ALASKA WORKERS' COMPENSATION BOARD

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

DONALD R. RIDGE, Employee, Claimant, v. CITY OF WASILLA, Employer, and ALASKA PUBLIC ENTITY INSURANCE, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 202313198 AWCB Decision No. 24-0062 Filed with AWCB Anchorage, Alaska on November 12, 2024

Donald Ridge's December 8, 2023 claim was heard in Anchorage, Alaska on August 21, 2024, a date selected on July 3, 2024. An April 12, 2024 request gave rise to this hearing. Attorney Richard Harren appeared and represented Donald Ridge (Employee). Attorney Krista Schwarting appeared and represented the City of Wasilla and Alaska Public Entity Insurance (Employer). Witnesses included Employee, who testified on his own behalf, and Employee's coworkers, Wasilla Police Officers Cody Rice, Kaleb Moyer, and Nate Lecours, who also testified on Employee's behalf. The record was held open to receive Employee's supplemental fee affidavit and Employer's objections to Employee's supplemental fee affidavit. It closed upon receipt of Employer's objections and the panel's deliberations on August 28, 2024.

ISSUES

Employer contends Employee's claim is barred by statute for failure to timely report his injury.

Employee contends the statutory time period did not begin to run until he understood the nature of his injury and its relationship to his employment, which was not until a magnetic resonance imaging (MRI) study showed that his shoulder required surgical treatment. He contends he timely reported his injury following the MRI so his claim is not barred.

1) Is Employee's claim barred for failure to timely report his injury to Employer?

Employee contends he suffered a left shoulder injury while participating in control tactics training at work and this injury is the substantial cause of his need for medical treatment. He seeks an award of medical costs.

Employer disputes Employee's entitlement to medical benefits on the basis that Employee failed to provide timely notice of injury and because Employee failed to submit any medical bills or out of pocket receipts prior to the evidence deadline. Employer also asserts that if medical benefits are awarded, benefits should be limited to past medical treatment since there are no current recommendations for further medical treatment.

2) Is Employee entitled to medical costs?

Employee contends he was given a two percent whole person permanent partial impairment (PPI) rating and he seeks an award of that benefit.

Employer relies on its late injury reporting defense and contends Employee should not be awarded PPI on that basis.

3) Is Employee entitled to PPI benefits?

Employee contends he was aided by the services of his attorney and requests an award of full reasonable attorney fees.

Employer denies Employee's entitlement to attorney fees. It contends Employee failed to provide timely notice of injury. It also contends the supplemental attorney fee requests should be denied

in full since attorneys R. Harren and H. Lee's supplemental fee affidavits were filed late. Employer additionally objects to attorney fees for duplicative work between Employee's two attorneys and for fees involving subpoenas, which Employer contends were unnecessary.

4) Is Employee entitled to attorney fees?

FINDINGS OF FACT

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

1) On January 26, 2023, Employee, a sergeant with the Wasilla Police Department, participated in control tactics training with fellow officers Rice, Moyer and Lecours. (Ridge Deposition, February 9, 2023; Ridge).

2) During one training routine, fellow officer Lecours demonstrated an "arm bar technique" on Employee which resulted in his left arm and shoulder being pulled at an extreme angle. (*Id*.).

3) Employee testified the "arm bar technique" caused immediate pain in his left shoulder and that he and officer Lecours stopped the training session for a short time. (*Id*.).

4) Employee said his left shoulder had "some pains, some swelling, and some limited range of motion for a certain number of days, but it mostly went away, and that was the attitude [he] took; this will -- this will go away." (Ridge Deposition, February 9, 2023).

5) Employee said he has been a control tactics instructor since 2006 and during every training session he has felt pain. He assumed his left shoulder pain was similar to prior occasions, and it would eventually heal itself with time. In the meantime, his left shoulder pain never limited his activities or caused him to miss work. (Ridge).

6) Officers Rice, Moyer and Lecours were present on January 26, 2023, participating in control tactics training and all testified Employee said he had left shoulder pain. (Rice, Moyer, Lecours).

7) Officer Lecours testified consistent with Employee that the training incident gave rise to Employee's left shoulder pain and confirmed Employee said he believed he had "tweaked" his shoulder. (Lecours).

8) Officer Moyer testified he was present in the training room with Employee and although he did not watch the training between Employee and Officer Lecours, he observed Employee in pain. (Moyer).

9) Officer Rice testified he recalled seeing Employee nursing his shoulder during training and heard Employee say they would have to lay off his shoulder for the rest of the training session. (Rice).

10) On August 24, 2023, during an annual exam with David Barnes, D.O., Employee mentioned having ongoing left shoulder pain. Dr. Barnes noted, Employee "was complaining of left shoulder pain since about January 2023" and Employee "had been trying to treat conservatively in hopes it would go away but [it] was not resolving. [Employee] had full range of motion and wanted to determine the cause." Dr. Barnes referred Employee to Charles Haggerty, M.D., an orthopedist, for a left shoulder evaluation. (Barnes chart note, August 24, 2023; Referral Form, August 24, 2023).

11) On September 18, 2023, Dr. Haggerty referred Employee for a left shoulder MRI. (Haggerty chart note, September 18, 2023).

12) On September 19, 2023, Employee's left shoulder MRI showed a labrum tear, acromioclavicular joint separation, and a paralabral cyst. (MRI report, September 19, 2023.) That same day, Employee reported the injury to his supervisor and submitted an injury report to Employer. (Ridge Deposition, February 9, 2023; Report of Injury, September 27, 2023).

13) On September 20, 2023, Employee received a left shoulder Cortisone injection. (Haggerty chart note, September 20, 2023).

14) On September 27, 2023, Employer controverted Employee's entitlement to benefits because he did not provide notice of his January 26, 2023 injury until September 19, 2023. (Controversion Notice, September 27, 2023).

15) On December 8, 2023, Harren filed an appearance and a claim on behalf of Employee, requesting temporary total disability (TTD) benefits, medical benefits, and attorney fees and costs. The appearance's caption is for *Donald Ridge v. City of Wasilla*. However, the text states Harren is appearing for an individual other than Employee. (Entry of Appearance, December 8, 2023; Claim for Workers' Compensation Benefits, December 8, 2023).

16) On December 15, 2023, Employer controverted benefits, contending Employee's claim was barred by AS 23.30.100 since Employer "did not learn of Employee's alleged injury until September 19, 2023." (Controversion Notice, December 15, 2023).

17) On January 15, 2024, because the Cortisone injection did not fully resolve his left shoulder pain, Employee opted to proceed with surgery. (Haggerty chart note, January 15, 2023). Surgery

was performed on January 19, 2024, and included a labral repair and biceps tenodesis. (Operative Report, January 19, 2024). Postoperatively, Employee participated in physical therapy. (Physical Therapy Notes, February 2, 8, 12, 15 and 20, 2024).

18) After the January 19, 2024, surgery, Employee took two weeks personal leave before returning to work; first on restricted light duty for four weeks and then full duty. Employee testified that he suffered no wage loss from the January 26, 2023 work injury because he used personal leave time. (Ridge Deposition, February 9, 2023; Ridge).

19) On February 20, 2024, physical therapy notes say, "Pt feels very good with all movements and exercises, feels minimal to no pain. . . ." (Chart Note, Arnold Remy, DPT, February 20, 2024).

20) On August 2, 2024, Amit Sahasrabudhe, M.D., performed an employer medical evaluation (EME), which included a medical history from Employee, a physical examination of Employee's left shoulder, and a medical record review. He noted Employee said, "I'm a guy, things hurt, I figured it would go away." He opined the January 26, 2023 work injury was the substantial cause of Employee's need for left shoulder treatment, Employee's medical treatment had been reasonable and necessary, he was medically stable and had incurred a two percent whole person PPI. Dr. Sahasrabudhe could think of no alternative explanation for Employee's left shoulder injury that would exclude the January 26, 2023 work injury as the substantial cause. He opined Employee was medically stable and no further treatment was reasonable or necessary for Employee's work injury. (Sahasrabudhe report, August 2, 2024).

21) A two percent PPI benefit's value is $5,460 ($273,000 x .02 = $5,460.) (Observation; experience).

22) On August 14, 2024, Employee filed a four-page hearing brief. The fourth page was solely the certificate of service. Aside from including the text of the applicable statute, (AS 23.30.100(d)), the "hearing brief" contained no substantive legal analysis, no relevant case law, and cited no legal precedent. Nor did Employee's brief provide a history of Employee's injury, the medical treatment received, or any detail or analysis of the benefits Employee requested. The brief's reliance on tort law discovery principles was misplaced in the context of the underlying worker's compensation claim. (Observation; judgment).

23) On August 14, 2024, Employee filed his witness list. One witness listed was Employer's claims administrator. Employee intended to elicit testimony "regarding the adjusting of the claim including a listing of the defense costs and attorney fees." (Witness List, August 14, 2024).

24) Employer had originally scheduled a deposition of Dr. Sahasrabudhe for August 13, 2024, in Colorado, which was rescheduled to August 15, 2024. Following Dr. Sahasrabudhe's August 2, 2024, EME Report, Employer canceled the deposition. (Deposition Notices, July 11, 2024, and July 19, 2024; Notice of Deposition Cancellation, August 15, 2024).

25) On August 21, 2024, Employee said he did not report the left shoulder injury to his supervisor or to the Human Resources Department when he first experienced pain on January 26, 2023; he did not know he had an injury until the September 19, 2023 MRI; after the MRI he immediately reported the injury to his supervisor and filled out an injury report. He did not know what the workers' compensation law was, as it relates to the 30-day notice requirement, but did know there were 30 days involved in injury reporting. Prior to the instant claim, Employee had filed three previous injury reports, sometimes even when he did not receive medical treatment. However, while working as a canine handler, he sustained dog bites all over his body, some bleeding, and he did not fill out an injury form. Employee stated, "an employee can't report every time there's pain at work." He was "shocked" when his claim was denied because he did not know he had an injury until the September 19, 2023 MRI and once he knew the MRI results, he reported the injury. Employee estimates he has spent "a couple thousand" dollars on deductibles and copays treating his shoulder injury and he thinks $200 is still owed in MRI costs. He has been a police officer for 30 years and is looking towards retirement. His primary concern is obtaining an order that benefits for the January 26, 2023 injury are compensable so he can get medical treatment for his left shoulder in the future, should he need it. (Ridge).

26) Sources from which medical costs evidence can be obtained include medical providers, medical providers' invoices, explanations of benefits, and the health insurance company that paid for medical treatment. (Experience).

27) Employee presented no evidence and no receipts for medical expenses. He also presented no evidence to substantiate a need for further medical treatment involving his left shoulder. (Observation).

28) On August 16, 2024, Harren and Lee filed attorney fee affidavits seeking a combined total of $12,650 in fees. Harren requested $8,800 in fees based on 17.6 hours of work billed at $500 per hour. His affidavit states, "EE agreed that my attorney fee rate would be $500 per hour." Harren's fee affidavit includes two handwritten exhibits itemizing time spent on Employee's case. Lee requested $3,850 in fees for 11 hours of work billed at $350 per hour. His affidavit states,

"EE agreed that my attorney fee rate would be $350 per hour." Lee described his work in "generic terms" intentionally "in accordance with work product doctrine." Neither fee affidavit addressed the Alaska Rule of Professional Conduct 1.5(a) factors. Lee's billing entries provide no substantive description of the nature or extent of work performed. (Fee Affidavit, Richard Harren, August 16, 2024; Fee Affidavit, H. Lee, August 16, 2024; observation, judgment, experience).

29) On August 21, 2024, Employer called no witnesses and presented no evidence rebutting work as the substantial cause of Employee's injury and need for left shoulder medical treatment. Nor did Employer present evidence indicating Employer suffered prejudice by not knowing of Employee's left shoulder injury within 30 days of the January 26, 2023 injury. (Record).

30) Employee withdrew his claim for TTD at hearing because he had been paid personal leave time, which was more than he would have received in TTD benefits, and because paying back his leave would be complicated in respect to taxes. At all times prior to the August 21, 2024 hearing, Employee had claimed TTD benefits. (Claim, December 8, 2023; Prehearing Conference Summaries, July 3, 2024; August 2, 2024). He also sought to amend his claim at hearing to request PPI benefits from Dr. Sahasrabudhe's two percent rating. The panel granted Employee's request, ruling that unusual and extenuating circumstances existed because the EME report had not been issued until after the August 2, 2024 prehearing conference, at which hearing issues were identified and because Employer had canceled Dr. Sahasrabudhe's deposition. (Record).

31) On August 28, 2024, Harren and Lee filed supplemental attorney fee affidavits seeking an additional combined total of $6,425. Harren requested an additional $4,500 in fees for 9 hours of work at $500 per hour. Lee requested an additional $1,925 for 5.5 hours of work at $350 per hour. The supplemental fee affidavits were filed on August 28, 2024, two days after the Board-ordered August 26, 2024 deadline. Neither supplemental fee affidavit addressed the Alaska Rule of Professional Conduct 1.5(a) factors. (Fee Affidavit, Richard Harren, August 28, 2024; Fee Affidavit, H. Lee, August 28, 2024; observation, judgment).

32) Employee's counsel filed 12 pleadings, seven of which related to Employee's attorney fees, including his motion to accept a one-day late filing and Harren's and Lee's affidavits to support their motion. Harren Law Office filed a witness list and a four-page hearing brief, which was not helpful to the panel. The other three pleadings were form-generated filings -- Employee's claim, Harren's entry of appearance, and an Affidavit of Readiness for Hearing. Harren filed no evidence,

no medical summaries, and presented no proof or evidence of medical expenses incurred, future anticipated medical care, or Employee's out-of-pocket expenses. (Observation).

33) Harren Law Office did not amend Employee's claim to include PPI benefits upon receiving Dr. Sahasrabudhe's August 2, 2024 report. Instead, counsel requested leave to amend Employee's claim at hearing. (Observation).

34) Neither Harren nor Lee presented testimony to support their fee requests during the August 21, 2024, hearing. (Observation).

35) Employer denies Employee's entitlement to attorney fees because Employee failed to provide timely injury notice. It also objects to Employee's attorney fees to the extent they reflect duplicative work by Harren and Lee, and to Lee's fees relating to subpoenas, which Employer contends were unnecessary. Employer contends Employee's request for supplemental attorney fees should be denied because the supplemental fee affidavits were filed late. (Employer's Opposition, August 28, 2024.)

36) Harren billed 26.6 hours between November 20, 2024 and August 23, 2024 representing Employee. Lee assisted Harren and billed 16.5 hours for the same period. Comparing the billing entries of both attorneys, several entries are duplicative: (1) On July 3, 2024, Lee billed 0.8 hours for "Prehearing attend and internal discussion." Harren billed 1.0 hours on that same day for "Prepare for and attend PH Conf; follow up." Lee did not attend the prehearing. Lee's billing entry fails to describe in any detail the extent and character of the work. (2) On August 21, 2024, Lee billed 2.5 hours for "hearing attend." On this same date, Harren billed 5.5 hours to "appear at hearing." Lee's billing entry fails to describe in any detail the extent and character of the work performed or the benefit his attendance provided to prosecute Employee's claim. Only Harren actively participated in the August 21, 2024, hearing. (3) On August 8, 2024, Harren block billed 3 hours. Work performed is described as "Review emails ER. REVIEW BRIEF of ER. T/C client re witness list; depo, etc; prepare witness list and hearing brief; assignments to Lee." On August 14, 2024, Lee billed 2.7 hours for "witness list, hearing brief." Lee's billing entry is vague and fails to describe in any detail the extent and character of the work performed on the hearing brief or in preparing the witness list. (Lee Fee Affidavit, August 16, 2024; Harren Fee Affidavit, August 16, 2024; Lee Supplemental Attorney Fee Affidavit, August 28, 2024; Harren Supplemental Attorney Fee Affidavit, August 28, 2024; Lee Affidavit, August 16, 2024, "Exh. A"; Harren Affidavit, August 16, 2024 "Exh A"; judgment).

37) Lee billed for work described as "subpoenas" on August 19, 20, and 21, 2024, totaling 2 hours. The subpoenas were not presented for issuance pursuant to 8 AAC 45.054. No subpoenas were necessary to compel the witnesses hearing attendance. All three officers who testified on Employee's behalf did so voluntarily, and without subpoenas having to be served on them. (Witness List, August 14, 2024; observation; judgment).

PRINCIPLES OF LAW

The Board may base its decisions on not only direct testimony, medical findings, 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).

Summers v. Korobkin Constr., 814 P.2d 1369, 1372 (Alaska 1991) addressed an injured worker's request for a prospective determination of compensability. His employer had controverted his case based on statutory notice defenses and contended the injury did not arise out of or in the course of his employment. The claimant's physician had recommended cervical surgery, and the employee was concerned about obtaining this surgery without knowing whether his employer would pay for it. Under these circumstances, *Summers* held the "injured worker who has been receiving medical treatment should have the right to a prospective determination of compensability."

> **AS 23.30.010. Coverage.** (a). . . [C]ompensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the Employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. . . . Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .
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> **AS 23.30.100. Notice of injury or death.** (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the employer.
> . . . .

> (d) Failure to give notice does not bar a claim under this chapter
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> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
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> (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
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> (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

Cogger v. Anchor House, 936 P.2d 157 (Alaska 1997) held:

> An employee must provide formal written notice to his or her employer within thirty days of an injury in order to be eligible for workers' compensation. . . . For reasons of fairness and based on the general excuse in AS 23.30.100(d)(2), this court has read a "reasonableness" standard, analogous to the "discovery rule" for statutes of limitations, into the statute. *Alaska State Hous. Auth. v. Sullivan,* 518 P.2d 759, 761 (Alaska 1974). Under this standard, the thirty-day period begins when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." *Id.* at 761 (quoting 3 Arthur Larson, *Workmen's Compensation* § 78.41, at 60 (1971)).

The exact date when an employee could reasonably discover compensability is often difficult to determine, and since missing the short 30-day limitation period bars a claim absolutely, for clarity and fairness *Cogger* determined the 30-day period can begin no earlier than when a compensable event first occurs. *Id*. It is not necessary that a claimant's injury be fully diagnosed for the 30-day period to begin. *Id. Sullivan* affirmed the position that "if an injury was not of a type that a reasonably prudent man would report at the time of its occurrence because it did not seem to be of a serious nature, then the claimant would not be barred by his failure to comply with the 30-day notice requirement." *Id.* at 761, 762.

Egemo v. Egemo Construction Co., 998 P.2d 434, 439 (Alaska 2000), held that when a claim for benefits is premature, the claim should be held in abeyance until it is timely, or it should be dismissed with notice that it may be refiled when it becomes timely.

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter;
> . . . .
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> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the Employee notwithstanding the provisions of (a) of this section.

The employee must "induce a belief" in the factfinders' mind the asserted facts are probably true." *Saxton v. Harris,* 395 P.2d 71, 72 (Alaska 1964*). Lindhag v. State, Dept. of Natural Resources,* 123 P.3d 948 (Alaska 2005), held a claim can fail for "failure of proof." See also, *Narcisse v. Trident Seafoods Corporation*, AWCB Decision No. 16-0070 (August 18, 2016).

> **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.
> . . . .

Credibility findings and the weight accorded evidence are "binding for any review of the Board's factual finding." *Smith v. CSK Auto, Inc.*, 2024 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.145. Attorney Fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board. . . . 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. . . . In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed . . . and the benefits resulting from the services to the compensation beneficiaries. . . .
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> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits . . . 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 proceeding, including a reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney successfully prosecutes the employee's claims. *Id*. To recover fees,

an employee must prevail on a claim. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1193 (Alaska 1993).

Wise Mechanical Contractors v. Bignell, 718 P.2d 971 (Alaska 1986) held attorney fee awards should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the claim's merits, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. The nature, length, and complexity of services performed, the employer's resistance, and the benefits resulting from the services obtained, are considerations when determining reasonable attorney fees for successful claim prosecution. *Bouse v. Fireman's Fund Ins., Co.*, 932 P.2d 222 (Alaska 1997) held since a claimant is entitled to full reasonable attorney fees for services on which the claimant prevails, it is reasonable to award one-half the total attorney fees and costs where claims on which the claimant did not prevail were worth as much money as those on which he prevailed.

Rusch v. Southeast Alaska Regional Health Consortium, 450 P.3d 784, 803 (Alaska 2019), held the statutory presumption of compensability does not apply to the amount and reasonableness of attorney fees sought by claimants in workers' compensation claims where "the parties did not dispute claimant's entitlement to attorney's fees; they dispute the fees' reasonableness." More importantly, addressing what the Board must consider when determining reasonable fees:

> To clarify our holding in *Bignell*, we hold that the Board must consider all of the factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney's fee (footnote omitted). . . . Some factors mirror those set out in the Act, such as the amount involved and the results obtained. On remand, the Board must consider each factor and either make findings related to that factor or explain why that factor is not relevant. *Id*. at 798-99.

The specific Rule 1.5(a) factors to consider in awarding attorney fees in these cases include:

> (1) The time and labor required, novelty and difficulty of the questions involved and skill requisite to perform the legal services properly.
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> (2) The likelihood that acceptance of the particular employment will preclude other employment by the lawyer.
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> (3) The fee customarily charged in the locality for similar services.

> (4) The amount involved, and the results obtained.
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> (5) The time limitations imposed by the client or the circumstances.
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> (6) The nature and length of the professional relationship with the client.
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> (7) The experience, reputation and ability of the lawyer or lawyers performing the services.
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> (8) Whether the fee is fixed or contingent.

The Board may weigh the evidence presented by a claimant and explain why it gives this evidence more or less weight in determining a reasonable fee award. *Rusch*. *State of Alaska v. Wozniak*, 491 P.3d 1081 (Alaska 2021) held, "The Board has discretion to fashion an award as it sees fit so long as it does not abuse that discretion."

Excusable neglect to make a timely filing for attorney fees may be grounds for equitable relief when the delay is not unreasonably long. *Mitchell v. United Parcel Service,* AWCAC Dec. No. 305 (June 12, 2024). *Andrews v. Alaska Interstate Construction*, AWCB Dec. No. 22-0073 (November 17, 2022) awarded reduced attorney fees to Harren Law Office. *Andrews* educated Harren Law Office on the various factors, including those set forth in AS 23.30.145(b) and Alaska Rule of Professional Conduct 1.5(a), that must be applied when determining the reasonableness of requested fees. In *Andrews*, neither Harren nor Lee presented evidence or argument concerning those factors. *Andrews* gleaned and examined from the record some Rule 1.5(a) factors applicable to ascertain a reasonable, fully compensatory attorney fee award. Harren Law Office was advised that when describing the extent and nature of work performed more than a "generic" description is required and the disputes or issues for which the work was performed should be identified.

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $273,000 multiplied by the Employee's percentage of permanent impairment of the whole person. . . . The compensation is payable in a single lump sum. . . .
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> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination. . . .
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> . . . .

> **8 AAC 45.120. Evidence.** . . .
> . . . .
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> (f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. . . .
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> **8 AAC 45.180. Costs and attorney 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 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 . . . . 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.
> . . . .
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> (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.
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> > (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 . . . . Failure by the attorney to file the request and an 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). . . unless the board determines that good cause exists to excuse the failure to comply with this section.
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> > (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.
> > . . . .

Williams v. Abood, 53 P.3d 134 (Alaska 2002), held the Board acted within its discretion in awarding only statutory minimum attorney fees for an attorney's representation of a claimant where two affidavits in support of a higher fee award were filed late, and one timely affidavit was

largely undecipherable and inaccurate. While there is a policy in favor of making attorney fees in workers' compensation cases fully compensatory, the policy does not relieve an attorney from following the procedural rules for obtaining compensation. *Id*. at 140.

Where requested fees are not sufficiently itemized or otherwise appear unreasonable, courts should not hesitate to deny those fees. *Hodari v. Alaska Department of Corrections*, 407 P.3d 468 (Alaska 2017). Attorney fee awards are reviewed under the abuse of discretion standard and should be upheld unless the award is "manifestly unreasonable." *Bouse* at 241.

ANALYSIS

1) Is Employee's claim barred for failure to timely report his injury to Employer?

An injured worker is required to report an injury to the employer in writing within 30 days of the first compensable event. AS 23.30.100(a); *Cogger*. Employer contends Employee's claim is barred because he did not give notice within 30 days of his injury.

It is undisputed that on January 26, 2023, while participating in control tactics training, Employee felt left shoulder pain. It is also undisputed that on September 19, 2024, approximately eight months after Employee's injury that caused left shoulder pain, he gave written injury notice to Employer. Under a literal construction of AS 23.30.100(a), Employee did not meet his duty to provide timely notice of injury. Nonetheless, the first compensable event was September 19, 2023, when an MRI revealed a labrum tear, acromioclavicular joint separation, and a paralabral cyst. *Cogger*.

In explaining why an injury was not reported within 30 days after control tactics training activities first caused left shoulder pain, Employee said although his shoulder had some pains, some swelling, and some limited range of motion for a certain number of days, it mostly went away. He had also been a control tactics instructor since 2006, and during every training session he felt pain. Employee assumed his left shoulder pain was like the pains he felt on past occasions and his shoulder would heal itself with time. The shoulder pain did not limit his activities or cause him to

miss work. Employee did not realize until the September 19, 2023 MRI that he had suffered an injury during the January 26, 2023 control tactics training. *Cogger*.

Drs. Barnes' and Sahasrabudhe's reports are consistent with Employee's testimony. Dr. Sahasrabudhe quoted Employee saying, "I'm a guy, things hurt, I figured it would go away." Dr. Barnes said Employee "had been trying to treat [the pain] conservatively in hopes it would go away, but [it] was not resolving." Employee's testimony concerning the timing of his injury report is consistent with statements he made to Drs. Barnes and Sahasrabudhe during their evaluations. He is credible. AS 23.30.122; *Smith*.

If an injury is not the type a reasonably prudent person would report when it occurred because it did not seem to be serious, then a claim is not barred by a failure to comply with the 30-day notice requirement. *Sullivan.* And since he did not miss time from work, or incur a medical bill until September 19, 2023, there was no compensable event to report. *Cogger*. Employee's statement that an employee cannot report an injury every time he experiences pain at work shows him to be a reasonably prudent person. Given his prior experiences feeling pain from control tactics training, and the fact his shoulder pain did not limit his activities or cause him to miss work, it was reasonable for him to have waited for his shoulder to improve until the September 19, 2023 MRI showed the serious nature of the injury. *Id*.; *Rogers & Babler*. Only on that date was it apparent Employee had sustained a compensable injury, which also satisfactorily explains why he did not notice Employer within 30 days of the January 26, 2023 incident. Employee's claim is not barred for failure to timely report his injury to Employer. *Sullivan*; *Cogger*.

2) Is Employee entitled to medical costs?

A) Past medical benefits

This decision resolves the issue of "legal" compensability under §100(a), above. For Employee's claim to be "medically" compensable, the work injury must, in relation to other causes, be the substantial cause of his need for medical treatment. AS 23.30.010(a). Here, the substantial cause of Employee's need for past medical treatment for his left shoulder is not in dispute. The only causation opinion in the record comes from the EME, who opined the January 26, 2023 injury was

the substantial cause of Employee's need for medical treatment. Therefore, the presumption of compensability analysis under AS 23.30.120(a)(1) does not apply.

The issue then becomes whether Employee has proven his claim for past medical costs. He had sources from which he could have obtained medical costs evidence, including his providers and the health insurance company that paid his claims. *Rogers & Babler*. Employee did not file evidence of a lien for the amounts his personal health insurance paid for treatment necessitated by his work injury; he did not file explanations of benefits related to his left shoulder treatment, nor did he file his medical providers' invoices. Neither did he provide evidence of outstanding medical bills or his out-of-pocket medical expenses. Employee failed to show he properly filed and served both the medical record and associated itemized bills in question. There is no evidence to consider beyond Employee's testimony he estimates he spent "a couple thousand" dollars on deductibles and believes the MRI bill maintains a $200 balance. To be relied upon to reach a decision, evidence must have been filed and served upon all parties 20 or more days before hearing. 8 AAC 45.120(f). No evidence of past medical costs was filed or served. *Id*. Absent any admissible past medical costs evidence, Employee has failed to meet his burden of production and persuasion. *Lindhag*; *Saxton*. Employee's claim for an order requiring Employer to pay past medical costs will be denied for failure of proof. *Lindhag*.

B) Future medical benefits

Employee said he is pursuing a claim for future medical care so he can get medical treatment after he retires, if needed. He is not seeking specific prospective treatment and has introduced no evidence of any need for further medical treatment. Employee's most current medical record post-surgery is a February 20, 2024 physical therapy note that says Employee "felt very good with all movements and exercises, feels minimal to no pain. . . ." After receiving physical therapy on February 20, 2024, there are no medical records showing Employee received any further left shoulder treatment. Dr. Sahasrabudhe determined no further treatment is necessary for Employee's left shoulder.

Employer filed two controversions in this case. Both relied on the legal defense under §100(a), rejected in this decision, above. Similarly, in its answer, Employer denied Employee's claim on

§100(a) grounds, and on grounds he had failed to present evidence supporting the claimed, past benefits. At no time did Employer suggest the injury did not arise out of or in the course of Employee's work for Employer. In other words, it denied his claim solely on a legal, notice defense and on a failure of proof defense as to past benefits claimed. Employer did not dispute its own EME physician's causation opinion. Therefore, given this matter's current posture, causation and "medical" compensability are not in dispute.

Employee has received medical treatment for his left shoulder, and he seeks a prospective determination of compensability as part of his claim. *Summers*. As Employer has never controverted, resisted, or objected to medical causation or compensability, Employee's left shoulder is compensable, and this issue is not even disputed. This case is distinguishable from *Summers*, where the employer not only raised legal defenses to compensability, but also claimed the injury never arose out of or in the course of employment. Further, the claimant in *Summers* had a physician's recommendation for neck surgery. The claimant was concerned about undergoing the surgery without knowing if his employer would pay for it. Here, Employee presented no evidence of any recommended future treatment. Therefore, *Summers* is inapplicable here because the facts are distinguishable; there is no recommended future treatment, and compensability is not currently in dispute. Employee's request for a prospective order finding future treatment compensable will be denied. Employee reserves his right to seek medical treatment; Employer reserves its right to deny that treatment on any applicable grounds other than §100(a).

3) Is Employee entitled to PPI benefits?

Since Employee's injury report was not late, this decision reaches his PPI claim on its merits. Neither the substantial cause of Employee's PPI, nor the degree of impairment are in dispute. AS 23.30.010. The only PPI rating in the record was given by Dr. Sahasrabudhe, who opined Employee incurred a two percent whole person permanent impairment because of the work injury. Employee is entitled to a two percent PPI benefit. AS 23.30.190; *Saxton*.

4) Is Employee entitled to attorney fees?

Employee requests actual attorney fees for services he contends the Harren Law Office provided to successfully prosecute his claim. Reasonable attorney fees may be awarded when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Childs*. Employer resisted paying benefits contending Employee's failure to timely report his injury barred entitlement. Employee retained counsel who successfully overcame Employer's §100 defense, successfully litigated this aspect of his claim, and obtained PPI benefits. Thus, Employee is entitled to a reasonable attorney fee award. AS 23.30.145(b); *Rusch*.

Attorney fees should be reasonable and fully compensatory to ensure injured workers have adequate representation. *Bignell*. The award must be reasonably commensurate with the actual work Harren Law Office performed. 8 AAC 45.180. The reasonableness of Harren and Lee's services are determined under statutory and decisional law requirements. Various factors, including those set forth in AS 23.30.145 and Alaska Rule of Professional Conduct 1.5(a), must be applied. Employee did not present evidence or argument concerning any of those factors. However, some Rule 1.5(a) factors applicable to ascertain a reasonable, fully compensatory attorney fee award can be gleaned from the record and will be examined. *Rusch*.

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

The only disputed issue was whether Employee provided timely injury notice. This issue is neither novel nor difficult. *Rogers & Babler.* Employee also requested an award of medical costs. His claim for TTD benefits was withdrawn at hearing. He further amended his claim at hearing to include PPI benefits and the Harren Law Office devoted minimal time to this issue. *Id*. Employee also requested an order for unidentified prospective medical care. Whether work was the substantial cause of Employee's need for medical care and entitlement to PPI benefits were not at issue. Dr. Sahasrabudhe confirmed work was the substantial cause of Employee's need for medical treatment and provided a two percent PPI rating. Extensive time and labor should not have been required to perform the legal services necessary to overcome Employer's §100 defense or to prosecute Employee's claim. *Id*.

Employee also seeks attorney fees. Entitlement to fees typically does not present a novel or difficult issue, nor does it require exceptional legal skill to properly draft a fee affidavit that accurately itemizes hours expended and describes the work's extent and character. Harren Law Office was advised how to draft a legally sufficient fee affidavit and the importance of addressing the Rule 1.5(a) factors. It was also educated to describe the extent and nature of work performed with more than a "generic" description. It was told the disputes or issues for which the work was performed should be identified. *Rusch*; *Andrews*. Harren Law Office did not heed the advice provided in *Andrews. Rogers & Babler*.

Considering the time and labor required, the simplicity of the issues involved, and the skill requisite to perform the legal services properly, this factor will be applied to lessen Employee's claimed fees. *Rusch*.

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

Neither Harren nor Lee addressed whether accepting Employee as a client would preclude them from accepting other clients' work. Harren possibly had 26.6 hours and Lee 16.5 less time to work on other employment over the nine months they participated as co-counsel to pursue Employee's claim. However, Harren and Lee gave no evidence that working on this case actually precluded other employment. This factor will be used to lessen Employee's claimed fees. *Rusch*.

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

Neither party introduced evidence of the fee customarily charged in Anchorage for legal services like those provided by Harren and Lee for Employee. Harren's hourly rate is $500, which experience shows is commensurate with other claimant's attorneys in Alaska with 30 years or more experience practicing law. Lee's hourly rate is $350. Employer has not objected to these hourly rates. Experience shows both Harren's and Lee's hourly rates are within the billing rates range customarily awarded in workers' compensation cases. *Rogers & Babler*.

(4) The benefits amount involved, and the results obtained.

Harren Law Office overcame Employer's §100 defense. Overcoming Employer's defense preserves Employee's right to seek future medical benefits for his left shoulder injury. However, Employer never objected to its EME's PPI rating, which resulted in Employee obtaining two percent PPI benefits worth $5,460. Harren Law Office did not, however, obtain an award for past medical costs of an unknown amount. Employee's claim was denied because Harren Law Office did not present evidence of Employee's out-of-pocket medical expenses or medical bills. *Lindhag*. Such evidence is not difficult to acquire, and which Employee likely possesses. *Id*. It needed only to have been filed. Harren Law Office did not obtain an award for prospective medical treatment because the issue was not disputed. *Summers*. This factor will be applied to both support and reduce Employee's claimed attorney fees. *Rusch*; *Bouse*.

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

This factor's applicability is not self-evident. Neither Harren nor Lee presented evidence of time limitations imposed by Employee or his case's circumstances. This factor will be used to lessen Employee's claimed fees. *Rusch*.

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

Harren nor Lee provided minimal evidence describing their professional relationship with Employee, or its nature and length. On November 20 and 21, 2023, Lee spent an hour on "client intake." On July 19, 2024, he spent .2 hours talking with Employee about a deposition. Although Harren's hand-written time accounting is hard to decipher and not in chronological order, it documents "initial interview," and says he spent 1.2 hours on, "multiple emails & phone calls to client, prepare AOH" on April 24 of an unspecified year. Employee's attorneys did not address how the length of their professional relationship with Employee affects their fees. This factor will be used to lessen Employee's claimed fees. *Rusch*.

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

Two attorneys from Harren Law Office with vastly different practice experience, worked on Employee's case. Employee's attorney of record, Harren, has over 30 years' experience. *Rogers & Babler*. Lee's affidavit did not provide his years' experience. Neither Harren's nor Lee's ability to perform services, or the skills necessary to perform the services properly were fully

demonstrated in this case. As examples, Harren's entry of appearance contains a typographical error that reveals another client's name. Employee's brief was unskillfully written. It did not summarize relevant medical records to support Employee's claims for medical costs, TTD or PPI benefits. Employee's brief included an irrelevant alternative argument if the failure to give timely notice was not excused. It cited tort law discovery rules. Harren Law Office could have easily researched and cited Alaska Supreme Court and Board decisions directly on point to support Employee's timely injury report. Finally, Harren Law Office did not gather or file relevant evidence to prove by a preponderance of the evidence Employee's past medical costs or need for prospective medical treatment. Employee's brief lacks any significant substantive content and did not assist the panel to analyze and decide the issues. This factor will be used to lessen Employee's claimed fees.

(8) Whether the fee is fixed or contingent.

Neither Harren's nor Lee's fee affidavits acknowledge they agreed to represent Employee for a fee contingent on their success. The contingent nature of a workers' compensation practice is statutorily derived, and this decision assumes Harren and Lee follow the law. AS 23.30.145.

Employee requests actual attorney fees for time Harren and Lee spent prosecuting his claim totaling $19,075. Harren's fees total $13,300; Lee's fees total $5,775. Harren and Lee are not "automatically" entitled to full, reasonable attorney fees just because they have asked for them. *Abood.* Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(b); *Childs*. An employee is entitled to full reasonable attorney fees for services on which the employee prevails, and it is reasonable to award one-half the total attorney fees where the claims on which an employee did not prevail were worth as much money as those on which he did not prevail. *Bouse*.

Employer contends that Employee's claims should be denied for his failure to timely report his injury. It does not challenge the billing rates of either Harren or Lee. Employer opposes the attorney fees' reasonableness to the extent Harren's and Lee's affidavits include duplicative billings. Employer also objects to Lee's fees for "subpoenas," which Employer contends were

unnecessary in this proceeding. Employer also opposes the supplemental fee affidavits of both attorneys on the basis that they were filed untimely.

Harren and Lee's supplemental fee affidavits were two days late. Practicing law requires strict attention to timeliness and calendaring. Nevertheless, the delay was not unreasonably long and will be excused. *Mitchell*.

A request for attorney fees "must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed." 8 AAC 45.180. There is an implicit expectation the fee affidavits' itemization be legible and sufficiently detailed to enable opposing counsel and the panel to easily discern the nature and extent of the work performed, when the work was performed, and the time expended. *Rogers & Babler*; *Andrews*; *Hodari*. Accurate, honest timekeeping is an essential administrative responsibility for attorneys seeking fee awards. *Abood.*

Aside from one typed entry dated August 8, 2024, Harren's August 16, 2024 fee affidavit's other ten entries are handwritten and nearly illegible, with eight of the entries containing only the month and year -- no individual day is provided. Entries are block billed, and it is difficult to discern how much time was billed for each task. Although purporting to be Harren's affidavit, it contains the statement "Exh A's timesheet spans from 11/20/23 (the date H. Lee started to work on this case) to 8/16/24." Since the quoted language is identical to the language contained in Lee's August 16, 2024 fee affidavit, it is an error; however, it is an error indicative of effort expended.

In 2019, *Rusch* held the factors set forth in ARPC 1.5(a) must be considered to support or lessen a fee award. Since 2019, it is common practice for attorney fee affidavits to address the factors set forth in ARPC 1.5(a). *Rogers & Babler*. Neither Harren's nor Lee's fee affidavits address the ARPC 1.5(a) factors despite both attorneys being admonished to address them in an earlier proceeding in which their fees were an issue. *Andrews*.

Harren and Lee performed duplicative work on several occasions and Lee performed work unnecessarily. Lee's billing entries for "subpoenas" (2.0 hours) and work duplicative of time

billed by Harren (6.3 hours) totals 8.3 hours. Subtracting 8.3 hours from the 16.5 hours which Lee billed results in 8.2 hours multiplied by Lee's $350 hourly rate equals $2,870.

Faced on the above analyses, Harren's attorney fees are excessive and unreasonable. This decision will reduce the time he spent working on this case by 33 percent. Therefore, Employee is entitled to an award of reasonable attorney fees for Harren's time; 17.6 hours at $500 per hour, or $8,800. Employee is entitled to an award of reasonable attorney fees for Lee's time; 8.2 hours at $350 per hour, or $2,870. Adding Harren's fees of $8,800 to Lee's $2,870 equals $11,670.

The fee award is reduced for excessive and unreasonable time spent on simple issues and for issues on which employee did not prevail. *Bouse*.

CONCLUSIONS OF LAW

1) Employee's claim is not barred for failure to timely report his injury to Employer.
2) Employee is not entitled to medical costs.
3) Employee is entitled to PPI benefits.
4) Employee is entitled to attorney fees.

ORDERS

1) Employee's claim for two percent PPI benefits is granted. Employer shall pay Employee $5,460.
2) Employee's claim for past medical costs is denied.
3) Employee's claim for prospective medical treatment is denied without prejudice in accordance with this decision.
4) Employee's request for actual attorney fees is granted in part. Employer shall pay Harren Law Office $11,670.

Dated in Anchorage, Alaska on November 12, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Marc Stemp, Member

/s/
Brian Zematis, 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 Donald R. Ridge, Employee / claimant v. City of Wasilla, employer; Alaska Public Entity Insurance, insurer / defendants; Case No. 202313198; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on November 12, 2024.

/s/
Rochelle Comer, Workers' Compensation Technician