ALASKA WORKERS' COMPENSATION BOARD

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

MANUEL HERNANDEZ, Employee, Claimant, v. OCEAN BEAUTY SEAFOOD'S, LLC, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201711427 AWCB Decision No. 23-0057 Filed with AWCB Anchorage, Alaska on October 20, 2023

Parts of Manuel Hernandez's (Employee) March 16 and December 26, 2018, January 8, May 20 and December 23, 2019, and March 18 and August 17, 2021 claims were to be reconsidered as directed on remand from the Alaska Workers' Compensation Appeals Commission (Commission), on the written record, on August 1, 2023, in Anchorage, Alaska, a date selected on June 7, 2023. A June 7, 2023 stipulation gave rise to this hearing. Attorney Justin Eppler represents Employee. Attorney Krista Schwarting represents Ocean Beauty Seafoods, LLC and its insurer (Employer). The record initially closed at the hearing's conclusion on August 1, 2023, but the panel reopened it to receive additional mental health records referenced but not found in the agency file. The record closed on September 22, 2023, after the parties had time to obtain and file the records. But Employee objected to his lawyer's fees and Employer objected to the

record reopening, so the panel determined the hearing is not completed and will reopen the record again.

Hernandez v. Ocean Beauty Seafoods, LLC, AWCAC Dec. No. 300 (February 21, 2023) (*Hernandez VI*) remanded a prior decision so the panel could consider several issues. However, in the meantime Employee objected to Eppler's attorney's fees to which he and Employer stipulated. Employer deferred to the panel if a hearing was necessary to address the stipulated attorney fees and Employee's objections. *Hernandez VI* noted that *Hernandez IV* did not accord Eppler an opportunity to be heard on the time reductions it made to his attorney fees. Now that Employee has objected to Eppler's attorney's fees, the attorney fee stipulation is in question.

Medical records relevant to resolving a major issue remanded in *Hernandez VI* were missing and Employee provided them. Employer contended the record should remain as it was when *Hernandez IV* was heard, and no new evidence should be allowed. It contended that to admit and consider new medical records post-hearing would violate its due process rights because it had not had an opportunity for its experts to review the records, or to depose the new records' authors. Employee contended new evidence should be allowed and would make no difference in the outcome since Employer failed to rebut the statutory presumption on the remanded issues.

Given the above, the panel on its own motion determined the hearing was not completed and is reopening the record to allow the parties to appear at a hearing to address the following:

1) Eppler's attorney fees, including but not limited to what effect if any does Employee's objection to his attorney's fees have on the pending fee stipulation.

2) If the panel should consider Employee's newly filed medical records on remand.

3) If so, the additional time Employer needs to address those records.

FINDINGS OF FACT

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

1) On August 7, 2017, Employee injured his upper back pushing a large cart of canned salmon while working for Employer; this also reportedly caused inguinal, umbilical and epigastric hernias. (First Report Of Injury, August 10, 2017; Janet Abadir, MD, report, May 8, 2018).

2) On August 14, 2017, one-week post-injury, Kayla Gordon, PA-C, examined Employee for his hernias and noted he had, "Normal mood and affect." (Gordon report, August 14, 2017).

3) On August 29, 2017, PA-C Gordon again found during Employee's basic psychological exam, "Normal mood and affect." However, she added an "Addendum" stating Employee felt he was not being given adequate assistance with his injuries and was "frustrated and . . . upset" about losing out on hours and pay. (Gordon reports, August 29, 2017).

4) By September 6, 2017, Employee's basic psychological examination was still reflecting, "Normal mood and affect." (Gordon report, September 6, 2017).

5) On September 14, 2017, Jeffrey Larson, MD, general surgeon, saw Employee for his hernias. Employee was eager to get his hernias repaired but Dr. Larson explained it would take time. Employee stated he had to get his hernias fixed because he needed "to travel out of the country in early October to see his girlfriend." He was frustrated that the process "might take some time." (Larson report, September 14, 2017).

6) On October 4, 2017, Dr. Abadir repaired Employee's hernias. (Abadir report, October 4, 2017).

7) On October 7, 2017, Employee displayed no emotional or psychological issues following discharge for his hernia surgeries. (AKI Kodiak Island Medical Center reports, October 17, 2017).

8) On October 12, 2017, Dr. Abadir released him to return to work without restriction effective November 1, 2017. Employee was happy with his results. (Abadir report, October 12, 2017).

9) On October 22, 2017 through December 20, 2017, Employee was in El Salvador. (Anne Marie Narog, FNP-C report, January 29, 2018).

10) On December 19, 2017, Steven Smith, MD, emergency physician, saw Employee for upper abdominal pain following his hernia repairs. Employee reported he was "very anxious," and had a headache "because he is worried about his job." He had taken a month off and went to El Salvador to visit family and had just returned. Employee's back was hurting; he denied any specific injury or trauma to his back and associated his pain with heavy lifting while working for Employer. Dr. Smith concluded Employee had a migrating stitch from hernia surgery. Employee was fixated on his back and wanted more x-rays. He "became quite concerned that he could not work." (Smith report, December 19, 2017).

11) On December 20, 2017, Dr. Smith saw Employee who said he had a headache for several days that was "unbearable." Employee was, "Holding his head and crying." Dr. Smith found he was a "poor historian with vague answers." He was not as "overly anxious" on this occasion as compared to the day prior. Dr. Smith diagnosed chronic thoracic back pain and acute tension-type headache. (Smith report, December 20, 2017).

12) On December 21, 2017, Dr. Abadir examined Employee again and noted he had back pain, headaches and anxiety. She again released him back to full-duty work. Dr. Abadir offered "spiritual care," which Employee accepted, and said he felt better and would try to reduce his stress through prayer. He was "happy with his care." (Abadir report, December 21, 2017).

13) On December 21, 2017, PA-C Gordon also saw Employee for his back and charted he had, "Normal mood and affect." (Gordon report, December 21, 2017).

14) On January 9, 2018, Laura Creighton, DC, saw Employee on referral from PA-C Gordon. Having recently returned from El Salvador, Employee said his back pain had worsened and he now had pain into his neck and had "a severe headache." Dr. Creighton noted Employee had difficulty filling out his paperwork because it was "difficult for him to look down." (Creighton report, January 9, 2018).

15) On January 9, 2018, PA-C Gordon noted Employee was "feeling down," wanted to work, and was, "tearful at one point during appointment when discussing mood." She diagnosed muscle spasms and, "depressed mood." PA-C Gordon referred Employee to KANA Behavioral Health. (Gordon report, January 9, 2018).

16) By January 16, 2018, Employee's mood and affect were "normal," and he was "cooperative" and "appropriate." (Gordon report; Angela Santiago, ANP report, January 16, 2018).

17) On January 22, 2018, Cristin O'Grady, MD, charted Employee had chest pain that started when he was talking with the "safety guy" at work about returning to work. According to Employee's report, Employer told him he could not start working until the safety person talked with Employer's insurer. He said he had a knot growing in the center of his chest "covering his throat" so it felt like he could not breathe. "And he just wanted to cry." Dr. O'Grady diagnosed atypical chest pain most likely secondary to anxiety, and an anxiety attack. She offered bloodwork but Employee declined stating "that he often has this kind of chest discomfort with

anxiety." She suggested he might benefit from long-term anxiety treatment. (O'Grady report, January 22, 2018).

18) On January 24, 2018, Curtis Mortensen, MD, emergency room physician, diagnosed Employee with an anxiety attack and referred him to a counselor. He reported Employee:

> [W]as feeling exceptionally anxious because he felt that maybe his employer may send someone to 'get him.' It sounds like he may have watched something like this on a movie recently. . . . [Employee] also has significant financial stressors and social stressors as he is trying to petition for his wife to come to the United States from Mexico. He is worried that his current issues with his employer may keep him from being able to do this. [Employee] has no history of severe mental illness. Anxiety is a relatively new complaint which has pretty much been around the issues discussed above.

Notably, Employee stated "he feels physically well." His "main symptoms are severe anxiety and insomnia." Dr. Mortenson said Employee was "paranoid." Employee had gone to "KANA" and "requested to be seen by his provider there," but could not get in so he came to the emergency room. (Mortensen report, January 24, 2018).

19) On January 30, 2018, PA-C Gordon declared Employee medically stable and released him "for full duty from his previous injury." She noted "he may still have some recurrent flares" and requested accommodation with breaks during very strenuous work, or less strenuous duties as needed and as available." His mood and affect were still "normal." PA-C Gordon's only diagnosis was "back pain." (Gordon letter; Physician's Report, January 30, 2018).

20) On February 5, 2018, Employee told PA-C Gordon, "you want to kill me, you give me pills and tell me to go back to work, give me pills, and tell me to go back to work." He tried to return to work and said it hurt and he felt like he was "going to die." PA-C Gordon was not sure what else she could do to assist him, and diagnosed "back pain." Employee had been seeing "Jocelyn," who he later identified as working at "KANA Mill Bay Clinic," and paying out of his own pocket. (Gordon report, February 5, 2018; Smith report, February 28, 2018).

21) On February 13, 2018, a radiologist read Employee's cervical and thoracic spine computerized tomography (CT) scans as unremarkable with exception of possible muscle spasms in the neck. (CT reports, February 13, 2018).

22) On February 23, 2018, Employee told PA-C Gordon he still could not work, and needed "stronger medicine" for his back pain. "He is worried about his wife's visa and his mother is

worried about him." He also reported "a lot of other stressors in his life now" and said not working was making everything worse. His mood and affect were normal, but he became tearful at times. (Gordon report, February 23, 2018).

23) On February 25, 2018, Gregory Culver, MD, emergency physician, saw Employee for "extreme anxiety." Employee had depressive thoughts of dying, fear of self-harm, hopelessness and listed many "extreme stressors." Not included in what he later told Dr. Smith at this visit, was "separation anxiety from his wife in El Salvador, and the possibility that he is having deadly medical problems." He was sobbing. Dr. Culver suspected "major depression; acute anxiety reaction." Dr. Culver handed Employee off to Dr. Smith at the shift change. (Culver report, February 25, 2018).

24) On February 25, 2018, Dr. Smith, emergency physician, assumed care for Employee's "chest pressure." He was concerned Employee's anxiety was made worse from depression:

> Patient states that he came here this morning because he has been awake part of the night thinking about his current situation. He states that he is worried about finances, trying to work with ongoing back pain, worried about obtaining a visa for his wife in El Salvador. He tells me that his tax return was not enough to allow him to have his wife come to the United States. He relates his financial worries started when . . . he "had an injury at work 6 months ago. . . ." He has significant financial stressors and that he is worried he is not working and is worried because he is paying for rent and is expensive to [live in] Kodiak and he is not making any money. [He is] also concerned about finances and the ability to bring his wife to the United States. He is worried about what his employer will do if he is not able to work and whether he will have a job.

Dr. Smith diagnosed (1) chronic bilateral thoracic back pain; (2) anxiety associated with depression; and (3) financial difficulties. (Smith report, February 25, 2018).

25) On March 6, 2018, Employee changed from PA-C Gordon to John Koller, MD. His main complaint was a protruding stitch at his surgery site. There was no mention of anxiety or depression. Dr. Koller removed him from work for 15 days. (Koller report, March 6, 2018).

26) On March 20 and 27, 2018, Dr. Koller took Employee off work for an additional 10 days. (Koller report, March 20, 2018).

27) On April 10, 2018, Dr. Koller released Employee to work with a 10-pound lifting restriction and with standing as close as possible to his worktable. (Koller report, April 10, 2018).

28) On April 18, 2018, Employee went to physical therapy (PT) and reported "he is now having panic attacks with significant daily anxiety" and sees his primary care provider for this. He denied having had any "diagnostic testing on his back." (PT report, April 18, 2018).

29) On April 30, 2018, Dr. Koller reexamined Employee who said that on the date he was to return to work, he had an anxiety attack.

> He states to me today he has not been back to work and stated two conditions in which he would go back to work, one is that he is pain free regarding his back and second that his anxiety issues are under control including insomnia. . . . There is no medical indication at this time for him that would preclude his returning to work at light duty status. At least not as it relates to his work injuries. . . . Unfortunately, I told him the medical evidence at hand that I am having in which to make a decision would not be supportive of him remaining off work any further. There maybe [sic] some psychosocial issues not relevant to the work comp injury that might be precluding his return to work and I did spend considerable time discussing that with him here today and that it will be dealt with under a separate venue but not part of this work comp visit. I did determine during this interview that he has had the back pain issue prior to the work comp injury and also anxiety and insomnia issues as well prior and these seem to have been exacerbated by the injury. Again noted that he had a knife wound to his upper thoracic back area that was fairly considerable and evident by a large scar and this is the area in which he indicates is where the pain is emanating from. A CT scan of the region did not reveal any structural abnormality outside of what is directly seen on observation.
>
> I began discussing that I would like to receive some light duty job descriptions and asked him if he had any ideas what they might offer. A call has been put in to the adjuster to acquire some samples. The patient became very emotional, broke down, and crying dropping down to his knees and at this point, further discussion was not possible. Allowed him time alone in the room to regain his composure and after 15 minutes he seemed to regain some cognizance which we could have further productive discussion, but he did seem very resistant to returning to work.
> . . .
> . . . .
>
> . . . I also learned that he is trying to obtain a letter from Dr. Wood indicating medical necessity for family members to be allowed here to help take care of him sensing some secondary gain at hand here. . . . Back examination, he actually has fairly good movement and fluidity to his back, but he does indicate pain in his upper back area contiguous with where the knife wound scar is.
> . . . .
>
> It should be noted that there is a significant emotional component which has resulted in anxiety, depression, and insomnia, emotional lability that maybe [sic]

> precluding his emotional mindset to return to work and this should also be dealt with in a separate venue and I will make the appropriate recommendations for that.

Dr. Koller opined "from a work-comp stand point," Employee's thoracic back strain had "healed and resolved." "Any residual pain or discomfort maybe [sic] more likely than not contributed by the previous stab injury." His umbilical hernias were repaired and "resolved," with exception of a protruding, nonabsorbable stitch that could be removed. Dr. Koller said Employee was "ripe for return to work . . . at light duty with limited hours," but also noted there may be "some psychosocial issues not relevant to work comp injury that might be precluding his return to work." (Koller report, April 30, 2018).

30) On May 1, 2018, Dr. Koller responded to a question from the adjuster:

> Dr. Wood authorized 5 days off for non-work related, non-injury related reasons. I cannot forward the dictation because it was for other medical reasons -- unless patient signs consent to release. I authorized him back to work on 4/30/17 [sic]. (Koller report, April 30, 2018; emphasis in original).

31) In April and May 2018, Dr. Koller had referred Employee somewhere to treat his anxiety, depression and insomnia. He considered this a different "venue" and would not release related records without Employee signing a consent form. There are no contemporaneous mental health treatment records in the agency file for this period. (Agency file; inferences from the above).

32) On June 9, 2018, Dr. Koller responded to another inquiry from the adjuster. He stated Employee's midthoracic back strain was "resolved," and "any further pain is attributed to previous knife impalement in area (pre-existing)" (emphasis in original). He added Employee's multiple hernias, while unusual to occur in one incident, were probably preexisting but were aggravated, repaired and stable, and needed no further treatment. Employee was medically stable as defined in the Alaska Workers' Compensation Act (Act) effective May 9, 2018, without any permanent partial impairment. (Koller report, June 4, 2018).

33) On June 19, 2018, Dr. Koller again stated:

> (1) [Employee's] mid-thoracic back strain resolved, and any further pain is attributable to previous impalement in area (pre-existing); (2) hernia (multiple) likely pre-existing -- unusual to have multiple hernias develop over one incident. However, all are repaired and stable -- no further treatment needed. Likely aggravation of previous existing condition (multiple herniation).

Dr. Koller stated Employee became medically stable on May 9, 2018, and will not have any impairment. (Koller response, June 19, 2018).

34) On June 28, 2018, David Bauer, MD, orthopedic surgeon, saw Employee for an employer's medical evaluation (EME) and diagnosed, among other things, an "admitted history of anxiety and panic attacks." He stated Employee "suffers from an unrelated anxiety and panic attack condition that is not substantially caused by work." The only condition post-injury was Employee's anxiety, which Dr. Bauer said was not caused by the work injury. Dr. Bauer opined further medical treatment would not be reasonable or necessary and Employee was physiologically capable of performing his job at the time of his injury. Employee reached medical stability for his work injuries by January 22, 2018, and in Dr. Bauer's view, "At that time, it became very clear that Mr. Hernandez is suffering from anxieties, and unrelated conditions." When asked if he could identify an alternative explanation for Employee's "medical complaints" that exclude his work injury as the substantial cause, Dr. Bauer stated Employee's ongoing complaints were probably related to his anxiety and psychological condition. Employee "has a history of increasing anxiety, and his current complaints are on a more-probable-than-not basis related to his psychological condition rather than any physiologic condition." Dr. Bauer opined Employee's thoracic back stab injury contributed nothing to his complaints as there was no evidence of any harm or change to his body. He needed no further treatment for any medical condition. (Bauer report, June 22, 2018).

35) By July 2018, Employee was complaining about new, left shoulder pain with movement. His physical therapist diagnosed probable left shoulder impingement. (PT reports).

36) On August 15, 2018, Brady Ulrich, PA-C, restricted Employee to lifting no more than 20 pounds, and no repetitive bending, stooping or squatting until after he had cervical and thoracic spine magnetic resonance imaging (MRI). (Ulrich report, August 15, 2018).

37) On August 22, 2018, Employee reported his PT had been unhelpful. He reiterated his left shoulder pain, which he said began while working for Employer at a cannery. "He goes to school and enjoys working on his computer in his spare time." Employee's past medical history included "anxiety," "depression," and "drug abuse." His diagnoses included left rotator cuff tendinitis and bursitis. (William Helmick, PA-C report, August 22, 2018).

38) On September 6, 2018, Jonathan Van Ravenswaay, MD, family physician, referred Employee to Anchorage Community Mental Health. (Referral order, September 6, 2018).

39) On September 12, 2018, Employee's thoracic MRI was read as essentially normal. (MRI report, September 12, 2018).

40) On September 17, 2018, PA-C Ulrich saw Employee to review his thoracic MRI:

> It is noted on the soft tissues at about the T1 to T4 levels there does appear to be some disruption of the latissimus dorsi muscle just left of midline and also on the actual imaging there appears to be some atrophy of the left latissimus dorsi, as well as evidence of a wound/scar tissue in that area. This does correlate with the area where he was stabbed. I did contact the radiologist . . . for an over read on this area.

PA-C Ulrich opined Employee's thoracic pain was "likely coming from some of the atrophy of his latissimus dorsi muscle from his previous injury near that area." Employee also complained about a new symptom, paresthesia in his left hand. His provider prescribed continued narcotics. (Ulrich report, September 17, 2018).

41) On September 28, 2018, Dr. Van Ravenswaay removed a retained suture from Employee's hernia surgery. (Van Ravenswaay report, September 28, 2018).

42) On October 6, 2018, Dr. Van Ravenswaay saw Employee and diagnosed depressive disorder, anxiety and tension-type headaches. (Van Ravenswaay report, September 6, 2018).

43) On October 10, 2018, Employee said he had been seeing a psychologist. Those records are not in his agency file. (Dr. Van Ravenswaay report, October 10, 2018; agency file).

44) On October 17, 2018, Bill Wise, MPT, did an ultrasound on Employee's left shoulder and made findings suggestive of a partial tear or inflammatory process, and effusion. (Ultrasound report, October 17, 2018).

45) On October 18, 2018, Dr. Van Ravenswaay was providing medication to Employee for his depression. He charted Employee has "chronic back and shoulder pain and went back to OPA who prescribed opiates for him again despite my warning him not to continue. I warned him of potential addiction." Dr. Van Ravenswaay said Employee needed an MRI for his left shoulder, which may need surgery. Nevertheless, Employee said he felt better, stronger and had better mood; he wanted to apply for a job at a local fish processing plant but was awaiting clearance from an orthopedic surgeon. Employee said he missed his last "counseling appointment" but said, "I don't need it," and said he felt "fine." Employee said he felt depressed when he had pain. Dr. Van Ravenswaay told Employee to stay active to help his mood. "He is able to go back to work in my opinion." (Van Ravenswaay report, October 18, 2018).

46) On October 22, 2018, Employee told PT that his doctor recently told him to look for work and continue with PT. Employee said he could not work "due to his shoulder pain." (Wise PT report, October 22, 2018).

47) On October 22, 2018, PA-C Helmick saw Employee for his left shoulder. "Of note, he does state that about 12 years ago he suffered a stab wound to his back. He was treated at the emergency room and states that they washed up his incision and sewed it up and he had no issues until last summer when his back started to give him pain." PA-C Helmick opined Employee's pain was not coming from his shoulder, because a steroid injection gave him no relief. Employee was "very upset" by PA-C Helmick's recommendations. (Helmick report, October 22, 2018).

48) However, by October 29, 2018, Employee had come around to think "his spine is the problem and not so much his shoulder." (Wise PT report, October 29, 2018).

49) On October 31, 2018, Employee's electrodiagnostic studies showed no radiculopathy, polyneuropathy or myelopathic process. (Electrodiagnostic studies, October 31, 2018).

50) By November 8, 2018, Employee reported zero left shoulder pain. He conveyed 60 percent improvement since attending PT. (Wise PT report, November 8, 2018).

51) On November 28, 2018, Employee said he had worked for only two days as an office cleaner and had to quit because pushing a vacuum caused too much pain. "Patient expresses that he is not sure what kind of job he can do because of his shoulder." (Wise PT report, November 28, 2018).

52) On December 5, 2018, Employee reported his left-sided thoracic spine pain was "localized to the area where he had previous stab injury." PA-C Ulrich opined "his previous stab injury may have predisposed him to a more recent injury at work that is causing his issues now likely from a muscle strain or sprain." He limited Employee to lifting no more than 30 pounds. (Ulrich report, December 5, 2018).

53) On December 6, 2018, Employee mentioned he had contacted the "Alaska Mental Health Clinic" and was receiving assistance there finding employment, and had an appointment with a different physician on December 7, 2018, to discuss a medication change. (Wise PT report, December 6, 2018).

54) On December 12, 2018, Employee reported he worked one and one-half day at Blue Moose applying labels to products and did not have "serious pain," but had discomfort in his left

shoulder blade and had trouble going from a seated flexed position to seated extension without feeling "popping in his spine." (Wise PT report, December 12, 2018).

55) On December 17, 2018, Employee said his left shoulder had improved 70 percent in PT but thought this was only because he was not working, which allowed his shoulder to rest. He said when he did a hamstring stretch at a previous PT visit, it resulted in a three-day headache. (Wise PT report, December 17, 2018).

56) On December 29, 2018, Dr. Van Ravenswaay saw Employee and diagnosed chronic low back pain and a depressive disorder. He prescribed a lumbar "back brace to use when heavy lifting and strenuous activity to avoid injury." (Van Ravenswaay Report, December 29, 2018).

57) On January 16, 2019, Employee said he had changed a tire five days earlier and now had new, right shoulder pain. He repeatedly told PT he was not able to work due to pain. (Wise PT report, January 16, 2019).

58) Employee had 36 PT treatments for thoracic pain, during which his physical complaints spread to include his neck, low back, left and right shoulders and paresthesia in his left hand. Although he said he had improved 70 percent overall since initiating therapy, Employee said he still could not work because of pain. (Wise PT reports).

59) On January 26, 2019, Dr. Van Ravenswaay reviewed Employee's records and opined his "left shoulder injury" occurred on August 7, 2017, and was "still active." Employee denied having any residual pain from a stab wound. Dr. Van Ravenswaay reviewed Employee's medical records and concluded his, "left shoulder pain was never really resolved, and contrary to my initial assessment, in my opinion, is still needing treatment as a result of the initial work injury." (Van Ravenswaay reports, January 26, 2019).

60) On February 15, 2019, Dr. Van Ravenswaay saw Employee and again diagnosed a depressive disorder. At this visit Employee's mood was "euthymic," and his affect was "pleasant, happy, and congruent to thought content." (Van Ravenswaay report, February 15, 2019).

61) On February 26, 2019, Employee insisted his left shoulder "started as a result of his work injury and is not related to a previous stab injury of the upper back." He was feeling "more depressed" and wanted to have "a normal life" post-injury. Dr. Van Ravenswaay diagnosed left shoulder bursitis, and prescribed medication. (Van Ravenswaay Report, Favorite 26 2019).

62) On March 4, 2019, Dr. Van Ravenswaay opined Employee had left shoulder pain since August 7, 2017. In his opinion, this was a result of the work injury "and not related to a prior stabbing injury of the left upper back." (Van Ravenswaay report, March 4, 2019).

63) On March 8, 2019, Dr. Van Ravenswaay encouraged Employee to "apply for work." He was working "occasionally in a body shop." (Van Ravenswaay report, March 8, 2019).

64) On March 18, 2020, Dr. Van Ravenswaay required a first-class plane ticket for Employee to San Diego so he could attend his second independent medical evaluation (SIME) appointment. (Van Ravenswaay note, March 18, 2020).

65) On April 9, 2020, Dr. Van Ravenswaay referred Employee to Birchwood Behavioral Health for evaluation and treatment for depression. (Van Ravenswaay letter, April 9, 2020).

66) On April 10, 2019, Dr. Van Ravenswaay reviewed Employee's left shoulder MRI, which he said showed bursitis but no other abnormality or injury. (Van Ravenswaay report, April 10, 2019).

67) On April 21, 2020, Paul Murphy, MD, orthopedic surgeon, saw Employee for an SIME. When asked if he had symptoms to his back before the work injury, Employee stated about 10 years earlier he had an injury to his "middle back." He explained "someone had thrown an object and struck him." Employee described this as a laceration with some stitches but "nothing internal." He had no bilateral discrepancies in his upper extremity range of motion. All provocative shoulder testing bilaterally was negative. The only thoracic spine abnormality found on examination was slight scoliosis. Dr. Murphy diagnosed multiple hernias and a thoracic spine strain substantially caused by the work injury, and a history of anxiety, depression and panic attacks. He found no objective findings of a structural disorder within Employee's thoracic spine. Dr. Murphy opined Employee became medically stable on September 17, 2018, when his thoracic spine diagnostic workup was completed. He further stated Employee had "clinical diagnoses of anxiety and panic attacks, which are not substantially caused by this work injury." Dr. Murphy stated the work-related disability was no longer present effective September 17, 2018. Employee needed no further medical treatment in his opinion. He did not think the work injury caused Employee's left shoulder symptoms. Dr. Murphy did not think the "prior stabbing injury" to the upper back contributed to Employee's symptoms. He provided a two percent permanent partial impairment (PPI) rating for Employee's chronic strain or non-specific back pain. (Murphy report, April 21, 2020).

68) On May 16, 2019, Martin Glaves, DO, saw Employee for persistent pain and left shoulder bursitis. Dr. Glaves recommended "multiple treatments, perhaps several times over the course of his life" for his initial injury on August 7, 2017. For his left shoulder bursitis, Employee required PT, steroid injections, anti-inflammatories and osteopathic manipulation therapy. For Employee's hernia, Dr. Glaves recommended a support belt and possible surgery "if symptoms are uncontrolled." (Glaves report, May 16, 2019).

69) On June 20, 2019, Employee reported "no depression, no anxiety, and no insomnia." He reported back and inguinal pain that started two days earlier "after helping a friend take a bumper off a car." Employee contended this pain resulted from his work injury with Employer. He complained that his legs were unequal length. (Van Ravenswaay report, June 20, 2019).

70) On July 16, 2019, Employee told Dr. Van Ravenswaay he "paints and thinks painting is better than lifting heavy objects at work," because he has had "no pain when painting." He reported no depression, anxiety or insomnia. (Van Ravenswaay report, July 16, 2019).

71) On July 17, 2019, Employee had x-rays to measure "unequal limb length." The radiologist determined, "No limb length discrepancy." (X-ray report, July 17, 2019).

72) On July 25, 2019, on Dr. Van Ravenswaay's referral, Employee had an ultrasound examination that ruled out a right inguinal hernia. (Ultrasound report, July 25, 2019).

73) On September 4, 2019, Dr. Van Ravenswaay saw Employee and among other things diagnosed a depressive disorder and recommended counseling and a possible psychiatric referral. (Van Ravenswaay report, September 4, 2019).

74) On October 17, 2019, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 19-0107 (October 17, 2019) (*Hernandez I*), struck Employee's *pro se* hearing brief as untimely but granted his request for an SIME. (*Hernandez I*).

75) On April 21, 2020, Paul C. Murphy, MD, orthopedic surgeon, saw Employee for an SIME. Among other things, Dr. Murphy diagnosed a history of anxiety, depression and panic attacks and opined these were not substantially caused by the August 7, 2017 work injury. Dr. Murphy stated Employee's work-related disability was no longer present, and he reached medical stability and his disability ended on September 17, 2018. Employee's physical examination was essentially normal with no neurological deficit, motor weakness or structural abnormalities. Employee needed no further medical treatment. (Murphy report, April 29, 2020).

76) On May 17, 2020, Dr. Van Ravenswaay opined "the August 7, 2017 injury is the most likely cause of [Employee's] anxiety, panic attacks, depression, pain, shoulder and spine complaints and his inability to work." He stated it was well known that depression can worsen chronic pain and cause debility. Dr. Van Ravenswaay found no symptom magnification. He did not think Employee could return to work as a fish processor because he needed treatment for his anxiety, depression and chronic pain to rehabilitate. Dr. Van Ravenswaay said Employee needed counseling and possibly psychiatric evaluation and treatment from a pain specialist. In his opinion, the August 7, 2017 injury was the substantial cause of Employee's need for continued medical treatment. Dr. Van Ravenswaay stated Employee was not medically stable on September 17, 2018, and would improve with counseling and psychiatric care, along with better pain control. (Van Ravenswaay letter, May 17, 2020).

77) On September 16, 2020, Dr. Murphy testified he is "well-versed in psychiatric illnesses, including anxiety, panic attacks and depression," but would "defer the psychology discussion to an expert in that field." He said while Employee had chronic pain, it was medically stable, and was unlikely to change with further treatment. Dr. Murphy said his prior opinion regarding Employee's ability to return to work remained unchanged but with "regards to anxiety, depression and panic attacks," he would defer to a psychologist. Orthopedically, Employee required no further treatment. (Zoom deposition of Paul C. Murphy, MD, September 16, 2020).

78) On September 24, 2020, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 20-0085 (September 24, 2020) (*Hernandez II*), denied Employee's request for another SIME. *Hernandez II* found the first SIME addressed Employee's medical and mental health conditions. (*Hernandez II*).

79) On September 30, 2020, Luke Liu, MD, pain specialist, saw Employee for trigger point injections to the left spinal thoracic region for "medically refractory myofascial pain and muscle spasm." (Liu report, September 30, 2020).

80) On October 6, 2020, Dr. Van Ravenswaay referred Employee to Wisdom Traditions Wellness Center (Wisdom Traditions) for counseling. (Referral Order, October 6, 2020).

81) On October 23, 2020, Anna Sappah, PsyD, with Wisdom Traditions saw Employee by Zoom for assessment and treatment of depression from a three-year history of chronic pain from a work injury. He presented with back, groin and shoulder pain that he contended arose from his work as a seafood processor. In the prior 12 months, Employee said he had experienced feeling

fear or panic, heard voices or saw things, and felt paranoid that others were out to get him. He reported no history of drug or alcohol use. (Sappah report, October 23, 2020).

82) On November 5, 2020, Jon Paff, MA, at Wisdom Traditions, set forth Employee's initial treatment plan with short- and long-term goals. (Paff report, November 5, 2020).

83) On December 2, 2020, Dr. Van Ravenswaay's office referred Employee to Providence PT for a functional capacity evaluation (FCE). (Referral Order, December 2, 2020).

84) On December 2, 2020, Employee's FCE showed he was able to perform full-time (eight-hour days, 40-hour weeks) light-duty work although Employee demonstrated "self-limiting behavior" on 50 percent of the 20 tasks. "*Please note that the overall level of work was significantly influenced by the client's self-limiting behavior. Therefore, the light level of work indicates a minimum ability rather than a maximum ability. A maximum overall level of work cannot be determined at this time due to the self-limiting behavior* (italics in original)." The provider noted three possible reasons for self-limiting behavior: (1) pain; (2) psychosocial issues including fear of reinjury, anxiety, or depression; (3) attempts to manipulate test results. The provider stated, "Although it is difficult to determine the causes of self-limiting behavior, our research indicates that motivated clients self-limit on no more than 20% of test items. If the self-limiting behavior exceeds 20%, then psychosocial and/or motivational factors are affecting test results." Employee's statements about his self-limiting behavior during his FCE included: Mid-back pain, pain and fatigue, upper-back pain, fear of reinjury and being sore in subsequent days. (Physical Work Performance Evaluation, December 2, 2020).

85) On March 11, 2021, Dr. Van Ravenswaay testified he is a board-certified, family medicine physician. In May 2020, he opined the work injury was the most likely cause of Employee's anxiety, panic attacks, depression, chronic pain, shoulder and spine complaints and his inability to work, and that remained his opinion. In his view, Employee's anxiety, depression and chronic pain arose from his work injury with Employer; "I think it's the substantial cause as it relates to his complaints of chronic pain, panic attacks, depression, anxiety." Dr. Van Ravenswaay opined Employee was not yet medically stable for his "panic and worry and depression regarding his injury"; Employee needs coordinated care to address these issues, in his view. He found no evidence of symptom magnification during his physical examinations. Dr. Van Ravenswaay opined Employee still needed treatment for anxiety, depression and chronic pain so he could

return to work as a fish processor. (Deposition of Jonathan Van Ravenswaay, MD, March 11, 2021).

86) Dr. Van Ravenswaay said he had referred Employee for an FCE, which in December 2020 limited Employee to light-duty work. He too would limit Employee to light-duty office work, sales, perhaps light cleaning but not heavy janitorial work. Dr. Van Ravenswaay said Employee needed to work regularly with a psychologist or behavioral health counselor, his medical doctor, and a pain specialist; he had referred him to pain specialist Dr. Liu and to Wisdom Traditions for counseling. He did not know the legal definition of "the substantial cause," but said, "I would guess that it would be the main reason for the condition." Dr. Van Ravenswaay had not reviewed formal job descriptions. He could not recall any research about the connection between chronic pain and depression. (Deposition of Jonathan Van Ravenswaay, MD, March 11, 2021).

87) Dr. Ravenswaay's initial treatment was to "tell [Employee] to go to work. I said you just need to go to work. You just need to find a job. You just need to try something." Employee took his advice but said returning to work "triggered his pain." (Deposition of Jonathan Van Ravenswaay, MD, March 11, 2021).

88) On cross-examination, Dr. Van Ravenswaay said he is not board certified in pain medicine, pain management or orthopedics. He does, however treat chronic pain as part of his practice, but "not a lot." Dr. Van Ravenswaay expects Employee to make significant improvement in his ability to work, "to overcome his sort of stuck in a rut kind of behavior where he is cycling down into depression and pain cycle." He thinks with treatment Employee could break that cycle so he could "hold down a job." Dr. Van Ravenswaay disagreed with Dr. Murphy's statement regarding chronic pain and that Dr. Murphy did not anticipate any significant change in his condition even with the use of a pain specialist. However, Dr. Van Ravenswaay agreed with Dr. Murphy's opinion that Employee "needs more than just a pain specialist." He needs "psychiatric care, counseling, medical doctor, orthopedic doctor, probably some voc rehab to work together in concert and not just with a pain specialist." Dr. Van Ravenswaay relied on an informal consult he had with psychiatrist "Dr. Rodriguez" who recommended an inter-disciplinary approach to treating Employee, and there is no such place in Anchorage under one roof. (Deposition of Jonathan Van Ravenswaay, MD, March 11, 2021).

89) On June 17, 2021, Arthur Williams, PhD, psychologist, saw Employee for an EME and diagnosed unspecified anxiety disorder and somatic symptom disorder, which involves excessive thoughts, feelings, or behaviors related to the somatic symptoms or associated health concerns as manifested by at least one of the following: (1) disproportionate and persistent thoughts about the seriousness of one's symptoms; (2) persistently high level of anxiety about health or symptoms; and (3) excessive time and energy devoted to the symptoms or health concerns. He opined the work injury was not the substantial cause of Employee's current condition, and said from a psychological perspective, he had been medically stable since January 30, 2018, when PA-C-Gordon released him for full duty. Dr. Williams stated, "any psychological treatment would be unrelated to [the work injury]." He found Employee's symptoms excessive and disproportionate based on the lack of objective findings. Employee had no work restrictions from a psychological perspective. (Williams report, June 17, 2021).

90) On July 27, 2021, Dr. Williams testified about his EME. He had asked Employee about depression:

> He said he was first depressed when he was in Kodiak in 2018. So there was a lag between the injury which occurred on 8-7-17 and his first exposure of being depressed. He was not sure how long he was depressed. He did go to counseling. He is not sure when he was last depressed.
>
> Now, one of the differential diagnoses I needed to make was whether he suffered from injury depressive disorder. So I asked him about the duration of his depressive feelings. He said they did not last all day. So that means he did not meet that criteria for injury depressive disorder. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

91) Employee attributed his depression to his pain. When he had pain, he would argue with his wife. He did not say that depression lead to pain. Employee was vague about "panic attacks." He could not say when they began but the last one was about one week before the EME. Employee felt "very anxious," and said these feelings may have been panic attacks. His panic attacks all occurred with a "precipitant," and therefore Dr. Williams opined "he did not meet the criteria of panic disorder." He added, "panic attacks themselves are not a diagnosis." (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

92) Dr. Williams testified if a person is depressed it may cause neurochemical changes that make that person more likely to have increased pain. Also, if a person is depressed, agitated or

anxious, it can cause muscular changes and neurochemical changes in neurotransmitters that can lead to an increase in pain. Therefore, Dr. Williams wanted to see if Employee's depression or anxiety preceded pain or if it was the other way around. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

93) Dr. Williams found Employee "quite dramatic" in his pain presentation and comments about his pain. Employee wanted to take off his shirt and show Dr. Williams that he was wearing "straps" to indicate that he was in pain. Dr. Williams relied on medical opinions from physicians as he is not a medical doctor; if medical doctors say there are no objective findings, he gives those opinions great weight. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

94) On the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*Guides*) Pain Disability Questionnaire, Employee scored 129, which placed him "in the severe range." Dr. Williams found Employee rated many of his scales at "10," which is the highest rating, meaning he was "unable to work at all, unable to lift overhead." The scale that stood out to Dr. Williams the most was the scale where Employee indicated he "could not walk or run at all, which would indicate to me that he needed to be in a wheelchair." Yet, from Dr. Williams' perspective as a psychologist, Employee had no gait problems and "seemed to walk normally." (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

95) Employee also said he had "severe depression." Dr. Williams has seen people with severe depression and Employee did not function like them in terms of "psychomotor retardation, very slow movement and speech, crying throughout the interview," and so forth. Employee did not "meet their criteria for major depressive disorder." Dr. Williams opined, "So for him to give himself a ten on that scale was very [concerning]." (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

96) Dr. Williams performed the third Pain Disability Questionnaire on Employee. With Dr. Bauer, Employee's score was 95 and with Dr. Murphy, it was 107. Dr. Williams testified "this scale has very good reliability, which means it is consistent over time." Therefore, the scores should be consistent. But in this case, where Employee scored 129 with Dr. Williams, they were not. Dr. Williams opined pain does not usually get dramatically worse unless there is an intervening factor. He was concerned about the lack of objective physical findings noted by

Employee's examining physicians. Dr. Williams said the variation from 95 to 129 raised concern about Employee's self-reporting. According to the AMA *Guides*, "Subjective complaints that are not clinically verifiable are generally not ratable under The Guides." (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

97) To meet the DSM-5 criteria for Major Depressive Disorder, Employee would have to be depressed "most of the day, nearly every day, as indicated by either subjective report or observation by others." He would have "significant weight loss," decrease or increase in appetite nearly every day, insomnia or hypersomnia, or psychomotor agitation or retardation. Employee did not "exhibit any of that nearly every day, observable by others." He made a point to tell Dr. Williams "depression and anxiety were not the cause of his inability to work and that both of those emotional factors followed pain rather than precipitated it." Dr. Williams further opined Employee's catastrophizing score at 38, which was eight points above the cutoff for elevation, meant he catastrophizes, which would exacerbate his pain perception. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

98) Dr. Williams reviewed Dr. Van Ravenswaay's reports and deposition and disagreed the work injury with Employer caused Employee's psychological issues. He found Dr. Van Ravenswaay did not perform a systematic evaluation of depression, anxiety and chronic pain like he did. And while Dr. Williams respects family physicians, the AMA *Guides* say that treating physicians' reports need to have more scrutiny because "they are definitely on the side of the patient." He was concerned about how Dr. Van Ravenswaay reached his conclusions other than just taking "at face value" what Employee said. Dr. Williams saw no indication of how Dr. Van Ravenswaay assessed Employee with a depressive disorder. In Dr. Williams' opinion, psychological factors four years post-injury "to a reasonable psychological certainty" were not related to the injury. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

99) Dr. Williams said the AMA *Guides* specifically state in respect to mental illness, "Treating clinicians should not become involved in forensic issues, such as causation involving their patients. Forensic evaluators should not provide treatment for forensic examinees. Treatment [and] forensic roles should be completely and permanently separated for any individual case." Dr. Williams was "very concerned" about Employee continually using narcotic medication. Employee was not using any active modalities to manage his pain. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

100) On cross-examination, Dr. Williams said Employee told him he had no prior workers' compensation claims and no personal injuries prior to his August 2017 work injury with Employer. He also reported no psychological diagnoses or treatment prior to his work injury. Dr. Williams diagnosed Employee with somatic symptom disorder and unspecified anxiety disorder. Referring to the DSM-5, Dr. Williams agreed that an individual suffering from somatic symptom disorder could have significant distress and impairment. He also agreed that individuals who have this diagnosis have "authentic distress and authentic impairment." The "new" diagnosis of somatic symptom disorder is designed to include patients with chronic pain conditions. When asked if, given this diagnosis, Employee was "significantly impaired from functioning or trying to function in an occupational environment," Dr. Williams said, "Well, he says it is not because of emotion factors. So, from my perspective, it would be related to his perception of his pain symptoms." He further explained:

> So it is his perception, pain perception, and it's his suffering and his pain behaviors rather than the actual evidence of any underlying disorder.
>
> And he specifically said several times that the pain, the depression and anxiety themselves were not the factors that were interfering, it was a disability to work, his disability to function, it was the pain itself. . . . It was his perception of the pain that led to anxiety and depression.

Dr. Williams had no reason to believe Employee was not experiencing physical pain from his hernia and thoracic region from his 2017 work injury. He agreed Employee's diagnosis should also include him having "predominant pain." Dr. Williams agrees with the definition of "chronic pain" as stated in the AMA *Guides*, Sixth Edition. He also agreed that under the AMA *Guides*, chronic pain can be considered a disease entity in its own right, and in certain people can be very debilitating. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

101) Dr. Williams had no medical records from before the work injury and he cannot rely solely on Employee's self-reporting, according to the AMA *Guides* and the AMA *Guides to Evaluation of Disease and Injury Causation*. Employee's complaints were disproportionate to the objective measures that are found in his medical records and disproportionate to other criteria he must follow in the AMA *Guides*, that Employee's attorney failed to quote in his previous questioning. Dr. Williams has concerns about Employee's self-limiting behavior seen in occupational and physical therapy reports He found a "consistent picture here of discrepancies between what

[Employee] does and says and how he presents and what would be expected," as addressed in Chapter 3 of the AMA *Guides*. Dr. Williams would leave it to medical doctors who stated Employee can return to full employment; as for the psychological aspect, Employee's anxiety and depression are not interfering with his ability to work. The same is true of the Somatic Symptom Disorder, which "in and of itself is not sufficient to interfere with his ability to work." Dr. Williams opined, "work is in an inverse relationship to depression." In other words, "going back to work may be a therapeutic thing for him." When asked why Employee's August 7, 2017 work injury is not the substantial cause "of his current condition," Dr. Williams stated:

> Yes. So just go to the AMA Guides. It is on page 38. And there are four criteria here in evaluating the reliability and credibility of pain behaviors among patients undergoing PPI assessments. "Examiners should consider the following: Congruence with established conditions."
>
> How likely is it that somebody who had an injury like this in 2017 is having disabling and, in fact, worse symptoms based on the pain disability questionnaire of 129 compared to 95 with Dr. Bauer in 2021 from an accident in 2017?
>
> "Consistency over time in situation." Again, the consistency of the disability is not there because of the increasing disability, which is not expected in this type of situation.
>
> "Consistency with anatomy and physiology." Again, the doctors have repeatedly said that there was no underlying indication of objective findings.
>
> "Agreement among observers." Some of the doctors agree. A lot of the medical practitioners agree, and the family doctor disagrees.
>
> "Inappropriate illness behavior." He is wearing straps. I believe it is the physical therapist that says he doesn't have to wear them. He engages in self-limiting behavior, which according to the AMA Guides could be considered to be symptom-magnification, according to the occupational therapy record.
>
> Also, the physical therapy record from Wise Physical Therapy of 1-16-2019. . . . It says that he denies any pain in his spine upon arrival but was explaining there were so many things that he could do that would hurt him, and he just wasn't going to do them to avoid pain.
>
> So again, that would also raise questions about symptom-magnification, as it is defined on page 24 of the AMA Guides. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

102) Dr. Williams declined to state Employee was faking his symptoms because "faking implies intent," and he could not comment on Employee's intent. However, he found a "discontinuity between the pain disability questionnaire, the catastrophizing questionnaire, and the survey of pain attitudes and the type of injury that he had. So that discrepancy would be an invalidity sign." When asked, "So if his work injury is not the substantial cause of his current condition, then what is the substantial cause of his current condition?" Dr. Williams stated:

> All I can do is hypothesize about that. I think there have been some unfortunate teratogenic factors involved here in terms of the way he has been treated, which Dr. Van Ravenswaay even acknowledged in terms of his own treatment approach with this person.
>
> I think there may be cultural factors. Some cultures are more expressive of pain behaviors than others.
>
> And I think that his beliefs, that some of his maladaptive beliefs about pain have been reinforced rather than treated in an adaptive way.

When asked if this opinion was based on speculation and without an underlying factual basis, Dr. Williams said, "That's based on my way of looking at the case and looking at other factors that may have influenced his current presentation." He definitively stated it would not be speculation to rule out work as the substantial cause of Employee's current condition, based on the AMA *Guides* criteria he previously mentioned. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

103) When asked why he recommended Employee have therapy with a pain psychologist for a month to treat depression, when Dr. Williams did not diagnose him with depression, he explained:

> Whenever somebody says he has suicidal thoughts, I always say somebody needs to be looking at those. . . .

With one month of therapy on a weekly basis, Dr. Williams hoped Employee could learn about catastrophizing and depressive symptoms and anxiety and learn a more adaptive way of dealing with "cognitive and emotional factors" related to his pain perception. (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

104) On August 5, 2021, Employer denied all benefits related to somatic symptom and anxiety disorders based on Dr. Williams' June 17, 2021 report. (Controversion Notice, August 5, 2021).

105) In his August 6, 2021 hearing brief, Employee acknowledged his prior TTD benefits had been paid at $273 per week from October 4, 2017, through June 20, 2018. He contended that prior to his work injury there was no medical history Employee "suffered from anxiety, depression, somatic symptom disorder or chronic pain." Employee relied on *Leigh*, *Vue* and *Huit* to support his contention that he raised the presumption as to his disability and need for treatment, and Employer failed to rebut it with substantial evidence; he relied on *Hibdon* to support his claim for ongoing medical care. He acknowledged that Dr. Koller had found Employee had anxiety and insomnia issues before his work injury but had also opined these were exacerbated by it. Employee conceded "that he is medically stable with respect to his thoracic spine." However, he contended he is not medically stable for his persistent pain, anxiety, and somatic symptom disorder, based on Dr. Van Ravenswaay's opinion. Employee contended Medicaid asserts a $32,711.65 lien for past medical treatment. He further contended entitlement to a reemployment benefits eligibility evaluation. Consequently, employee also contended he should be entitled to "stipend" benefits during the time to which he should have been, or was, involved in the reemployment process. (Employee's Hearing Brief, August 5, 2021).

106) On August 10, 2021, Schwarting sent Eppler an email stating:

> Per our discussion, my client is willing to enter a check tomorrow, which would mail on Thursday, for the following benefits:
>
> 1. The 2% PPI initially assessed by Dr. Murphy, which is worth $3,540.00 and
> 2. TTD for the period of 5/17/20-6/17/21, which is worth $21,261.00.
>
> In exchange for this, we would continue tomorrow's hearing and promptly schedule mediation on the remaining benefits. This is a good-faith offer to get Mr. Hernandez some funds while we negotiate the remainder of the claim. . . . (Schwarting email, August 10, 2021).

107) On August 11, 2021, the parties appeared before a Board panel to continue a hearing set for that day on the merits of Employee's claims. The parties had agreed Employer would pay some benefits at issue to Employee and schedule mediation to resolve the rest. Schwarting stated:

> So, what the employer and insurer are agreeing to pay now, is a two percent PPI rating that was issued -- or assessed by Dr. Murphy. And so we are also paying a period of temporary total disability benefits and that period is between May 17,

> 2020, and June 17, 2021. And that period of TTD benefits totals $21,261. . . . He is not waiving anything beyond those specific benefits and everything else will be submitted to mediation.

Eppler agreed to these terms. The panel reluctantly continued the hearing based on these representations. (Transcript of Proceeding, August 11, 2021).

108) On August 12, 2021, Employer told Employee it had incorrectly calculated the TTD benefits for May 17, 2020 through June 17, 2021, his TTD weekly rate was $273, and the amount should have been $15,483 not $21,261. (Notice of Correction, August 12, 2021).

109) On August 17, 2021, Employee claimed an unfair or frivolous controversion, a penalty, interest, and attorney fees and costs on grounds Employer unilaterally changed the terms of the August 11, 2021 agreement. (Claim for Workers' Compensation Benefits, August 17, 2021).

110) On September 10, 2021, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 21-0082 (October 17, 2019) (*Hernandez III*), memorialized the continued August 11, 2021 hearing to allow the parties time to mediate the case. (*Hernandez III*).

111) In its December 15, 2021 hearing brief, Employer conceded that initially "the employer and insurer miscalculated" the TTD benefits due for the period between May 17, 2020, and June 17, 2021. It contended Employee's TTD rate was known to both parties as was the period during which the stipulated benefits were to be paid. Employer contended paying the miscalculated amount would have been a "windfall" to Employee. As for attorney fees, Employer contended Eppler lacked experience, his paralegal's rate was excessive, Eppler and his paralegal did "concurrent work," the time spent on task "far exceeds what it should," and Employee did not prevail on all issues for which Eppler charged in his attorney fee affidavit. (Employer's Hearing Brief, December 15, 2021).

112) In his December 15, 2021 hearing brief, Employee objected to the unilateral change in the parties agreed-upon TTD benefits and said he had received a check for $19,023 and "has not cashed the reduced check." He contended the parties on August 21, 2021, entered an enforceable stipulation when, in exchange for $21,261 Employee agreed to continue the hearing and submitted to mediation. Employee relied on various legal theories, most notably contract law, estoppel, and the stipulation regulation, and requested an order requiring Employer to pay him $21,261 and not consider this an "overpayment" or allowed to be "recharacterized" or "recouped" in any manner. (Employee's Supplemental Hearing Brief, December 15, 2021).

113) On December 17, 2021, Eppler submitted an amended affidavit for his attorney fees and costs. He had clerked while in law school for a leading workers' compensation firm. This involved appearing at prehearing conferences and preparing clients for depositions while he was still a law student. Eppler was admitted to the Colorado Bar in November 2012, and the Alaska Bar in October 2015. In Colorado, he represented clients in probate, contested guardianships, estate litigation and estate planning. He also worked for a family law firm including litigating divorce, child custody and child support cases. When Eppler moved to Alaska in 2015, he worked for a family law firm and in October 2015, started his own practice focusing on probate and estate planning. His work required him to review medical reports and testimony from expert witnesses. As of 2021, Eppler had been representing injured workers in workers' compensation cases for two years. He also counseled and advised numerous injured workers without entering an appearance. Since 2012, Eppler was the lead attorney on approximately 200 cases in addition to those on which he assisted another attorney. He noted he had received no attorney's fees in Employee's case since he began representing him in December 2019. As of his affidavit date, Eppler had obtained $19,023 in benefits for Employee that were previously denied. He is a solo practitioner and uses contract paralegal assistance when needed. When accepting a new case, Eppler must consider the contingency factor in workers' compensation cases, whereas he can take other clients who pay an hourly fee. Eppler served on the SIME selection panel in 2021 as a public service to the Division. He contended the medical issues in this case were complex and involved numerous treating, EME and SIME physicians. Eppler further noted Employee was previously represented by two experienced attorneys who were unable to obtain any benefits for him. He declined approximately 10 probate and five workers' compensation cases in part to handle Employee's case. Eppler further noted that sometimes it takes years to obtain attorney fees in a given case. (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021).

114) On February 18, 2022, Loretta Lee, MD, internal medicine, performed an EME. She opined Employee had no PPI rating for his hernias. Dr. Lee stated he could have ratable impairments for his back pain and psychiatric issues, "However, these would be due in part or in whole to a preexisting condition." She reasoned that most people who have a lifting injury requiring surgery do not have protracted issues with depression and anxiety as Employee did. Dr. Lee concluded there was a preexisting condition or predisposition for these issues to develop regardless of any work events. She found Employee had no structural damage on imaging and

could have had a muscle strain in his back that resolved over "weeks to months." She could not attribute all post-injury issues to the work event. "There has to be a plausible mechanism of injury that is supported by objective evidence. In this case, that criteria was not met." (Lee report, February 18, 2022).

115) On March 9, 2022, Dr. Lee predicted Employee would have permanent physical capacities to perform physical demands for: Stores Laborer, Informal Waiter, Fish Cleaner, Fish Roe Processor, and Cannery Worker. (Dr. Lee responses, March 9, 2022).

116) On December 22, 2021, Dr. Van Ravenswaay testified at hearing. He had read Dr. Williams' deposition transcript and stood by his own prior testimony. Dr. Ravenswaay said, Employee, even with his help, had difficulty accessing psychiatric care because Employer controverted his case, and he had only Medicaid insurance. He opined Employee has "some sort of syndrome of depression" and anxiety. As far as Dr. Van Ravenswaay could tell, Employee "didn't have any of these symptoms before." (Record).

117) Employee also testified at hearing. He said Dr. Koller stopped treating him in Kodiak because he could not find out what was wrong with him. Employee said prior to his 2017 work injury with Employer, he never had "a diagnosis or ever received treatment for" anxiety, depression, or panic attacks. He had limited Zoom meetings with the counselor at Wisdom Traditions, which Employee said made him feel good at the time because he had someone to talk to about his situation. Employee said when he tried to return to work, cleaning with his wife, bending caused back pain which caused "more worry, more anxiety." He objected to Dr. Williams' examination and said Dr. Williams did not allow him to speak about his situation. (Record).

118) Employee contended Dr. Williams' report did not rebut the presumption of compensability of anxiety, depression and panic attacks. He contended Employer never asked a physician to offer a causation opinion on those issues. Dr. Williams simply stated, "it's not related," but had no explanation for why it was not related to his work injury. Employee contended Dr. Bauer's opinion made the same conclusory statement that the mental health conditions were not related. In short, Employee contended the EME reports were not legally sufficient evidence, making weighing them irrelevant. He contended, "there is no evidence that Employee had [anxiety and depression, pain, and panic attacks] prior to the 2017 work injury." Employee contended Dr. Williams' opinion fails because he cannot provide an alternate explanation for Employee's

mental health conditions. He contended Employer never asked anyone to address psychological issues until it sent Employee to Dr. Williams; thus, he contended Employer had an obligation to pay for mental health treatment at least until August 4, 2021, when it first controverted benefits based on Dr. Williams' report. Employee contended he needs a "comprehensive treatment plan" to determine when he is medically stable from all his maladies. He relied on the *Rusch* decision to support his attorney's increased fee rate. (Record).

119) Employer contended the Board should rely more heavily on Dr. Williams and on the orthopedic physicians, all of whom said Employee needed no further medical care or psychological treatment for his work injury, and he was long-ago medically stable. It contended in respect to its controversion notice, "What happened here is the Employer agreed to pay a period of past benefits. It happens all the time. It's not a settlement, and [*Stenseth*] is about a settlement agreement." Employer contended Eppler and his paralegal were charging too much per hour for attorney fees and paralegal costs compared to other practitioners. It contended Eppler admitted he had done three merits hearings before the Board and had no workers' compensation appellate experience. Employer did not object to Eppler's hours. (Record).

120) On January 21, 2022, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 22-0005 (January 21, 2022) (*Hernandez IV*), addressed the parties' August 11, 2021 oral agreement:

> 47) On August 11, 2021, the parties agreed to settle the case and set the terms on the record as follows: Employer will pay $3,540 based on a two percent PPI rating plus $21,261 in TTD benefits from May 17, 2020, through June 17, 2021. (Record). (*Hernandez IV* at 14).

121) Eppler had billed $80,992.25 for 190.57 attorney hours, $20,562.75 for 111.15 paralegal hours, and $1,803.94 in litigation costs, totaling $103,358.94. At hearing, Eppler testified he was entitled to $425 per hour based on the quality of his legal work, and contended his hours were reasonable. He also requested six hours additional time bringing his total to $105,908.94. However, *Hernandez IV* awarded Eppler only $20,639.85 in attorney fees and $6,944.63 in costs. *Hernandez IV* determined that of the eight factors set out in the Alaska Bar Association, Rules of Professional Conduct, Rule 1.5(a), only factors (1), (3), (4) and (7) needed to be addressed. It further found experienced claimant attorneys received $425 per hour, and decided Eppler lacked relevant workers' compensation legal experience. *Hernandez IV* made specific factual findings regarding attorney fee and costs as follows:

54) On December 17, 2021, Eppler billed 4.4 paralegal hours: (1) .6 hours for "Draft entry of Appearance" on "12/19/2019"; (2) .6 hours for "Draft Amended WCC" on "12/19/2019"; (3) .6 hours for "Draft AWCB medical summary" on "12/19/2019"; (4) .6 hours for "Draft Request for Conference" on "12/19/2019"; and (5) two hours to "Finalize WCC, AWCB M/S, Req. for Conference, Entry of Appearance" on "12/20/2019." (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021; Entry of Appearance; Request for Conference; Workers' Compensation Medical Summary; Claim for Workers' Compensation Benefits, December 23, 2017).

55) On December 17, 2021, Eppler billed a total of .8 paralegal hours and .2 attorney hours to file a "Request for Prehearing Conference" as follows: .6 paralegal hours for "Draft Request for Prehearing Conference" on "3/6/2020," .2 paralegal hours for "Revise/finalize Request for Conference" on "3/24/2020," and billed .2 attorney hours to "Review, revise, finalize and file Request for Prehearing Conference" on "03/24/2020." (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021).

56) On December 17, 2021, Eppler billed .4 paralegal hours on "02/10/2021," .3 paralegal hours on "4/13/2021" for "Draft ARH," and billed .2 attorney hours to "Review, revise, finalize, file and serve Affidavit of Readiness for Hearing. E-mail to Client" on "04/14/2021." (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021).

57) On December 17, 2021, Eppler billed (1) 7.15 paralegal hours consisting of .8 hours on "06/09/2020," .6 hours on "06/24/2020," 4.5 hours on "08/05/2020," and 1.25 hours on "08/07/2020," and (2) 2.57 attorney hours consisting of .6 hours on "06/24/2020" and 1.97 hours on "08/19/2020" for the written record SIME hearing. (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021).

58) On December 17, 2021, Eppler billed 8.9 attorney hours consisting of 3.2 hours on "12/06/2021," 3.4 hours on "12/13/2021," and 2.3 hours on "12/15/2021," in preparation for "Employee's Supplemental Hearing Brief" related to the enforcement of the August 11, 2021 agreement. (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021; Employee's Supplemental Hearing Brief, December 15, 2021).

59) On December 17, 2021, Eppler billed 36.9 attorney hours and 28.7 paralegal hours for Employee's August 6, 2021 hearing brief. (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021). This 23-page long brief did not cover all hearing issues; it provided insufficient assistance to fact-finders to ascertain factual or legal bases to support Employee's claims. (Judgment).

60) An "Entry of Appearance" is a one-page document with boilerplate language. A "Claim for Workers' Compensation Benefits," commonly referred as "WCC," is a one-page form with fillable fields and checkboxes. Employee's December 23, 2019 medical summary contains a cover page and four pages of scanned documents. A "Request for Conference" is a one-page document with fillable fields and checkboxes. An "Affidavit of Readiness for Hearing," commonly referred as an "ARH," is a one-page form with fillable fields and checkboxes. (Observation). These documents do not require specific training, expertise,

research or analysis to be completed. A legal assistant, paralegal or attorney may adequately complete such a document in five to 10 minutes without further reviews or revisions. (Knowledge; judgment).

61) In Paragraph 1 of the December 17, 2021 Amended Affidavit of Attorney's Fees and Costs, Eppler states, "I am the owner and manager of the Law Office of Justin S. Eppler, LLC, the attorney of record for Todd Christensen, the employee in the above claim." (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021). Christensen is not Employee; this editing error shows that Eppler uses templates. Lawyers regularly use document templates to save time and money. (Observation; knowledge).

62) At hearing on December 22, 2021, the panel noted a lack of evidence supporting Employee's compensation rate adjustment or TPD benefit claims. Eppler said Employee was withdrawing his compensation rate adjustment claim, but Employee orally disagreed. After a brief discussion with his client, Eppler said Employee was still seeking a compensation rate adjustment. Employee did not provide any evidence to support his compensation rate adjustment claim. (Agency file; record). When the panel inquired about Employer's position regarding reemployment benefits, Schwarting responded that she would communicate with the adjuster, but it did not dispute the claim or offer any defenses. Employee said he could not obtain a PPI rating for his hernias because Employer declined payment. Employer admitted the compensability of Employee's hernias. Employee provided no evidence or argument for the medical transportation costs issue. (Record).

. . . .

65) Eppler appeared in two merits hearings and several procedural hearings; he has no experience in workers' compensation appellate proceedings. (Eppler). He was awarded $385 per hour in *Cohen-Barce v. Vanstrom*, AWCB Decision No. 21-0010 (February 2021), an uninsured employer case. In such cases, reasonableness of attorney fees are rarely challenged. (Knowledge; observation). (*Hernandez IV* at 15-17).

122) *Hernandez IV* reduced Eppler's fees and paralegal costs, finding he and his paralegal overcharged, were not credible and took too long to perform simple services. (*Hernandez IV*).

123) *Hernandez IV* made the following conclusions of law and orders:

CONCLUSIONS OF LAW

1) Employee's September 23, 2021 email will not be stricken from the record.
2) The parties' August 11, 2021 agreement is not enforceable.
3) Employee is not entitled to TTD benefits.
4) Employee is not entitled to TPD benefits.
5) Employee is entitled to a PPI rating for his hernias.
6) Employee is not entitled to a compensation rate adjustment.
7) Employee is entitled to a reemployment evaluation.

8) Employee is entitled to past medical benefits. He is not entitled to past transportation costs.
9) Employee is entitled to a penalty.
10) Employer did not unfairly or frivolously controvert any benefits.
11) Employee is entitled to interest, attorney fees and costs.

ORDER

1) Employee's September 23, 2021 email will not be stricken from the record.
2) The parties' August 11, 2021 agreement is void and unenforceable.
3) Employee's TTD claim is denied; he is not entitled to TTD benefits from June 20, 2018, and continuing.
4) Employee's TPD claim is denied.
5) Employee's request for a PPI rating or PPI benefits for his psychological conditions is denied.
6) Employer shall pay for a PPI rating for Employee's hernias.
7) Employee's compensation rate adjustment claim is denied.
8) Employee is hereby referred to the Rehabilitation Benefits Administrator for a vocational reemployment eligibility evaluation.
9) Employee shall be deemed to be in reemployment process beginning December 23, 2019, and continuing until the reemployment process is complete in accordance with the Act and regulations.
10) Employer shall pay Employee the §041(k) stipend from December 23, 2019, through August 11, 2021. Employer shall reclassify the TTD benefits paid from May 17, 2020, through June 17, 2021, as §041(k) stipend. From August 12, 2021, forward, the §041(k) stipend will be suspended until TTD and PPI benefits are prorated and exhausted, respectively.
11) Employer shall pay Employee's past medical benefits for his thoracic spine injury from June 20, 2018, through September 17, 2018, subject to the Alaska Medical Fee Schedule, the Act and applicable regulations.
12) Employee retains his right to seek future medical benefits for his work injury that are necessary and reasonable; Employer retains its defenses.
13) Employee's claim for past transportation costs is denied.
14) Employee retains his right to future medical transportation expenses for the work injury to the extent he provides appropriate documentation; Employer retains its defenses.
15) Employee's request for a finding of unfair or frivolous controversion is denied.
16) Employer shall pay a late-payment penalty on (1) past medical benefits for his thoracic spine injury from June 20, 2018, through September 17, 2018; (2) the §041(k) stipend from December 23, 2019, through August 11, 2021; and (3) PPI benefits commensurate to a two percent rating, all in accordance with the Act and regulations.
17) Employer shall pay Employee interest on unpaid benefits pursuant to the Act and regulations.

> 18) Employer shall pay Eppler $20,639.85 in attorney fees and $6,944.63 in costs, totaling $27,584.48.

124) On April 7, 2022, Employee appealed *Hernandez IV* to the Commission. (Notice of Appeal, April 7, 2022).

125) On July 26, 2022, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 22-0054 (July 26, 2022) (*Hernandez V*), affirmed the Reemployment Benefits Administrator's designee's finding that Employee was not eligible for reemployment benefits. (*Hernandez V*).

126) Employee did not seek review of *Hernandez V*. (Agency file).

127) On February 21, 2023, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCAC Dec. No. 300 (February 21, 2023) (*Hernandez VI*), the Commission addressed Employee's appeal from *Hernandez IV* and made some notable statements: "The Commission notes Dr. Bauer did not explain to what the anxiety and panic attacks were attributable" (page 5). "The Commission notes Dr. Murphy did not discuss the cause or origin of the anxiety and panic attacks" (page 8). "He [Dr. Williams] did not discuss or provide an opinion as to the origin and cause of Mr. Hernandez's anxiety and panic attacks" (page 9-10). "The Commission notes Dr. Williams did not address the cause of the chronic pain, just noting [Employee] had it" (page 11). "The Commission notes the Board did not discuss the basis for its conclusions about the time involved in [Eppler's] activities and did not provide Mr. Eppler with an opportunity to respond" (page 12, n. 53). "[Dr. Williams] did not provide an alternative explanation for the causation of either the chronic pain, depression, or the anxiety" (page 17). "Based on *Vue* and *Huit*, Ocean Beauty did not rebut the presumption because no alternative cause for the chronic pain were discussed" (page 21). "Dr. Murphy . . . stated . . . the anxiety/panic attacks were 'not substantially caused by this work injury.' However, he did not explain why this is so or point to an alternative cause" (page 22). "[Dr. Bauer] further states, 'Mr. Hernandez has a history of increasing anxiety, and his current complaints are on a more-probable-than-not basis related to his psychological condition rather than any physiologic condition.' However, he does not indicate what that psychological condition is nor does he indicate the cause or origin of the condition" (page 21-22). (*Hernandez VI*).

128) *Hernandez VI* also stated the following in its analysis and in one order, which appear internally inconsistent with each other: "Therefore, the Commission remands the question of the terms of the stipulation and whether Ocean Beauty has good cause for seeking a change in the

terms" (page 19). "The matter is remanded to the Board to enforce the stipulation/Board order with regard to the payment of TTD as agreed on August 11, 2021, and to recalculate when .041(k) benefits should start" (page 20). "The Board needs to determine whether the agreement put on the record on August 11, 2021, should be revised to reflect the correct sum of TTD benefits for the period of May 17, 2020, through June 17, 2021" (page 30). (*Hernandez VI*).

129) *Hernandez VI* remanded *Hernandez IV* with the following in its "Conclusion and order" section: (1) "The Board needs to determine whether the agreement put on the record on August 11, 2021, should be revised to reflect the correct sum of TTD benefits for the period of May 17, 2020, through June 17, 2021." (2) "The Board also needs to determine if the terms of the agreement, i.e., payment of TTD benefits, should be modified to reflect payment of .041(k) benefits." (3) "The Board also needs to revisit the question of Mr. Hernandez's chronic pain and his anxiety/panic attacks, and to ascertain if the work injury is the substantial cause of either or both." (4) "The Board further needs to consider whether the presumption of compensability of ongoing disability and need for medical treatment for the chronic pain condition and/or anxiety/panic attacks was overcome with substantial evidence as required, since none of the experts relied on by the Board: Drs. Murphy, Bauer, and Williams, addressed the relative causes of the need for medical treatment for chronic pain and anxiety/panic attacks, merely stating that they could not connect these problems to the work injury and, therefore, work was not the substantial cause." And (5) "Once the Board reconsiders these issues, the Board will then need to readdress the issue of attorney fees, pursuant to the Court directive that an award of fees must be made utilizing the criteria in Rule 1.5 of the Rules of Professional Conduct and the contingent nature of representing injured workers." (*Hernandez VI*).

130) On July 31, 2023, a hearing officer mediated Employee's case and, according to his agency file, "partially resolved" the claims by resolving the attorney fee issue only. (Agency file; Judicial; Mediation Details tabs, July 31, 2023).

131) On August 4, 2023, Schwarting and Eppler signed and filed a stipulation for approval of Employee's attorney fees. They agreed Eppler provided valuable services to Employee and his efforts expedited Employee's receipt of benefits. Schwarting and Eppler agreed that upon Board approval, Eppler would receive $63,250 in attorney fees and costs through August 4, 2023. "It is [Eppler's] intent to withdraw as counsel for Mr. Hernandez following the approval of this

stipulation." There was no evidence Schwarting or Eppler served this stipulation on Employee. (Stipulation for Approval of Employee's Attorney Fees, August 4, 2023).

132) On August 15, 2023, the hearing panel sent a letter to Employee, Schwarting and Eppler advising them that the Division would serve Employee with Schwarting's and Eppler's August 4, 2023 cover letter and attorney fee stipulation. The letter gave Schwarting and Eppler until 5:00 PM on August 18, 2023, to file and serve comments regarding the question of whether Employee had a right to notice and an opportunity to be heard on Schwarting's and Eppler's attorney fee stipulation. It gave Employee until 5:00 PM on August 23, 2023, to file and serve on Schwarting and Eppler any written comments he had regarding the attorney fee stipulation. The letter also asked Eppler to file and serve a current attorney fee and cost affidavit supporting an award of $63,250 in attorney fees and costs by 5:00 PM on August 18, 2023. The affidavit was to address Rule 1.5, commonly referred to as the *Rusch* factors. (Letter, August 15, 2023).

133) On August 18, 2023, Eppler filed and served on Schwarting, but not on Employee as directed, an attorney fee and cost affidavit. This affidavit was similar to Eppler's December 17, 2021 attorney fee affidavit. It addressed the *Rusch* factors. Eppler added that he had succeeded on his appeal from *Hernandez IV*, and the Commission awarded him full, reasonable attorney fees at $425 per hour. (Second Amended Affidavit of Attorney's Fees and Costs, August 18, 2023).

134) On August 18, 2023, Schwarting responded to the panel's August 15, 2023 letter and confirmed that a recent mediation had resolved only Eppler's existing claims for attorney fees. Employer deferred to the Board as to whether a hearing was necessary to address Employee's rights in respect to the fee stipulation. (Schwarting letter, August 18, 2023).

135) On August 22, 2023, Employee filed with the Division and served on Eppler and Schwarting a response to his attorney's fee stipulation with Employer. He stated, "My attorney did not fully [sic] his responsibility in representing me, he should not get pay." He did not further explain this position. (Employee email, August 22, 2023).

136) On August 31, 2023, the hearing panel sent the parties a letter reopening the hearing record, because while reviewing Employee's agency file, the panel determined many mental health records appeared to be missing. Because a major issue in this case is mental health care, the panel directed the parties to obtain, file and serve all mental health medical records by no

later than September 22, 2023, and if there were no additional records, to so state and explain how this was determined. (Letter, August 31, 2023).

137) On September 19, 2023, Employee filed and served additional medical records, mostly including records for mental health treatment. Many were for treatment prior to the hearing for *Hernandez IV*. (Medical Summaries, September 19, 2023).

138) On September 22, 2023, Employer objected to the panel reopening the hearing record and contended: (1) The record on remand from the Commission should be the same as when *Hernandez IV* heard the matter in December 2021; (2) Records that pre-dated the December 22, 2021 hearing should have been submitted as evidence prior to that hearing; (3) Records after December 22, 2021 should not be considered because they were not part of the record for the *Hernandez IV* hearing; (4) Reopening the record violates Employer's due process rights because it did not have an opportunity to have its experts review these records or allow Employer to depose the providers if necessary; (5) In April 2021, Eppler filed an affidavit stating that he had completed all necessary discovery, had all required evidence and was fully prepared for a hearing, so "they should not be now allowed" to submit additional evidence for a remanded hearing. (Employer's Objection to Reopening the Hearing Record, September 22, 2023).

139) On September 22, 2023, Employee responded to Employer's objection to the panel reopening the hearing record: (1) The subsequently obtained and filed records were done at the Board's direction; (2) Employer had medical releases all along and it could have obtained and filed medical records as well; (3) With or without the recently filed records, Employee prevails on compensability of his mental health and chronic pain disability need for treatment claims because Employer never rebutted the presumption for those conditions. (Employee's Response to Employer's Objection to Reopening the Hearing Record, September 22, 2023).

140) The Commission in *Hernandez VI* did not limit the evidence on remand to the evidence in the agency file on the date *Hernandez IV* was heard. (*Hernandez VI*).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. 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;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

. . . .

(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.

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

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. . . .

8 AAC 45.120. Evidence. (a) Witnesses at a hearing shall testify under oath or affirmation. The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . . .

(b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . . Irrelevant or unduly repetitious evidence may be excluded on those grounds.

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served

> upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.
> . . . .
>
> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

ANALYSIS

This panel has the obligation to ensure quick, efficient, fair and predictable delivery of benefits to Employee, if he is entitled to them, at a reasonable cost to Employer. It must decide Employee's case on its merits while being impartial and fair to all parties and affording all an opportunity to be heard and their arguments and evidence fairly considered. AS 23.30.001(1), (3), (4). The panel may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. AS 23.30.135(a). It may adjourn, postpone, or continue a hearing from time to time in its discretion to facilitate the above statutes. 8 AAC 45.070(a). Panel members may examine witnesses and ensure that each party has a reasonable opportunity for a fair hearing. 8 AAC 45.120(a), (b). Relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, but evidence must have been in the agency file at least 20 days prior to the hearing. 8 AAC 45.120(e), (f). Moreover, the panel will not consider evidence filed after the hearing record closed unless the panel determines the hearing was not completed and reopens the record for additional evidence or arguments. In that event, the panel will notify the parties of reopening the hearing record and specify what additional documents or evidence should be filed. 8 AAC 45.120(m).

In this case, the panel has determined the remand hearing was not completed. Employee has objected to his attorney's stipulated attorney fees. The parties have a right to be heard on Eppler's fees and he has a right to explain his bills, with which *Hernandez IV* had difficulty. Important medical records were absent from the agency file prior to the *Hernandez IV* hearing, and have now been provided. Employer has not had an opportunity to have its experts address those records to determine if their opinions have changed, or been strengthened. *Hernandez VI* did not limit the panel on remand to considering only the evidence in the agency file at the time the hearing occurred. Given these changed circumstances since *Hernandez VI* issued, the hearing record will be reopened for an in-person hearing at which the following issues will be addressed:

1) **Eppler's attorney fees, including but not limited to what effect if any does Employee's objection to his attorney's fees have on the pending fee stipulation.**

2) **If the panel should consider Employee's newly filed medical records on remand.**

3) **If so, the additional time Employer needs to address those records.**

The parties will be directed to attend a prehearing conference promptly, at which time the designee will schedule an in-person hearing to address the above, and any other matters that will aid in the resolution of this case on remand. Other matters may include, but are not limited to, witnesses to address Eppler's fees or the newly filed medical records.

ORDER

The parties will proceed in accordance with this decision and order.

Dated in Anchorage, Alaska on October 20, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Pam Cline, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Manuel Hernandez, employee / claimant v. Ocean Beauty Seafood's LLC, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201711427; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on October 20, 2023.

/s/
Lorvin Uddipa, Office Assistant