ALASKA WORKERS' COMPENSATION BOARD

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

AARON D. UNSEL,	)	
	)	
Employee,	)	
and	)	
	)	
JASON WEINER,	)	
	)	
Claimant,	)	FINAL DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201117973
	)	
KLEBS MECHANICAL, INC.,	)	AWCB Decision No. 24-0034
	)	
Employer,	)	Filed with AWCB Anchorage, Alaska
and	)	on June 13, 2024
	)	
LIBERTY NORTHWEST INSURANCE CORP,	)	
	)	
Insurer,	)	
Defendants.	)	
	)	

Attorney Jason Weiner's February 16, 2024 claim for attorney fees and costs was heard on May 23, 2024, in Anchorage, Alaska, a date selected on April 9, 2024. A March 18, 2024 request gave rise to this hearing. Weiner appeared by Zoom, testified and represented Aaron D. Unsel (Employee), who did not participate. Attorney Martha Tansik appeared and represented Klebs Mechanical, Inc. and its insurer (Employer). There were no other witnesses. The record closed at the hearing's conclusion on May 23, 2024.

ISSUES

As a preliminary matter, Employer objected to Weiner testifying about any inaccuracies or corrections to his previously filed attorney fee affidavits. It further objected to him testifying about or obtaining attorney fees between March 29, 2024 (the day after the last date on Weiner's May 6, 2024 fee affidavit) to May 20, 2024 (the third working day prior to hearing), contending such fees should have been filed on an affidavit no later than three working days before hearing.

Weiner contended he was unaware of any mistakes or corrections on his attorney fee affidavits. After deliberating, the panel issued an oral order allowing Weiner to testify about his attorney fees, including any corrections he wanted to make to his attorney fee affidavits.

1) Was the oral order allowing Weiner to testify about his fees correct?

Weiner contends he provided valuable services to Employee by defending against Employer's September 29, 2023 petition for an order terminating ongoing narcotics. He contends he is entitled to full, reasonable attorney fees and costs.

Employer contends Employee did not prevail on any "claim" for benefits. Rather, it prevailed on its petition by obtaining an order compelling Employee to attend a functional rehabilitation clinic, which Employer says it had been trying to get him to do for nearly two years, unsuccessfully. Employer further contends there is no legal authority to award Weiner fees or costs.

2) Is Weiner entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On November 18, 2011, Employee reportedly slipped on ice, fell and injured his tailbone while working for Employer. (Report of Occupational Injury or Illness, November 25, 2011).

2) On July 11, 2022, Employee said he was frustrated because he was trying to get a spinal cord stimulator (SCS). He "emphatically" stated he wanted to get off opioids and was trying to find a rehabilitation center to monitor his withdrawal. (James Wiesman, MD, report, July 11, 2022).

3) On September 29, 2023, Employer petitioned the Board for an order as follows:

> Employer petitions for the termination of ongoing narcotics and an order compelling Mr. Unsel to attend functional rehabilitation as recommended by the IME physicians. Nearly two years of offers to pay for & facilitate this treatment were ignored, despite Mr. Unsel telling Dr. Weisman (IME) the Insurer was not assisting. (Petition, September 29, 2023).

4) On November 9, 2023, the parties appeared before a Board designee to state the issue for a hearing set for February 13, 2024. The only issue was Employer's September 29, 2023 "petition to terminate narcotics and compel attendance at functional rehabilitation." (Prehearing Conference Summary, November 9, 2023).

5) On February 6, 2024, Employer's adjuster wrote a letter to no one in particular stating, "This correspondence is to verify that all treatment for which medical providers either called or wrote to the carrier for authorization was authorized." The letter does not state if any such providers called or wrote for authorization that was then authorized. (Letter, February 6, 2024).

6) On February 6, 2024, Employer's hearing brief for the February 13, 2024 hearing said:

> Due to Employee's Medicare status, the parties seek an order clarifying compensability to two specific treatments: detoxification/functional restoration and a[n] . . . SCS. The parties are in agreement about the compensability of the first, and that the second (SCS) should be ordered not compensable. However, in order to have legally binding weight with Medicare, a merits hearing and Decision and Order are required. (Employer's Hearing Brief, February 6, 2024).

Employer stated the new issues therefore were:

> 1. Whether [Employee] should be compelled to attend an inpatient detoxification/functional restoration program as his costly, high dose narcotic use is not improving either his pain or functionality.
>
> 2. Whether an invasive spinal cord stimulator is reasonable and medically necessary for medical treatment when [Employee] had prior poor experiences. (Employer's Hearing Brief, February 6, 2024).

Employer said the Board has the right to "suspend" Employee's benefits under AS 23.30.095(d). It stated medical care must be "reasonable and necessary." Employer conceded its liability for treatment for Employee's substance abuse and narcotic addiction resulting from prescription medication for his work injury, and said he had an obligation to minimize his damages. Employer sought a "proactive determination that refusal to participate in the reasonable and appropriate recommendation for inpatient substance abuse/functional restoration program should result in a

termination of compensability for narcotic medication benefits." It suggested "all physicians" continued to opine that an SCS was a viable option. Employer said because physicians said an SCS is an option, "the parties cannot settle the claim" because they needed predictability "about a very large cost item." It sought an order stating an SCS was not reasonable and medically necessary treatment and thus "not compensable" as future treatment for Employee's recovery. (Employer's Hearing Brief, February 6, 2024).

7) On February 8, 2024, Employee stated he would "love to attend an inpatient detoxification/functional restoration program if such an option would work for him." He did not want to continue taking pain medications, but they provided his only relief. Employee intended to rely on opinions from Forest Tennant, MD, reportedly an expert on arachnoiditis, a condition Employee has. Employee said Dr. Tennant would assist the panel in determining how to treat Employee's arachnoiditis and reduce his narcotic use. He said he never refused to cooperate with treatment and contended Employer wanted only a "partial treatment plan" that would not relieve his pain. Employee suggested the panel hear from Dr. Tennant "before ordering that Employer can cease paying for his narcotics." He had tried an SCS, and it failed. Employee had no objection to a finding that an SCS was not reasonable or necessary treatment, and he did not want, nor did he need an SCS. He criticized Employer for suggesting a functional restoration program without specifying one. Employee stated Employer's doctors did not know how to treat arachnoiditis and recommended "dangerous" treatment. He sought attorney fees for defending against Employer's petition, under "AS 23.30.145(b) and (c)." (Employee Hearing Brief, February 8, 2024).

8) On February 8, 2024, Weiner in his first attorney fee and cost affidavit swore:

> 2. The attached invoices reflect time actually and necessarily spent on this case. Attorney and paralegal fees amount to $14,190.00 and $0.20 in costs. I intend to supplement these costs at the hearing. Billing is completed at the end of each month, so all billing after January 31, 2024 was taken from timesheets that are not reflected in the billing. These are only actual attorney fees pursuant to AS 23.30.145(b).
>
> 3. Fees should also be calculated pursuant to AS 23.30.145(a). The employee reserves the right to supplement this information at the hearing scheduled on February 13, 2024.

Attached to Weiner's affidavit were nine pages of itemized entries showing service dates, initials for the attorney or paralegal providing services, a brief description of services, the time expended,

the hourly rate, and the total for each item. Weiner billed $300 per hour for his time, and billed his paralegals at $100 per hour. The itemization does not separate paralegal fees from attorney fees. Nonetheless, the total reflected on the itemization is $11,610 for attorney fees and paralegal costs, and $1.89 for other costs including long-distance phone and facsimile services. This amount differs from the $14,190 stated in Weiner's affidavit. (Affidavit of Attorney's Fees and Costs, February 8, 2024, and attachments (affidavit (1)).

9) At hearing on February 13, 2024, the panel declined to allow Employee to call Dr. Tennant, because he was an unauthorized medical expert. It also did not consider Weiner's attorney fee request because it was not raised as an issue for hearing. (Record, February 13, 2024).

10) At the February 13, 2024 hearing Employer modified its position. On the newly added SCS issue, Employer asked the panel to rule whether the SCS is compensable, or not. Employer wanted predictability in planning for possible settlement or for future expenditures. As for the inpatient multidisciplinary pain program, Employer said it wanted Employee to attend one to assist him with medication dependency brought about by his work injury and related treatment. Nevertheless, it said that if Employee did not go to a Board-ordered inpatient multidisciplinary pain program, within a specific time, the panel should order that Employer need not pay for his prescription painkillers. It added, for settlement purposes, that Medicare will not cover certain benefits without a Board order finding them not compensable. (Record, February 13, 2024).

11) At the February 13, 2024 hearing Employee said an SCS is not a solution for him but acknowledged technology may improve over time. He did not foreclose the possibility that he may change his mind and want an SCS later. Employee said Employer simply wanted to "detox him" and he already had a bad reaction to Suboxone, a medication typically used in such clinics. He wanted to get better and not be "judged" anymore. Employee likened Employer's petition to "extortion." (Record, February 13, 2024).

12) On February 14, 2024, *Unsel v. Klebs Mechanical, Inc.*, AWCB Dec. No. 24-0007 (February 14, 2024) (*Unsel II*), noted preliminary and other issues as raised on February 13, 2024:

> Employee contended he has been frustrated in trying to find appropriate treatment for his arachnoiditis, to which he attributes all his symptoms. He contended Dr. Tennant is an appropriate person to offer an expert opinion on how to address this difficult disease. An oral order declined to allow Dr. Tennant's testimony at hearing.

> **1) Was the oral order disallowing Dr. Tennant's testimony correct?**
>
> Employer contends [an SCS] is neither reasonable nor necessary medical treatment for Employee given his circumstances. Nevertheless, it requests an order finding the SCS is or is not compensable as future medical treatment.
>
> Employee contends he has no objection to an order finding the SCS is not a reasonable treatment for him. He currently does not want to undergo any further SCS treatment.
>
> **2) Is an SCS reasonable medical treatment?**
>
> Employer contends Employee should be ordered to attend an inpatient multidisciplinary pain program. It contends his current treatment, which consists mainly of pain medication, is not helping him and it needs to end. Employer seeks an order terminating his narcotic entitlement should he fail to attend.
>
> Employee contends he wants to get off narcotic medication and wants to attend a clinic so long as it is with physicians familiar with arachnoiditis, and is not just a "detox" clinic.
>
> **3) Should Employee be required to attend, and Employer be required to pay for, an inpatient multidisciplinary pain program?**
>
> **4) Should benefit suspension be decided at this time?**

Based on the parties' pleadings and arguments, *Unsel II* made relevant factual findings:

> 126) On February 6, 2024, Employer contended that due to "Employee's Medicare status," the parties sought an order "clarifying compensability" for (1) "detoxification/functional restoration" and (2) an SCS. It contended the parties "are in agreement" that a detoxification and functional restoration program is compensable, and the Board should order the SCS is not compensable. Employer suggested that "to have legally binding weight with Medicare," the Board must issue a decision addressing these two issues. It contended the issues therefore are (1) should Employee be compelled to attend an inpatient multidisciplinary pain clinic, and (2) is an SCS reasonable and medically necessary treatment? (Employer's Hearing Brief, February 6, 2024).
>
> 127) As legal support, Employer relied on AS 23.30.001(1) and contended the Board has the right to suspend compensation under AS 23.30.095(d). . . .
>
> 128) Employer contended risks associated with Employee's continued narcotic use far outweigh benefits he would get from weaning at a multidisciplinary pain center. It contended Employee does not get functional increase or significant pain reduction from his opioid treatments. Employer noted Employee wants to go to a

pain clinic. It seeks a "proactive determination that refusal to participate in the reasonable and appropriate recommendation for inpatient substance abuse/functional restoration program should result in a termination of compensability for narcotic medication benefits." (Employer's Hearing Brief, February 6, 2024).

129) As for the SCS, Employer suggested "all physicians" continued to opine an SCS is a viable option. It further noted Employee does not want it and Employer cannot force him to get one. Employer said because physicians said it is an option, "the parties cannot settle the claim" because [they need] predictability "about a very large cost item." It seeks an order stating an SCS is not reasonable and medically necessary treatment and thus "not compensable" as future treatment for Employee's recovery. (Employer's Hearing Brief, February 6, 2024).
. . . .

131) On February 8, 2024, Employee said he would "love to attend" the recommended inpatient multidisciplinary pain clinic. He did not want to continue with pain medicine and currently did not want to have an SCS. Employee contended the Board should listen to Dr. Tennant who is an expert in arachnoiditis. He had "no objection to the Board finding that a spinal cord stimulator is not a reasonable treatment" for him "under the circumstances." He objected to a pain clinic with physicians who do not know how to treat arachnoiditis. Employee requested attorney fees for responding to Employer's petition. (Employee Hearing Brief, February 8, 2024).
. . . .

139) Employee does not want an SCS. He reviewed his records and complications he had, including an infection, and this convinced him that an SCS is not an option. (Record).

140) In its closing argument, Employer modified its position somewhat. On the SCS issue, Employer stated the Board should rule either that the SCS is compensable, or it is not. Employer just wanted predictability in planning for a possible settlement or expected future expenditures. As for the inpatient multidisciplinary pain program, Employer said it wanted Employee to attend one to assist him with his medication dependency brought about by his work injury and related treatment. Nevertheless, it contended that if Employee did not go to a Board-ordered inpatient multidisciplinary pain program, within a specific time, the Board should order that Employer need not pay for his prescription painkillers. It added, Medicare will not cover certain benefits without a Board order finding them not compensable. . . .

141) At hearing and in his closing argument, Employee contended an SCS is not a solution for him but acknowledged the technology may improve over time. He does not foreclose the possibility that he may change his mind and want an SCS later. Employee contended Employer simply wants to "detox him" and he has

> already had a bad reaction to Suboxone. He wants to get better and not be "judged" anymore. Employee likens Employer's petition to "extortion." He contended the Board cannot order him to attend an inpatient multidisciplinary pain clinic. . . .

Unsel II also offered the following, relevant analyses:

> **2) Is an SCS reasonable medical treatment?**
>
> Employer initially sought an order finding an SCS is not reasonable and necessary medical treatment for Employee's injury. At hearing, it changed his [sic] position and simply wanted a decision stating the SCS is or is not compensable. Employee states he does not object to such an order. The parties appear to be trying to settle Employee's remaining medical treatment and related transportation benefits and feel this decision is important to facilitate settlement. The parties' positions place this issue in an unusual posture. . . .
> . . . .
>
> Employee has vacillated between wanting and not wanting an SCS. Most recently he stated he did not want an SCS, based on a family member's negative experiences with them and his review of his own medical records reminding him of his own complications from previous attempts. At hearing, he testified that based on his past experience with trial SCSs, including malfunctions, poor results and an infection, they were no longer an option for him. On the other hand, Employee stated he would attend a specified inpatient multidisciplinary pain program to wean himself from medications and hopefully gain functional restoration. At least one physician stated it is not possible to determine a pain source unless Employee is cleansed from narcotics and other unnecessary medications so physicians can pinpoint a pain generator and apply possible medical treatment or procedures to reduce or eliminate that pain. Employee is confident that arachnoiditis is the sole cause of his painful symptoms; he could be mistaken.
>
> Given the above, and assuming Employee attends an inpatient multidisciplinary pain program and is weaned from narcotics and other inapplicable or inappropriate medications, he may reduce his overall pain level. That is the goal. At that point, his physicians may be able to pinpoint the source of any remaining pain, including but not limited to arachnoiditis. If, hypothetically, physicians at that point all agree an SCS would probably be helpful in reducing his remaining pain and increasing his function, Employee may vacillate yet again and decide an SCS is appropriate treatment for him after all. In closing argument at hearing, Employee stated an SCS is not completely foreclosed, because new and better devices may be developed in the future. If this decision finds an SCS is not reasonable treatment, it is likely Employee would have to pay for that himself or place the burden on taxpayers to pay for it under Medicare. Neither party explained why either outcome is better than Employer paying for an SCS if it continues to be reasonable treatment and Employee changes his mind and chooses to try one again.

Based on an abundance of substantial evidence, including credible opinions from Drs. Johnson, Hilgenhurst, Schooley, Wiesman, and Weiss, and opinions from Drs. Thomas, Robins, Webb and Charway who stated Employee was psychologically fit for an SCS, an SCS is reasonable treatment for attempting to reduce Employee's symptoms. AS 23.30.122; *Smith*. Drs. Olbrich's and Hazelwood's opinions are given less weight on the SCS issue because Dr. Olbrich acknowledged that SCSs were not his expertise; furthermore, he sounded more like an advocate for Employer by volunteering with bold-faced emphasis that addiction does not count as an injury, which is a principal contrary to Alaska law. *Parris-Eastlake*. Drs. Olbrich's and Hazelwood's opinions stand against the weight of five other physicians, some of whom with SCS expertise. AS 23.30.122; *Smith*. This finding does not mean Employee has to have a third SCS trial or an SCS implant. It simply answers the question presented, and the parties are free to use this finding and decision for whatever purpose they deem appropriate. But absent a change in circumstances, if Employee decides to have an SCS in the future, Employer will have to pay for it.
. . . .

3)Should Employee be required to attend, and Employer be required to pay for, an inpatient multidisciplinary pain program?
. . . .

Unlike the SCS issue, there are no medical providers suggesting Employee should not attend a "rehabilitation center," a "rehab facility," or an "inpatient multidisciplinary pain program." Thus, there is no factual dispute on this issue and the presumption analysis need not be applied.

. . . There is no readily identifiable downside to Employee attending an inpatient multidisciplinary pain program as Drs. Wiesman and Hazelwood both recommended. Employee may decline Suboxone since he now knows he had a bad reaction to that substance. Thus, an inpatient multidisciplinary pain program, absent any evidence to the contrary and giving weight and credibility to Drs. Wiesman's and Hazelwood's opinions, and considering Employee's valid concerns, is reasonable treatment for the intended purposes. AS 23.30.122; *Smith*; *Phillips Petroleum*; *Mendoza*; *Bignell*; *Metcalf*; *Bockness*.

Employee may seek a referral to an inpatient multidisciplinary pain program from his Dr. Hilgenhurst, but a referral is unnecessary. To interpret and apply the Act to make this process quick, efficient, fair, predictable and to deliver medical benefits to Employee at a reasonable cost to Employer, and to make the process simple and summary, this decision will order Employee to attend, and Employer to pay for, an inpatient multidisciplinary pain program at either the Cleveland or Mayo Clinics at Employee's option. AS 23.30.001(1); AS 23.30.005(h).

Neither party should have any objection to this process since Employee stated he wanted to go, and Employer stated he needs to go and will pay for it. To get this process moving, Employee will be directed to select one of these clinics and make

an appointment for whatever preliminary evaluation is necessary within 30 days; the appointment need not occur within 30 days, but the appointment must be made. It is possible that these clinics may not accept workers' compensation claimants. If that occurs, Employee will be directed to find an inpatient multidisciplinary pain program that accepts Alaska workers' compensation cases, and this panel reserves jurisdiction to resolve any disputes on this issue. If a clinic sees Employee for an evaluation, Employer will pay for the visit and Employee will submit a transportation log through his and Employer's attorneys to the adjuster for reimbursement in accordance with the Act and applicable regulations. If Employee is admitted to an inpatient multidisciplinary pain program, Employer will pay the costs in accordance with the Act and regulations. Both parties' rights and defenses are reserved.

4)Should benefit suspension be decided at this time?

Employer primarily relies on AS 23.30.095(d) to seek an order "terminating" Employee's right to narcotic medication if he refuses to attend an inpatient multidisciplinary pain program. However, that statute requires a finding that Employee "unreasonably" refused to "submit to medical" treatment. That finding requires an evidentiary hearing after Employee refuses to go to the inpatient multidisciplinary pain program as directed in this decision. His medical benefits may be "suspended," not terminated, "while the refusal continues" and no compensation may be paid during the suspension "unless the circumstances justified the refusal." Therefore, this decision will not address any suspension remedy unless Employee refuses or constructively refuses to attend the pain program as directed, and after an evidentiary hearing.

CONCLUSIONS OF LAW

1) The oral order disallowing Dr. Tennant's testimony was correct.
2) An SCS is reasonable medical treatment.
3) Employee will be required to attend, and Employer will be required to pay for, an inpatient multidisciplinary pain program.
4) Benefit suspension will not be decided at this time.

ORDER

1) Employer's September 29, 2023 petition is denied in part and granted in part.
2) Employer's petition to terminate narcotics is denied.
3) Employer's petition to compel Employee's attendance at an inpatient multidisciplinary pain program is granted. Employee is directed to make an appointment for a preliminary evaluation at an inpatient multidisciplinary pain program of his choice within the continental United States within 30 days from the date this this decision is issued. The parties through counsel are directed to work together to arrange Employer's payment for an evaluation to see if the clinic will accept Employee as a patient. Employee is directed to submit an itemized travel

> log through attorneys to the adjuster for reimbursement for travel to and from any preliminary evaluation.
> 4) If an inpatient multidisciplinary pain program accepts Employee as a patient, the parties are directed to work together through counsel to make payment arrangements.
> 5) The panel reserves jurisdiction over this issue if inpatient multidisciplinary pain programs decline to accept Employee as a patient for any reason.
> 6) An SCS is reasonable medical treatment compensable under the Act for Employee's work injury with Employer. (*Unsel II*).

The panel for the instant hearing carefully reviewed *Unsel II* and could find no EME opinion suggesting that Employee be seen at a multidisciplinary pain program that had specific expertise treating patients with arachnoiditis. (*Unsel II*; observations).

13) On February 16, 2024, Weiner claimed attorney fees and costs, "Previously provided on main claim." He requested $17,490.20 in attorney fees and costs for services rendered "relevant to the hearing on February 13, 2024," and in preparation for Employee's instant attorney fee and cost claim. (Claim for Workers' Compensation Benefits, February 16, 2024).

14) On February 16, 2024, Weiner said in relevant part in his second attorney fee affidavit:

> 2. All invoices were attached to the affidavit of attorney's fees that were filed on February 8, 2024. These are only actual attorney fees pursuant to AS 23.30.145(b). The previously attached invoices reflected time actually and necessarily spent on this case up to the time of filing the amended affidavit of attorney's fees and costs three business days prior to the hearing. Attorney and paralegal fees amounted to $14,190.00 and $0.20 in costs. Since that time undersigned and his office have spent an additional 2 hours at $300.00 an hour to prepare the affidavit of attorney fees on February 8, 2024; an additional 3 hours at $300.00 an hour on February 12, 2024[,] preparing for the hearing, another four hours preparing for and attending the hearing on February 13, 2024, and another 2 hours at $300.00 an hour for preparing the amended affidavit and the claim for attorney fees. This amounts to an additional $3,300 in attorney fees. This brings the total attorney fees to date to $17,490.20.
>
> 3. Attorney fees are inputted into Word timesheets and then placed into the billing system at the end of each month. The fees that are not on the invoices are from February, and the end of February has not arrived as of yet. Therefore, there is no invoice, but there are records in my timesheets for February billing.
>
> 4. It should be also be noted that my fees for this case are based on the retainer entered several years ago. Currently, my fees are $450.00 an hour for workers' compensation cases, consistent with other experienced workers' compensation

> attorneys. I also do not usually force cases to trial, so this attorney fee affidavit is somewhat novel to me.
>
> 5. Fees should also be calculated pursuant to AS 23.30.145(a). . . . (Amended Affidavit of Attorney's Fees and Costs, February 16, 2024 (affidavit (2)).

15) The dollar amounts in Weiner's February 16, 2024 affidavit (2) on its face do not correlate to the dollar amounts on itemizations attached to affidavit (1). (Observations).

16) On March 13, 2024, Employer controverted Employee's claim for attorney fees and costs and contended there was no nexus between Weiner's legal services and any benefit to Employee. Employer stated it offered a multidisciplinary pain program "at all times," and never controverted the SCS. It contended that Weiner's "quality of work" did not warrant the attorney fees requested. (Controversion Notice, March 13, 2024).

17) On March 13, 2024, Employer answered the February 16, 2024 claim in relevant part:

> 4. Counsel for employee did nothing to gain Employee any benefits. The ordered program has been offered for years. Employer has been requesting the same information the Board ordered provided for years. Employee's counsel has failed to help him gain any benefits by failing to get program information.
>
> 5. Further, Employee's counsel did not gain [SCS] benefits. Those have never been denied. Employee adamantly denied wanting them and wanted to settle his claim. Employer said that was not possible due to the expense of the SCS in a settlement with a Medicare beneficiary.
>
> 6. Employer, thus, agreed to allow the [SCS] issue for hearing so that Employee could convince the Board an SCS was not reasonable in his case. While Employee testified credibly that he did not ever want the SCS and explained all of his reasons, his counsel (who appeared, at best, distracted throughout the hearing) undermined his client's position on closing argument -- resulting in an affirmation that the SCS is compensable and again making the medical unsettleable because of the large potential future expense for a Medicare beneficiary. Counsel's actions actually went against Employee's stated interest. . . . (Answer to Employee's Workers' Compensation Claim, March 13, 2024).

18) On March 18, 2024, Weiner's third fee and cost affidavit stated in relevant part:

> 2. The attached invoices reflect time actually and necessarily spent on this case. Attached are the attorney's fees through February 29, 2024. The total is [$]19,490.00 and [$]1.89 in costs. These are only actual attorney fees pursuant to AS 23.30.145(b).

3. Fees should also be calculated pursuant to AS 23.30.145(a). . . .

Attached to Weiner's affidavit were the same nine pages attached to affidavit (1), along with three additional pages itemizing professional services from February 1, 2024, through February 28, 2024. These itemizations listed an additional $8,630 for services Weiner and his paralegals rendered, at $300 and $100 per hour, respectively. (Second Amended Affidavit of Attorney's Fees and Costs, March 18, 2024 (affidavit (3)).

19) On March 28, 2024, Employer opposed Employee's attorney fee affidavits on grounds they were a "request for interim fees on an interlocutory decision." It said Weiner failed to comply with 8 AAC 45.180(b), which constituted a waiver to recover fees beyond statutory minimum fees under that regulation and under AS 23.30.145. It added:

> Finally, in its hearing brief, Employer and insurer intend to assert specific defenses against many of the entries. A spreadsheet will be provided at hearing for Board review. To allow for sufficient notice of objections, these objections and defenses include but are not limited to
>
> (1) the relationship of the 2021 time to a prior C&R for which counsel was already compensated as a part of;
> (2) duplication of billing between paralegal and attorney;
> (3) duplication of time entries by counsel;
> (4) what appears to be significant overbilling for simple tasks on almost every entry by counsel (not a single entry is less than .3);
> (5) billing related to settlement discussions, IMEs, prescriptions, and releases, which are unrelated to the issues which went to hearing;
> (6) claiming two hours for adding one paragraph to an affidavit;
> (7) confusion over the internally inconsistent documentation of hourly rates;
> (8) blatant overbilling related to pleadings, hearing briefing, and attendance;
> (9) entries are too vague to discern relationship or actions undertaken;
> (10) entries related to Dr. Tennant, who was excluded as an unallowed expert; and
> (11) failure to comply with counsel fee request requirements.
>
> Bottom line is that of those entries which might possibly be related to the issues for hearing, the entries all appear grossly overinflated and inaccurate, calling into question the veracity of an affidavit swearing their accuracy. (Opposition to Employee's Affidavits of Attorney's Fees and Costs, March 28, 2024).

20) On April 4, 2024, Employer's adjuster wrote to Cleveland Clinic, one of Employee's selected facilities, stating, "This correspondence provides authorization for the initial consultation

evaluation and participation in the In-patient Multidisciplinary Pain Program for patient Aaron Unsel [date of birth redacted].” (Letter, April 4, 2024).

21) On April 9, 2024, the parties set a May 23, 2024 hearing limited to Employee’s claim for attorney fees and costs. (Prehearing Conference Summary, April 9, 2024).

22) On May 3, 2024, Employer filed and served documents including email strings among the parties and their attorneys, and letters to Employee about informational releases. The email strings are redundant, and several exhibits (especially N and O) have blank pages, presumably because attachments were photocopies of receipts or other documents not included in the evidence filing. The earliest email strings from 2021 addressed attorney fee payments to Weiner. Beginning February 25, 2022, the parties began emailing regarding a functional restoration program for Employee. Employee stated, “He is willing to do a program, but his stipulation would be through his doctor.” Thereafter, emails between the attorneys addressed primarily Employer’s request for follow-up information regarding where Employee wanted to go. By December 1, 2022, Employer was suggesting that if Employee did not make a rehabilitation facility selection soon, Employer would file a petition to compel his attendance. In 2024, Employee emailed Weiner and Tansik stating that he could not give additional information about the rehabilitation clinics because the facilities he had located that knew something about arachnoiditis required him to be seen at the clinic first before the clinic would provide details about timelines and expenses. (Notice of Filing Hearing Evidence, May 3, 2024).

23) On May 6, 2024, Weiner’s fourth attorney fee and cost affidavit, stated in part:

> 2. The attached invoices reflect time actually and necessarily spent on this case. Attached are the attorney’s fees through March 31, 2024, to supplement the previously provided invoices. The total is $21,190.00 and [$]1.89 in costs. These are only actual fees pursuant to AS 23.30.145(b).
>
> 3. Fees should also be calculated pursuant to AS 23.30.145(a).

Attached to this affidavit was a one-page itemization totaling an additional $1,700 for services that Weiner and his paralegals rendered, at $300 and $100 per hour, respectively. (Third Amended Affidavit of Attorney’s Fees and Costs, (May 6, 2024) (affidavit (4)).

24) On May 16, 2024, Employer contended: It had not controverted Employee’s right to benefits and had paid all medical bills presented. It had been trying to get Employee into a functional restoration program for years. At the *Unsel II* hearing, Employee’s counsel failed to gain any

benefit for him, and in fact "destroyed" his expressed goal of settling his case. There is no factual or legal bases for the panel to award Weiner attorney fees and costs because it awarded Employee no benefits resulting from his services. However, citing two Board decisions, Employer acknowledged that if an attorney "successfully defends against a petition brought by an employer that would otherwise diminish an employee's entitlement to benefits, interim fees may be awarded." *Unsel II* did not resolve the termination-of-narcotics issue, so Employee did not prevail on that either. Employer's hearing brief further contended:

> The Board did exactly what the Employer asked of them, ordering the Employee into a functional restoration program and affirmatively ruling on compensability of a[n] [SCS] that Employee wanted excluded for purposes of settlement.

Given the above, Employer said Weiner was entitled to no attorney fees or costs. (Employer's Hearing Brief, May 16, 2024).

25) Alternately, and in addition to the above defenses, Employer stated: Weiner's fee affidavits are "invalid" and "excessive" when compared to required Prof. Rule 1.5(a) considerations. Addressing these, Employer said first, the issues in *Unsel II* were not complex or novel:

> The issue was simply whether the Employer could obtain an order for an employee to participate in a functional rehabilitation program (FRP) that he repeatedly asserted he wanted but did nothing to pursue.

Second, the "length of the work" was dictated by Weiner "doing nothing" to move the matter forward. In its words, "The time was driven by avoidance, rather than ongoing work on the file." Third, Weiner gave "extremely limited" effort and since he previously stated he was "very busy with other matters" this demonstrated that Employee's case did not require him to decline other work. Fourth, Weiner's work did not result in "any gained benefits" and Employer was actually trying to provide Employee additional benefits. Fifth, the quality and quantity of Weiner's work was "negligible." Employer criticized Weiner's prehearing preparation, briefing, appearance and tardiness at the *Unsel II* hearing while attending it "from a ski hill, changing clothes, and while driving a car." It said Weiner spent all his "time and energy" on "seeking fees" and advocating for himself. His exhibits and Dr. Tennant were excluded at the *Unsel II* hearing. Thus, Employer stated if fees are awardable they must be "seriously discounted" for failing to meet Prof. Rule 1.5(a) requirements. (Employer's Hearing Brief, May 16, 2024).

26) As another reason to deny Weiner's attorney fee request, Employer said numerous itemized entries on his affidavits failed to "adhere to the regulations," were "block billed," were inaccurate "at best" and "falsified" at worst, and often duplicated work performed by his paralegals. For all these reasons Employer stated Employee's attorney fee and cost request should be denied. (Employer's Hearing Brief, May 16, 2024).

27) On May 16, 2024, Weiner said: He obtained a benefit for Employee because his narcotic benefits were going to be terminated unless he went to a rehabilitation program. Weiner negotiated with Tansik on the issues raised in *Unsel II*, and consulted with Employee to determine the rehabilitation program best for him. He prepared Employee for the last hearing and ultimately, "won on every point, even some that were not part of the Employer's petition." *Unsel II* ordered Employer to "facilitate" Employee getting into an arachnoiditis program at Cleveland or Mayo Clinic "(or some equivalent)." This was a "clear benefit" for Employee. Weiner clarified his fee request fell under §145(b). He stated there is no difference between success on a controversion or on a petition, for attorney fee award purposes. Therefore, Weiner was "successful on his claim" and should get attorney fees and costs. Alternately, Weiner said: Employer was trying to cut off Employee's pain medications "by using the excuse that they just wanted him to go to a rehabilitation program." Employer was just setting him up for failure but Weiner "stopped that." Therefore, this was not an interim benefit but a final benefit to Employee "who no longer has to worry about the employer cutting off his pain medications" because he "does not go into the program they want him to enter." (Employee Hearing Brief, May 16, 2024).

28) Weiner further stated: He submitted an appropriate fee affidavit that "details all the work" that went into defending Employee against Employer's petition. The issue "was complex" and dealt with a "relatively uncommon condition," arachnoiditis and Employer's effort to force Employee into its "preferred mode of treatment that would save them money." Employer has no right to know the contents of communications between Employee and Weiner, but Weiner billed for all communications and "the time billed is accurate." Employee tried to move the matter forward because the adjuster was "not doing what she needed to get the programs approved." The adjuster failed to follow through. Moreover:

> The employer makes an argument that appears to lack any legal basis -- that [Weiner] was not prevented from taking any other work [by representing Employee]. Since when is this a factor for considering whether to pay a successful

> workers' compensation employee's attorney fees? There is no citation to this factor, and nothing in the regulation which suggests this is a factor.

Weiner only "has some much time in his day." Employee's case took time away from "his family and other activities" and he dedicated it to Employee. Weiner's work "resulted in a positive result" for Employee. He researched arachnoiditis programs and contacted an expert. Weiner was "able to have a technician attend the hearing" to explain Employee's lab results. He also prepared Employee for his hearing testimony. Weiner noted the *Unsel II* hearing "ended up starting earlier than the original estimate," and he was able to attend the hearing and obtain a "successful result." He criticized Tansik's work and suggested she was unfamiliar with his efforts to get Employee alternative care, or with the poor result from his previous pain clinic. Weiner was "prepared and attentive in areas where it counted." (Employee's Hearing Brief, May 16, 2024).

29) Weiner continued: "There is nothing false about the fee affidavits." For example, reviewing a hearing request includes considering "what is behind" the request especially where Employer's "petition did not make much sense." It also involved checking "availability, reviewing the issues to see what will be necessary for the hearing, and conferring with the paralegal about preparations for the hearing." If anything, "one half hour is light." There is "no rule against block billing." Weiner said his billings were not excessive, and he has obtained $450 per hour in other cases; here he is billing only $300. His billings were "consistent with the amount of time and effort spent on this case." He criticized Employer's "excessive" billing allegations "without explaining how they were excessive." Employer made "biased and false allegations" suggesting Weiner's billing practices were inaccurate. "There is no requirement that [Weiner] spend as little time preparing for hearing as Ms. Tansik does." Weiner and his paralegals collaborate on each other's work. He criticized Employer's contention that Weiner's fee affidavits failed to include sufficient detail, but Employer could somehow determine that "the entries are unrelated" to the issues in *Unsel II*. "All billings had to do with the issues surrounding the employer's recent petition." Weiner "made sure" billings prior to Employer's petition "were not included in the bill." Consequently, "None of the billings should be eliminated." Employer failed to provide comparison to "any other counsel" to support its contention that the time Weiner spent on hearing preparation was excessive or higher than any other counsel would have required. It further failed to state how Weiner's fee affidavits did not conform to the applicable regulations. (Employee's Hearing Brief, May 16, 2024).

30) Lastly, Weiner said: Employer's arguments were "inaccurate" and "completely improper." He suggested Tansik did not undermine his case because, "Employer won nothing." Weiner did not understand why Employer "has taken this approach" to his case. Employee needs his medications and has unsuccessfully tried to wean off them. Weiner suggested Tansik "may be applying her own religious beliefs" in recommending a specific treatment approach in this case. If so, then "all the more reason" why Weiner should be awarded his full, reasonable attorney fees. (Employee's Hearing Brief, May 16, 2024).

31) On May 20, 2024, Weiner did not file another fee affidavit. (Agency file).

32) As a preliminary matter at hearing on May 23, 2024, Employer objected to Weiner's attorney fees between March 29, 2024, and May 20, 2024, and said he waived those fees because he did not include them on an attorney fee affidavit he should have by regulation filed three working days prior to the hearing. It relied on 8 AAC 45.180(b)(2) for support; Employer contended that "the affidavit" referred to in §180(b)(2), meant the fee affidavit Weiner was required to file three working days prior to the hearing for any additional attorney fees he was requesting, incurred after he filed any prior affidavit. Employer further objected to Weiner testifying about corrections or inaccuracies in his previously filed attorney fee affidavits. It stated that Weiner had notice from Employer's answer, controversion and briefing that his attorney fee affidavits were inaccurate and did not comply with the regulations. (Record).

33) Weiner stated his May 6, 2024 fee affidavit covered everything "back." He said there was "very little work done" after that date. Weiner was mostly concerned that attorney fees on his May 6, 2024 affidavit (affidavit (4)) be considered, as it was "more than timely." As for Weiner testifying to correct any "mistakes" in his prior attorney fee affidavits, he had no notice of any mistakes and did not know to what Employer was referring. (Record).

34) After the panel deliberated, an oral order deferred Employer's first objection to this written decision, because it was a legal issue. The panel orally overruled Employer's second objection and permitted Weiner to testify about his prior attorney fee affidavits and any other issue in his claim, because he was the "claimant." The panel cited *Rusch* as support. (Record).

35) The parties objected to each other's briefing. Employee's brief was filed untimely after 5:00 PM on the deadline date. Employer's timely filed brief inadvertently lacked an exhibit that included its detailed objection to Weiner's attorney fee entries, which it filed untimely the next

day. An oral order accepted both parties' filings as timely. The panel adjourned the hearing for approximately 15 minutes so Weiner could review the tardy attachment. (Record).

36) Weiner in his opening statement recalled deducting billings from his affidavits that were previously billed and paid, including work done on a Compromise and Release (C&R) agreement. He further said Employer was manipulating Employee by not formally controverting his right to benefits, but otherwise resisting them by petitioning to cut them off. If Employee was without his medications, "he could have died." Weiner said he stepped in after settling Employee's case when Employer filed a petition, to help him out. If he did not think he was ultimately entitled to fees, he would not have helped Employee. Weiner further stated "religion" played a role in the manner by which Employer handled this case; he did not elaborate on this contention. He takes "the little" cases to help his clients. Employee prevailed in *Unsel II*, but conceded the decision disagreed with his position on the SCS and noted that the Board did not have to "buy-in" to the parties' attempt to settle medical issues. Employee did not have to "play along" with Employer's SCS theory just so he could settle his case. Whether Employee needs an SCS or wants one, or not, has nothing to do with settlement. Weiner defended his appearance at the *Unsel II* hearing and contended that notwithstanding his presence on a ski slope or in his vehicle during the hearing, he did what he needed to prevail. He obtained "tremendous benefit" for Employee, while Employer prevailed on nothing. Weiner said he charged far less for his hourly rate in this case than his peers who would otherwise not even take Employee's case. Further, the Board should grant attorney fees in this situation because he stepped in to assist Employee after the case had previously settled. He implied that without awarded attorney fees, injured workers in this situation would lack follow-up assistance from their prior attorneys. (Record).

37) Employer contended: Weiner was not entitled to an "interim" attorney fee award. There was no claim, controversion or controversion-in-fact. Therefore, under the applicable statutes, no attorney fees may be awarded. Moreover, Weiner failed to meet regulatory standards by block-billing, had other infirmities with his affidavits and itemizations, and failed to file any paralegal affidavits, thereby waiving his right to paralegal costs. Employer said Weiner's fee affidavits failed to address the nature, length, complexity of his services and benefits resulting from his services to Employee. It further said Weiner failed to address the *Rusch* factors as required in these cases since 2019. Employer contended that both paralegals and Weiner reviewed the same documents, and that was "duplicative." Weiner engaged in "expansive over-billing practices."

Employer said the panel could take "administrative note" that a two-page hearing brief, which in its view contained no legal authority or analysis, could not possibly take 3.6 hours to complete. Any time spent on Dr. Tennant should be stricken because *Unsel II* disallowed his testimony based on a well-known legal principle prohibiting medical experts outside the Act's parameters. It stated, contrary to Weiner's statement, that he billed for services already resolved and paid in the C&R. Employer said Weiner did "nothing for his client" since 2021. (Record).

38) Weiner testified at length at hearing. The designated chair asked him specific questions about his four previously filed attorney fee affidavits: (1) February 8, 2024; (2) February 16, 2024; (3) March 18, 2024; and (4) May 6, 2024. Fee affidavit (1) on its face stated Weiner claimed $14,190 in fees and $0.20 in costs, but his attached itemization reflected only $11,610 in fees and $1.89 in costs. When asked to explain this discrepancy, Weiner referred to fee affidavit (2) and concluded that the amount set forth in fee affidavit (2) had already been included in fee affidavit (1), but he had made a calculation error, and agreed that his "attorney fees," which in his mind included paralegal fees, should have been $14,910, not $14,190, and his costs were actually $1.89. He agreed with the chair's understanding that fee affidavit (2) totaled $3,300, which was included in fee affidavit (1). Weiner testified he deducted the C&R-related time, which were the first four entries on his itemization for 2021. However, notwithstanding the above, Weiner's fee affidavit (1) did not deduct the first four entries from 2021, and fee affidavit (2) added $3,300 again to his total set forth in fee affidavit (2). (Record; observations).

39) When asked about fee affidavit (3), Weiner testified that although the same $3,300 (that was added to affidavit (1) from affidavit (2)) appeared again attached to the itemization to fee affidavit (3), he did not include the $3,300 in fee affidavit (3). In other words, the February 29, 2024 itemization attached to fee affidavit (3) actually resulted in only $5,330 ($8,630 - $3,300 = $5,330) added to the previous total from fee affidavit (2). His paralegal completed fee affidavit (3). Weiner's fee affidavit (4) included attorney fees through March 31, 2024, and added $1,700 to his total. Weiner said his claimed fees, set forth in his four affidavits, totaled $21,190. (Record).

40) To avoid having to leave the May 23, 2024 hearing record open, Weiner testified that he had incurred 2.0 hours reviewing Employer's brief and his own; 2.0 hours for hearing preparation; and using the chair's time calculation, 2.8 hours attending the hearing (2.0 + 2.0 + 2.8 = 6.8 hours x $300 per hour = $2,040). This resulted in Weiner's claimed attorney fees totaling $23,230 ($21,190 + $2,040 = $23,230). (Record; observations).

41) Weiner's "attorney's fees" included his paralegals' costs. When asked to respond to Employer's objection to the lack of paralegal fee affidavits, Weiner said he had "no idea that was even a problem" and Employer failed to address it in its brief. He said in previous cases he always certified his work and certified that his paralegals' work was done under his supervision, and he is the attorney responsible for the case. Weiner said Employer waived the paralegal affidavit issue by not raising it in its brief. If he had known about it, he "would have corrected it." He never had an issue before with his paralegals filing affidavits and had filed fee affidavits with Tansik before and it was never an issue. However, Weiner conceded that in most instances those cases were settlements, and he could not recall a specific case with Tansik that went to hearing where his attorney fees became an issue. (Record).

42) Weiner testified that he first makes a timesheet for each service. Then, his billing person takes those timesheets and creates an itemization. Thus, in his view Weiner has a timesheet for each item that specifies what that service was, but his timekeeper does not disclose that because Weiner wants to protect the attorney-client privilege. He testified there is no block-billing. In other words, he has two sets of records -- the one with the details is not included in his itemization attached to his fee affidavit. (Record).

43) Weiner responded to Employer's specific objections to his itemized time for services performed: He said that responding to Employer's repeated inquiries and things Weiner had "never seen before" took "tremendous" time. Employer should have controverted Employee's case, but rather it took a roundabout way of doing the same thing, which confused Weiner. In Weiner's opinion, this case has "been insane," and no other attorney has ever done what Tansik has done here. Therefore, Weiner testified it took an inordinate amount of his time to "figure it out," and he is still not sure he has figured it out. He testified it took "a lot longer than usual" to go through this case. Weiner said his time spent going through medical summaries is accurate because he reviews each one. He works up to 120 hours per week, and spent significant time "thinking about" how he needed to instruct his paralegals, and how to progress this case. Weiner testified that even scheduling something on the calendar takes more than just typing it into his computer or writing it down; he has to think about his availability, his schedule and numerous other factors. When it comes to billing for "notice," .2 hours is Weiner's standard billing time, because much goes into it; *i.e.*, he has to read the notice, check for conflicts and so forth. (Record).

44) When asked about billing .5 for reviewing a notice stating Employer was sending Employee to its doctor, Weiner justified this by stating he reviewed the notice, and then had to consider what he needed to do next to prepare his client for this appointment, possible objections and so forth. He also said this file was closed, which required him to go back, review the file and figure out "where we were." Regarding "duplicative billing," Weiner testified he instructed as well as supervised his paralegals constantly. This is because his paralegals do not have the knowledge he has, and they must collaborate to properly prepare even an email. Weiner will look up terms he does not understand from medical records, so he has a better understanding of Employee's condition and medical needs. For example, he had never heard of arachnoiditis before this case. Employee, who is in constant pain, does not always understand everything, so it took Weiner additional time to explain things. As for comparing Weiner's billings with Tansik's, Weiner testified that most conversations and emails originated from Tansik, so she knew what she was talking about, but he had to figure it out. He billed the amount of time it took to handle this case; he has no idea how Tansik bills and she has no idea how long it takes him to perform his duties. He testified that his attorney fees are accurate and probably a "little under" what he actually expended. Weiner wanted to have "some encouragement" to continue helping injured workers who do not know how to represent themselves. When asked what he meant in each affidavit by having his attorney fees "calculated" under both §§145(a) and (b), Weiner testified that since Employer did not controvert a claim, this made it difficult for him to obtain attorney fees under §145(a). Employer was trying to "manipulate future benefits" and tell Employee what to do or he would be cut off. Weiner likened this to a "very odd sort of controversion" that "they never filed." In other words, he wants attorney fees under either §§145(a) or (b). (Record).

45) Weiner's fee affidavits duplicate $3,300 in charges from affidavit (2). (Observations).

46) Employer called no witnesses, raised no objection to Weiner's hourly rate, and did not cross-examine him at hearing. (Record).

47) In his closing argument, Weiner contended the method Employer used to resist Employee's medical benefits should have been a controversion but was "something else." Employee could never have properly responded to this and prevailed at hearing, like Weiner did. Weiner "jumped in" to assist Employee because his benefits could have been terminated but for his efforts. His fees should not be penalized for obtaining Dr. Tennant even though he was not able to call him as an expert at the *Unsel II* hearing, because Weiner learned a lot about arachnoiditis from his

interaction with Dr. Tennant. If Employer had terminated Employee's medication, he could have had withdrawal. Weiner got Employee what he wanted; Employee "was very pleased." He faulted Tansik for not informing him how to prepare his fee affidavits properly. (Record).

48) In its closing argument, Employer contended Employee "pretty much" represented himself and interacted frequently with the adjuster. It said that for two years prior to the *Unsel II* hearing, Employer tried to arrange for a clinic to get Employee off narcotics. It contended that when no progress was made on this issue, it had "no choice" but to petition the Board to intervene. Employer said it prevailed on the issue it took before the Board, which was getting an order compelling Employee to attend "that program." It contended Employee wanted the Board to rule that an SCS was not compensable because he did not want one, and Employer acquiesced to adding this as an issue for hearing. Employer contended it prevailed on this issue too. It contended that *Unsel II*, an "interlocutory decision," required Employee to arrange for an appointment as ordered but he has failed to do so. Employer said there is no evidence that it ever failed to pay for any medical care or controverted any medical benefits or medications and Employee's case has remained "open and billable" at all times. It contended that §145(a) requires a controversion, and if there was no controversion, the Board must look to what benefits were obtained before awarding an attorney fee. Employer said there was no controversion-in-fact either because for that to occur it had to take some action in opposition to Employee "after a claim" had been filed. Since no claim was filed and there was no controversion, it contended no attorney fees can be awarded under any statutory provision. Employer relied on *Jonathan* and *Harnish Group, Inc.* It stated its petition to terminate Employee's medical benefits was only if he failed to mitigate his damages by attending a functional restoration program. Moreover, Employer said §145(a) requires "an award of compensation" before an attorney fee order can be made, and there was no award of compensation in *Unsel II*. It further stated *Unsel II* simply awarded what Employer had already offered and had never denied. Employer said the order determining an SCS was compensable went in Employer's favor, because Employee did not want it. No fees are awardable under §145(b) either because it never resisted any benefit Employee wanted. It relied on *Rusch* and contended Weiner failed to address its required factors. Since Dr. Tennant was an unlawful expert, Weiner should not be compensated for work related to him. Employer said the Board has authority to deduct for block-billing. It contended Weiner as an experienced attorney should know how to read the rules and regulations, as well as case law, to properly complete his fee affidavits. (Record).

49) The panel did not leave the hearing record open for Weiner to file an additional attorney fee and cost affidavit because he testified to his supplemental fees at the hearing. (Record).

50) It is well known to this panel that many claimant attorneys practicing workers' compensation law will not take an injured worker's case unless there is a controversion, because they are afraid they will not be entitled to attorney fees. Adjusters and their attorneys often react differently in the way they prosecute a petition or a defense in cases where an experienced workers' compensation lawyer represents the injured worker. (Experience; observations).

51) The Act's attorney fee statute §145 is vague, confusing, difficult to apply and has caused extensive litigation since its inception. Parties commonly use the word "claim" as a synonym for "injury," "case," and "report of injury" in normal parlance. (Experience; observations).

52) This case was unusually contentious, especially on the attorney fee issue. It is unusual for an employer to object to every single attorney fee entry from opposing counsel, save one. (Experience; judgment; observations).

PRINCIPLES OF LAW

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). *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995) noted that the Alaska Workers' Compensation Act (Act) does not define "claim." However, it cited 8 AAC 45.900(a)(5), which defined a "claim" as "any matter over which the board has jurisdiction," but did not otherwise discuss that section. *Jonathan* held for statute of limitations purposes, a "claim'" is a "written application for benefits filed with the Board." *Tipton v. Arco Alaska, Inc*., 922 P.2d 910, 912, n. 4 (Alaska 1996) reiterated that *Jonathan*'s "claim" definition was limited to issues arising under the statute of limitations. In a case reviewing a Board regulation, *Burke v. Houston NANA, LLC*, 222 P.3d 851, 858 (Alaska 2010) said the Court will resolve legal questions involving "agency expertise" using the "reasonable basis" standard.

City & Borough of Juneau v. Thibodeau, 595 P.2d 626 (Alaska 1979) defined a "final judgment" invoking a party's right to appeal. Overruling a portion of *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027 (Alaska 1972), *Thibodeau* cited *Greater Anchorage Area*

Borough, which stated, "The basic thrust of the finale requirement is that the judgment must be one which disposes of the entire case, '. . . one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" It further suggested an appellate court should "look to the substance and effect, rather than form," and focus "primarily on the operational or 'decretal' language therein." *Greater Anchorage Area Borough*, 504 P.2d at 1030-31.

> **AS 23.30.095. Medical treatments, services and examination**. . . .
>
> (d) If at any time during the period the employee unreasonably refuses to submit to medical or surgical treatment, the board may by order suspend the payment of further compensation while the refusal continues, and no compensation may be paid at any time during the period of suspension, unless the circumstances justified the refusal.

> **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). *Richards v. University of Alaska*, 370 P.3d 603, 614 (Alaska 2016) rejected a party's contention in an administrative appeal, in reference to "bare allegations," stating "argument is not evidence."

> **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. . . .

Rose v. Alaskan Village, Inc., 412 P.2d 503 (Alaska 1966) explained:

> AS 23.30.145(a) of the Alaska Workmen's Compensation Act enjoins the Board, in determining the amount of legal fees that are to be awarded, to
>
> > take into consideration the nature, length and complexity of the services performed. . . .
>
> In the instance where an employer fails to pay compensation or otherwise resists the payment of compensation, AS 23.30.145(b) provides:
>
> > (I)f the claimant has employed an attorney in the successful prosecution of his claim, the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation ordered. . . .
>
> We construe AS 23.30.145 in its entirety as reflecting the legislature's intent that attorneys in compensation proceedings should be reasonably compensated for services rendered to a compensation claimant. . . .

Johns v. State, Dept. of Highways, 431 P.2d 148, 154 (Alaska 1967) dealt with attorney fees on appeal. Nevertheless, *Johns* reiterated, "We construe AS 23.30.145 in its entirety as reflecting the legislature's intent" that attorneys "in compensation proceedings should be reasonably compensated for services rendered to a compensation claimant" (footnote omitted).

Haile v. Pam American World Airways, Inc., 505 P.2d 838 (Alaska 1973), decided if attorneys in three workers' death cases were entitled to a statutory minimum attorney fee percentage under §145(a), or if the Board could award a "reasonable" attorney fee under §145(b). The Board had awarded a lower fee under §145(b), and the claimants appealed. The employer in *Haile* never controverted the death claims but "failed to respond" to them or "pay compensation," so the claims were set for hearing. Prior to hearing, the employer told the Board that it did not contest the claims. *Id*. at 839-40. Citing §145, *Haile* held, "Thus, the award of the minimum statutory fees applies

only in cases where a claim has been controverted." *Id*. at 840. As to whether the employer's delay in payment without having filed a formal controversion notice equated to a controversion-in-fact, bringing the fee request under §145(a), *Haile* declined to "find doing nothing" is not a "controversion" and reasoned:

> The attorneys who represented the claimants are certainly entitled to an award of reasonable fees. That is provided for by the act. But there is no reason why they should receive a sum out of all proportion to the services performed. Alaska's provision allowing attorney's fees is unique in its generosity to the claimants and their counsel (footnote omitted). It, however, does not provide that a delay in payment, by itself, constitutes a controversion of the claim justifying the award of the minimum fees. There is no justification for adding such provision to the comprehensive terms of the act. *Id*. at 841.

Bradley v. Mercer, 563 P.2d 880, 881 (Alaska 1977), addressed attorney fees where the employer did not contest the worker's right to compensation, but contested the average weekly wages used to fix his compensation rate. The insurer began voluntarily paying benefits at the minimum rate. The worker filed an adjustment claim and prevailed The Board awarded attorney fees but ordered these paid from the worker's award. He appealed; the superior court affirmed, and he appealed again. *Bradley* does not say if the carrier filed a controversion. On appeal, the employee argued he was entitled to fees under §145(b). The employer argued §145(a) applied because it did not oppose paying compensation, but only objected to the rate. *Bradley* rejected the employer's argument and said, "We hold that when a carrier contests the amount of compensation owed to an injured workman, it 'resists the payment of compensation' within the meaning of [145(b)]." "If the claimant has hired an attorney in the successful prosecution of his claim, [145(b)] entitles him to reasonable attorney's fees in addition to any added compensation that is awarded to him."

In *Alaska Interstate v. Houston*, 586 P.2d 618, 619-20 (Alaska 1978) the Board had awarded reasonable fees under §145(b) and the employee appealed, apparently because statutory minimum fees under §145(a) would have been higher. The superior court reversed; the employer appealed. *Houston* affirmed the higher award; the opinion does not state if the employee's claim was controverted or "controverted-in-fact." The employer argued that *Haile* resolved the necessity of a controversion. And apparently because there was no controversion filed in *Houston*, the

employer argued that the superior court was wrong to apply §145(a). It objected to statutory fees that were "glaringly absurd." *Houston* said:

> Section 145(a) requires only that the Board 'advises that a claim has been controverted,' not that a formal notice of controversy be filed under §155(d). That latter provision serves the independent concern, not relevant here, of §155, and does not purport to define when a claim is in fact controverted. To require that a formal notice of controversion be filed as a prerequisite to an award of the statutory minimum attorney fees would serve no purpose that we are able to perceive. It would be a pure and simple elevation of form over substance because the nature of the hearing, the pre-hearing discovery proceedings, and the work required of the claimant's attorney are all unaffected by the existence or not of a formal notice of controversion when there is controversion in fact.

Houston, referencing *Bradley* said, "As the carrier admits in the present case, controversion of a claim may at the same time also include 'an attempt to resist payment of compensation,' and therefore arguably be subject to the provisions of §145(a) and §145(b).

Wien Air Alaska v. Arant, 592 P.2d 352 (Alaska 1979) (*reversed on other grounds*), adopted the "controversion-in-fact" doctrine and stated:

> In *Haile* . . . we held that the section 145(a) formula only applies to 'controverted' claims and the section 145(b) grant of reasonable attorney fees applies to an employer who otherwise fails to make payment of compensation (footnote omitted). The Arants maintain that Wien controverted the claim. Wien maintains that while it 'resisted' payment of the increased amount, it did not 'controvert' the claim. *Id*. at 364.

The Board in *Arant* had not discussed the controversion issue but merely concluded that the employer had resisted the claim in excess of a certain amount, the employee retained an attorney in successful claim prosecution, and thus the Board awarded fees under §145(b). *Arant* held the employer had controverted the claim by denying it owed the employee more benefits, without filing a formal controversion notice, distinguished *Haile* on that basis, and remanded for fee computation under §145(a). That the employer agreed to pay some benefits but "only disputed the amount" did not preclude a controversion finding. *Id*. at 365. *Arant* concluded, "We hold that a notice of controversion by the employer is not required for an award of attorney's fees under [145(a)]." *Id*. Remanding, *Arant* further stated:

> AS 23.30.145 seeks to insure that attorney's fee awards in compensation cases are sufficient to compensate counsel for work performed. Otherwise, workers will have difficulty finding counsel willing to argue their claims (footnote omitted). Also, high awards for successful claims may be necessary for an adequate overall rate of compensation, when counsel's work on unsuccessful claims is considered. *Id*. at 365-66.

Whaley v. Alaska Workers' Compensation Board, 648 P.2d 955, 959 (Alaska 1982) stated, "AS 23.30.145 is unique in its generosity to claimants and their counsel."

Wise Mechanical Contractors v. Bignell, 718 P.2d 971, 975 (Alaska 1986) in a controverted case, addressed fees under §145(c) and applied factors from what was then known as the Alaska Code of Professional Responsibility, DR-106(B), to determine a "reasonable fee":

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, 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.
> (8) Whether the fee is fixed or contingent.

Bignell expanded this holding to all workers' compensation fees and further noted:

> . . . If an attorney who represents claimants makes nothing on his unsuccessful cases and no more than a normal hourly fee in his successful cases, he is in a poor business. He would be better off moving to the defense side of the compensation hearing room where attorneys receive an hourly fee, win or lose, or pursuing any of the other . . . practice areas where a steady hourly fee is available.

Bailey v. Litwin Corp., 713 P.2d 249, 259 (Alaska 1986) reversed and remanded a fee award and "instructed the Board to award the injured worker's attorney fees . . . pursuant to [145(a), (b)]." On remand the employee requested $21,700 in fees, which were double his "normal hourly rate," but the Board awarded him only $5,156.25. He appealed again. *Bailey v. Litwin Corp*., 780 P.2d 1007, 1011-12 (Alaska 1989) reviewed the latter ruling and stated:

> In this case, the Board determined that Bailey was not limited to the minimum fee calculated under [145(a)], but that he was entitled to additional compensation because of the nature, length and complexity of the services performed. Bailey's actual attorney's fees were $10,850, representing 62 hours at $175 per hour. He requested $21,700. The Board adjusted the hourly rate from $175 to $125 (footnote omitted). The Board also reduced the number of compensable hours from 62 to 55, because the Board found that Bailey had already been paid for seven hours of work. This finding is supported by the record. *Id*. at 1011.

The Board had declined to apply a contingency factor and found the employee did not prevail on all issues in his claim. *Bailey* affirmed the Board's attorney fee award. *Id*. at 1012.

In *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108-09 (Alaska 1990), an injured worker lost at hearing on a controverted disability claim but prevailed on a medical claim. The Board awarded only statutory minimum fees under §145(a). Following additional litigation and appeals, *Cortay* reviewed prior cases interpreting and applying §145, including §145(c), which applies only to attorney fees on appeal, and reiterated "a 'full fee' is not necessarily limited to an hourly fee if a fee calculated at an hourly rate would not reflect the amount of work expended." *Id*. In reversing the superior court's attorney fee award, and without discussing why §145(b) applied in this "controverted" case rather than §145(a), *Cortay* concluded:

> Awarding fees at half a lawyer's actual rate is inconsistent with the purpose of awarding full attorney's fees in the workers' compensation scheme. If lawyers could only expect 50% compensation on issues on which they prevail, they will be less likely to take injured workers' claims in the first place.

Olson v. AIC/Martin, J.V., 818 P.2d 669 (Alaska 1991) held fees were properly awarded under §145(b) where an employer unsuccessfully tried to obtain a rate reduction, which would have resulted in a $44,000 overpayment had it been successful. The Board found the employer had "otherwise resisted" paying benefits and there was no "award" to the employee upon which to base a fee order under §145(a), which "requires that compensation be 'awarded.'" *Olson* did not state if the employer controverted a claim.

Adamson v. University of Alaska, 819 P.2d 886 (Alaska 1991), involved a Board hearing paused by an oral settlement. The injured worker later refused to sign the C&R. The employer petitioned the Board to enforce the oral agreement. The Board held a hearing on the employer's petition,

declined to approve the oral agreement, and determined the Board would reconvene the original hearing where it left off. The employee's attorney sought attorney fees for succeeding against the employer's petition to enforce the oral settlement. The Board declined, to "wait and see whether the employee ultimately prevail[ed] in her claim and, if so, to what extent the recovery exceed[ed] the terms of the offered oral agreement." At the third hearing, the employer prevailed, and the Board denied the employee's claims. It also denied attorney fees and costs for the employee's success at the second hearing, because it did not result in success on her claim.

In *Childs v. Copper Valley Electric Ass'n*, 860 P.2d 1184, 1190-91 (Alaska 1993), the employer controverted the employee's right to benefits. The employer later voluntarily paid some benefits after the worker filed a claim, but before hearing. The employee lost on most issues at hearing, but the Board failed to award any attorney fees on the amounts controverted but later paid voluntarily. The employee appealed. *Childs* cited §145 and said it provides that "attorney's fees in workers' compensation cases should be *fully* compensatory and reasonable, in order that injured workers have competent counsel available to them (emphasis in original)." *Childs* held the employer's voluntary payment was the "equivalent of a Board award, because the efforts of Childs's counsel were instrumental to inducing it." Consequently, the Board should have awarded attorney fees on the voluntary payment "pursuant to AS 23.30.145(a)."

Underwater Construction, Inc. v. Shirley, 884 P.2d 156, 159-61 (Alaska 1994) held, "Nonetheless, section 145(a) limits the Board's authority to award attorney's fees to 'the amount of compensation controverted and awarded.'" *Shirley* reviewed "policies underlying the attorney's fees statute," which included "to ensure that injured workers are able to obtain effective representation" and the fact the "employer is required to pay the attorneys' fees relating to the unsuccessfully controverted portion of the claim because it created the employee's need for legal assistance." *Shirley* also held, "More importantly, an employer seeking to modify or terminate payments made under a Board order must first seek the approval of the Board."

In *Bouse v. Fireman's Fund Ins. Co*., 932 P.2d 222, 242 (Alaska 1997), both parties appealed from the Board's award of 50 percent of the requested actual attorney fees in a controverted case. The employee contended he should have been awarded 100 percent and the employer said he should

have been awarded none because it had controverted his claim merely as a "precaution." *Bouse* affirmed the Board's award noting the employee did not prevail on his main issue; it also rejected the employer's argument noting the insurer had "filed a controversion and exposed itself to an attorney's fees award."

Thompson v. United Parcel Service, 975 P.2d 684, 691 (Alaska 1999) in a controverted claim reversed the Board's denial of a rate adjustment. *Thompson* simply said, "Because we reverse, Thompson is entitled to . . . reasonable attorney's fees . . . pursuant to AS 23.30.145."

Seville v. Holland America Line Westours, Inc., 977 P.2d 103, 113, n. 6 (Alaska 1999) in a controverted claim reversed the Board's benefit denial. *Seville* stated without analysis that the injured worker "has separately argued that the Board erred in failing to award attorney's fees. We need not address the issue. Having now prevailed on her claim for compensation, Seville will be entitled as a matter of course to an award of fees under AS 23.30.145(b)."

Williams v. Abood, 53 P.3d 134, 147 (Alaska 2002) affirmed the Board's award of 50 percent of the injured worker's actual attorney fees. It reasoned the Court's prior attorney fee holdings do "not mean that an attorney representing an injured employee in front of the board automatically gets full, actual fees." The Board had to weigh the nature, length, complexity of the lawyer's services and the issues upon which he prevailed. Finding the employee had prevailed on two important issues, but lost on five other significant issues, *Abood* affirmed.

Bustamante v. Alaska Workers' Compensation Board, 59 P.3d 270, 274 (Alaska 2002) recognized, referring to the injured worker, "Without counsel, a litigant's chance of success on a workers' compensation claim may be decreased."

State v. Cowgill, 115 P.3d 522, 523-24 (Alaska 2005) rejected the employer's argument that defense fees were the benchmark for evaluating claimants' fees, and the "enhanced" so-called "normal" rate was not justifiable because claimants' lawyers seldom receive nothing for their work when awards and settlements are considered.

In *Circle De Lumber Co. v. Humphrey,* 130 P.3d 941 (Alaska 2006), the employer argued the Board erred by awarding the injured worker attorney fees exceeding statutory minimums because the lawyer failed to file a fee affidavit. The Board had awarded fees to the attorney equaling 35 percent of the overall value of its award to the employee. *Humphrey* affirmed and stated:

> Although we have previously noted that subsections (a) and (b) are construed separately (citation omitted) they are not mutually exclusive. Rather, in a controverted case, the claimant is entitled to a percentage fee under subsection (a) but may seek reasonable fees under subsection (b). In prior cases we have looked to hourly measures of reasonable compensation, even though the cases qualified for treatment under subsection (a) (citation omitted). *Id*. at 953 n. 76.

Neither the Board's decisions nor *Humphrey* stated if there was a formal claim controverted or controverted-in-fact.

Harnish Group, Inc. v. Moore, 160 P.3d 146 (Alaska 2007), discussed how and under which statute attorney fees may be awarded in workers' compensation cases. The injured worker hurt his back at work and his employer began paying benefits. He later had a non-work-related motor vehicle accident that reinjured his back. Without having filed a claim or having received a controversion notice from his employer, or any other resistance from the employer, the employee hired an attorney fearing things would get "real complicated." *Id*. at 147. His case progressed routinely, and eventually his employer reclassified his benefits to permanent total disability (PTD) and sent his first check on January 23, 2004. On January 27, 2004, his previously-retained attorney entered an appearance; in early February 2004, the attorney filed a claim, for among other things, PTD benefits beginning from the injury date. The employer admitted the claimed benefits, which they were already paying, but denied the attorney fees claim, contending the change to different benefits was made before the lawyer filed a claim. *Id*.

When the parties could not resolve the attorney fee issue, it went to hearing. The Board determined the employer had "attempted to resist" paying the claimed benefits. It found the worker's attorney was "instrumental in securing and preserving" his permanent disability benefits and had provided valuable services to him. The Board awarded statutory minimum attorney fees under §145(a) against the employer on past and ongoing benefits "given the successful prosecution of the claim." *Id*. The employer petitioned for reconsideration, and contended the Board could not award fees

under §145(a), because the employer had never controverted a claim. The employer also contended the original decision granted attorney fees under §145(b), even though the attorney had requested them under §145(a). In reconsideration, the Board changed its basis for the attorney fee award from §145(b) to simply "AS 23.30.145." The latter decision also found the employer's "resistance" to payment was a " controversion in fact." *Id*. at 150-52. The employer appealed. On appeal, *Harnish Group, Inc.* stated:

> At issue in this case is the award of statutory minimum attorney's fees under the [Act]. Alaska Statute 23.30.145 provides for the award of attorney's fees in workers' compensation cases. Subsection (a) authorizes the Board to award attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim (footnote omitted). An award under subsection .145(a) may include continuing fees on future benefits (footnote omitted). In contrast, subsection (b) requires an employer to pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. *Id*.

Harnish Group, Inc. said an employer could contest "a claimant's entitlement to benefits in two ways": A controversion if the employer disputed its liability or refused to pay, or in an answer to a claim. *Harnish Group, Inc.* did not discuss an employer's right to file a petition seeking to terminate an injured worker's ongoing but non-controverted benefits. Rather, it stated:

> We have never delineated the exact actions an employer must take to oppose a claim in order for there to be a controversion in fact. But we previously upheld the imposition of subsection .145(a) fees when an employer did not "unqualifiedly accept" the employee's claim for PTD compensation (footnote omitted). Here, NC Machinery unqualifiedly accepted Moore's claim for PTD benefits in its answer to the claim, so it cannot have controverted in fact Moore's claim. *Id*.

Harnish Group, Inc. held the Board erred in awarding fees under §145(a), finding a controversion (actual or in-fact) is required for the Board to award fees under §145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id.* at 152. Fees may be awarded under §145(b) when an employer "resists" paying compensation and an attorney is successful in prosecuting the employee's claims. In this latter scenario, reasonable fees may be awarded. *Id.* An award under §145(a) may include continuing fees on future benefits. *Harnish Group, Inc.* found that all actions the Board identified as showing the employer's resistance to paying more PTD benefits occurred

before the employee filed a claim; *Harnish Group, Inc.* referenced *Jonathan*'s "claim" definition but did not otherwise analyze it. In this case where a written "claim" was filed:

> To determine whether there has been a controversion in fact in cases where an employer does not file a notice of controversion, the Board needs to look at the employer's answer to a claim for benefits and its actions after the claim is filed to determine whether the employer has controverted in fact the employee's claim for benefits. *Id.*
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> . . . .
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> Although substantial evidence in the record supports the Board's conclusion that NC Machinery resisted paying Moore PTD benefits, the actions that the Board identified as resistance cannot serve as the basis for a controversion in fact of Moore's claim because Moore's claim had not been filed when the actions occurred (footnote omitted). In order for an employer to be liable for attorney's fees under [145(a)], it must take some action in opposition to the employee's claim after the claim is filed. *Id.*

Given the above analyses, *Harnish Group, Inc.* then looked to §145(b), again in context of a case with a pending, written "claim" for benefits:

> The first element for an award of fees under subsection .145(b) is that the employer "otherwise resisted" payment of benefits. The Board's finding that NC Machinery resisted payment of the PTD benefits is supported by substantial evidence. . . .

Harnish Group, Inc. concluded that "substantial evidence" included the Board's finding that the employer was attempting to prolong the reemployment process. It concluded, "any attempt by NC machinery to prolong the reemployment process could reasonably be seen as an attempt to undermine Moore's PTD claim." *Id.* at 153. *Harnish Group, Inc.* continued:

> The second element that must be shown in a subsection .145(b) attorney's fees claim is that the claimant "employed an attorney in the successful prosecution of the claim." The Board decided based on its "review of the unique facts of this case," that it could not find that the employer would have provided PTD benefits to the employee at the time it did, "but for the representation of the employee by Mr. Beconovich."

Harnish Group, Inc. found this finding also supported by substantial evidence. The employee's "claim" forced the employer to either admit or deny PTD liability; it chose to admit it. Without the claim, the employer could have chosen to reclassify the employee's benefits later. The employee's attorney also performed work that "closed" reemployment benefits making his client

eligible for PTD benefits because he was no longer in the reemployment process. In short, *Harnish Group, Inc.* said the Board had correctly found that the employer did not recharacterize benefits voluntarily but did so "in the face of an impending claim for those benefits by an experienced attorney." *Harnish* cited the Board's ability to rely on not only direct testimony but on "the board's experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above," under *Rogers & Babler*. This permitted the Board to decide that the employee's lawyer obtained the PTD award based on unique facts, or on the Board's experience dealing with adjusters' reactions to an attorney's presence in a case. *Harnish Group, Inc.* reversed and remanded for the Board to determine the employee's reasonable fees under §145(b).

In *Lewis-Walunga v. Municipality of Anchorage*, 249 P.3d 1063 (Alaska 2011), the employer "controverted [the employee's] workers' compensation claim." The employer argued at hearing that attorney fees should be awarded under §145(a) rather than (b). The Board rejected this argument and awarded attorney fees under §145(b), but reduced them by 30 percent. The employee appealed and the Alaska Workers' Compensation Appeals Commission (Commission) reversed and ordered the Board to not reduce attorney fees "under [§145(b)] based on the size of the benefits awarded," but rather to award attorney fees "the Board finds were reasonably incurred in the representation of the employee in this case." *Id*. at 1065. The Commission questioned why the attorney fees should be calculated under §145(b), rather than §145(a), and decided the Board plainly erred in failing to explain why it awarded fees in this fashion. Noting §145(a) established "a minimum fee, but not a maximum fee," the Commission held "the record could support" the Board's decision to award "a reasonable fee in excess of the statutory minimum" but determined the Board "had not made adequate findings." *Id*. *Lewis-Walunga* reversed and noted "neither the workers' compensation statutes nor the Board's regulations authorize the Board to consider settlement offers when awarding attorney's fees. . . ." *Id*. at 1070, n. 20.

Humphrey v. Lowe's Home Improvement Warehouse, Inc., 337 P.3d 1174 (Alaska 2014) (*LHIW, Inc*.) addressed attorney fees on appeal. However, *LHIW, Inc*. also noted the Commission had questioned why the Board awarded attorney fees under §145(b) "(for cases in which the employer resists or otherwise delays payment) rather than" under §145(a) "(for cases in which the employer controverts benefits, as Lowe's did here)." *LHIW, Inc*. said "AS 23.30.145(a) governs an award

of fees when an employer controverts benefits; AS 23.30.145(b) permits a fee award against an employer when the employer resists or otherwise delays payment." *LHIW, Inc*. at 1178, n. 4.

Bockus v. First Student Services, 384 P.3d 801, 808-09 (Alaska 2016) decided an injured worker's appeal from the Commission's reversal of the Board's attorney fee award based on his employer's resistance to pay benefits for his surgery. The worker had filed a claim.

> As demonstrated by our previous case law, an employer's acquiescence to a workers' compensation claim or provision of the requested benefit before a Board hearing does not rule out a finding that the employer resisted providing the benefit. In [*Shirley*] we affirmed the Board's award of attorney's fees under [§145(a)] when an employer delayed changing an employee's temporary total disability (TTD) benefits to permanent total disability (PTD) benefits, even though the amount of each compensation installment was the same (footnote omitted). We observed that if no amount of compensation had been at stake in the case, as the employer claimed, it would have had no reason to controvert the claim (footnote omitted). More recently, in [*Harnish Group, Inc*.] we held that attorney's fees could properly be awarded under [§145(b)] when the employer had changed an employee's status to PTD at about the same time the employee filed a claim for those benefits (footnote omitted). The employer subsequently signed a reemployment plan, which was inconsistent with the status change; in its answer to the employee's claim, the employer admitted the employee was PTD but denied it should pay attorney's fees (footnote omitted). We held that fees could be awarded for resisting payment because of the employer's action in signing the reemployment plan.

Warnke-Green v. Pro-West Contractors, LLC, 440 P.3d 283, 291 (Alaska 2019) in an "appeal fee" case defined who was a "successful party" in an appeal to the Commission, and thus entitlement to attorney fees. Opposing full attorney fees on appeal, the employer argued that the employee at hearing had "obtained only what had been offered prior to the filing of his claim." *Warnke-Green* rejected that notion and determined that as a successful party on a significant issue, the injured worker's lawyer was entitled to full, reasonable attorney fees on appeal.

D&D Services v. Cavitt, 444 P.3d 165, 167, n. 2 (Alaska 2019) was also an "appeal fee" case. *Cavitt* cited *Humphrey* for the idea that "a claimant who prevails on 'a significant issue' on appeal is a successful party," and *Warnke-Green*, for the notion, "To determine success on appeal, the Commission needs to consider what the Board ordered, what the parties sought in the appeal, and

what the appeal decided." In a footnote, *Cavitt* also cited §145(b) as "(authorizing Board-ordered attorney's fees from employer who 'otherwise resists' paying compensation)."

State of Alaska v Wozniak, 491 P.3d 1081, 1088 (Alaska 2021) an attorney fee case stated:

> The Board has discretion to fashion an award as it sees fit so long as it does not abuse that discretion. Even if the Board's award here was somewhat higher than what the State proposed as a reasonable fee and was in a novel format, neither the amount of the fees nor the manner in which they were awarded was manifestly unreasonable under the circumstances presented here.

Rusch v. Southeast Alaska Regional Health Consortium, 453 P.3d 784 (December 2019) involved two parties' workers' compensation cases settled through mediation, with the same claimant attorney. The parties did not resolve attorney fees and that issue went to hearing. In *Rusch* the employee had filed a claim and the employer controverted benefits. The Board made findings related to the hourly rate and "number of hours" it determined were reasonable for specific tasks. *Id*. at 790-92. It reduced billable hours based on billing methods, such as using quarter-hour increments, and "block billing," which consists of billing entries that do not specify time taken for each task, but only give a total. The Board reduced hours billed, finding the attorney had spent too much time on some tasks. It faulted the claimant's lawyer for failing to explain some entries, but disallowed his testimony about his fees. Similarly, the Board reduced some billings finding they were paralegal tasks. The claimant appealed to the Commission, which found the Board's attorney fee award was not manifestly unreasonable, and affirmed. *Id*. at 793.

On appeal, *Rusch* held that the Board's award of attorney fees should be upheld unless it was "manifestly unreasonable." *Id*. It further stated, "We have rejected attempts to tie the hourly fees paid to claimants' counsel to the hourly fees for defense counsel," because unlike defense counsel paid on an hourly basis, claimants' lawyers sometimes only receive partial fees. The parties in *Rusch* disputed who was successful on what issue in the settlement. *Rusch* adopted a test from *Singh v. State Farm Mutual Automobile Insurance Co*., 860 P.2d 1193 (Alaska 1993) to evaluate a claimant's success on an issue in a workers' compensation "settlement." The *Singh* test that *Rusch* adopted, "places the burden on the party opposing attorney's fees to show lack of merit." Non-monetary issues have to be analyzed the same way. *Rusch*, 453 P.3d at 796.

The employer in *Rusch* said Board litigation involved a dispute over minimal physician bills and the claimant's lawyer 's efforts "did not result in any gain through settlement." *Rusch* stated that on remand, the employer had the burden to prove this allegation. *Id*. It also clarified *Bignell* and stated on remand, in "determining a reasonable attorney's fee," the Board must consider each factor in Rule of Prof. Conduct 1.5(a), "and either make findings related to that factor or explain why that factor is not relevant." *Id*. at 799.

As for the Board reducing the claimant lawyer's time for some tasks, *Rusch* held that the attorney must be given an opportunity at hearing to testify and explain his time entries. The Board's failure to do so violated procedural due process. *Rusch* noted that the Board's regulations require an affidavit itemizing hours expended and the extent and character of work performed, but otherwise provides "no additional guidance about the form of an affidavit." *Id*. at 800. *Rusch* concluded that, "the Act is to be construed and applied in a manner that encourages, not discourages, attorney representation of injured workers." *Id*. Moreover, *Rusch* concluded that the Board's regulations do not prohibit block-billing and prior Board decisions do not have a clear rule for reductions solely for block-billing. *Id*. at 806. *Rusch* concluded that the attorney fees awarded were manifestly unreasonable. *Id*. at 807.

Alaska Rules of Prof. Conduct, Rule 1.5, referenced in *Rusch*, 453 P.3d at 798-99 states:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

In *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Dec. No. 152, at 7-8 (May 11, 2011) the Commission heard the employer's claim that the Board erred by awarding attorney fees under both §§145(a) and (b). Though the Commission vacated the Board's decision on other grounds, it discussed attorney fee awards anticipating the issue would arise again. *Porteleki* stated the Board was in a "far better position" to evaluate whether a party successfully prosecuted "a claim" than is the Commission. It further stated the Board need not reduce attorney fees for time spent litigating *de minimis* issues upon which the employee lost.

> **8 AAC 45.112. Witness list.** A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. If a witness list is required under 8 AAC 45.065, the witness list must be filed with the board and served upon all parties at least five working days before the hearing. If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing, except that the board will admit and consider
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> (1) the testimony of a party, ...
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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 an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.
> . . . .
>
> (d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state. (1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the

> services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
> (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.
> . . . .
>
> (f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to the applicant:
> . . . .
>
> (14) fees for the services of a paralegal . . . but only if the paralegal. . . .
>
> (A) is employed by an attorney licensed in this or another state;
> (B) performed the work under the supervision of a licensed attorney;
> (C) performed work that is not clerical in nature;
> (D) files an affidavit itemizing the services performed and the time spent in performing each service; and
> (E) does not duplicate work for which an attorney's fee was awarded;

In *Murphy v. Fairbanks North Star Borough*, 494 P.3d 556, 571 (Alaska 2021) the claimant appealed the Board's refusal to award paralegal costs because he failed to produce affidavits from the paralegals as required by 8 AAC 45.180(f)(14). *Murphy* stated:

> The Board's regulation about attorney's fees and costs is a procedural rule to implement AS 23.30.145 and treats paralegal work as a cost rather than as a component of attorney's fees (footnote omitted). Reimbursing an attorney for paralegal time as a cost is not inconsistent with the statute and in fact mirrors our practice at the time the Board's regulation was adopted (footnote omitted). There is nothing improper in interpreting "costs" in AS 23.30.145(b) to include paralegal services, nor is a requirement that a paralegal submit a separate affidavit inconsistent with AS 23.30.145's statutory language. We therefore reject Murphy's argument that the regulation is contrary to statute. . . .

ANALYSIS

1) Was the oral order allowing Weiner to testify about his fees correct?

Weiner is a real party in interest and filed a claim requesting attorney fees and costs. He is the claimant and a "party." Although Weiner did not file a witness list for the May 23, 3024 hearing, a panel will admit and consider "the testimony of a party." 8 AAC 45.112(1). The attorney fee and cost regulation states, "at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed." 8 AAC 45.180(b), (d). Employer presented no authority prohibiting Weiner from testifying about his attorney fee affidavits and clarifying or correcting any errors. Moreover, *Rusch* held that in an attorney fee dispute hearing, the attorney must have an opportunity to explain entries. Otherwise, a due process violation occurs. Therefore, the oral order allowing Weiner's testimony about his attorney fee affidavits and attached itemizations was correct.

Employer's next objection is more complicated. It stated Weiner could not testify about any fees for the period between March 28, 2024, which is last entry date on his May 6, 2024 fee affidavit (affidavit (4) that he filed before the record closed), and three working days prior to the hearing (May 20, 2024). It contended "the affidavit" mentioned in 8 AAC 45.180(b) and (d) specifically refers to "the affidavit" Employer implied Weiner had to file "three working days" before hearing. Employer said by failing to file an additional attorney fee affidavit on May 20, 2024, Weiner waived his right to testify about, and receive, any additional fees for legal services he performed on this case after March 28, 2024, through May 19, 2024.

Weiner is claiming attorney fees exceeding the statutory minimum. Thus, in Employer's view he had to file a fifth affidavit and itemization on May 20, 2024. But Employer misreads the regulation. It states that once a hearing was scheduled Weiner had to file a fee affidavit "*at least* three working days" before the hearing and at the hearing he could supplement "the affidavit" through his testimony (emphasis added). The regulations are the same regardless of whether Weiner requested fees under §§145(a) or (b); he requested fees under both. The qualifier "at least" does not dictate a requirement that Weiner had to file a fee affidavit on May 20, 2024. His May 6, 2024 fee affidavit (4) was obviously "at least," and far more than, three working days prior to

the May 23, 2024 hearing. Therefore, Weiner's four pre-hearing fee affidavits were all timely, and he had a right to testify about his attorney fees incurred after March 28, 2024, the last itemized entry on his May 6, 2024 fee affidavit (4), through the hearing date. 8 AAC 45.180(b), (d)(1). While most attorneys file a fee affidavit with itemizations three working days prior to hearing, the regulation does not prohibit what Weiner did in this instance, and Employer's position on this point is without merit.

2) Is Weiner entitled to attorney fees and costs?

Employee contends he prevailed at the *Unsel II* hearing and Employer lost. Weiner states he is entitled to attorney fees and costs for successfully defending against Employer's September 29, 2023 petition. Employee says that as a result of his lawyer's legal services, *Unsel II* did not terminate his right to narcotic medications, which was a benefit to him. He is "very satisfied" with *Unsel II*. Employer contends it prevailed in *Unsel II* and Employee lost. It states that since Employee never filed a claim, it never controverted one and no legal authority exists under which Weiner can be awarded attorney fees. Employer further contends Weiner's services were unrelated to the *Unsel II* issues, were excessive, duplicated paralegal efforts, his affidavits and itemizations falsified time entries, his services were unnecessary, and they did not result in Employee receiving any benefit. It contends *Unsel II* did exactly what Employer wanted.

This decision will first determine if Weiner's services provided any "benefits resulting" to Employee. Was he "successful"? AS 23.30.145(a), (b); 8 AAC 45.180(d)(2). It will consider any "compensation or medical and related benefits awarded" to Employee, "the amount involved" at the *Unsel II* hearing, and the "results obtained." AS 23.30.145(a); Rules of Prof. Conduct, Rule 1.5(a)(4); *Cavitt*. Whether Employee was a prevailing party in *Unsel II* for attorney fee purposes will be determined by looking at the issues raised, the results in *Unsel II*, the applicable statutes, and Alaska Supreme Court precedent. This decision borrows analyses from decisional law dealing with determining a "successful party" on appeal. Although cases involving successful parties on appeal are in some ways distinguishable from those involving hearings, the "appeal fee" cases give helpful guidance that appears equally applicable here.

A) Employee was a successful party at the Unsel II hearing.

On September 29, 2023, Employer petitioned for (1) "termination of ongoing narcotics and" (2) an order compelling Employee to attend functional rehabilitation "as recommended by the IME physicians." On November 9, 2023, the parties appeared for a prehearing conference to state the issues for the February 13, 2024 hearing. The only issue listed in the designee's prehearing conference summary was Employer's September 29, 2023 "petition to terminate narcotics and compel attendance at functional rehabilitation." Neither party sought to modify the designee's summary nor objected to it. Employer's requested relief was therefore twice stated, once in its petition and once in the prehearing conference summary, as two separate requests: (1) termination of Employee's narcotics, and (2) an order compelling him to attend functional rehabilitation recommended by Employer's physician. Employer's petition and prehearing conference requests for relief did not make request (1) predicated upon Employee's obedience to request (2).

However, months later on February 6, 2024, when Employer filed its hearing brief, its position changed. Employer's brief stated the parties, trying to settle the remaining medical care issue, were merely seeking an order "clarifying compensability to two specific treatments: [1] detoxification/functional restoration, and [2] a[n] . . . SCS." Its brief represented that the parties were "in agreement about compensability of the first," [1] detoxification or functional restoration. According to Employer's brief, the parties both agreed [2] an SCS should be ordered not compensable. But based on Employer's arguments, it appears these modified and new issues were raised and included simply to obtain a written decision so the parties could settle the case.

Oddly, Employer's brief then contended that the two issues to be heard on February 13, 2024, were "1. Whether [Employee] should be compelled to attend an inpatient detoxification/functional restoration program as his costly, high dose narcotic use is not improving either his pain or functionality," and "2. Whether an invasive [SCS] is reasonable and medically necessary for medical treatment when [Employee] had prior poor experiences." Not stated as an issue was the primary relief Employer sought in its petition -- "termination of ongoing narcotics."

Nevertheless, and contrary to its previous contention that the parties were "in agreement about compensability," Employer's brief cited authority for the panel to suspend Employee's benefits

under §095(d) for refusing to attend a "detoxification/functional restoration" program. There was no evidence Employee ever refused to attend a detoxification or functional restoration program. The evidence shows he requested that Employer provide one with experience in treating arachnoiditis. He also distrusted the insurer and wanted his doctor to select the clinic.

On July 11, 2022, Employee told an EME doctor he was frustrated trying to get an SCS, and "emphatically" stated he wanted to get off opioids and was trying to find a rehabilitation center to monitor his withdrawal. The evidence shows the parties did not agree on the type of program he should attend. There was no evidence presented at the May 23, 2024 hearing showing the clinic Employee wanted with physicians familiar with arachnoiditis was the same "as recommended by the IME physicians." Moreover, there is a difference between an insurer stating a case is "open and billable," which a provider could interpret to mean, "go ahead and see the patient, bill us, and we will let you know later if we will pay it," and an insurer authorizing particular treatment. Only after *Unsel II* was issued did Employer on April 4, 2024, write Cleveland Clinic specifically authorizing an initial evaluation for Employee, at his chosen clinic. Until the adjuster wrote that letter, Employer did not "unqualifiedly" accept Employee's request for a multidisciplinary pain clinic with experience helping patients with arachnoiditis. *Harnish Group, Inc*. Moreover, the panel searched the agency file and could find no EME physician that recommended Employee attend a multidisciplinary pain program that specializes in arachnoiditis. *Rogers & Babler*.

Employer's February 6, 2024 hearing brief again changed the relief requested in its September 29, 2023 petition and as stated at the prehearing conference, and suggested it wanted a "proactive determination that refusal to participate in the reasonable and appropriate recommendation for inpatient substance abuse/functional restoration program should result in a termination of compensability for narcotic medication benefits." In its brief, Employer made its request to terminate Employee's narcotics contingent on his refusal to attend a detoxification and functional restoration program; this is different than its initial request. As for the SCS, which Employer's brief had earlier stated both parties agreed "should be ordered not compensable," it noted "the parties cannot settle the claim" without predictability about the SCS. Employer said it sought an order stating an SCS was not reasonable and necessary treatment and thus "not compensable." *Unsel II* held exactly the opposite. "Settlement" was not an issue at the February 13, 2024 hearing;

terminating narcotics, requiring Employee to attend a pain clinic, and the added SCS issue were. Thus, any effect *Unsel II* had on the parties' ability to settle the case is irrelevant. The panel will not consider "settlement offers when awarding attorney's fees." *Lewis-Walunga*.

In his February 8, 2024 hearing brief, Employee stated he would "love to attend" an appropriate restoration program. The problem was, he was trying to find a clinic familiar with arachnoiditis and had been since at least July 2022. Weiner's fee itemizations showed time trying to assist Employee in finding an appropriate clinic. Employee said he never refused to cooperate with treatment and Employer's recommended restoration program was only a "partial treatment plan" because it would not address his arachnoiditis. He understood at the *Unsel II* hearing that his narcotic benefits were at risk, and asked the panel to hear from his arachnoiditis medical expert "before ordering that Employer can cease paying for his narcotics."

In its closing argument at the February 13, 2024 *Unsel II* hearing, Employer argued its modified position again. On the SCS issue, it wanted a ruling that the SCS was or was not compensable. It wanted predictability "for settlement purposes" or "for future expenditures." Employer reiterated its new condition precedent that if Employee did not go to an ordered inpatient multidisciplinary pain program within a specific time, the panel should terminate his prescription painkillers. This was a completely different request for relief than what Employer requested in its September 29, 2023 petition and at the November 9, 2023 prehearing conference.

In his closing arguments at the February 13, 2024 *Unsel II* hearing, Employee again made it clear that he understood Employer's petition put his narcotic medications at risk; in fact, he likened Employer's petition to "extortion." While not sharing Employee's "extortion" description, this panel also understood Employer's petition placed Employee's narcotics at risk, because Employer contended the medications were doing Employee more harm than good, were not improving his function, and it cited legal authority for the panel to "suspend" them. Employee did not foreclose the possibility that he may change his mind and want an SCS at some point if technology improved. His main concern was that the normal "detox" clinic, which Employer wanted him to attend, had already failed because while attending one he had a bad reaction to Suboxone, a commonly used medication to treat people addicted to prescription medications.

Further, *Unsel II* clearly set forth the issues for the February 13, 2024 hearing. Neither party sought reconsideration or modification, or appealed *Unsel II* to the Commission. *Unsel II* was not an "interlocutory decision" as Employer contended in its pleadings and at the May 23, 2024 hearing, because it resolved the only issue in the case, which was Employer's September 29, 2023 petition. *Thibodeau*; *Greater Anchorage Area Borough*. As Employer correctly noted, when *Unsel II* was heard there were no claims and no other petitions pending. Weiner's attorney fees and costs could not be addressed at the *Unsel II* hearing because they had not been raised as an issue. Weiner's claim for attorney fees and costs arose after *Unsel II* was issued.

Addressing the ever-changing issues from Employer's September 29, 2023 petition, *Unsel II* stated, "Employer contends [an SCS] is neither reasonable nor necessary medical treatment for Employee given his circumstances." Contrary to Employer's initial request, *Unsel II* ordered that an SCS "is reasonable medical treatment compensable under the Act for Employee's work injury with Employer." Regardless of whether or not Employee currently wants an SCS, or if he changes his mind and someday wants one when technology improves, or after he is detoxified and an SCS is his only option, he is entitled to an SCS if he wants one and Employer will have to pay for it pursuant to *Unsel II.* Weiner's efforts, especially in noting that Employee may later consider an SCS, were instrumental in obtaining this device, which is a benefit to Employee. AS 23.30.145(a), (b); 8 AAC 45.180(b), (d)(2); Rules of Prof. Conduct, Rule 1.5(a)(4).

The parties at the May 23, 2024 hearing agreed that a multidisciplinary pain program was reasonable, necessary and compensable medical treatment. At hearing, Employer perhaps sensing that its petition to terminate Employee's narcotics would not be granted, said that what it really wanted was an order compelling Employee to attend such a program and should he fail to, the panel should then terminate his narcotic entitlement. *Rogers & Babler*; *Harnish Group, Inc*. Employer contends it offered Employee a detoxification clinic for years, and *Unsel II* ordering it to pay for one did nothing more than Employer was willing to do all along. But *Warnke-Green* rejected a similar argument in an appeal fee case, finding the claimant in that case entitled to full, reasonable attorney fees as "a successful party" because the attorney had prevailed on a "significant issue." *Unsel II* granted Employer's petition to compel Employee's attendance at an inpatient multidisciplinary pain program, but one "of his choice." Thus, though *Unsel II* granted

a portion of Employer's petition in part, it also granted Employee's request to require Employer to pay for a clinic familiar with arachnoiditis. Those were "significant issues" for Employee, aided by Weiner. AS 23.30.145(a), (b); 8 AAC 45.180(d)(2); Rules of Prof. Conduct, Rule 1.5(a)(4).

Employee may not have been as successful in defending against Employer's petition had he not had an attorney. *Rogers & Babler*; *Bustamante*; *Porteleki*. Moreover, since *Unsel II* ordered Employer to pay for the clinic with the expertise Employee requested, Employer cannot unilaterally controvert that benefit but must petition for relief. *Shirley*. That is a significant benefit to him. AS 23.30.145(a), (b); 8 AAC 45.180(d)(2); Rules of Prof. Conduct, Rule 1.5(a)(4).

Most importantly, *Unsel II* rejected Employer's express request to "terminate" Employee's right to narcotic medication under §095(d). Employer's petition by its own terms was "resistance to pay benefits" and "an attempt to undermine" Employee's right to narcotics by seeking an order terminating them. *Bockus*; *Harnish Group, Inc*. There is a difference between benefit "suspension," and "termination." *Unsel II* denied the request to "terminate" Employee's benefits. It expressly declined to address any "suspension" remedy until such time as Employee refused or constructively refused to attend the ordered program. Any further action in this case will require a party to file a new pleading and raise new issues. What Employee or Employer did or did not do post-hearing in respect to *Unsel II*'s orders is irrelevant to Weiner's claim for attorney fees for benefits obtained in the *Unsel II* hearing. But as for "terminating" Employee's narcotics as Employer's September 29, 2023 petition and prehearing conference contention had requested, *Unsel II* expressly stated, "Employer's petition to terminate narcotics is denied."

In its pleadings and at hearing, Employer repeatedly stated that Employee continued to receive narcotics and related medical treatment, and nothing was controverted. As a result of the February 13, 2024 hearing, initiated and necessitated only by Employer's September 29, 2023 petition to terminate Employee's narcotics, *Unsel II* denied Employer's primary petition request and Employee's narcotic medications continue unabated. *Shirley*. This is a clear success and a benefit to Employee because he testified that narcotic medication is his only source of modest relief. Weiner's effort assisted Employee in obtaining this result as well. AS 23.30.145(a), (b); 8 AAC 45.180(d)(2); Rules of Prof. Conduct, Rule 1.5(a)(4); *Warnke-Green*. Adjusters and their attorneys

often react differently when an attorney is, or becomes, involved in a case that goes to hearing. Experience shows it is likely that but for Weiner's participation, Employer may not have modified its arguments as time went on and may have pressed forward with its initial request to "terminate" Employee's narcotics. *Rogers & Babler*; *Harnish Group, Inc.*; *Bustamante.*

In summary, there can be no doubt that given the record as a whole, Employee succeeded in *Unsel II* and Weiner obtained benefits for him if for no other reason than *Unsel II* denied Employer's September 29, 2023 petition seeking an order terminating his narcotics. *Porteleki*. The next question is whether authority exists to award Weiner attorney fees for his services.

B) There is legal authority for an attorney fee and cost award.

In the panel's experience, judgment and observations attorney fee statute §145 is difficult to understand and apply in many instances. *Rogers & Babler*. The lengthy citations in this decision's Principles of Law section addressing §145 chronologically summarize all Alaska Supreme Court cases addressing §145 in any significant, potentially relevant way. Some cases demonstrate this statute's various and sometimes confusing application: *Lewis-Walunga*; *Harnish Group, Inc.*; *Humphrey*; *Seville*; *Thompson*; *Bailey*; *LHIW, Inc*. The Commission and Alaska Supreme Court appear to have difficulty applying it as well. *Rogers & Babler*. Nevertheless, this panel has reviewed those cases and will apply, or not apply them, as appropriate.

The panel could find no case on point. Here, Employee had not filed a claim for benefits, and none was pending when *Unsel II* heard Employer's petition on February 13, 2024. Employer had not formally controverted Employee's right to benefits either. Rather, Employer was paying Employee's medical benefits and filed a petition to terminate them and require him to attend a pain clinic. Thus, many cases cited in this decision are distinguishable on their facts either because they involved a "claim" and a "controversion," (*Bignell*; *Cortay*; *Childs*; *Shirley*; *Bouse*; *Thompson*; *Seville*; *Cowgill*; *Lewis-Walunga*; *LHIW, Inc*.) or because the decision did not provide enough information for the reader to determine if a claim and controversion were involved (*Bradley*; *Houston*; *Arant*; *Olson*; *Humphrey*). Therefore, contrary to Employer's citations, one cannot easily apply case law precedent in this case because there was no formal claim or controversion. The instant matter is a case of first impression.

Employer's legal premise rests on the fact that there was no formal "claim" or "controversion" pending at the time *Unsel II* decided Employer's petition. Consequently, Employer contends it could not and did not controvert a nonexistent claim. This is true. It further contends that a "claim" must exist under both §§145(a) and (b) for either section to apply and provide authority for this decision to award Weiner attorney fees for defending against Employer's petition. Since there was no "claim," Employer reasons there can be no attorney fee award. Moreover, it contends since there was no "controversion," neither §§145(a) nor (b) can apply. Employer states it never resisted paying compensation for which Employee filed a "claim," and thus this decision can find no "controversion-in-fact" either. It also concludes that because *Unsel II* "awarded" Employee no benefits, no fees may be assessed against Employer.

There is a fundamental flaw in Employer's reasoning: If Employer is correct, no employer would ever have to controvert. All they would have to do is file petitions to terminate ongoing compensation. Using Employer's logic, this would never expose an employer "to an attorney's fee award," because the employer would not have filed a controversion. *Bouse*. This practice would increase litigation by requiring injured workers, in response to the petitions, to file "claims" in cases where there were no controversions. Employers would answer the claims by simply admitting all benefits requested in the claim and citing the fact that they were currently paying benefits and had a pending petition to terminate them -- all done without formally controverting. This would inappropriately chill injured workers' ability to find competent counsel willing to represent them in these cases. Many claimant lawyers will not take an injured worker's case unless there is a controversion in place, because they fear not getting paid for services rendered. *Rogers & Babler*. But "AS 23.30.145 seeks to insure that attorney's fee awards in compensation cases are sufficient to compensate counsel for work performed. Otherwise, workers will have difficulty finding counsel willing to argue their claims." *Arant*.

AS 23.30.145 on which Employer relies presupposes "that a claim has been controverted, in whole or in part," under §145(a), or that an employer failed to "file timely notice of controversy" (presumably referring to a controversion) and the employee employed an attorney in "the successful prosecution of the claim," under §145(b), before attorney fees can be awarded. In

Employer's view, under either subsection, no "claim" and no "controversion" equals no attorney fees. On its face, the fee statute at first glance seems to support Employer's position.

For example, considerable case law interpreting §145 (with emphasis added) supports Employer's position: "Thus, the award of the minimum statutory fees *applies only* in cases where a *claim* has been *controverted*." *Haile.* The fee statute does not provide that a delay in paying benefits, "by itself, constitutes a *controversion* of the *claim* justifying the award of the minimum fees." *Id*. "As the carrier admits in the present case, *controversion* of a *claim* may at the same time also include 'an attempt to resist payment of compensation,' and therefore arguably be subject to the provisions of §145(a) and §145(b)." *Houston*. An attorney fee cannot be awarded under §145(a) where no "*compensation*" is "*awarded*." *Olson*. "Nonetheless, section 145(a) limits the Board's authority to award attorney's fees to 'the amount of compensation *controverted* and *awarded*.'" *Shirley*. "Rather, in a *controverted* case, the claimant is entitled to a percentage fee under subsection (a) but may seek reasonable fees under subsection (b)." "Subsection (a) authorizes the Board to award attorney's fees as a percentage of the amount of benefits *awarded* to an employee when an employer *controverts* a claim. . . . In contrast, subsection (b) requires an employer to pay reasonable attorney's fees when the employer delays or 'otherwise resists' payment of compensation and the employee's attorney successfully prosecutes his *claim*." "In order for an employer to be liable for attorney's fees under [§145 (a)], it must take some action in opposition to the employee's *claim* after the *claim* is filed." Fees may be awarded under §145(b) when an employer "resists" paying compensation and the attorney successfully prosecutes the employee's "*claims*." Actions identified as "resistance" to paying benefits "cannot serve as the basis for a *controversion in fact* of [the employee's] *claim* because [his] *claim* had not been filed when the actions occurred." *Harnish Group, Inc*. Subsection 145(b) is used "(for cases in which the employer resists or otherwise delays payment)" while §145(a) is "(for cases in which the employer *controverts* benefits. . . .)." *LHIW, Inc*.

Employee had no pending "claim," Employer had not filed a "controversion," and *Unsel II* addressed only Employer's petition to: terminate narcotics, order him to attend a clinic and decide the added SCS compensability issue. By contrast, it is not surprising that the Court came to the results it did in cases where formal claims were filed and controverted, or in cases where the

present issues did not arise. *Harnish Group, Inc*. upon which Employer relies, said there were "two ways" an employer could contest an injured worker's entitlement to benefits: in a "controversion" or in an answer to "a claim." It did not say that these were the only two ways, and it did not consider or discuss an employer's right to file a petition to terminate benefits as Employer did here. Thus, *Harnish Group, Inc*. is also distinguishable.

The Court has not yet delineated the "exact actions" an employer must take to oppose "a claim" without filing a formal controversion. *Harnish Group, Inc*. The instant matter may reveal that action because this decision turns on how the law defines "claim" as used in §145. Employer relies on *Jonathan*'s "claim" definition. *Jonathan* is distinguishable because its holding is limited to cases under the Act's statute of limitations. *Tipton*. This case involves the Act's attorney fee statute. Regulation §45.900(a)(5) defines "claim" as used in the regulations to include "any matter" over which this panel "has jurisdiction." Neither party contends that this panel has no jurisdiction to hear and decide Employer's petition. Its petition clearly creates a "matter."

Even though the Act does not define a claim, "claim" as defined in §45.900(a)(5) is broad enough to include a petition to terminate Employee's benefits. That petition triggered Employee's right to defend himself by hiring an attorney. *Shirley*. If one applies §45.900(a)(5)'s "claim" definition to the word "claim" in §§145(a) or (b), the above-cited decisions awarding fees in cases with a claim and controversion, or even without a formal controversion in place, arguably apply to this case. *Houston*; *Harnish Group, Inc*. Parties in these cases commonly use "claim" as a synonym for among other things "injury," "case," and "notice of injury" in normal parlance. *Rogers & Babler*. Understanding this, the Workers' Compensation Division, through its rule-making Board, using its "agency expertise," promulgated a "claim" definition that covers myriad situations in which an injured worker could hire an attorney. *Burke*. Thus, it is reasonable that the "claim" definition in §45.900(a)(5) be applied to claims arising under §§145(a) and (b).

Employer "resisted" paying Employee compensation, or sought to reduce it, by petitioning to terminate his right to narcotics. AS 23.30.145(b); *Bockus*; *Bradley*; *Olson*. Weiner protected a valuable benefit (prescription narcotics) and, considering substance over form, *Unsel II* in substance "awarded" Employee additional benefits (ongoing narcotics, a multidisciplinary pain

clinic program with arachnoiditis experience, and an SCS if he wants one) against Employer's resistance, potentially entitling Weiner to a fee award, even under §145(a). *Houston*.

Considerable case law interpreting §145 (with emphasis added) also supports Employee's position and the above conclusion: "In the instance where an employer . . . otherwise *resists* the payment of compensation," §145(b) provides that factfinders "shall make an award" including "reasonable attorney fees." The Court construes §145 "in its entirety as reflecting the legislature's intent that attorneys in compensation proceedings should be reasonably *compensated* for *services rendered* to a compensation *claimant*. . . ." *Rose*; *Johns*. "Alaska's provision allowing attorney's fees is *unique* in its *generosity* to the *claimants* and their counsel." *Haile*; *Whaley*. "We hold that when a carrier *contests* the amount of compensation owed to an injured workman, it '*resists* the payment of compensation' within the meaning" of §145(b). In such cases, "if the claimant has hired an attorney in the successful prosecution of his claim," §145(b) "*entitles* him to reasonable attorney's fees. . . ." *Bradley*. "It would be a pure and simple elevation of *form over substance* because the nature of the hearing, the prehearing discovery proceedings, and the work required of the claimant's attorney are all *unaffected* by the existence or not of a formal notice of controversion when there is a controversion in fact." *Houston*. Section 145 "seeks to *ensure* that attorney's fee awards in compensation cases are sufficient to *compensate* counsel for work performed. Otherwise, workers will have *difficulty finding counsel* willing to argue their claims." *Arant*. "If an attorney who represents claimants gets nothing on his unsuccessful cases and no more than an hourly fee in his successful cases, he is in a poor business" and would be better off moving to the other side of the hearing room. *Bignell*. Attorney fees should be based on the "nature, length and complexity of the services performed." *Rose*; *Johns*; *Bailey*. "Awarding fees at half a lawyer's actual rate is inconsistent with the purpose of awarding *full attorney's fees* in the workers' compensation scheme." *Cortay*. An employer had "*otherwise resisted*" paying benefits where it unsuccessfully tried to obtain a compensation rate reduction, and the claimant's attorney fees were properly awarded under §145(b). *Olson*. Attorney fees "in workers compensation cases should be fully compensatory and reasonable, in order that injured workers have competent counsel available to them." *Childs*. The policies underlying the Act's attorney fee statute include ensuring "that injured workers are able to obtain effective representation." *Shirley*. The factfinders must weigh "the nature, length, complexity of the lawyer's services and the issues upon which he

prevailed" in awarding attorney fees. *Abood*. Although §§145(a) and (b) are construed separately, they "are not mutually exclusive." *Humphrey*. "We have never *delineated* the exact actions an employer must take to *oppose* a claim in order for there to be a controversion in fact." Fees may be awarded under §145(b) when an employer "*resists*" paying compensation and the injured worker hired an attorney who successfully prosecutes his claims. *Harnish Group, Inc*. Subsection 145(b) "permits a fee award against an employer when the employer *resists* . . . payment." *LHIW, Inc.* As a successful party on a "*significant* issue," the injured worker's lawyer was entitled to "*full, reasonable attorney fees*" in an appeal fee case. *Warnke-Green*. Subsection §145(b) authorized an order awarding "attorney's fees from employer who '*otherwise resists*' paying compensation. *Cavitt*. The factfinders have "discretion to fashion an award as it sees fit so long as it does not abuse that discretion." *Wozniak*. Even if the fee award was somewhat higher than what the employer proposed and "was in a novel format, neither the amount of the fees nor the manner in which they were awarded was manifestly unreasonable" under the circumstances. *Id*. An attorney fee award will be upheld unless it is "manifestly unreasonable." *Rusch*. The Act "is to be construed and applied in a manner that *encourages*, not *discourages*, attorney representation of injured workers." *Id*. This panel is in a "far better position" to evaluate whether a party successfully prosecuted "a claim" than is the Commission. *Porteleki*.

The next best thing to a formal controversion to demonstrate Employer's "resistance" to continued payment of Employee's valuable medical benefits is a petition seeking an order "terminating" his medical care. Based on the above analyses and cited case law, authority exists for this decision to award Weiner attorney fees, potentially, under §145(b).

Adamson upon which Employer relies is also distinguishable. Unlike the claimant in *Adamson*, Employee had no pending claim and nothing to decide on its merits. By contrast, Employee's attorney successfully defended against Employer's petition, which had it been granted, would have terminated Employee's right to narcotic medications. There is a difference between *Adamson*, where the injured worker prevailed against her employer's petition to enforce an oral settlement, where the worker apparently thought she could do better at hearing but lost altogether, and Employee's case where Employer's petition if granted would have terminated a valuable benefit for which Employee had no claim pending, but is now still receiving. In *Adamson*, a hearing

decided the injured worker's claim for benefits. Here, a hearing on Employer's petition decided not his claim for, but Employee's right to, continued narcotics. *Adamson*'s use of the word "claim" is, like *Jonathan*'s, case specific.

Employer contended public policy does not provide a basis to award Weiner attorney fees for "accomplishing nothing." But Weiner successfully defended against Employer's petition and retained and obtained "significant benefits" for Employee. *Warnke-Green*; *Cavitt*. The next question is whether Weiner is entitled to reasonable attorney fees.

C) Weiner's attorney fee affidavits and itemizations support an attorney fee award.

The law "places the burden on the party opposing attorney's fees to show lack of merit." *Rusch*; *Singh*. Employer detailed its objections to Weiner's attorney fee affidavits and itemizations, but presented no witnesses at hearing and did not cross-examine Weiner. Although it charted its objections to Weiner's itemizations, Employer's "bare allegations," are merely arguments, and "argument is not evidence." *Richards*.

The attorney fee affidavit regulations for fee requests under §§145(a) or (b) state that the fee affidavit must itemize "the hours expended, as well as the extent and character of the work performed. . . ." 8 AAC 45.180(b)(1), (d)(1). *Rusch* pointed out that these regulations provide "no additional guidance about the form of an affidavit"; nor do the regulations specify information needed in any attached itemization. It further noted the regulations do not prohibit block-billing and previous agency decisions did not have a "clear rule" for reductions solely for block-billing. Therefore, random reductions based on these defenses is inappropriate. *Rusch*.

Employer's 20-page chart showing its objections to Weiner's and his paralegals' time and charges opposes every single charge, save one. Its objections include: inappropriate billing for past services related to a C&R; "vague" entries; "irrelevant" entries; "false billing"; entries "unrelated to hearing issues and overinflated"; entries providing no benefit to Employee; "overbilling"; "duplicative" entries; amounts too high compared to Tansik's billing for the same activity; settlement discussions not compensable; activities took too long for simple tasks; inappropriate "block billing"; Tansik's estimates about how long it should have taken for Weiner to perform the

activity; "med summary" entries are "false billings"; Tansik denies receiving certain emails from Weiner; time spent on an unauthorized medical expert must be excluded; and time spent on briefing and hearing preparation was "false" and "overbilled."

Tansik did not testify at hearing. Her arguments about what she did or did not receive from Employee or his counsel are not evidence and do not support any reductions. *Richards*. Similarly, Employer's subjective statements that certain entries were vague, irrelevant, false, unrelated, overbilled, duplicative, too high, not compensable, took too long and so forth are arguments, not evidence. Even objections to work on a "med summary" that Tansik said she did not receive are without merit because Employer presupposes that "med summary" refers to a medical summary used to file and serve medical records; it could refer to an internal summary. Employer failed to cross-examine Weiner on what he meant by "med summary." Moreover, the Court has determined it is inappropriate to judge a claimant's lawyer's time and attorney fees based on opposing counsel's time for the same or similar work. *Cowgill*. Weiner's itemizations reflect normal interactions with his client and others.

Weiner testified at length at hearing about his attorney fee affidavits and itemizations. Although his four admissible attorney fee affidavits were difficult to follow, he generally explained them satisfactorily although some explanations did not comport with the factfinders' calculations. For example, Weiner testified that he did not include in his fee affidavit (1) and (3) his four 2021 entries for work for which he was already paid related to the C&R. But his timekeeping database included those amounts in the $11,610 totals. He also testified that the $3,300 from affidavit (2) was already included in affidavit (1). However, his timekeeping database again included $3,300 from affidavit (3), which Weiner testified he deducted from the total amount resulting in only $5,330 in new activity from fee affidavit (3). While it does not appear that Weiner was intentionally double-billing, an adjustment will be made for these apparent oversights.

Weiner's method of tracking and itemizing his fees made it difficult for the factfinders to determine his billing. Nevertheless, Weiner's testimony about his interaction with his paralegals and his supervision over them, his own thought processes, and his difficult interactions with Employee who is on narcotic medication and has difficulty understanding, was credible. AS 23.30.122;

Smith. Likewise, he explained that when he performs an activity such as reviewing a document, it involves more than just reviewing the document. He had to determine what effect the document would have on his client's case, what action was needed and what he had to tell his paralegals to do in respect to the document. He reviews and approves everything that goes out of his office. In these regards, Weiner's testimony was also credible. AS 23.30.122; *Smith*.

Weiner's four fee affidavits, apart from being confusing and difficult to follow, nonetheless adequately "itemized the hours expended" and generally stated "the extent and character of the work performed." His time entries showed the "extent," and the descriptions showed the "character." In that regard, they comported with 8 AAC 45.180(b)(1) and (d)(1). *Rusch*. It is difficult to understand how Employer could object to Weiner's various activities related to "settlement" discussions when at the *Unsel II* hearing Employer stated it wanted a ruling on the SCS for "settlement purposes." Settlement is a desired and integral part of a workers' compensation case. Employer failed to explain why Weiner should not be paid for attempting to settle Employee's case when those efforts failed, but he then prevails at a hearing on Employer's petition to terminate Employee's benefits. It failed to meet its burden to show with evidence that all Weiner's requested attorney fees lack merit. *Rusch*; *Singh*.

However, some of Employer's objections have merit, and Weiner is not "automatically" entitled to full, reasonable attorney fees and costs just because he asked for them. *Abood*. First, Weiner failed to file his paralegals' affidavits supporting their work. He was unaware of this requirement even though the regulation is clear; paralegal "fees" are "costs" and must be supported by the paralegals' affidavits. 8 AAC 45.180(f)(14)(A)-(E). *Murphy* rejected a worker's appeal from a panel's refusal to award paralegal costs without affidavits. Paralegal charges are not attorney fees, and paralegal costs without affidavits will be denied as fees and costs. This decision will reduce Weiner's requested attorney fees and costs by all amounts itemized as paralegal expenses. Second, Employee was apparently unaware that he could not call a medical expert outside the Act's parameters. Therefore, any legal effort directed toward Dr. Tennant will also be deducted. The amounts deducted for Dr. Tennant total $360 for services on February 2, 2024.

Employer did not object to Weiner's $300 hourly rate. But the law requires additional considerations: The "nature" of this case was contentious; it is unusual for an employer to compile a chart objecting to every attorney fee entry by the claimant's lawyer save one. *Rose*; *Johns*; *Rogers & Babler*. This case was unusual because Employer chose to petition to terminate medical benefits rather than controverting them, seeking to avoid attorney fee exposure. AS 23.30.145(a); *Bouse*. Weiner referred to this as a "very odd sort of controversion" that was never filed. The "length" of Weiner's services was not particularly long, but as he testified, the issues underlying *Unsel II* were somewhat more complex than average because Employee with Weiner's assistance spent considerable time trying to find a multidisciplinary pain clinic that specializes in arachnoiditis. Employee successfully defended against Employer's petition and the resulting "benefits" are discussed in detail in subsection (*A*), above.

Professional rules require additional considerations in determining Weiner's attorney fees: (1) Employer's petition, filed in the case without a formal pending "claim" or "controversion," required Weiner to expend substantial time defending his client's right to continuing narcotics, and obtaining a multidisciplinary pain clinic of his choice, and an SCS should he desire one, in an attorney fee case of first impression. Overall, Weiner was successful as analyzed above. (2) Neither party produced direct evidence on whether Employer's petition precluded Weiner from engaging in other employment while he worked on this claim. (3) Weiner's $300 per hour charge in this case is, based on his testimony, significantly lower than fees charged by other attorneys in Alaska representing injured workers. (4) The ongoing narcotic medication, appropriate clinic and SCS were significant benefits at stake; Weiner obtained the benefits as analyzed above. (5) As Employer's petition sought to terminate Employee's narcotic medication, which he could not quit abruptly, this posed time limitations on Weiner. (6) Weiner testified that Employee was "very happy" with his services, so the "nature" of his relationship with Employee was good. According to his fee affidavits, he represented Employee for several years. (7) Neither Weiner nor his affidavits addressed his legal "experience, reputation or ability." However, at the *Unsel II* hearing, Weiner ably and successfully defended against Employer's petition, preserved Employee's narcotic medications, got him the multidisciplinary pain clinic he wanted and protected his right to an SCS should he want one in the future. On the other hand, Weiner showed unfamiliarity with statutes and regulations involving medical experts and paralegal costs. He provided no legal

support for his contention that Tansik had a duty to assist him in these regards. (8) Weiner did not specifically state in his affidavits or testimony that his fees were contingent, but there is no evidence to the contrary and the May 23, 2024 hearing addressed a claim for attorney fees and costs. Therefore, based upon the evidence presented at hearing and in the four fee affidavits, Weiner's attorney fees for the *Unsel II* hearing were "reasonable." *Rusch*; *Bignell*; Rules of Prof. Conduct, Rule 1.5(a)(1)-(8).

Given the above analyses, Weiner's fees for his work in *Unsel II* could be supported under either §145(a) or (b). But Employer's "resistance" and Alaska Supreme Court precedent support applying §145(b) to this unusual case and awarding "reasonable attorney fees" to Weiner under that subsection. Applying all required considerations for an attorney fee award, analyzed above, this decision will award Weiner attorney fees as follows: from fee affidavit (1) $10,170 in fees and $1.89 in costs, after deducting all C&R charges itemized in November 2021, all paralegal fees, and $3,300 because those fees are included in fee affidavit (2); from fee affidavit (2), $3,300 in fees; from fee affidavit (3) $4,140 in fees, after deducting $360 related to Dr. Tennant and deducting duplicative bills for $3,300 already included in fee affidavit (2); and from fee affidavit (4) $1,110 in attorney fees. Total full, reasonable attorney fees for work done for the *Unsel II* hearing equal $18,720 ($10,170 + $3,300 + $4,140 + $1,110 = $ 18,720).

D) Weiner is also entitled to attorney fees for obtaining his attorney fees.

On February 16, 2024, Weiner formally claimed attorney fees and costs. On March 13, 2024, Employer formally controverted his claim. The instant decision awards Weiner significant attorney fees for his work done in *Unsel II*, the fees subject of his claim. Although he did not receive all his requested attorney fees and costs from the May 23, 2024 hearing, Weiner succeeded on a "significant" issue -- most of his attorney fees -- and lost on *de minimis* items related to costs, inadvertent duplicative bills for $3,300 and work related to Dr. Tennant. *Porteleki*. Therefore, he is entitled to attorney fees under §145(a) for results obtained at the May 23, 2024 hearing. At hearing, Weiner testified he spent 2.0 hours reviewing Employer's and his own brief and 2.0 hours for hearing preparation; the panel's timekeeping determined he participated at the May 23, 2024 attorney fee hearing for 2.8 hours. There was no contrary evidence, and nothing in Weiner's hearing preparation was unusual or unreasonable. *Rusch*; *Singh*.

The "nature" of Weiner's attorney fee claim was also contentious. The "length" was frankly too long, but Employer's objection to every itemized entry on Weiner's fee affidavits, save one, necessitated his lengthy testimony. The claim's "complexity" was higher than normal and unusual because Employer petitioned to terminate benefits to avoid attorney fees, requiring Weiner to defend his client's position, and incur attorney fees while so doing. *Bouse*. As stated previously, this is a case of first impression. Weiner's services resulted in a significant attorney fee award to Employee and Weiner, which benefits them both because Weiner did not provide free services, and he is more likely to continue representing Employee. *Rusch*; *Haile*; AS 23.30.145(a), (b).

Further, (1) Employer's fee claim controversion required Weiner to prepare for and attend a hearing on his claim; Weiner was successful. (2) No direct evidence was offered on whether Weiner's attorney fee claim precluded him from engaging in other employment while he worked on this claim. (3) His $300 per hour charge is much lower than fees charged by other attorneys in Alaska representing injured workers, and his time was not out of proportion to his fees. *Haile*. (4) The fees at issue were substantial; Weiner obtained most of his requested attorney fees. (5) As the claim was only for Weiner's attorney fees, Employee's time constraints if any were irrelevant to Weiner's claim. (6) Weiner testified that Employee was "very happy" with his *Unsel II* services so the "nature" of his relationship with Employee was good. According to his fee affidavits, Weiner represented Employee for several years. (7) Neither Weiner nor his affidavits addressed his legal "experience, reputation or ability." However, at the May 23, 2024 hearing, Weiner ably explained how he calculated his attorney fees and, with a few exceptions, defended his fee affidavits successfully. (8) Weiner did not specifically state in his affidavits or testimony that his fees were contingent, but there is no evidence to the contrary, and the panel assumes they were, because he requested fee approval. Rules of Prof. Conduct, Rule 1.5(a)(1)-(8).

Therefore, based upon Weiner's efforts post-*Unsel II* in obtaining his attorney fees from the *Unsel II* hearing, and after Employer controverted his attorney fee claim, his requested attorney fees for the May 23, 2024 hearing were reasonable. *Rusch*; *Bignell*; Rules of Prof. Conduct, Rule 1.5(a)(1)-(8). This decision will award Weiner an additional $2,040 in attorney fees under §145(a) for succeeding in his controverted claim for attorney fees. The total attorney fees this decision will award for Weiner obtaining this decision are $20,760 ($18,720 + $2,040 = $20,760), and it will

award him $1.89 in costs. This result comports with the Alaska Supreme Court's policy to construe the Act in a way that "encourages, not discourages" Weiner and other attorneys to represent injured workers in workers' compensation cases. *Rusch*.

CONCLUSIONS OF LAW

1) The oral order allowing Weiner to testify about his fees was correct.
2) Weiner is entitled to attorney fees and costs.

ORDER

1) Weiner's February 19, 2024 claim for fees and costs is granted in part and denied in part.
2) Weiner's requests for all attorney fees and costs for paralegal expenses, his duplicative $3,300 billings for the same services, and attorney fees related to Dr. Tennant are denied.
3) Employer is directed to pay Weiner $20,760 in full, reasonable attorney fees and $1.89 in costs.

Dated in Anchorage, Alaska on June 13, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Randy Beltz, Member

/s/
Bronson Frye, 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 Aaron D. Unsel, employee / claimant v. Klebs Mechanical, Inc., employer; Liberty Northwest Insurance Corp., insurer / defendants; Case No. 201117973; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on June 13, 2024.

/s/
[Rochelle Comer], Office Assistant II