ALASKA WORKERS' COMPENSATION BOARD

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

TOMAS A. DICKSON, Employee, Claimant, v. STATE OF ALASKA, Self-Insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 201912133 AWCB Decision No. 23-0066 Filed with AWCB Fairbanks, Alaska on November 16, 2023

Tomas A. Dicksons's (Employee) August 17, 2020 claim and December 10, 2020 amended claim were heard in Fairbanks, Alaska, on October 26, 2023, a date selected on July 24, 2023. A July 24, 2023 prehearing conference gave rise to this hearing. Attorney J. John Franich represented Employee, who testified. Attorney Daniel J. Moxley represented State of Alaska (Employer). Jacob Hendrickson testified on behalf of Employer. All parties appeared by Zoom. The record remained open to receive Employee's supplemental attorney fees and costs affidavit, Employer's opposition and Employee's response, and closed on November 7, 2023.

ISSUES

Employee contends he is entitled to temporary total disability (TTD) benefits from his retirement in February 2021 to the present. He contends he returned to work after the work injury because he could not afford to leave his job until he reached Social Security retirement age and he left his job two days later. Employee contends his physician advised him to limit his activities as his pain level allows, his pain level was no longer bearable when he retired and he works occasional part-time "odd lot" work as his pain level has allowed since he left his job. He contends he

wants to return to gainful work and has sought reemployment benefits. Employee requests an order awarding TTD benefits from August 31 to September 2, 2019 and from February 18, 2021 to the present. Alternatively, Employee requests TTD benefits be awarded from the March 9, 2023 second independent medical evaluation (SIME) to the present.

Employer contends Employee successfully returned to work for a long period and voluntarily retired for reasons unrelated to the work injury. It contends Employee's performance evaluations before and after the work injury show he was able to acceptably perform his job duties and his retirement letter stated he would return to work under conditions not related to his work injury. Employer requests an order denying TTD benefits.

1) **Is Employee entitled to TTD benefits?**

Employee contends he has been unable to work since February 2021 because his work injury became too painful and he worried about his ability to safely perform his job. He contends he is entitled to a reemployment eligibility evaluation and requests an order directing the reemployment benefits administrator (RBA) to assign a rehabilitation specialist under AS 23.30.041(c).

Employer contends Employee voluntarily retired in February 2021 and did not miss work due to the work injury. It contends he is not entitled to a reemployment eligibility evaluation. Employer requests an order denying Employee's request for an order directing the RBA to assign a rehabilitation specialist under AS 23.30.041(c).

2) **Should the RBA be directed to order an eligibility evaluation under AS 23.30.041(c)?**

Employee contends he is entitled to interest on awarded TTD benefits.

Employer contends Employee is not entitled to interest because he is not entitled to TTD benefits.

3) **Is Employee entitled to interest?**

Employee contends he prevailed on medical and permanent partial impairment (PPI) benefits before the hearing and the SIME process was necessary to achieving benefits. He contends Employer's voluntary payment of medical and PPI benefits is the equivalent of an award because his attorney's efforts were instrumental in inducing it. Employee requests an order for attorney fees incurred to date under AS 23.30.145(b), and statutory minimum fees under AS 23.30.145(a) on all future benefits.

Employer contends Employee's attorney did not prevail on behalf of his client and requests an order denying attorney fees and costs. Alternatively, it contends Employee should be awarded reasonable fees for time spent on medical and PPI benefits but should be awarded no fees for time spent on reemployment and TTD benefits. Employer contends the hourly attorney fee rate and paralegal rate sought by Employee are unreasonable. It also objects to specific entries.

4) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

1) On August 30, 2019, Employee was injured while repairing snow poles when a snow pole fell over onto the roadway, struck the shoulder and the bottom kicked up and hit him on the left forearm and hand. (First Report of Occupational Injury or Illness, September 5, 2019). He went to the emergency room and was diagnosed with a left forearm hematoma and contusion and left third finger contusion. X-rays of the forearm, wrist and hand were taken but no fracture was identified. (Emergency Department record, August 30, 2019). He was restricted from "attending work/school from 830 to 9/5" and could "return to work/school on 9/6/2019." (Work/School Excuse, Golden Heart Emergency Physicians, August 30, 2019).

2) On September 20, 2019, Employer paid $404.44 in TTD benefits from September 3, 2019 to September 5, 2019. (Employer's Documentary Evidence, October 6, 2023).

3) On September 23, 2019, Employer controverted TTD and TPD benefits as of September 6, 2019 because he was released to work without restrictions. (Controversion Notice, September 23, 2019).

4) On November 18, 2019, Employee reported left shoulder pain stating it "began to bother more about 2 months ago." He had a hard time lifting it very high and hurt anteriorly with any movement. Michelle Peterson, FNP, released Employee for "regular work" and told Employee to follow up with David Witham, MD. (Peterson medical report, November 18, 2019; Work Activity Status Report, November 18, 2019).

5) On January 28, 2020, Dr. Witham recommended Employee undergo a contrast-enhanced CT arthrogram. (Witham medical report, January 29, 2020).

6) On February 20, 2020, a left shoulder CT scan showed partial-thickness subscapularis tendon tears, a low-grade SLAP tear and mild arthrosis with early humeral chondromalacia. (CT report, February 20, 2020).

7) On April 3, 2020, Dr. Witham stated the CT scan revealed "partial intrasubstance tearing of the subscapularis as well as evidence of biceps tendinopathy at its origin, superior glenoid" consistent with Employee's symptoms. His symptoms included "pain with abduction of his arm above about 70 degrees as well as pain with external rotation beyond 10 degrees" and pain and difficulty with end range internal rotation. Employee was "functioning and working full time unrestricted for the DOT at Central." Dr. Witham advised improvement potential through surgical intervention, likely including "debridement and possible repair of the subscapularis as well as biceps subpectoral tenodesis" involving "arthroscopic evaluation, acromioplasty, biceps tenodesis, debridement of labrum, possible open repair of subscapularis." He was not doing any "non-urgent, emergent type surgeries" at the time and Employee was "willing to carry on with his current self-management of maintenance of range of motion and strength as best he can." (Witham medical report, April 3, 2020).

8) On July 9, 2020, R. David Bauer, M.D., examined Employee for an Employer's Medical Evaluation (EME) and diagnosed a prior history of right shoulder rotator cuff surgery, partial thickness rotator cuff disease on the left side, not substantially caused by or aggravated by the work injury, a nontender, left forearm contusion with recurrent soft tissue mass, possibly from a fascial hematoma or recurrent cyst, and prominent left distal ulna without objective evidence of injury to the distal radial ulnar joint. He stated the work injury caused the hematoma and "the current findings on the ulnar aspect" of Employee's forearm but it "was not likely that there was any injury to the distal radial ulnar joint given the normal x-rays." Dr. Bauer concluded the work

injury was not the substantial cause of Employee's disability or need for treatment related to his left shoulder:

> Rotator cuff pathology is not uncommon in someone in their seventh decade of life. Most rotator cuff imaging findings are the result of age-related degenerative changes. A substantial portion of the asymptomatic population has evidence of rotator cuff pathology. The prevalence of rotator cuff abnormalities in asymptomatic people is high enough for degeneration of the rotator cuff to be considered a common aspect of normal human aging. Painless and normal shoulder motion is possible in the presence of severe changes in the rotator cuff. Supraspinatus pathology is related to age rather than to clinical sign of impingement. There is a high correlation between the onset of rotator cuff tears (either partial or full thickness) and increasing age period rotator cuff disease is progressive due to the nature of that degenerative condition period symptom duration does not correlate with the rotator cuff tear severity or other patient factors.
>
> Bilateral rotator cuff disease, either symptomatic or asymptomatic, is common in patients who present with unilateral symptomatic disease. Patients treated for symptomatic rotator cuff tear on one side have a higher prevalence of rotator cuff tears and decreased shoulder function on the contralateral side compared with an age- and sex-matched group of healthy individuals. This can be present even in [sic] the individual is asymptomatic in that shoulder. There's a wide array of abnormal magnetic resonance imaging signals even in shoulders of young (average age 29) asymptomatic individuals. Larger asymptomatic terrors are more likely to develop symptoms over time.
>
> Traumatic rotator cuff tears occur after a fall or trauma to an abducted, externally rotated arm. These tears are typically large and involve the subscapularis. This is not the mechanism of injury in this instance.
>
> Based upon these factors, the incident described is not the substantial cause of the pathology in the left shoulder.

The work injury did not aggravate or accelerate Employee's preexisting left shoulder condition as it has "relatively minor rotator cuff findings" and his examination was "out of proportion to the nature of the findings on the CT arthrogram." Dr. Bauer concluded the mechanism of injury, being struck on the arm and having the arm be forcibly lifted, did not cause a rotator cuff tear. The substantial cause of the difficulties in Employee's left shoulder and the partial thickness rotator cuff tear are aging and degeneration. Dr. Bauer opined the treatment had been medically reasonable, necessary and within medically acceptable treatment options but no further treatment was necessary for the work injury as the substantial cause for a left shoulder arthroscopy is

rotator cuff disease unrelated to the work injury. Employee reached medical stability on April 3, 2020, as "the CT arthrogram showed the absence of any objective harm or change to the structure of the shoulder" and there was no evidence of partial impairment. Dr. Bauer recommended Employee be restricted from lifting above his head with his left arm due to "the underlying condition" but not due to the work injury. (Bauer EME report, July 9, 2020).

9) On July 24, 2020, Employer controverted all benefits based upon Dr. Bauer's EME report. (Controversion Notice, July 24, 2020).

10) On August 17, 2020, Employee sought PPI benefits, transportation costs, a finding of unfair or frivolous controversion and attorney's fees and costs for injuries to his left hand, arm and shoulder when he was struck by a falling snow pole and catapulted into "brush/ditch." (Claim for Workers' Compensation Benefits, August 17, 2020).

11) On September 15, 2020, Employer denied Employee was entitled to the benefits requested in his August 17, 2020 claim and relied on Dr. Bauer's EME report. (Employer's Answer, September 15, 2020).

12) On September 17, 2020, Employer controverted Employee's August 17, 2020 claim based upon Dr. Bauer's EME report. (Controversion Notice, September 17, 2020).

13) On November 19, 2020, Jennifer Malcolm, DO, wrote:

> In reviewing all of the above information and the IME I believe that the RTC changes found with Mr. Dickson's examination are appropriate findings for his agegroup [sic] as the report says. HOWEVER, the accident caused the first flare in pain. My belief is that the patient has developed rotator cuff partial tearing that was not symptomatic, painful or inflamed until the accident described with the snowpole [sic]. This accident caused pain that the patient was at risk for due to his underlying RTC condition but was not symptomatic from (until the accident). The accident caused the pain but did not cause the underlying rotator cuff tear in my opinion. (Malcolm progress report, November 19, 2020).

14) On November 25, 2020, Employee and his supervisor Jacob Hendrickson signed his performance evaluation report from December 1, 2019 to November 30, 2020, which gave him an overall rating of mid-acceptable. (Performance Evaluation Report, November 25, 2020).

15) On December 1, 2020, Employee reported 30 percent pain relief for one week after a left shoulder subacromial steroid injection. Ambria Thomas, PA-C, advised Employee to modify activity "as needed based on pain" and referred him to "Dr. Malcom for diagnostic ultrasound-guided steroid injection into the biceps tendon." She informed Employee he "may benefit from

diagnostic arthroscopic rotator cuff repair versus debridement, SLAP debridement and open biceps tenodesis in the future" but to wait to see "how he does following steroid injection prior to proceeding." (Thomas medical report, November 18, 2019).

16) On December 10, 2020, Employee sought medical and transportation costs, interest and attorney's fees and costs for a left arm injury, stating it "aggravated or combined with a preexisting shoulder condition to bring about employee's disability and need for medical treatment. Injury may be cumulative in nature." (Amended Claim for Workers' Compensation Benefits, December 10, 2020).

17) On December 29, 2020, Dr. Malcolm performed a biceps injection for pain relief "until patient is able to meet with Dr. Carey." (Malcolm medical report, December 29, 2020).

18) On December 30, 2020, Employee requested an SIME. (Petition, December 30, 2020).

19) Employer did not answer Employee's December 30, 2020 petition for an SIME. (Record).

20) On January 11, 2021, Employer denied Employee was entitled to claimed benefits based upon Dr. Bauer's EME report. (Employer's Answer, January 11, 2021).

21) On January 28, 2021, Employee signed the following letter, "Effective on February 17, 2021, I Tomas A. Dickson will be retiring from my duties with State of Alaska Department of Transportation, Public Facilities." (Employee letter, January 28, 2021).

22) On January 29, 2021, Employee emailed the Alaska Division of Retirement and Benefits stating, "I have tendered my retirement notification to Dan Schacher, my Foreman Jacob Hendrickson and now here to you. My last day is scheduled for February 17, 2021. Are there forms and/or other paperwork that I am not aware of that need my immediate attention? Please advise ASAP so I can get them/it done before my last shift." (Employee email, January 29, 2021).

23) On February 17, 2021, Employee filled out and signed an Employment Clearance Form, checking "Resignation" and "Retirement" boxes and commenting he was "Retiring from state service." (Employment Clearance Form, February 17, 2021).

24) On February 25, 2021, Employee emailed Daniel Schacher the following letter:

> Due to some misconceptions or misunderstandings concerning my previously submitted letter of resignation, please accept this "Letter of notification of intent to Retire from State of Alaska service" instead of, and in place of said letter of resignation, making same letter null and void. This letter will accomplish the same goal making clear the timing and necessity of opening my position to

> replacement at Montana Creek. It will also make clear my intention to Retire from State service and not to "resign", as it seems to me that "resignation" sheds a somewhat unfavorable light on me and my working relationship with upper management, as if there were some disagreements or bad feelings causing me to want to quit (I'm not quitting. I'm retiring.), this is not the case in any way. I've taken pride in my ability represent the State D.O.T and have felt honored to be of Public Service to the people and the Department. I don't have any bad feelings towards any D.O.T. personnel, supervisory or management, and hope there aren't any towards me. There are only two factors that have not set well with me for a long time now, and they are as follows; The ongoing never ending geo-diff controversy which will probably never be made right (I feel as if I've been deceived and robbed of what should be rightfully be mine), and the closing if [sic] Central Maintenance Station (again, I feel robbed, of my job there). Any other reasons for my decision to retire are basically not State related and are potentially out of our control. This just seems to be the most viable solution for me at this time[.]
>
> As I mentioned in our recent face to face conversation, if, in the unlikely event that the State should decide to stop losing resources, and reopen Central Station, I would seriously consider coming out of retirement and applying for a 52 or 53 position there. As long as it didn't happen too far in the future. I know, with my experience, I could be an asset. However, time is not our friend, and I believe there is a point of no return, both for me and for the roads in our maintenance area. Until then, I will continue to watch the slow but undoubtedly sure failing of the roads and our maintenance area, due mostly to the fact that Montana Creek simply cannot keep up with that much area. <u>It is</u> happening since Central was closed. It is a slow but steady falling behind, try as we might. There are lots of compliments on our roads, but the givers aren't out there seeing the slow buildup of undone work. Jacob can validate all this with dollar numbers. Any thoughts of closing the road either seasonal or for good is, in my opinion, not sound thinking at this point. Anyone who doubts the public use of these roads, from local citizens, recreation of all sorts, and industry, hasn't obviously spent enough time observing said use. We have. I'm not talking about those inefficient, poorly timed placement traffic counters either. You'll never get a true accurate record there.
>
> As I mentioned before, the dates my retirement will remain the same with my final day being February 24, 2021 the last day of my scheduled off shift, and my last day of work will be February 17, 2021. I [sic] position will be open for consideration February 18th, 2021.
>
> Thank you for your time and consideration, both now and at my date of hire. (Employee email and letter, February 15, 2021).

25) On September 16, 2022, Employee requested a hearing on his December 30, 2020 petition for an SIME. (Affidavit of Readiness for Hearing (ARH), September 16, 2022).

26) On September 20, 2022, Employer opposed Employee's hearing request because it agreed an SIME should be conducted. (Opposition to Employee's Affidavit of Readiness for Hearing on Employee's Petition for SIME, September 20, 2022).

27) On November 29, 2022, the parties filed a mutually signed SIME form. (SIME form, November 29, 2022).

28) On February 16, 2023, Frank W. Uhr. M.D., J.D., examined Employee for an SIME and diagnosed a left shoulder contusion/strain with radiographic evidence of a partial-thickness rotator cuff tear, resolved left forearm contusion/hematoma, resolved left dorsal hand/middle finger contusion and a left forearm fascial defect with muscle herniation and stated left cubital tunnel syndrome must be ruled out. Employee informed Dr. Uhr he "retired from the job of injury in February 2021. Currently, he performs some heavy equipment repair in the summer for the gold mines, and performs equipment repair and other odd jobs for nearby friends and neighbors." He identified the potential causes of Employee's disability and need for treatment as the work injury, preexisting left shoulder degenerative changes/degenerative partial-thickness rotator cuff tear and left ulnar nerve entrapment at the elbow unrelated to the work injury. Dr. Uhr opined the work injury aggravated, accelerated or combined with any preexisting left shoulder condition and "produced a permanent change in the preexisting condition" to cause Employee's disability and need for medical treatment for the left shoulder contusion/strain with radiographic evidence of a partial-thickness rotator cuff tear:

> Asymptomatic rotator cuff tears, including partial-thickness rotator cuff tears, are prevalent in the general population and estimated to occur in a range from 8-40% of individuals. Generally, the prevalence of asymptomatic rotator cuff tears increases with age, and is higher in individuals with symptomatic rotator cuff tears on the contralateral shoulder.
>
> Based on the above discussion, in my opinion it is possible, but cannot be stated to a reasonable degree of medical probability, that the partial-thickness tearing of the left shoulder rotator cuff tendon identified on the 2/20/20 CT scan of the left shoulder preexisted the 8/30/19 work-related subject incident.
>
> Regardless of whether the partial-thickness rotator cuff tear identified on the CT scan pre-existed the subject incident, my interview with Mr. Dickson and review of the medical records available indicate that the left shoulder was not symptomatic prior to 8/30/19.

Dr. Uhr was not able to opine whether the work injury was the substantial cause of the possible left cubital tunnel syndrome. When asked whether Employee's work-related disability continued, he stated it did not continue because Employee returned to his job at the time of injury without restrictions until he retired in February 2021. Dr. Uhr said the work-related disability ended on or before November 18, 2019, when FNP Peterson stated Employee was working regular duty. He opined the left forearm contusion/hematoma, left forearm fascial defect with muscle herniation and left dorsal hand/middle finger contusion were medically stable on January 28, 2020 when Employee did not report left forearm symptoms to Dr. Witham. But the left shoulder contusion/strain with radiographic evidence of a partial-thickness rotator cuff tear was not medically stable. Dr. Uhr expected Employee to reach medical stability "within 6-12 months, depending on whether [Employee] proceeds with surgical intervention." He recommended a supervised physical therapy program before surgical intervention on his left shoulder and upper extremity electrodiagnostic testing to rule out left cubital tunnel syndrome. Dr. Uhr assessed a two percent upper extremity impairment rating. (Uhr SIME report, February 16, 2023).

29) On May 10, 2023, Dr. Uhr responded to six questions from Employee, one question was about PPI, two questions were about medical treatment and three questions were about Employee's physical capacity to work as an equipment operator. He converted the two percent upper extremity impairment rating to a one percent whole person impairment rating. Dr. Uhr opined:

> . . . the subacromial left shoulder injection and subsequent left biceps tendon sheath injection were performed for therapeutic purposes (to decrease the left shoulder pain), and diagnostic purposes (to identify the left shoulder pain generator/pain generators for treatment, including surgical planning).
>
> In my opinion the 12/29/20 left shoulder biceps tendon sheath injection was reasonable and necessary for the process of recovery.

He stated the orthopedic surgical consultation with Dr. Carey for the left shoulder condition is reasonable and necessary treatment. Dr. Uhr opined Employee does not have "the current physical capacity to work as an equipment operator that includes the essential physician capacities" in the job description for Equipment Operator - Journey I and II. He stated Employee does not have the capacity to frequently reach above his shoulder level on the left side and he

was not able to opine "with a reasonable degree of medical probability" whether he was able to "safely lift/carry more than 50 pounds frequently." Dr. Uhr recommended a functional capacity evaluation (FCE) for a precise evaluation of Employee's physical capacities and need for work restrictions. He was unable to predict whether or not Employee would have the permanent physical capacity to work as an equipment operator at medical stability due to the "uncertain nature of future treatment for the left shoulder condition and [Employee]'s response to such" and again recommended a FCE at medical stability. When asked what accommodations would be necessary, Dr. Uhr responded:

> If, at the time of maximum medical improvement, Mr. Dickson is not able to return to the position of equipment operator as described above, I anticipate he will require restrictions limiting overhead use, overhead positioning, and overhead lifting with the left shoulder. He may also require accommodations restricting lifting/carrying/pushing/pulling more than 50 pounds. (Uhr response, May 10, 2023).

30) On May 11, 2023, Employee requested the RBA refer him to a reemployment specialist for an eligibility determination based upon Dr. Uhr's opinions. (Email, May 11, 2023)

31) On June 5, 2023, the reemployment benefits technician asked Employer to provide verification Employee had been off work for 90 consecutive days due to the work injury and a doctor's written opinion indicating the employee may be permanently precluded from returning to the same job held at the time of injury. (Letter, June 5, 2023).

32) On June 7, 2023, Employer informed the RBA Employee was released to work on November 18, 2019 and attached FNP Peterson's November 18, 2019 physician's report. (Workers' Compensation Reemployment Verification for 90 Consecutive Days of Timeloss, June 7, 2023).

33) On June 8, 2023, Employee informed the RBA Dr. Uhr's report and supplemental report provides the written opinion sought in the June 5, 2023 letter. (Letter, June 8, 2023).

34) On June 28, 2023, Employer withdrew the July 24, 2020 and September 17, 2020 controversions; it did not withdraw the September 23, 2019 controversion. (Letter, June 28, 2023).

35) On August 2, 2023, Employer paid $1,770 in PPI benefits, $442.50 in penalty and $7.64 in interest. (Employer's Documentary Evidence, October 6, 2023).

36) On August 24, 2023, Employee reported increased left shoulder pain and decreased range of motion which was progressively worsening. Dr. Malcolm stated his left shoulder pain was

consistent with the pain he had in 2020 and recommended physical therapy. An arthroscopy would be considered if Employee's range of motion improvement plateaued or if pain continued to be a problem. (Malcolm medical report, August 24, 2023).

37) On September 27, 2023, the Board designee included "1% PPI issue rating," TTD and reemployment benefits, interest and attorney fees and costs as issues for hearing. (Prehearing Conference Summary, September 27, 2023).

38) On October 23, 2023, Employee requested fully compensatory fees under AS 23.30.145(b) and statutory minimum fees under AS 23.30.145(a) on all future benefits. He requested an hourly attorney fee rate of $520 for 42.20 hours, resulting in $21,944 in attorney fees, $3,666 in paralegal costs for 14.10 hours at $260 per hour, and $1,989.53 in costs for Dr. Uhr's May 10, 2023 responses to SIME questions. The affidavit excluded time spent on the RBA issue. Employee contended his attorney rejected other cases during the pendency of this case because of the time required to adequately represent Employee. He contended his attorney has practiced in all areas of civil litigation, criminal defense and workers' compensation law for 43 years, represented clients with published opinions in 30 cases before the Alaska Supreme Court (Court), 19 cases before the Alaska Court of Appeals and 202 Board and Alaska Workers' Compensation Appeals Commission (Commission) cases. (Affidavit of Paralegal Costs, October 23, 2023; Affidavit of Attorney's Fees, October 23, 2023).

39) At hearing, the parties agreed PPI benefits were not at issue. (Record).

40) Employee testified at hearing that he lives in Central, Alaska. He first started working for Employer at the Central station, which was about eight-and-a-half miles from his home. In December 2015, the Central station was closed and he was transferred to the Montana Creek station. Due to this change in station, Employee lost the geographical pay differential as the Montana Creek station was close to Fairbanks. His commute changed to 55 miles one way; and he stayed at camp and worked a "one week on and one week off" rotation. Employee was working at Montana Creek at the time of the work injury and he returned to work on his next rotation. He forced himself to work through the left shoulder pain from the work injury. Employee filed a claim after Dr. Bauer's EME report. He had left shoulder pain, numbness and tingling from his left forearm to his hand in December 2020. Employee retired in February 2021 because he was worried he might injure himself or others since most of the equipment he used at work required him to steer with his left hand, while his right hand operated implement levers.

He confirmed he wrote the February 15, 2021 letter. Since Employee retired, Employer reopened the Central station. He is planning on left shoulder surgery in early 2024 after he stops smoking for six weeks. Employee did not discuss "working" with his physician. If a job position came up at the Central station after his surgery, he would give it "real serious consideration." Dan Schacher called him a few times to ask him to return to work at the Montana Creek station but he informed Schacher he was not cleared to return to work. Since the work injury, Employee assisted his neighbors with changing tires and his neighbors paid him a small amount of money, maybe $20. (Employee).

41) Jacob Hendrickson testified at hearing he worked as a foreman for the last seven years and he was Employee's supervisor. Employee returned to work after the work injury on September 12, 2019, with a note from a doctor, when his next rotation began. Employee satisfactorily completed his job duties before and after the work injury. Employee told Hendrickson he retired because his wife had difficulty keeping up with wood to heat their home on her own and Employee was tired of being away from home, he missed his wife and dogs. He asked Employee whether he could afford to retire and Employee stated he could "make it work" between his state retirement until he received Social Security retirement benefits. Employee did not share any safety concerns regarding his work injury with Hendrickson. (Hendrickson).

42) On October 26, 2023, Employee filed an amended and supplemental attorney fees and costs affidavit requesting $25,532 in attorney fees for 49.10 hours at $520 per hour. He added 1.6 hours total for time spent on the RBA issue on May 10, June 8, and June 24, 2023. (Amended and Supplemental Affidavit of Attorney's Fees and Costs, October 26, 2023).

43) On November 2, 2023, Employer opposed Employee's request for attorney fees and costs, contending Employee's attorney did not prevail on behalf of his client. Employer contended the SIME was "obtained via a very smooth and agreeable process" and Employer withdrew its controversions of almost all benefits based on the SIME report. It contended Employee's attorney's only significant contribution was filing an amended claim, participating in obtaining in SIME and participating in the hearing regarding TTD, reemployment benefits and attorney's fees and costs. Employer contended Employee did not prevail on the SIME because the issue was never in dispute and it withdrew its controversions and paid some benefits based upon the SIME report "without any prompting" from Employee's attorney. It contended if the Board awarded benefits based upon the premise Employee prevailed because Employer voluntarily paid

benefits, it would "be disincentivizing employers from engaging in self-initiated case-resolving action" and "penalize Employer despite its effort, to analyze the case on its own accord and pay benefits it believes are due under the Act." Employer contended the panel should deny attorney fees for work on TTD, reemployment benefits and interest if Employee's requests are denied. It contended the fees sought were "not due in light of the *Rusch* factors and other applicable law." Employer contended the case was straightforward and uncomplicated and Employer's resistance was limited. It contended Employee chose to drag the case out for years, unnecessarily delaying it and resulted in "new reviews of the file to re-learn it," evidenced by affidavit showing "almost no attorney work" between December 30, 2020 and September 16, 2022. Employer contended "there was no way this case significantly interfered with" Employee's attorney's ability to take on other cases "[g]iven how little work" Employee's attorney performed on this case. It contended even highly experienced attorneys do not get $520 per hour in Alaska and a lower rate of $425 or $450 per hour would be more customary and reasonable. Employer contended the hearing issues were "relatively low-dollar" and Employer voluntarily paid benefits it believed were due. It contended that while Employee's attorney is experienced and "has a relatively decent reputation in the field," the time he spent researching and responding to Employer's attorney's email regarding TTD was excessive. Employer contended the hourly paralegal rate was excessive, unreasonable and "drastically higher than what the Board typically awards" and cited recent cases awarding $165 and $160 per hour. It contended the SIME costs for Dr. Uhr to respond to Employee's questions should not be awarded because they were incurred to acquire evidence in support of Employee's TTD and reemployment claims, neither of which should be awarded. Employer objected to specific entries, contending Employee's attorney block-billed, spent excessive time on tasks and completed work his paralegal could have performed. (Employer's Opposition to Amended and Supplemental Affidavit of Attorney's Fees and Costs, November 2, 2023).

44) On November 7, 2023, Employee contended he prevailed on several issues before the hearing and the SIME process was necessary to achieving benefits. He cited *Childs* to contend Employer's voluntary payment is the equivalent of a Board award because Employee's attorney's efforts were instrumental in inducing it. Employee contended Employer controverted medical benefits and Employer did not request an SIME, he did, and Employer did not agree to an SIME until he filed an ARH on his petition for an SIME and the parties negotiated before

providing a mutually signed amended SIME form. He contended his questions to Dr. Uhr clarified his PPI rating. Employee contended attorney fees and costs should be awarded for "overcoming Employer's resistance to providing benefits and withdrawing" its controversions. He contended his attorney was awarded $600 per hour for his appeal work in *Rusch*. Employee relied upon *Martino* to contend the hourly attorney rate sought was reasonable. He contended he prevailed on medical costs and PPI benefits, which were previously controverted, after Dr. Uhr responded to his questions. Employee contended his attorney's paralegal is one of the most experienced in workers' compensation and she is "worth" the hourly rate sought because she has more than 20 years' experience and is a National Association of Legal Assistants (NALA) Certified Paralegal and teaches at the University of Alaska Paralegal Program. He sought an additional 2.9 hours to research and write his reply. (Reply to Employer's Opposition to Amended and Supplemental Affidavit of Attorney's Fees and Costs, November 7, 2023).

45) Employee submitted itemized fee affidavits totaling $27,040 in attorney fees and $5,655.53 in costs, totaling $32,695.53. Employee's attorney itemized .6 hour finalizing questions for Dr. Uhr on March 27, 2023 and .5 hour in a telephone conference with Employee and amending the questions to Dr Uhr. Table One illustrates the time spent on TTD and reemployment benefits and Table Two illustrates time spent preparing for and attending the hearing:

Table One

Date	Hours	Description
May 10, 2023	.6	Letter to Reemployment Benefits Administrator requesting eligibility evaluated based on Dr. Uhr's report.
June 8, 2023	.4	Received adjuster response to Reemployment Benefits Administrator inquiry. Letter to Reemployment Benefits Administrator renewing eligibility request.
July 24, 2023	.6	Letter to Reemployment Benefits Administrator Stacy Niwa re 1) on 6/28/23 ER withdrew controversion of reemployment benefits; 2) Dr. Uhr's 1% PPI and EE does not have the current physical capacity to work as an equipment operator; and 3) renewed request for eligibility evaluation
August 9, 2023	.4	Email from Moxley re TTD. Reviewed file to prepare response.
August 11, 2023	2.50	Researched and responded to Moxley's 8/8/23 email re TTD
Total	4.50	

Table Two

Date	Hours	Description
October 17, 2023	3.50	File review. Begin drafting hearing brief. Email to Moxley re analysis of issues for hearing. Will ER pay PPI when EE reaches MMI for elbow and shoulder conditions that Dr. Uhr said are not yet stable?
October 18, 2023	2.30	Email exchange with Moxley re hearing issues and settlement negotiations. Resumed working on hearing brief
October 19, 2023	6.50	Completed drafting EE's Hearing Brief and Witness List
October 20, 2023	.3	Briefly reviewed brief. Email exchange with Moxley re documentary evidence
October 20, 2023	.3	Email from Board re hearing to be with Kathryn Setzer (Juneau). Telephone conference with EE re possibility of Zoom hearing. Replied to Board email. Email from K. Setzer re Zoom hearing with EE to appear telephonically
October 24, 2023	2.20	Hearing preparation with EE
October 26, 2023	2.50	Attended hearing. 9:00 to 11:30.
Total	17.60	

PRINCIPLES OF LAW

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

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.** . . . (c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. . . .
> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;

Benefits sought by an injured worker are presumptively compensable and the presumption applies to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, and without regard to credibility, an injured employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, and without regard to credibility, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). If the employer's evidence rebuts the presumption, it drops out and the employee must prove his claim by a preponderance of the evidence. *Id*. This means the employee must "induce a belief" in the factfinders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn, and credibility is considered. *Huit*.

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary

> conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990). In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in-fact, is required for the Board to award fees under AS 23.30.145(a). *Id*. at 152. A controversion in fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation. *Underwater Const. v. Shirley*, 884 P.2d 156, 159 (Alaska 1994). Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-53. Nonetheless, when an employee does not prevail on all issues, attorney fees should be based

on the issues on which the employee prevailed. Fees incurred on lost, minor issues will not be reduced if the employee prevails on primary issues. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Dec. No. 152 (May 11, 2011).

When an employee files a claim to recover controverted benefits, subsequent payments, though voluntary, are the equivalent of a Board award, and attorney's fees may be awarded under AS 23.30.145(a) where the efforts of counsel were instrumental in inducing the payments. *Childs v. Copper Valley Elect. Ass'n.*, 860 P.2d 1184, 1190 (Alaska 1993). An employee may, at the same time, also be entitled to recover reasonable attorney's fees under AS 23.30.145(b) where the employer fails to pay compensation due or resists paying compensation. *Id*. at 1191.

Rusch v. Southeast Alaska Regional Health Consortium, 453 P.3d 784 (Alaska 2019) held in determining an attorney fee award, the Board must consider all factors in Alaska Rule of Professional Conduct 1.5(a), including:

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

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

Rusch v. Southeast Alaska Regional Health Consortium, AWCAC Memorandum Dec. No. 298 (December 15, 2022) (*Rusch II*), awarded J. John Franich $450 per hour for work before the Commission.

In *Martino v. Alaska Asphalt Services, LLC*, AWCB Dec. No. 23-0044 (August 10, 2023), the Board awarded Robert Bredesen, an attorney with over 20 years' experience representing parties in workers' compensation cases, $520 per hour for attorney fees based upon the Commission's approval of $520 per hour, who argued the $450 awarded in January 2020 had the same buying power as $521.87 in January 2023. It disagreed with the employer's contention that work before the Commission was more legally complex than work for a hearing.

In *Scheideman v. Saori Group, Inc*, AWCB Dec. No. 22-0039 (June 3, 2022), the employee requested an hourly paralegal rate of $185 but was awarded paralegal fees at $165, $125 and $150 per hour for failing to provide any explanation for the increase in paralegal hourly fees. In *Bryant v. Ravn Air Group*, AWCB Dec. No. 22-0076 (December 22, 2022), the Board awarded paralegal costs at $170 and $200 per hour. In *Vaillancourt v. State of Alaska*, AWCB Dec. No. 23-0042 (August 3, 2023), noted the former paralegal, now attorney, Bryan Haugstad, billed and was previously awarded $275 per hour for paralegal costs with 10 years' experience as a paralegal.

> **AS 23.30.155. Payment of compensation.** . . . (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.
>
> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

Vetter v. Alaska Workmen's Compensation Board, 524 P.2d 264 (Alaska 1974) reversed the Board's decision denying TTD benefits. On April 24, 1970, Vetter was assaulted on the job by a customer while working for her uninsured employer. At hearing, Vetter won medical care but lost her disability claim. In denying Vetter's disability claim, the Board found:

> That the applicant did not suffer disability from work as a result of injury on April 24, 1970. She was able to continue working for the remaining five to six hours of her shift and did not find need to see the doctor until the afternoon of a (sic) day when she was hurt at 2 a. m. The Board believes that applicant does not want to

> work and that her husband, who did not want her to work before the injury, probably keeps her from working now. We believe the fact that she gives a previous earning history of minimal employment during the three years previous to injury is indicative of this. *Id*. at 265.

Given these facts, in its analysis *Vetter* concluded, as a general proposition:

> If a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability. If an employee, after injury, resumes employment and is fired for misconduct, his impairment playing no part in the discharge, there is no compensable disability (footnote omitted). Total disability benefits have been denied when a partially disabled claimant has made no bona fide effort to obtain suitable work when such work is available (footnote omitted). And, a claimant has been held not entitled to temporary total disability benefits even though she had a compensable injury when she had terminated her employment because of pregnancy and thereafter underwent surgery for the injury. Since the compensable injury was not the reason she was no longer working, temporary disability benefits for current wage losses were denied. *Id*. at 266-67.

Vetter said the above-referenced legal doctrine was correct and if substantial evidence supported the Board's finding that Vetter chose not to work for various reasons not connected to her work injury (*e.g.*, no need to work; her husband's desire she not work; her desire not to work), the Board's decision denying disability would be affirmed. *Id*. at 267. *Vetter* explained:

> The Board in the instant case determined . . . Vetter was no longer employed, not because of any injury but because of her own personal desires, and found no actual impairment of her earning capacity. If this determination is supported by substantial evidence, the claim for compensation was correctly denied. *Id*.

But *Vetter* found "considerable evidence in the record that [Vetter] was unable to return to work due to complications resulting from her injury." And while the employee stated, "her main reason for not returning to work was that she wanted no more fights or arguments with anyone," she also testified headaches and kidney problems she suffered as a result of her work injury limited her public activities. Vetter also declined a waitress job at another restaurant because she was physically unable to perform the work. Vetter's physician testified it was his opinion "she was incapacitated as a result of her injury and was not malingering," and no contrary medical evidence was presented. *Id*. at 268. *Vetter's* majority found a lack of substantial evidence to support the Board's finding Vetter "was unwilling to work." The Court said:

> In short, the focus of the hearing was not upon the defense [Vetter] was unwilling to work but rather upon the defense that her injuries resulted from a deliberate attack by her upon a customer. And whatever testimony reflected adversely upon her willingness to work was given incidentally in response to questions directed to this latter issue. Such testimony, even given its most favorable inference, does not support the finding of her unwillingness to work.
>
> We thus find a lack of substantial evidence to support the finding of the Board that [Vetter] was unwilling to work and reverse the decision of the superior court affirming the Board's refusal to grant appellant disability compensation. We remand this case to the superior court with instructions to in turn remand the case to the Workmen's Compensation Board for further proceedings in conformity with this opinion (*id*.).

On remand the Board again found Vetter voluntarily removed herself from the labor market and again denied her disability claim. In Vetter's second appeal, the Court found the Board reconsidered an issue already decided on appeal, her entitlement to disability benefits from April 24, 1970 until May 9, 1972, without authority. It affirmed the portion of the decision from May 10, 1972 forward as there was sufficient evidence presented regarding Vetter's voluntary removal from the labor market subsequent to May 9, 1972 to substantiate the Board's finding. The Court reversed and remanded with more forceful instructions. *Vetter v. Wagner*, 576 P.2d 979 (Alaska 1978).

In *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990), the Court concluded "*Vetter* does not control this case" because "There is no evidence that Cortay intended to remove himself from the labor market." *Id*. at 107. *Cortay* stated:

> Today we clarify our holding in *Estate of Ensley* that TTD benefits cannot be denied to a disabled employee because he or she may be unavailable for work for other reasons. Though *Estate of Ensley* concerns unavailability for medical reasons, the rationale for not denying TTD benefits applies to any reason that might render the employee unavailable for work. *Id*. at 108.

If a claimant voluntarily removes himself from the labor market, he can be disqualified from indemnity benefits. *Humphrey v. Lowe's Home Improvement Warehouse, Inc.*, 337 P.3d 1174 (Alaska 214). Withdrawal from the labor market via retirement need not be "purely personal" to be voluntary, but neither does it bar compensation when the claimant's work injury is the

substantial cause of claimant's disability that results in retirement. *Strong v. Chugach Electric Association, Inc.*, AWCAC Dec. No. 128 (February 12, 2010). Where an employee's unemployment is because of his work injury, and his earning capacity is impaired, he is entitled to compensation. *Strong* set the legal standard as "unemployed but willing to work and making reasonable efforts to return to work" when deciding if an unemployed injured worker's loss of earnings is due to a compensable disability or an otherwise non-compensable voluntary withdrawal from the work force. *Id.* at 20.

> **AS 23.30.395. Definitions.** . . . (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
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> **8 AAC 45.092. Second independent medical evaluation.** . . . (j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to
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> (1) submit written questions or depose the examiner, the party must
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> (B) initially pay the examiner's charges to respond to the written questions or for being deposed; after a hearing and in accordance with AS 23.30.145 or 23.30.155(d), the charges may be awarded as costs to the prevailing party;

ANALYSIS

1) Is Employee entitled to TTD benefits?

Employer and Employee dispute whether Employee is entitled to TTD benefits from February 2021 to the present. AS 23.30.185; AS 23.30.395(16). The presumption of compensability applies to this dispute. AS 23.30.120; *Meek*. Employee raises the presumption he is entitled to TTD benefits with his testimony that he retired due to the left upper extremity numbness and tingling caused by the work injury and was unable to earn wages. *Tolbert*. Employer rebutted the presumption with Dr. Bauer's EME report opining the work restriction of no overhead lifting was due to Employee's preexisting condition, and the fact Employee returned to work a short time after the work injury and on his February 25, 2021 letter stating his decision to retire was based upon "personal" reasons unrelated to the "State" and he would seriously consider coming out of retirement if the Central station was reopened. *Huit*.

Once Employer rebuted the presumption of compensability, Employee must prove his entitlement to TTD benefits by a preponderance of the evidence. *Huit*. Employee was released to regular work in September 2019, and returned to work and continued working until February 2021 when he retired. On December 1, 2020, PA-C Thomas advised Employee to modify activity "as needed based on pain" but did not recommend any work restrictions. In May 2023, Dr. Uhr responded to questions from Employee and opined he did not have the current physical capacity to work as an equipment operator. However, Dr. Uhr's opinion did not state Employee lacked the physical capacity to work as an equipment operator when Employee retired in February 2021.

At hearing Employee testified he retired due to the work injury because he was worried he might injure himself or others while operating equipment due to left upper extremity pain, numbness and tingling and he would "seriously consider" working at the Central station if a position became open after his upcoming left shoulder surgery and he was able to return to work. While Employee certainly had continuing pain after the work injury, no physician recommended any work restrictions due the work injury or the pain, numbness or tingling Employee testified to experiencing at hearing.

Employee's February 25, 2021 letter stated his decision to retire was based on personal reasons unrelated to the "State" and he would "seriously consider" coming out of retirement if the Central station was reopened. He did not mention his work injury or left upper extremity pain, numbness or tingling. None of the medical records documented Employee shared his safety concern with any physician and none of his treating physicians recommended any work restrictions after he returned to work. In fact, Employee testified he did not discuss "working" with his physician.

Employee contended he demonstrated he is willing to work and remain in the labor market because he is seeking reemployment benefits. Employee sought TTD and reemployment benefits after Dr. Uhr's SIME. Neither his August 17, 2020 claim nor his December 10, 2020 amended claim sought TTD or reemployment benefits until they were identified as disputed

issues at the September 27, 2023 prehearing conference, more than two-and-a-half years after Employee retired. Employee's failure to discuss his physical ability to work and related safety concerns about his ability to perform his work with his physician and delayed pursuit of TTD and reemployment benefits discredits his alleged willingness to work and remain in the labor market. *Strong*.

Hendrickson testified Employee told him Employee retired because he was tired of working away from home at the Montana Creek station since his wife had a difficult time keeping up with the firewood needed to heat their home, he missed his wife and dog and he could afford it. Employee's February 25, 2001 letter is consistent with this testimony. His letter stated the closing of Central station and related loss of the geographical pay differential did not "sit right" with him but he would "seriously consider" coming out of retirement for a job at Central station. The Central station had a much shorter commute and would allow him to stay home with his wife and dogs.

Similarly, Employee testified he would give a job opening at Central station "real serious consideration" after his shoulder surgery and he declined job openings at Montana Creek since he retired. His performance evaluations show he continued to perform his job acceptably after the work injury and were consistent with Hendrickson's testimony Employee did not share any safety concerns regarding his work injury with him. Hendrickson's testimony is credible. AS 23.30.122; *Smith*; *Rogers & Babler*. Employee's testimony that he retired due to the work injury because he was worried he might injure himself or others while operating equipment due to left upper extremity pain, numbness and tingling is not credible; other factors were the reason he was no longer working. *Id*.

The preponderance of the evidence is that Employee willfully removed himself from the job market when he retired because he did not want to work at Montana Creek station due to personal reasons unrelated to the work injury. Employee voluntarily removed himself from the workforce and was unwilling to work because he was tired of working, his wife had a difficult time keeping up with the firewood needed to heat their home on her own, he missed his wife and dog, and he could afford to retire. *Cortay*; *Vetter*. Thus, his incapacity to earn wages was not due to the work injury; rather it was due to his voluntary retirement because of personal reasons

not connected to the work injury. AS 23.30.010(a); AS 23.30.185; *Vetter*; *Humphrey*; *Strong*; *Saxton*. Employee is not entitled to TTD benefits.

2) Should the RBA be directed to order an eligibility evaluation under AS 23.30.041(c)?

AS 23.30.041(c) provides if an employee is totally unable to return to his work at the time of injury for 90 consecutive days as a result of the work injury, the RBA is required to order an eligibility evaluation. As determined above, Employee voluntarily retired because of personal reasons not connected to the work injury; his incapacity to earn wages was due to his voluntary retirement as he was tired of working. While Dr. Uhr stated Employee does not have "the current physical capacity to work as an equipment operator that includes the essential physician capacities" in the job description for Equipment Operator - Journey I and II, he did not state Employee would be totally unable to return his job at the time of injury after left shoulder surgery. He recommended a FCE at medical stability because he was unable to predict whether Employee would have the permanent physical capacity to return to his job. There is no medical record precluding Employee from returning to the same job held at the time of injury. The RBA will not be directed to order an eligibility evaluation under AS 23.30.041(c).

3) Is Employee entitled to interest?

As determined above, Employee is not entitled to TTD benefits. Therefore, Employee is not entitled to interest. AS 23.30.155(p).

4) Is Employee entitled to attorney fees and costs?

Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(a), (b); *Childs*. Employer controverted all benefits based upon Dr. Bauer's EME report on July 24, 2020. Employee filed his first claim on August 17, 2020, which Employer controverted on September 17, 2020. Employee filed his amended claim on December 10, 2020. On December 30, 2020, Employee requested an SIME. Employer denied Employee was entitled to benefits sought in the December 10, 2020 amended claim based upon Dr. Bauer's EME report in its January 11, 2021

answer but it did not answer Employee's December 30, 2020 petition for an SIME. Employer agreed to an SIME on September 20, 2022, after Employee requested a hearing on his petition for an SIME. The SIME was conducted in response to Employee's claims and Employee's attorney was instrumental in his claim's preparation. AS 23.30.145(a); *Childs*. After the SIME was complete, Employer withdrew the July 24, 2020 and September 17, 2020 post-claim controversion on July 23, 2023, denying medical and PPI benefits and paid for medical and PPI benefits. Employee's attorney's efforts were instrumental to induce Employer to pay medical and PPI benefits. AS 23.30.145(b); *Child*. Employer should be awarded attorney fees and costs.

Employee submitted itemized fee affidavits totaling $27,040 in attorney fees and $5,655.53 in costs, totaling $32,695.53. Employer objected to specific entries, contending Employee's attorney block-billed, spent excessive time on tasks and completed work his paralegal could have performed. Employee's attorney's fee affidavits are relatively detailed and do not contain block-billing because they identified the general nature of the services, the hourly rate and the time spent.

Employer contended Employee's delay required him to re-review the case and "almost no attorney work" occurred between December 30, 2020 and September 16, 2022. However, Employer failed to answer Employee's December 30, 2020 petition requesting an SIME and did not agree to an SIME until September 20, 2022, after Employee requested a hearing on his petition. Therefore, Employer also contributed to delay. Court precedent allows attorneys to perform the same services without the benefit of a paralegal and bill at their full hourly rate. *Rusch*. Therefore, the time incurred on the attorney fee affidavit will not be reduced based upon these contentions.

However, Employee was not successful on the RBA and TTD benefit issues at hearing; he did prevail on attorney fees and costs. The RBA and TTD benefit issues were not minor issues that can be disregarded. *Porteleki*. His attorney itemized 4.5 hours spent on the RBA and TTD benefit issues, 17.60 hours preparing for the hearing, including writing the hearing brief and witness list and appearing for hearing, and 1.10 hour preparing questions for Dr. Uhr; half of his questions were about RBA and TTD benefits. He prevailed on attorney fees and costs, one of

three major issues at hearing. Based upon the *Rusch* factor 1.5(a)(4), requested attorney fees will be reduced accordingly.

> *(1) the time and labor required, novelty and difficulty of the questions involved and skill requisite to perform the legal services properly;*

This case required an average number of hours, and the questions involved were not novel or difficult.

> *(2) the likelihood acceptance of the employment will preclude other employment by the lawyer;*

The acceptance of any case would preclude the attorney involved from using that time for another matter. Employee's attorney stated he turned other cases away while this case pended.

> *(3) the fee customarily charged in the locality for similar services;*

Employee's attorney contended *Rusch* awarded him $600 per hour in 2019. However, *Rusch* remanded the case to determine the reasonable hourly rate and the Commission awarded Employee $450 per hour. Attorney Bredesen was awarded $520 per hour in *Martino* and he has 20 years' experience, which is less than Employee's over 40 years' experience. Employee's requested hourly attorney rate of $520 is reasonable. *Rogers & Babler*.

> *(4) the amount involved, and results obtained;*

Employee's attorney's efforts were instrumental to induce Employer to pay medical and PPI benefits. While Employer may assert the dollar amount of these benefits are modest, Employee is awaiting further surgery and treatment to recover from surgery. The benefit to Employee is not modest; it is significant. Furthermore, attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay*. As Employee was not successful on TTD and reemployment benefits, the time spent on those benefits, 4.5 hours, in Table One will not be awarded. Also, the time spent on this hearing in Table Two will be reduced by two-thirds for time spent on TTD and reemployment benefits; Employee will be awarded 5.87 hours of that time; 11.73 will not be awarded (17.60 hours x 2/3 = 5.87 hours).

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

There were no unusual time limitations imposed by the client or the circumstances.

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

Employee did not submit any specific information regarding this issue.

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

Employee's attorney is highly experienced and has a good reputation.

(8) whether the fee is fixed or contingent.

This matter is based on a contingent fee.

Based upon the above analysis, Employee will be awarded $520 per hour for 35.22 hours of work (52 hours - 4.5 hours - 11.73 hours - 0.55 hour = 35.55 hours), totaling $18,314.40 in attorney fees.

Employee's attorney billed 14.10 paralegal hours at $260 per hour for a total of $3,666 in paralegal costs. Employer contended the hourly paralegal rate was excessive and cited recent cases awarding $165 per hour, including *Scheideman*. However, a more recent case, *Bryant*, awarded $170 and $200 for the hourly paralegal rate and *Vaillancourt* noted former paralegal, now attorney, Bryan Haugstad, billed and was previously awarded $275 per hour for paralegal costs with 10 years' experience as a paralegal. Employee's paralegal has more than 20 years' experience, is a NALA Certified Paralegal and teaches at the University of Alaska Paralegal Program. Court precedent allows attorneys to perform the same services without the benefit of a paralegal and bill at their full hourly rate. *Rusch*. The $260 hourly paralegal rate is reasonable. *Rogers & Babler*.

Employer objected to $1,989.53 for Dr. Uhr's responses to Employee's questions. Employee sent six questions to Dr. Uhr, one question was about PPI, two questions were about medical treatment and three questions were about Employee's physical capacity to work as an equipment

operator. Employee's attorney's efforts were instrumental to induce Employe to pay medical and PPI benefits but Employee did not prevail on the RBA and TTD issues at hearing. Therefore, Employee will be awarded half the SIME cost for Dr. Uhr's responses to his questions, $994.75, because half of the questions were about medical and PPI benefits. 8 AAC 45.092(j)(1)(B). Employee's attorney will be awarded $4,660.75 in costs ($3,666 + $994.75 = $4,660.75).

CONCLUSIONS OF LAW

1) Employee is not entitled to TTD benefits.
2) The RBA should not be directed to order an eligibility evaluation under AS 23.30.041(c).
3) Employee is not entitled to interest.
4) Employee is entitled to attorney fees and costs.

ORDER

1) Employee's August 17, 2020 claim and December 10, 2020 amended claim are granted in part and denied in part.
2) Employee's request for TTD and reemployment benefits are denied.
3) Employee's December 10, 2020 amended claim for attorney fees and costs is granted.
4) Employer shall pay $18,314.40 in attorney fees, and $4,660.75 in costs.

Dated in Fairbanks, Alaska on November 16, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn M Setzer, Designated Chair

/s/
Jonathan Dartt, Member

/s/
John Corbett, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Tomas A. Dickson, employee / claimant v. State Of Alaska, self-insured employer;

defendant; Case No. 201912133; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified US Mail on November 16, 2023.

/s/
Lorvin Uddipa, Workers' Compensation Technician