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. 24-0002 Filed with AWCB Anchorage, Alaska on January 29, 2024

Manuel Hernandez's (Employee) March 16 and December 26, 2018, January 8, May 20 and December 23, 2019, March 18, 2021, and August 17, 2021 claims were scheduled to be "reconsidered" as directed on remand from the Alaska Workers' Compensation Appeals Commission (Commission), on the written record, on August 1, 2023. The panel reopened the record and directed the parties to address an attorney fee stipulation. Later, the panel determined the remand hearing was "not completed" because mental-health records were missing, and reopened the record again. On September 22, 2023, Employee filed the records. The panel held a hearing on January 24, 2024, a date selected on December 7, 2023, for argument on these and other issues. Employee appeared and testified; Attorney Krista Schwarting appeared and represented Ocean Beauty Seafoods, LLC, and its insurer (Employer). The record remained

open until January 26, 2024, so Employer could address a procedural issue, and closed on that date.

ISSUES

Employer contends the panel need not wait until Employee's claims are resolved before ruling on the pending attorney fee stipulation between Employee's former attorney and Employer.

Employee contends the panel should not consider awarding his former lawyer any attorney fees until the remanded claims are resolved and Employee's benefits are determined.

1) Should a decision on Eppler's attorney fees and costs be held in abeyance?

Employer contends the panel should not consider medical records or other evidence submitted after December 22, 2021, the date *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 22-0005 (January 21, 2022) (*Hernandez IV*) was heard. It asserts numerous grounds why considering additional records would be prejudicial and unfair to Employer.

Employee contends the panel needs to have all relevant mental-health records available to review before deciding his case on remand. He supports the panel considering the records.

2)Should the panel consider medical records filed after December 22, 2021?

Alternately, Employer contends if the panel considers medical records filed after December 22, 2021, Employer should have an opportunity for its experts to review and respond to the records, and for it to possibly depose the records' authors.

Employee contends he has waited too long to obtain his benefits. He contends Employer should have at most 10 to 15 days to complete its discovery regarding the new medical records.

3)Should Employer be given time for additional discovery?

FINDINGS OF FACT

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

1) On August 11, 2021, the parties appeared for a hearing on Employee's claims. The parties put an oral stipulation on the record for Employer to pay Employee certain benefits, and requested a continuance to try mediation. The panel granted the continuance. *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 21-0082 (August 11, 2021) (*Hernandez III*).

2) However, on August 12, 2021, Employer reduced the amount attributable to temporary total disability (TTD) benefits in the August 11, 2021 stipulation from $21,260 to $15,483. The adjuster paid Employee the reduced amount plus $3,540 for a two percent permanent partial impairment (PPI) rating. The stipulation's value to Employee was $19,023 ($15,483 + $3,540 = $19,023). (Notice of Correction, August 12, 2021).

3) A September 13, 2021 mediation was unsuccessful. (Agency file: Events, Mediation Details tabs, September 13, 2021).

4) On December 22, 2021, the parties participated in a merits hearing on Employee's claims. On January 21, 2022, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 22-0005 (January 21, 2022) (*Hernandez IV*) decided Employee's claims and other issues. (*Hernandez IV*).

5) Employee's former attorney Justin Eppler billed $105,908.94 for services rendered to Employee. *Hernandez IV* determined that only factors (1), (3), (4) and (7) in Rule 1.5(a), applied. It found experienced claimant attorneys receive $425 per hour, and decided Eppler lacked relevant experience. *Hernandez IV* made specific factual findings about Eppler's attorney fees and costs and reduced them, finding he and his paralegal overcharged, were not credible and took too long to perform simple services. The specific objections are described in factual findings 54 through 65. Ultimately, *Hernandez IV* awarded Eppler $20,639.85 in attorney fees and $6,944.63 in costs, totaling $27,584.48. (*Hernandez IV*).

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

7) On February 21, 2023, the Commission in *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCAC Dec. No. 300 (February 21, 2023) (*Hernandez VI*), said in its "Discussion" section: "The Commission notes Dr. Bauer did not explain to what [Employee's] anxiety and panic attacks were attributable." "The Commission notes Dr. Murphy did not discuss the cause or origin of the anxiety and panic attacks." "He [Dr. Williams] did not discuss or provide an opinion as to the origin and cause of [Employee's] anxiety and panic attacks." "The

Commission notes Dr. Williams did not address the cause of the chronic pain, just noting [Employee] had it." "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." "[Dr. Williams] did not provide an alternative explanation for the causation of either the chronic pain, depression, or the anxiety." "Based on *Vue* and *Huit*, Ocean Beauty did not rebut the presumption because no alternative cause for the chronic pain were [sic] discussed." "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." "[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." (*Hernandez VI*).

8) *Hernandez VI* stated, ". . . the Commission remands the question of the terms of the [August 11, 2021] stipulation and whether [Employer] has good cause for seeking a change in the terms." "The matter is remanded to the Board to enforce the [August 11, 2021] 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." "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." (*Hernandez VI*).

9) *Hernandez VI* said 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 [Employee'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*).

10) Typically, when the Commission or the Court on appeal from a Board decision finds that an employer did not rebut the presumption of compensability, the decision will state that the injured worker is entitled to benefits based solely on the raised but unrebutted presumption. In some cases, appellate tribunals direct the panel on remand to decide any remaining issues on the record as it existed at the time of the decision from which the appeal or petition for review was taken. (Experience, observations).

11) Although *Hernandez VI* remanded for "reconsideration" and "discussion," it did not expressly limit the evidence on remand to evidence in the agency file on December 22, 2021, the date the panel heard *Hernandez IV*. (*Hernandez VI*).

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

13) On August 4, 2023, Employer and Eppler filed a stipulation for approval of Eppler's attorney fees. They agreed Eppler provided valuable services to Employee and his efforts expedited Employee's receipt of benefits. Employer 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 is no evidence Employer or Eppler served this stipulation on Employee. (Stipulation for Approval of Employee's Attorney Fees, August 4, 2023).

14) On August 15, 2023, the panel advised Employee, Employer and Eppler that the Division was serving Employee with the Eppler-Employer attorney fee stipulation. The panel gave them deadlines to file and serve answers to the question of whether Employee had a right to notice and an opportunity to be heard on the Eppler-Employer stipulation and to arguments about the fee stipulation. The panel asked Eppler to update his attorney fee and cost affidavit supporting $63,250 in attorney fees and costs and to address Rule 1.5, commonly referred to as the *Rusch* factors. (Letter, August 15, 2023).

15) On August 18, 2023, Eppler filed and served on Employer, but not on Employee as directed, an attorney fee and cost affidavit. This affidavit was similar to his previous 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).

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

17) On August 22, 2023, Employee filed and served on Eppler and Employer his response to the Eppler-Employer fee stipulation. He stated only, "My attorney did not fully [sic] his responsibility in representing me, he should not get pay." (Employee email, August 22, 2023).

18) On August 31, 2023, the hearing panel reopened the record again, because while reviewing Employee's agency file the panel noticed many mental health records referenced in providers' records were not in the agency file. Because a major issue in this case is mental-health care, the panel directed the parties to obtain, file and serve all mental-health 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).

19) On September 19, 2023, Employee filed and served additional medical records, mostly including mental-health treatment records. Many were for treatment prior to the December 22, 2021 *Hernandez IV* hearing. (Medical Summaries, September 19, 2023).

20) On September 22, 2023, Employer objected to the panel reopening the record and contended: (1) The record on remand from the Commission should be the same as when *Hernandez IV* heard the matter on December 22, 2021; (2) Records pre-dating the December 22, 2021 hearing should have been submitted as evidence prior to that hearing; (3) Reopening the record violates Employer's due process because it did not have a chance for its experts to review these records or allow it to depose the providers; (4) In April 2021, Eppler filed an affidavit stating he had completed all 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).

21) On September 22, 2023, Employee responded to Employer's objection to the panel reopening the hearing record and contended: (1) The newly filed records were done at the Board's direction; (2) Employer had medical releases and it could have obtained and filed medical records as well; (3) With or without the new records, Employee prevails on compensability of his mental-health and chronic pain, disability and 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).

22) On October 20, 2023, given Employee's objections to the fee stipulation and the panel's uncertainty about the scope of the *Hernandez VI* remand, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 23-0057 (October 20, 2023) (*Hernandez VII*) reopened the remand hearing record again for the parties to appear at a hearing to address the following issues:

> (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.

Hernandez VII cited applicable statutes and regulations and decided the remand hearing was "not completed" and reopened the record for additional evidence or arguments. It determined Employee had a right to be heard on Eppler's fees, and Eppler had a right to explain fees *Hernandez IV* had reduced. *Hernandez VII* also determined that relevant mental-health records were absent from the agency file prior to the *Hernandez IV* hearing, and had now been provided. It noted Employer had not had an opportunity to have its experts address those records. *Hernandez VII* found *Hernandez VI* did not expressly limit the panel on remand to considering only evidence in the agency file on December 22, 2021, when *Hernandez IV* was heard. (*Hernandez VII*).

23) On October 30, 2023, Employee terminated his relationship with Eppler effective that date. (Employee letter, October 30, 2023).

24) On November 3, 2023, Eppler withdrew as Employee's attorney, and filed a notice of an attorney fee lien for $63,250 based on the August 4, 2023 Eppler-Employer stipulation. (Notice of Withdrawal of Attorney; Affidavit of Justin S. Eppler and Notice of Attorney's Fee Lien, November 3, 2023).

25) On November 7, 2023, Employee filed and served on Employer additional medical records, some relating to his mental-health issues. (Medical Summaries, November 7, 2023).

26) On December 7, 2023, Employee and Schwarting attended a prehearing conference at which the Board's limited issues from factual finding 22, above, were set for a January 24, 2024 hearing. The Division served the prehearing conference summary on all parties and on Eppler. (Prehearing Conference Summary December 7, 2023).

27) On December 8, 2023, the Division served on the parties and on Eppler a notice for the January 24, 2024 hearing. (Hearing Notice, December 8, 2023).

28) On January 23, 2024, as is routine custom and practice, Division staff contacted the parties and Eppler to determine if they planned to attend the hearing the following day in-person or by Zoom. Eppler advised that he did not plan on attending, but would accept the Zoom meeting link, which Division staff emailed to him. (Division staff; email, January 23, 2024).

29) On January 24, 2024, Eppler did not appear at the hearing. (Observations).

30) At hearing on January 24, 2024, Employee confirmed that benefits he sought related to chronic pain in his thoracic spine area, anxiety, panic attacks and a somatoform disorder. He volunteered that he had no similar symptoms or conditions prior to his work injury with Employer. When asked about two physicians' reports charting that he told them he had all these preexisting issues before his injury, Employee said those physicians were "crazy." He testified about his displeasure with Eppler's legal services and contended the panel should wait to rule on the Eppler-Employer attorney fee stipulation until his remand merits hearing was completed and he knew the benefits he would receive. Employee agreed that Eppler obtained around $21,261 in benefits for him. However, he objected to the large disparity between $21,261 he received and the $63,250 that Eppler would receive if the Board approved the Eppler-Employer stipulation. Employee said he was not aware of the Eppler-Employer fee stipulation until the panel sent him a copy and gave him an opportunity to respond to it. (Record).

31) At hearing, Employer contended it did not object to Employee being heard on the Eppler-Employer fee stipulation. However, it considered his testimony irrelevant because Rule 1.5 did not require the Board to consider Employee's satisfaction with his attorney's performance in evaluating and approving an attorney fee award. Employer stated the mediated Eppler-Employer stipulation was done only to bring closure to at least one issue in this case. It stated the Board did not need to wait until the merits hearing was over to approve the fee stipulation, because

Employer considered "the results obtained" language in Rule 1.5 to include results obtained along the path to a final decision, and not just success in the ultimate decision itself. Nevertheless, Employer requested until January 26, 2024, to advise the panel if it wanted to seek relief from the Eppler-Employer stipulation. The panel granted this request for more time. (Record).

32) On the second issue, regarding post-December 22, 2021 mental-health records, Employee contended the panel should have access to all relevant medical records so it can make a wise decision. He stated his former attorney had "access" to all his records but never obtained them. Employee was unclear if Eppler ever asked him to sign a release for his mental-health records before the December 22, 2021 hearing. Nevertheless, Employee obtained them himself and filed them with the Division as the panel directed. (Record).

33) Employer reiterated its previous objections to the Board considering medical records filed after December 22, 2021, and added new ones: (1) The records were available prior to the December 22, 2021 hearing; (2) Employee or Eppler should have obtained and filed them before that hearing; (3) The panel considering these records would violate Employer's due process because its experts had no chance to consider them and respond; (4) Employee filed an affidavit stating he had completed all discovery and was fully prepared for the December 22, 2021 hearing; (5) Board regulations provide a 20-day deadline for filing evidence; (6) Employee should not have another "bite at the apple" and be allowed to file old medical records; (7) Laches applies against Employee; (8) Estoppel applies against Employee; (9) AS 23.30.001 requires the Board to ensure quick, efficient, fair, and predictable delivery of benefits to injured workers at a reasonable cost to Employer; accepting these records violates that mandate; (10) Accepting new records prejudices Employer by forcing it to relitigate the prior hearing at great time and expense, because one of its employer's medical evaluation (EME) physicians is retiring. Employer relied on the *Patterson* Board decision as support. (Record).

34) On the time Employer needed to review and respond to the records issue, Employee contended he has not been able to work as a result of his injury since October 2017. He contended Employer should have no more than 10 to 15 days to have its experts review the new medical records and provide any responses. Employer contended it may need to hire a new EME and may need to have more than one specialist review and analyze the newly provided medical-health records. It contended this could take "at minimum" six months. (Record).

35) On January 24, 2024, Employer stated in response to the panel's question about seeking relief from the Eppler-Employer fee stipulation, "The employer and carrier/adjuster's . . . are not taking a position on this question, and the Board should determine whether the stipulation is null and void, deny the stipulation or approve the stipulation. (Employer's Response Regarding Fee Stipulation, January 24, 2024)."

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . employers. . . .
> > (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> > . . . .
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> > (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The Board may base its decision 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 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
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> (c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. . . .

> **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
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> > (1) the claim comes within the provisions of this chapter; . . .

Williams v. State of Alaska, Department of Revenue, 938 P.2d 1065, 1076 (Alaska 1997), held that the employer failed to rebut the presumption of compensability on the injured worker's gastrointestinal condition. It stated, "We REVERSE the Superior Court's decision affirming the

denial of Williams's physical injury claim because we conclude that the State did not overcome the presumption of compensability. We REMAND with instructions to remand to the Board to determine the benefits due on Williams's claim her employment aggravated her pre-existing gastrointestinal condition."

> **AS 23.30.130. Modification of awards**. (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after . . . the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .
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> **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. . . .

In *Patterson v. Matanuska-Susitna Borough School District*, AWCB Dec. No. 18-0005 (January 12, 2018), the claimant's attorney sought a Board order extending the deadline to file his attorney fee and cost affidavit and itemization, having missed the filing deadline by two days. The employer objected, noting that the filing date was a Friday, which provided only one day to review the lengthy affidavit and itemization because the following Monday before the hearing was a holiday. The Board determined late-filing from this attorney "has been a recurring event." Consequently, *Patterson* found the employer was prejudiced by the late-filing and did not find "good cause" to extend the time for the attorney fee affidavit and cost filing. *Patterson* granted the employer's petition to strike the attorney fee affidavit.

Wausau Insurance Companies v. Van Biene, 847 P.2d 584, 588 (Alaska 1993), held the Board possesses authority to invoke "equitable principles to prevent an employer from asserting statutory rights." This included, "Equitable estoppel, implied waiver, and laches." The Board in *Van Biene* found the employer implicitly waived its past and future right to recover a Social Security offset from the employee's widow's ongoing workers' compensation death benefits by raising the offset issue but not pursuing it for three years. The Board found that, based on an

adjuster's statement that the widow's death benefit compensation rate was "fixed," the widow purchased a home and incurred related debt; it found the adjuster's statement was prejudicial to her. *Van Biene* explained that an "implied waiver arises where the course of conduct pursued evidences an intention to waive a right, or is inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party." To prove an "implied waiver," there must be "direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver."

The Board also found the employer was estopped from taking any Social Security offset. *Van Biene* stated elements for estoppel include assertion of a position by word or conduct, reasonable reliance thereon by another party and resulting prejudice. The Board had applied these elements to the employee's case and found the prejudice element present when she bought a new home. The employer appealed, the Superior Court affirmed, and the employer appealed.

Van Biene reversed finding a lack of substantial evidence to support the Board's findings that implied waiver and estoppel precluded the insurer from obtaining Social Security reimbursements for overpayments, or obtaining future offsets. The Court based its opinion on its conclusion that nothing the adjuster had done or said would lead a reasonable person to believe the insurer would not require an offset. *Van Biene* concluded, "at best, such conduct subsequent to [the adjuster's] conversation and letter indicates only neglect or an internal mistake." *Id*. at 589.

The Board had also applied laches to bar the insurer from obtaining any Social Security benefit offset. *Van Biene* noted that the insurer was attempting to assert its "statutory (legal) based rights" to the offset and stated:

> Given that Wausau is attempting to assert its statutory (legal) based rights to offsets and reimbursements we conclude that laches is inapplicable. Laches is an equitable defense inapplicable to actions at law (citations omitted). (*Id*. at 589 n. 15).

The Commission in *Sourdough Express, Inc. v. Barron*, AWCAC Dec. No. 069, 5-6 n. 24 (February 7, 2008) cited *Van Biene* and said, "Laches is a defense to an action in equity, not in law. . . . It is not available as a defense to enforcement of the workers' compensation statutes. . . ." *Barron* also noted that laches, like other equitable defenses, is based on a party's unreasonable failure to timely bring a claim, and resultant prejudice to the other party.

> **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. . . . When the board advises that a claim has been controverted . . . the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . . In determining the amount of fees, the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries. . . .

Wise Mechanical Contractors v. Bignell, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory. The Board must consider the contingency factor in awarding fees to employees' attorneys in workers' compensation cases because attorneys only receive fees when they prevail on a claim. *Id*. at 973.

Adamson v. University of Alaska, 819 P.2d 886, 895 (Alaska 1991) held that an injured worker must succeed "on the claim itself, not on a collateral issue" to obtain an attorney fee award. However, if the injured worker succeeds on part of the claim's merits that results in benefits under the Act, attorney's fees are awardable. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993) stated when an employee does not prevail on all issues, attorney fees should be based on the issues on which he prevailed. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Dec. No. 152 (May 11, 2011) said fees incurred on lost minor issues will not be deducted if the employee prevails on primary issues. *Rusch & Dockter v. SEARHC*, 453 P.3d 784, 803 (Alaska 2019) held an attorney fee award will only be reversed if it is "manifestly unreasonable" and said a "determination of reasonableness requires consideration and application of various factors that may involve factual determinations, but the reasonableness of the final award is not in itself a factual finding." *Rusch* said the Board must consider the following non-exclusive factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining attorney fee reasonableness in these cases:

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

AS 23.30.155. Payment of compensation. . . .

(j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. . . .

AS 23.30.260. Penalty for receiving unapproved fees and soliciting. (a) A person is guilty of a misdemeanor . . . if the person (1) receives a fee . . . on account of any services rendered for representation or advice with respect to a claim, unless the consideration or gratuity is approved by the board or the court;

8 AAC 45.040. Parties. (a) . . . a person other than the employee filing a claim shall join the injured employee as a party. . . .

8 AAC 45.050. Pleadings. . . .

(f) For stipulations under this subsection,

. . . .

(2) stipulations between the parties may be made in writing at any time before the close of the record or may be made orally in the course of a hearing or a prehearing;

(3) stipulations of fact or to procedures are binding upon the parties named in the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation; . . .

(4) notwithstanding any stipulation to the contrary, the board may base its findings upon the facts as they appear from the evidence, may cause further evidence or testimony to be taken, or may order an investigation into the matter as prescribed by AS 23.30.

8 AAC 45.120. Evidence. . . .

> (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.
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> **8 AAC 45.180. Costs and attorney's fees.** . . .
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> (b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit [a] . . . Claim or a petition. . . .

ANALYSIS

1) Should a decision on Eppler's attorney fees and costs be held in abeyance?

This issue stands in a unique procedural and substantive posture. Eppler and Employer attempted to resolve one issue, Eppler's attorney fees, through stipulation. The regulation providing for "parties" to make the subject stipulation, 8 AAC 45.050(f)(2), is ambiguous because it states "the parties" may make stipulations in writing. However, it does not state who "the parties" are. Are they merely "the parties" to the stipulation, or are they "the parties" to the claim? Employee, a party, never signed the attorney fee stipulation. He testified he was unaware of it until the Division sent him a copy and gave Employee an opportunity to respond; he objected to it.

Unlike stipulations that do not require approval, attorney fee stipulations are subject to review and approval under AS 23.30.145(a), AS 23.30.260(a), 8 AAC 45.180(b), and Rule 1.5. For example, parties may stipulate that an injured worker is entitled to a vocational reemployment eligibility evaluation under AS 23.30.041(c), without agency approval. By contrast, with limited exceptions not applicable here, it is a crime for an employee's attorney to receive attorney fees in a workers' compensation case without approval. AS 23.30.260(a). Fee stipulations, of which a claimant has notice and to which he objects, require greater scrutiny than routine stipulations.

Employee conceded that Eppler obtained for him $21,261 in TTD plus $3,540 for PPI benefits. The actual amount Employer paid Employee resulting from the August 11, 2021 stipulation was

$19,023, although the amount owed remains disputed and is subject to review on remand. *Rogers & Babler*; *Hernandez VI*. Nevertheless, he objects to Eppler receiving any attorney fees until a final merits hearing determines Employee's entitlement to benefits; *i.e.*, the "results obtained." Moreover, he objects to the disparity between the benefits Eppler obtained for him, $19,023, and the $63,250 the fee stipulation would provide Eppler if approved.

Eppler is in an awkward procedural position in this case. He has not filed a claim for attorney fees or costs and is not a party. 8 AAC 45.180(b). The Division invited him to the January 24, 2024 hearing to testify about or argue why the panel should approve the August 4, 2023 fee stipulation, and to address specific time entries that *Hernandez IV* reduced. Eppler did not participate.

The panel has concerns about awarding Eppler attorney fees before Employee's case is decided on remand, primarily because the outcome is not yet known, and Rule 1.5(a)(4) requires the panel to consider the "benefits obtained." *Rusch*. There is a great disparity between the benefits the parties agree Eppler obtained for Employee, and the attorney fees in the stipulation. The panel noted hypothetically that if Employee loses, Eppler arguably could be entitled to less attorney fees, and Employer could never recover any attorney fees the panel awards Eppler now. AS 23.30.145(a); *Bignell*; *Childs*; *Porteleki*; *Rusch*; *Adamson*; Rule 1.5(a)(4). If Employee loses, there will be nothing further owed him from which Employer could recover what then becomes an "overpayment." AS 23.30.155(j). *Rusch* and *Adamson* state, "Board-awarded fees depend on success on the claim itself." Given this explanation, Employee contended the panel should wait before awarding Eppler fees. Employer had additional time to decide whether to seek relief from the fee stipulation, and ultimately took no position on the issue. 8 AAC 45.050(f)(3).

The panel has not heard, reconsidered, deliberated or decided the merits of Employee's case on remand. But awarding Eppler a potentially non-recoverable $63,250 attorney fee and costs now is inconsistent with the legislature's stated goals for "quick, efficient, fair, and predictable delivery" of benefits to Employee "at a reasonable cost" to Employer. AS 23.30.001(1). Clearly, Eppler is entitled to some attorney fees and costs for getting Employee at least $19,023.

Therefore, given the above analysis, Eppler's attorney fees and costs will be held in abeyance until Employee's case is decided on its merits on remand. The Division will serve this decision on Eppler. Eppler "must apply" for attorney fee and cost approval; to apply, he may file a claim or petition seeking attorney fees and costs from Employer, and "shall" petition to join Employee as a party. 8 AAC 45.040(a); 8 AAC 45.180(b).

2)Should the panel consider medical records filed after December 22, 2021?

The parties were given an opportunity to be heard on whether Employee's newly filed mental-health and other records should be considered at the remand hearing. Employee contends the panel should have all relevant records to make a good decision. *Hernandez VI* is unique because it states Employer did not rebut the raised presumption below, but does not direct the panel on remand to award Employee benefits. AS 23.30.120(a); *Williams*. Employer objects to the panel considering new medical evidence and relies on *Patterson*. That case is distinguishable. In *Patterson*, the injured worker's attorney requested relief from regulations regarding filing his attorney fee and cost affidavit, and sought a time extension. Here, Employee did not seek to file additional mental health records; the panel directed the parties to do so, and he is the one that did it. Employer states several additional grounds to support its objection as follows:

(1) The records were available prior to the December 22, 2021 merits hearing.

Employer is correct that the records Employee produced recently were mostly "available" in the sense that someone could have obtained and filed them before the December 22, 2021 hearing. But no one did, and AS 23.30.135(a) gives this hearing panel authority to make its "investigation or inquiry or conduct its hearing" in a manner by which it may "best ascertain the rights of the parties." AS 23.30.135(a). A major issue in this case is Employee's claim for benefits for three mental-health conditions. Yet neither party obtained nor filed most of Employee's known mental-health records with the Division. The Division's request that the parties obtain and file these records was not made to assist either party; it was made to assist the panel in deciding Employee's claim and evaluating Employer's defenses. Therefore, the fact that most of the records were available prior to the December 22, 2021 hearing is irrelevant to the panel's authority to order them produced. In other words, ordering the parties to obtain and produce the

records was not based on equity; it was based on the panel's statutory authority to do so. *Van Biene*; *Barron*.

(2) Employee or Eppler should have obtained and filed them before that hearing.

While this contention is undoubtedly true, no party obtained and filed the records most relevant to the mental-health issue. The discussion from (1) above is incorporated here by reference.

(3) Considering these records violates Employer's due process rights.

This perceived due process violation is easily resolved by allowing Employer time for additional discovery, if necessary.

(4) Employee said he was fully prepared for the December 22, 2021 hearing.

This too is true, but this contention does not address the panel's authority to require additional records be produced because the remand hearing is not completed. AS 23.30.135(a).

(5) Board regulations provide a 20-day deadline for filing hearing evidence.

This is also true, but irrelevant. The above analyses are incorporated here by reference.

(6) Employee should not be given another "bite at the apple."

Neither Employee nor Eppler sought to file additional medical records on their own motion. The panel ordered the parties to produce the records. AS 23.30.135(a).

(7) Laches applies against Employee.

Employer raised laches against Employee, not against the panel that directed the parties to produce these records. AS 23.30.135(a); 8 AAC 45.120(m). Employee did so. Employer did not explain how laches would apply against Employee who was simply following the panel's order.

Laches may be used as an affirmative defense against a party in a workers' compensation case, and is most often used against an injured worker. However, there are exceptions, and laches is sometimes applied against employers. *Van Biene*. The panel could find no decisional law applying laches against agency fact-finders in the midst of hearing a case. It is unlikely the

Commission or the Alaska Supreme Court would fault a hearing panel for exercising its statutory authority under AS 23.30.135(a) and its regulatory authority under 8 AAC 45.120(m) by requesting parties to provide missing mental-health medical records before the panel renders a decision in a claim for mental-health-related benefits. Laches does not apply in this instance.

(8) Estoppel applies against Employee.

The analysis from (7) above, is incorporated here by reference. Estoppel does not apply here. No similar equitable defense applies under these facts to this issue.

(9) Accepting these medical records violates AS 23.30.001.

Employer's contention that accepting additional medical records violates AS 23.30.001 is based on its contention that doing so will not be "quick," "fair," or at "a reasonable cost" to Employer. It contends doing so will not be "quick," because it will take more time. A panel's investigation, providing due process, and making sure its hearing is conducted in a way to "best ascertain the rights of the parties" always takes time. AS 23.30.001(1), (2), (4); AS 23.30.135(a).
Employer contends accepting these records will not be "fair," because Employee or Eppler could have and should have provided them before the December 22, 2021 hearing. It is true that someone, including Employee or his lawyer, could have and should have provided the records earlier. Employer also could have and probably should have obtained a mental-health record release from Employee, and obtained and filed these records and shared them with its experts. In short, the subject records were not exclusively in Employee's control. While Employer's option to send these records to its medical experts involves a "cost," given the analyses in this section, Employer has not demonstrated that the cost would be anything other than a routine and "reasonable cost" to Employer. AS 23.30.001(1).

Ordering a party to produce these relevant mental-health records now, supports the legislature's mandates in AS 23.30.001. Doing so prevents this panel from issuing a decision on remand that could be subject to, for up to one year, a petition for modification based on new mental-health records. AS 23.30.130(a). This would not be "quick." A remand decision not considering mental-health records in a mental-health case could be reversed on appeal and remanded for the panel to review these same records. That would not be "quick" either, or inexpensive. Similarly,

producing and reviewing the records now is "fair," because the legislature requires this panel to afford all parties due process and a right to be heard, and for all parties' "evidence to be fairly considered." AS 23.30.001(2), (4). Taking the additional step of obtaining missing medical records now may well reduce future litigation. Clearly, the more litigation that occurs over these records the more the "cost" will be to Employer. Therefore, requiring the parties to obtain and produce these records now does not violate AS 23.30.001; to the contrary, it furthers the statutory mandates.

> *(10) Accepting these records prejudices Employer by forcing it to relitigate the prior hearing at great time and expense.*

Employer raises prejudice to support its equitable laches and estoppel defenses. But those equitable defenses apply to parties to claims. *Barron*. Employee did not ask to submit additional records; the panel directed the parties to do so, and Employee is the one who did it. Preparing for and litigating claims necessarily takes time and money. *Rogers & Babler*. It remains to be seen if the additional medical records Employee produced at the panels directive are impactful in this case. In any event, Employer may choose to have one or more expert witnesses review those records, or not. Time and expense are part of the normal administrative adjudicative process, and are not reasons for this panel to not decide Employee's claims and Employer's defenses "on their merits" or not have their arguments and evidence "fairly considered." AS 23.30.001(2), (4).

3)Should Employer be given time for additional discovery?

Employer contends it needs at least six months to have its experts review the newly produced medical records, issue opinions, depose the experts and possibly depose Employee's providers who authored the records. It contends one of its EME physicians is retiring and is no longer taking cases. Employer did not state that particular expert would not agree to review additional records in this case with which he is already familiar. Moreover, that expert is a physiatrist, and the documents at issue are primarily mental-health records.

Employee contends he has not worked since October 2017 and would like his claim resolved sooner than later. He contends Employer should be given no more than 10 to 15 days for its

experts to review the records and offer opinions. Employee is not an attorney, and understandably is unfamiliar with attorney work-load issues, expert witness availability, establishing deposition dates for medical witnesses and so forth. His request that Employer be limited to no more than two weeks to complete discovery related to his new medical records is unrealistic. Employer's request for approximately six months to perform discovery related to these newly filed medical records will be granted.

CONCLUSIONS OF LAW

1) A decision on Eppler's attorney fees and costs will be held in abeyance.
2) The panel will consider medical records filed after December 22, 2021.
3) Employer will be given time for additional discovery.

ORDER

1) Eppler's attorney fees and costs are held in abeyance until Employee's claim is decided on remand, or until the case is otherwise resolved.
2) All of Employee's medical records in the agency file will be considered at the future hearing on remand, subject to the Act and applicable administrative regulations.
3) Both parties have a right to obtain and submit additional medical records in accordance with the Act and applicable administrative regulations.
4) Employer has until July 31, 2024, to complete discovery related to Employee's medical records, as set forth in this decision.
5) If Employer completes its discovery relative to the subject medical records before July 31, 2024, it shall so advise Employee and the Division in writing so a hearing can be scheduled promptly.
6) The Division will calendar a prehearing conference for July 31, 2024, to reschedule an in-person hearing on remand.
7) The Division will serve a copy of this decision and order on Eppler.
8) If Eppler wants attorney fees and costs, he must file a claim or petition to have them decided after Employee's claims are decided on their merits, and shall petition to join Employee.

Dated in Anchorage, Alaska on January 29, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Mark Sayampanathan, Member

/s/
Anthony Ladd, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 accordance 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 accordance 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 and on Justin Eppler by certified U.S. Mail, postage prepaid, on January 29, 2024.

/s/
Pamela Hardy, Office Assistant