attorney fee and cost affidavit filed on December 1, 2022; the record closed on December 5, 2022.

ISSUE

Employee contends his attorneys' hourly rates are reasonable and were awarded in previous cases. He contends the work his attorneys performed was reasonable and necessary to prepare

the case to make it worth settling and to obtain a good settlement. Employee's current attorney addressed the eight ethical principles relevant to his firm's efforts in this case and requests full, reasonable attorney fees and costs for Employee's attorneys' efforts in resolving the case favorably.

Employer contends that from the case's inception many issues did not require litigation because the issues were not complex. It contends there were too many unnecessary interoffice conferences, and unnecessary efforts regarding a second independent medical evaluation (SIME). Employer contends too much time was spent litigating the attorney fee issue and contends the attorney fees overall were excessive; it seeks an order reducing them accordingly.

Is Employee entitled to full, reasonable attorney fees and costs?

FINDINGS OF FACT

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

- 1) On October 10, 2016, Employee injured his arm while changing a water pump at work for Employer. (First Report of Injury, November 29, 2016).
- 2) In October 2016, Lawrence Wickler, MD, evaluated Employee for a painful and numb left arm. He concluded Employee had issues in his cervical spine that correlated with his symptoms. Louis Kralick, MD, also evaluated Employee and recommended a cervical discectomy and fusion from C5 through C7. (Wickler report, October 12, 2016; Kralick report, October 18, 2016).
- 3) On November 11, 2016, Employer hired Thomas Dietrich, MD, to perform an employer's medical evaluation (EME). He agreed with the attending physician's opinions regarding causation. (Dietrich report, November 11, 2016).
- 4) On February 27, 2018, Employee represented himself and claimed permanent partial impairment (PPI) benefits and medical costs. (Claim for Workers' Compensation Benefits, February 27, 2018).
- 5) On February 28, 2018, Employee, still representing himself, petitioned for an SIME. (Petition, February 28, 2018).

- 6) Between February 28, 2018 and February 27, 2020, Employee filed five petitions. Employee filed the first petition; his attorney filed the remaining four. The petitions included two requesting an SIME, one appealing a reemployment eligibility decision, two requesting protective orders regarding discovery and one requesting an extension of time to request a hearing. (Petitions, February 28, 2018 through February 27, 2020).
- 7) On March 14, 2018, attorney JC Croft entered his appearance as Employee's attorney. (Entry of Appearance, March 14, 2018).
- 8) From March 28, 2018 through October 11, 2022, Employee's attorneys participated in 10 prehearing conferences in this case. This is fewer than a typical number of prehearing conferences in a period exceeding four years, probably because of the pandemic. (ICERS database, Judicial; Prehearings and Hearings; Prehearing Conference Summary tabs, August 28, 2018 through October 11, 2022; experience; judgment).
- 9) On January 24, 2018, Employer controverted Employee's right to, and claims for, temporary total and temporary partial disability (TTD) benefits, PPI benefits exceeding 17 percent, reemployment benefits, and all medical benefits effective January 12, 2018, except for a Functional Capacity Evaluation, Lyrica for up to one year, and "possible radiofrequency ablation in the future." (Controversion Notice, January 19, 2018).
- 10) On August 8, 2018, Employer renewed its initial controversion with minor changes. (Controversion Notice, August 8, 2018).
- 11) On September 19, 2018, Employee amended his previously filed claim and sought TTD benefits, medical costs and related transportation expenses, interest, and attorney fees and costs. (Claim for Workers' Compensation Benefits, September 19, 2018).
- 12) On October 5, 2018, Employer renewed its initial controversion with minor changes. (Controversion Notice, October 5, 2018).
- 13) On February 26, 2019, the Board approved the parties' stipulation to award Employee \$7,200 in reasonable attorney fees and costs for work done to that date. (Statement of the Board, February 26, 2019).
- 14) On September 11, 2020, JC Croft filed a fee affidavit itemizing attorney fees and costs incurred on Employee's claim between March 10, 2018, and September 11, 2020. The itemization included primarily JC Croft's fees at rates ranging from \$225 to \$275 to \$300 an hour. One entry for Eric Croft's attorney fees was made at \$400 per hour. Costs for paralegals

Brenda Marlow and Patty Jones at \$170 per hour totaled \$3,893. Costs for legal assistant Courtney Carroll at \$75 per hour totaled \$187.50. The total attorney fees and costs were \$22,093, but were reduced by \$7,200 for stipulated attorney fees for prior services rendered, which were paid on March 12, 2019. The remaining balance for attorney fees and costs was \$14,893. The itemization included 44 pages setting forth the activity done, the date, the person providing the service, and the amount for each entry. (Affidavit of Fees, September 11, 2020).

15) On September 16, 2020, the parties appeared before the Board for a hearing on Employee's February 27, 2020 petition to extend the time he had to request a hearing to avoid exceeding the statutory deadline for requesting one. Employer resisted extending the time for requesting a hearing and contended the only substantive issue that had not been resolved was medical and related transportation costs. It also contended Employee had not provided any basis to extend the statutory deadline. Employee also submitted an attorney fee affidavit on September 11, 2020, implying he was seeking attorney fees. Employer objected to the Board considering attorney fees on an interlocutory issue that never included attorney fees and costs. (*Bryant v. Ravn Air Group*, AWCB Dec. No. 20-0094 (October 13, 2020) (*Bryant I*)).

16) On October 13, 2020, *Bryant I* at Employee's request "extended" the hearing request deadline and provided a "date certain" for Employee to file his hearing request and avoid claim denial, and denied his request for attorney fees and costs because they were not raised as issues for the hearing. *Bryant I* also stated Employee had not waived his right to seek attorney fees and costs should he prevail. (*Bryant I*).

17) On February 19, 2021, the parties attended a prehearing conference before a Board designee and agreed to a hearing on April 28, 2021. (Prehearing Conference Summary, February 19, 2021).

18) On April 7, 2021, the parties stipulated to continue the April 28, 2021 hearing because they had agreed to have the case mediated; the Division continued the hearing. (Stipulation for Continuance, April 8, 2021).

19) On June 16, 2021, a hearing officer mediated Employee's case and partially resolved it. Apparently, the only issues remaining were Employee's attorney fees and costs, which the parties could not resolve at mediation. (Agency file, Judicial, Mediation tabs, June 16, 2021).

20) On August 31, 2021, the parties' lawyers participated in the out-of-state deposition of SIME Judy Silverman, MD. (Deposition of Judy Silverman, MD, August 31, 2021).

- 21) On April 18, 2022, Eric Croft substituted his appearance for JC Croft as Employee's counsel. (Substitution of Counsel, April 15, 2022).
- 22) On July 8, 2022, Eric Croft submitted an attorney fee affidavit itemizing fees and costs incurred in this case between October 4, 2018, and July 8, 2022. The itemization included attorney fees for Eric Croft billed at \$400 and \$450 per hour and JC Croft billed at \$225, \$275, \$300 and \$350 per hour. Paralegals Jones and Carroll, who were no longer employed at the law office, were billed at \$170 and \$200 per hour. The legal assistant was again billed at \$75 per hour. The total attorney fee and cost bill was \$36,121.01. It included \$1,243.01 in costs related to Dr. Silverman's deposition. Employee also provided JC Croft's supplemental affidavit for time he spent working on Employee's case between October 4, 2018, and April 15, 2022. Marlow similarly submitted an affidavit for the same period. (Affidavit of Fees and Costs, July 8, 2022).
- 23) On July 12, 2022, the parties stipulated that Employee was injured "in the course and scope" of his employment with Employer and that work was the substantial cause of disability and need for treatment for his cervical spine. They further agreed Employer had paid and would continue to pay for treatment that SIME Dr. Silverman recommended and would withdraw its prior medical benefit controversions. Employer also agreed to pay Employee \$1,093.10 in out-of-pocket medical expenses he had incurred and to hold him harmless from any provider's claim for treatment related to his work injury. The parties agreed to try to resolve attorney fees and costs. The Board approved the stipulation. (Stipulation, July 12, 2022).
- 24) On July 14, 2022, Employer formally withdrew all prior controversions of medical benefits but for one filed on September 8, 2021. (Partial Withdrawal of Controversions, July 13, 2022).
- 25) On October 11, 2022, the Board's designee set a hearing on Employee's remaining claim for attorney fees and costs. (Prehearing Conference Summary, October 11, 2022).
- 26) On November 28, 2022, Employee contended he should receive reasonable attorney fees and costs from October 3, 2018, when a partial payment was made, through November 18, 2022. He promised to file a supplemental fee itemization at the December 1, 2022 hearing. Employee established that his attorneys achieved substantial results in at least five areas: (1) they brought forward past attorney fees and secured payment by stipulation in early 2019; (2) they sought and obtained a Board order extending the deadline for Employee to request a hearing thus protecting his right to a hearing; (3) they sought and obtained a favorable SIME report, later confirmed by

the physician's deposition; (4) they sought and obtained a stipulation agreeing to claim compensability, later approved by the Board; and (5) they sought and obtained withdrawal of three substantive controversions in this case. Employee contended his attorney's efforts took a denied claim and turned it into an accepted one. He subsequently received "full benefits," was retrained and is now working in a new field, in his view all the result of his attorneys' efforts. Employee's brief gave minimal background information about his work injury to put his arguments in context. The brief described how he prevailed on a protective order for overbroad releases, a request for an SIME and on reemployment benefits eligibility. Employee's brief also described how he litigated to obtain vocational reemployment benefits after being originally denied. It further described how Employer initially opposed his SIME petition later reversed its position and signed the same form offered much earlier. Employee's brief also provided context for times when little was happening on the claim. He also described his efforts to maintain his reemployment stipend at a time when Employer challenged his right to obtain it when he was not going to school full-time because of COVID-19 restrictions. Employee's hearing brief appropriately gave historical context, basic case facts, and arguments supporting the attorney fee and cost issue, as well as pertinent attachments, which was helpful to the fact-finders. (Employee's Brief, November 28, 2022).

27) On November 28, 2022, Employer provided basic background information about the case and contended Employee did not prevail on his entire claim for "full, open future medical benefits." It noted Dr. Silverman disapproved of some treatment and Employer maintained its controversion of that treatment. Employer objected to "needless and duplicative" attorney fee entries, JC Croft's attorney fee rate increases, and what Employer perceived as a lack of relationship between the benefits gained and the attorney fees claimed. While admitting that JC Croft gained experience during this claim, Employer objected to JC Croft's \$350 per hour rate as, in its view, he "did not gain sufficient experience to justify three separate rate changes during one claim." Employer objected to "a number of inter-office conferences," stating that experienced attorneys would not require such consultations "in a relatively simple claim." It further contended the paralegal rates "exceed the norm." Employer suggested "highly experienced paralegals" at its office historically billed at \$100 per hour. It objected to Eric Croft's rate for his "relatively brief time on this file." Employer contended JC Croft billed for unnecessary work or for things on which he did not prevail. For example, Employer contended

JC Croft required the Board to calculate the date upon which he had to file a hearing request so Employee's claim would not be denied. It suggested an experienced attorney could figure that out himself. Employer contended the July 2022 hearing for a prospective medical benefit determination was not necessary since Employer had already agreed to pay for the treatment Dr. Silverman recommended. It further objected to "numerous entries on a near-monthly basis for periodic file reviews even in months without active litigation. Employer contended JC Croft's billing separately for travel time and deposition preparation was duplicative because "the standard should be to bill concurrently for those items." Employer attached Employee's July 8, 2022 attorney fee and cost affidavit to its brief. (Employer's Hearing Brief, November 28, 2022).

28) Employer's hearing brief was only partially helpful to the fact-finders because it raised only general objections to general entries with very little specificity. It did not include evidence supporting its contentions. (Experience, judgment, observations).

29) On December 1, 2022, paralegal Marlow provided an affidavit for work she did on Employee's behalf under JC and Eric Croft's supervision, as applicable, between October 4, 2018, and November 30, 2022; she stated her work did not duplicate work for which an attorney fee was also claimed. She billed \$1,474.50 in total costs at \$170 per hour for 7.95 hours. (Affidavit of Brenda Marlow, November 30, 2022).

30) On December 1, 2022, Eric Croft submitted a supplemental attorney fee and cost affidavit that encompassed all work performed on this case between October 4, 2018, and November 30, 2022. Employee added the attorney fees as well as paralegal costs and legal assistant costs together to derive \$44,508 in "fees." He also included \$1,243.01 in "costs," all related to Dr. Silverman's deposition. Employee submitted 47 pages of itemized fees and costs. The total requested was \$45,751.01. (Affidavit of Fees and Costs, November 30, 2022).

31) At hearing on December 1, 2022, Employee contended JC Croft's attorney's fees have previously been approved by the Board, the Alaska Workers' Compensation Appeals Commission or Alaska Supreme Court from \$225 to \$275 to \$300 per hour. He contended Eric Croft's fees had similarly been approved for purposes of the timeframe applicable to this case, at \$400 and \$450 per hour. Employee cited as support for these statements the Commission and Court decisions in *Roberge*, *United Physical Therapy*, and *Vue*. He further contended JC Croft's gradual "step up" in his hourly attorney fee rate was justified because he had been practicing

workers' compensation law for approximately two years, was gaining experience and had won a Supreme Court appeal. Employee noted JC Croft billed only 6.6 hours at \$350 per hour in the instant case. He contended that during times when little was happening in the case, his attorneys did case "maintenance," to keep track of the matter. As time went by, the case approached the statute of limitations deadline. Employee prepared and filed a request to extend the time to ask for a hearing. He contended *Bryant I* extended the time for nearly one year. Employee agreed the extension of time could have been accomplished by a stipulation, but there was no stipulation. At no time after Employee sought a Board order, did Employer offer to stipulate. Employee further contended that Employer subsequently threatened to interrupt the vocational reemployment process and cut off his benefits. This he contended, required him to go to an informal conference with the Rehabilitation Benefits Administrator (RBA). Employee contended he prevailed on that issue. Subsequently, Employee sought and obtained an SIME over Employer's objection. The SIME was helpful to him and resulted in claim acceptance. Employee noted several controversions were not withdrawn until summer of 2022. He was fully satisfied with the medical benefits he received after the SIME, based on the SIME physician's opinion. As Employer never made a reasonable offer to settle attorney fees and costs, Employee contended he had to pursue attorney fees and costs before the Board. (Record).

32) Employee further contended his lawyers' fees were fair and reasonably incurred to prepare the case for hearing. Eric Croft addressed each *Rusch* factor: (1) he agreed this was not the most complex case but had many moving parts that needed to be taken into consideration; (2) he contended JC Croft had a "limited caseload" and this case was simply part of that; (3) Employee relied on references to *Roberge*, *United Physical Therapy* and *Vue* as support for his attorneys' requested rates being approved in other cases; (4) Employee's claim went from controverted to accepted and he obtained significant benefits including retraining into a new career, which his attorney said he enjoys; (5) Employee's case had numerous limitations statutes that had to be watched carefully to avoid case dismissal; (6) the lawyers represented Employee for a little over four years; (7) JC Croft won Supreme Court cases, was diligent and was very successful representing injured workers according to his uncle; Eric Croft; and (8) all the Croft Law Firm's attorney fees are contingent. Employee contended its lawyers' "periodic file reviews" were important to make sure deadlines were not missed and to keep the case moving forward. During mediation, the mediator noted instances where JC and Eric Croft accidentally billed for the same

activities, and they subsequently removed those inadvertent double billings in the fee itemizations. Employee also defended JC Croft's exit memorandum as very helpful to advise the next attorney on the case what had happened and what needed to happen. (Record).

33) At hearing, Employer contended its attorney was involved in the case from the beginning. Schwarting contended "things were litigated that did not need to be litigated." She disputed the complexity of the case and reiterated that it did not need to be litigated as much as it was. Employer contended the Board should examine the attorney fees requested and award only those it feels are reasonable and necessary. It contended that after Dr. Silverman's report came out, Employer was happy to pay the medical care Dr. Silverman recommended. Employer contended JC Croft insisted on going forward to obtain an unnecessary Board order finding the claim compensable. It contended doing so was "not a victory," because Employer simply paid what it offered to pay the first instance, which included the treatment Dr. Silverman authorized. Employer further contended, after looking at the fee itemization, too much time was billed for "simple tasks." It contended they were too many conferences and stated Employer's lawyer does not bill for interoffice conferences. Employer objected to JC Croft "cleaning up" an SIME petition, which Employer contended was unnecessary work. It contended calculating the time an SIME tolls in the hearing request process is "very easy." Employer objected to "periodic file reviews" as an unnecessary legal expense. It identified approximately 10 hours for periodic file reviews, interoffice conferences and an exit memorandum when JC Croft left the firm as particular attorney fee charges to which Employer objected. (Record).

34) On December 5, 2022, Employer offered its specific objections to Employee's attorney fees. It contended the itemized entries were "emblematic" of the hearing arguments. For example, Employer cites an August 3, 2022 affidavit entry discussing "Get SIME dates for deposition to BLM," and notes the SIME physician's deposition was taken in 2021. Employer reiterated its objections to periodic file reviews, multiple interoffice conferences and "entries that do not correlate with the issue currently being decided." It also objected to "the sheer amount of time" spent on the attorney fee hearing brief. It contended 10.9 hours for briefing attorney fees was unreasonable and unnecessary for a "straightforward and simple" claim. Employer concluded that the Board should determine the fees incurred in this claim "were excessive and reduce them accordingly." (Employer's Objections to Attorney Fees, December 5, 2022).

35) The panel has seen a wide range of paralegal hourly rates. Competent attorneys who represent injured workers before the Board are few, hard to find, and the number is dwindling. Lawyers who represent injured workers are not competing for clients. Given the relative dearth of competent counsel willing to represent injured workers, when a lawyer takes a person's case, that case is added to the lawyer's caseload and makes it difficult for that attorney to accept a contemporaneous case. Four years is a relatively long time to represent an injured worker in a workers' compensation case. (Experience; observations).

PRINCIPLES OF LAW

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

AS 23.30.145. Attorney fees. (a) . . . 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.

Cortay v. Silver Bay Logging, 787 P.2d 103, 109 (Alaska 1990) stated, "Awarding fees at half a lawyer's actual rate is inconsistent with the purpose of awarding full attorney's fees in the worker's compensation scheme." *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 975 (Alaska 1986) reiterated, "As we have noted, the objective of awarding attorney's fees in compensation cases is to ensure that competent counsel are available to represent injured workers." *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784, 798-99, 803 (Alaska 2019), clarified the Court's directives on awarding attorney fees to successful claimant lawyers:

To clarify our holding in *Bignell*, we hold that the Board must consider all of the factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney's fee. . . . Some factors mirror those set out in the Act, such as the amount involved and the results obtained. On remand, the Board must

consider each factor and either make findings related to that factor or explain why that factor is not relevant.

....

We have consistently construed AS 23.30.145 “in its entirety as reflecting the legislature’s intent that attorneys in compensation proceedings should be reasonably compensated for services rendered to a compensation claimant” (citation omitted). Given our recognition that reasonable fees can be awarded in addition to statutory minimum fees under subsection (a), we see no reason to distinguish between the subsections in setting out the factors the Board needs to consider in awarding reasonable attorney’s fees. . . .

....

. . . The parties did not dispute the claimants’ entitlement to attorney’s fees; they disputed the fees’ reasonableness. A determination of reasonableness requires consideration and application of various factors that may involve factual determinations, (citation omitted) but the reasonableness of the final award is not in itself a factual finding. The difference is illustrated by what we consider in reviewing these questions. We use the substantial evidence test for review of factual determinations, considering whether the record has adequate evidence to support the factual finding (citation omitted). In contrast when we review the Board’s exercise of discretion in an award of attorney’s fees, we consider whether the award is manifestly unreasonable.

Rusch also held it was improper to reduce an attorney’s hourly rate for “paralegal tasks” the attorney performed because attorneys are not required to hire paralegals and reducing the hourly rate discourages representation of injured workers. *Id.* at 803-04.

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. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. . The following costs will, in the board’s discretion, be awarded to an applicant:

....

(4) costs of taking the deposition of a medical expert. . . .

....

(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk

....

(17) other costs as determined by the board.

- (A) is employed by an attorney licensed in this or another state;
- (B) perform the work under the supervision of a licensed attorney
- (C) performed work that is not clerical in nature
- (D) files an affidavit itemizing the services performed and the time spent in performing each service; and
- (E) does not duplicate work for which an attorney's fee was awarded.;

Rules of Professional Conduct, Rule 1.5(a) referenced in *Rusch* states:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (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.

ANALYSIS

Is Employee entitled to full, reasonable attorney fees and costs?

Employee requests actual attorney fees for services he contends his two attorneys JC and Eric Croft provided in resolving his claim. AS 23.30.145(a). Employer contends Employee's fee request as well as his paralegal costs are unreasonable, both in time spent and in rate. Since Employer does not contend Employee's lawyers are entitled to no attorney fees, and are simply arguing about reasonableness, the statutory presumption analysis does not apply. *Rusch*.

JC and Eric Croft's attorney fee affidavits are relatively detailed and do not contain "block billing" commonly seen in other attorney fee affidavits. They identify the attorney providing the legal services, the general nature of the services, the hourly rates charged, the time spent, and the

total amounts incurred. *Rogers & Babler*. Employer does not fault Employee's attorney fee affidavits on their face; it just disputes the time spent and in some instances the attorneys' and paralegals' hourly rates. But Employer's contentions are mostly conclusory statements not supported by evidence. For example, the fact that Schwarting's law firm does not charge for interoffice conferences is not a legal axiom; it is a professional preference. One law firm's billing practice does not legally prevent another law firm from charging an attorney fee for all time spent related to a case. Employee attorneys are not competing for clients. *Rogers & Babler*.

Similarly, Employer contended it was duplicative for JC Croft to have billed separately for travel time and deposition preparation because "the standard should be to bill concurrently for those items." Employer did not explain from where this "standard" derived. Employer's one specific objection was an August 3, 2022 entry for "Get SIME dates for deposition to BLM," and noted Dr. Silverman's deposition had occurred in 2021. But without more, this entry could refer to several things other than the inference Employer attached to it, like justifying Employee's position in ongoing attorney fee negotiations or having paralegal Marlow prepare a statement for deposition costs to use later at hearing, and is *de minimis*.

Ultimately, Employer primarily objected to legal services billed for file reviews, interoffice conferences and JC Croft's exit memorandum. Employee convincingly contended periodic file reviews ensured the case moved forward, and no filing deadlines were missed. This protected Employee's rights and avoided errors. He convincingly contended interoffice conferences were necessary to plan and implement case-related activities. Lastly, Employee convincingly contended that when JC Croft left the firm, an exit memorandum assisted Eric Croft and others working on this case to understand the case history, case status and what needed to occur to resolve it. Employer presented no evidence or convincing argument that these activities were unreasonable or unnecessary.

By contrast, Eric Croft appropriately addressed each part of Professional Conduct Rule 1.5(a):

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

Eric Croft agreed this was not the most complicated case, but contended it required persistence and skill to perform the legal services properly. JC Croft performed most of the legal services and did a good job in petitioning for a protective order, which protected Employee's privacy and required Employer to alter its original discovery releases; in obtaining a favorable SIME over Employer's objection; and obtaining *Bryant I* over Employer's objection, which resulted in an order stating Employee's claim is compensable, which would require Employer to file a petition before unilaterally controverting benefits in the future, and ordered an extension of time in which to request a hearing to avoid case dismissal. All this preparatory work resulted in Employer withdrawing several controversions and providing benefits. Employee continued retraining without his stipend benefits being terminated and obtained a new career. This all took considerable time and effort to perform properly, which the results show it was.

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.

Eric Croft explained that JC Croft had a limited caseload as a relatively new lawyer. This case was one in his caseload and there was no evidence or argument that accepting this case precluded other employment by JC or Eric Croft. However, experience and logic show that when an attorney accepts a case, typically that will preclude another contemporaneous case, especially if that attorney has a limited caseload, as did JC Croft. *Rogers & Babler*.

(3) the fee customarily charged in the locality for similar legal services.

Before *Rusch*, even experienced litigators with little workers' compensation experience generally billed and were awarded attorney fees at a lower hourly rate, typically in the \$275 to \$325 range. After *Rusch*, an attorney's overall legal experience must be considered. JC Croft was a relatively new attorney and was learning and gaining experience representing injured workers in workers' compensation cases. His "step up" rates beginning at \$225, and moving up to \$275, then \$300 and ultimately \$350 per hour are reasonable given his initial relative inexperience and subsequent success over four years in representing claimants at all adjudicatory levels including the Alaska Supreme Court. Eric Croft has lengthy experience as an attorney and considerable experience representing injured workers in these cases. There is no evidence the claimed attorney fee rates for JC or Eric Croft were not within fees customarily charged for similar legal

services. As Employee pointed out, and Employer did not dispute, the Alaska Workers' Compensation Appeals Commission and the Alaska Supreme Court have awarded attorney fees to JC and Eric Croft, for the most part, at or above the requested hourly rates.

(4) the amount involved and the results obtained.

Results cannot be determined solely by "the amount involved." JC Croft successfully protected Employee's privacy rights by filing a petition for a protective order after which Employer altered its releases that were deemed too broad. Overall, Employee through his attorneys' efforts obtained a good result on the merits as well. While Employer contended it offered to provide medical treatment as Dr. Silverman recommended, Employee's attorneys successfully obtained an SIME over Employer's objection, which resulted in Dr. Silverman's opinions and Employer's provision of additional benefits. Employer contended Employee wanted more medical treatment than that which Dr. Silverman recommended, so he was not fully successful. But at hearing Employee's position was that he was ultimately satisfied with the treatment Dr. Silverman suggested. Moreover, once Employee began his vocational reemployment plan pursuant to the plan's terms, Employer threatened to terminate his stipend benefits because he was not participating in reemployment activities "full-time." Employee's attorneys successfully obtained an opinion from the RBA stating his reemployment plan contemplated part-time participation, and in any event COVID-19 interfered with his ability to attend training full-time. He prevailed on this issue, his stipend benefits were not curtailed, and he was retrained into a new career. Employee and his attorneys were successful in their procedural efforts and in their merit claims.

(5) the time limitations imposed by the client or by the circumstances.

While this provision is normally thought to refer to a client's emergent needs, which would take precedence over other clients' needs, Employee explained at hearing that statutory deadlines and the law required diligent attention to Employee's claim. While his explanation did not directly address the accepted purpose behind this provision, Employee made a good point. Employee's attorneys diligently reviewed the file, even when there was little case activity occurring, to ensure that Employee's rights were protected, and no statutory deadlines were missed. This decision will not fault his attorneys or reduce their attorney fees for doing so.

(6) the nature and length of the professional relationship with the client.

JC and Eric Croft represented Employee for about four years. Some of that time involved little case activity, and during those times Croft's law office billed minimal amounts for file reviews. Experience shows that four years is a relatively long time to represent an injured worker in a workers' compensation case. *Rogers & Babler*.

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services.

As already stated, Eric Croft has lengthy experience as an attorney and has considerable experience in the specialized workers' compensation field. By contrast, JC Croft was a relatively new attorney when he was representing Employee and had relatively little overall legal experience. He was in training as an attorney representing injured workers. Nevertheless, JC Croft had success at all levels of the adjudicatory process in workers' compensation, including winning before the Alaska Supreme Court. Moreover, consistent with the Alaska Supreme Court's stated preference that attorneys who represent injured workers receive full, reasonable attorney fees for their successful representation, it is reasonable to award attorney fees that may seem higher than those ordinarily awarded, to compensate a new attorney as he or she gains experience. It is desirable to incentivize new attorneys to continue to represent injured workers in these cases. *Cortay; Bignell*.

(8) whether the fee is fixed or contingent.

As is true with most workers' compensation cases, JC and Eric Croft's attorney fees in this case are contingent upon succeeding in Employee's claims, which for the most part they did.

Given all the above factors and analyses, Employer's objections to Employee's attorneys' fees are not well taken. JC and Eric Croft's itemized attorney fees are reasonable, were necessarily incurred to obtain the above-referenced results, and will fully compensate them for their successful efforts on Employee's behalf. Employee's claim for attorney fees will be granted. Though Employee appears to include paralegal fees as part of his "fees," they are actually

litigation “costs.” 8 AAC 45.180(f)(14). Therefore, he will be awarded \$40,837.50 in actual attorney’s fees as set forth in his attorneys’ November 30, 2022 attorney fee affidavit.

As for litigation costs, Employer did not object to \$1,243.01 related to Dr. Silverman’s deposition; following that deposition Employer withdrew its controversions. Employee will be awarded \$1,243.01. 8 AAC 45.180(f)(4). Employer also did not object to \$105 for services provided by a legal assistant; Employee will be awarded \$105 for those services as a litigation cost. 8 AAC 45.180(f)(17). Lastly, Employee claims \$3,565.50 for paralegal expenses. Employer objected to these costs, contending the rates are too high. Though \$170 and \$200 per hour may exceed the rates at which Employer’s representative bills its paralegals, Employer provided no evidence that these rates are unreasonable or too high. Moreover, Alaska Supreme Court precedent allows attorneys to perform the same services without the benefit of a paralegal and bill at their full hourly rate. *Rusch*. Therefore, Employee will be awarded \$3,565.50 in paralegal costs. This decision will award Employee attorney fees and costs totaling \$45,751.01.

CONCLUSION OF LAW

Employee is entitled to full, reasonable attorney fees and costs.

ORDER

- 1) Employee’s September 19, 2018 claim for attorney fees and costs is granted.
- 2) Employer is ordered to pay Employee \$40,837.50 in actual attorney’s fees.
- 3) Employer is ordered to pay Employee \$1,243.01 for costs related to Dr. Silverman’s deposition.
- 4) Employer is ordered to pay Employee \$105 for legal assistant costs.
- 5) Employer is ordered to pay Employee \$3,565.50 in paralegal costs.
- 6) The total attorney fee and cost award is \$45,751.01.

Dated in Anchorage, Alaska on December 22, 2022.

ALASKA WORKERS’ COMPENSATION BOARD

/s/

William Soule, Designated Chair

/s/

Robert C. Weel, Member

/s/

Nancy Shaw, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the

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board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Terry Bryant, employee / claimant v. Ravn Air Group, employer; Commerce And Industry Insurance Company, insurer / defendants; Case No. 201617107; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on December 22, 2022.

_____/s/
Kimberly Weaver, Office Assistant