Alaska Workers' Compensation Appeals Commission

Brenda Dockter, Appellant, vs. Southeast Alaska Regional Health Consortium and Alaska National Insurance Company, Appellees.	Final Decision Decision No. 246 March 29, 2018 AWCAC Appeal No. 17-002 AWCB Decision No. 16-0132 AWCB Case No. 201403022

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 16-0132, issued at Juneau, Alaska, on December 21, 2016, by southern panel members Kathryn Setzer, Chair, and Bradley Austin, Member for Labor.

Appearances: J. John Franich, Franich Law Office, LLC, for appellant, Brenda Dockter; Michael A. Budzinski, Russell Wagg Meshke & Budzinski, PC, for appellees, Southeast Alaska Regional Health Consortium and Alaska National Insurance Company.

Commission proceedings: Appeal filed January 19, 2017; briefing completed October 12, 2017; oral argument held on January 16, 2018.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Brenda Dockter was injured while working for Southeast Alaska Regional Health Consortium, insured by Alaska National Insurance Company (Southeast), on February 5, 2014. Attorney David Graham entered an appearance on Ms. Dockter's behalf on December 7, 2015. Following mediation on June 24, 2016, the parties settled all disputes except for attorney fees. The Alaska Workers' Compensation Board (Board) approved the Compromise and Release (C&R) on August 4, 2016. The dispute over attorney fees was heard on October 25, 2016, and the Board issued its decision and order on

December 21, 2016, limiting the award of fees.[1] Ms. Dockter timely appealed this decision and the Alaska Workers' Compensation Appeals Commission (Commission) heard the parties' arguments on January 16, 2018. The Commission now affirms the Board's decision because the Board did not abuse its discretion and its findings are supported by substantial evidence in the record as a whole.

2. *Factual background and proceedings.*[2]

On February 5, 2014, Brenda Dockter injured her left knee which she twisted when she stood up from a chair while working for Southeast.[3] On August 6, 2014, Ms. Dockter underwent arthroscopic surgery with meniscectomy of her left knee.[4]

On February 25, 2015, Southeast filed a notice of controversion denying temporary total disability (TTD), temporary partial disability (TPD), permanent partial impairment (PPI), and all medical treatment related to chondromalacia of the left knee as of February 13, 2015, stating:

> There is substantial evidence the disability or need for medical treatment did not arise out of and in the course of employment.
>
> [Southeast] relies on the opinion of Michael Fraser, MD (sic), based on his evaluation on 2/13/15. Dr. Fraser opines that the chondromalacia noted within the left knee patella and medial femoral condyle is pre-existing in nature and unrelated to the work injury of 2/5/14.[5]

On June 19, 2015, Southeast filed another controversion denying "physical therapy, narcotics specifically Hydrocodone and cortisone injections as of 6/11/15." Southeast stated "[t]here is substantial evidence that the disability or need for medical treatment did not arise out of and in the course of employment. AS 23.30.010(a)." For

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[1] *Dockter v. S.E.A.R.H.C. and Alaska National Insurance*, Alaska Workers' Comp. Bd. Dec. No. 16-0132 (Dec. 21, 2016) (*Dockter*).

[2] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[3] *Dockter* at 3, No. 1.

[4] *Id.*, No. 2.

[5] *Id.*, No. 3.

this controversion, Southeast relied on the opinion of Lance Brigham, M.D., based on his evaluation of June 11, 2015. He opined the need for physical therapy, narcotics, cortisone injections, and ACL reconstruction was not indicated. He recommended anti-inflammatories such as Meloxicam and viscosupplemental injections to the left knee. Southeast also noted in the controversion that the future total knee replacement was related to the February 5, 2014, work injury. Dr. Brigham had further stated Ms. Dockter was medically stable with a 5% PPI rating.[6]

On August 12, 2015, Ms. Dockter filed a claim seeking TTD from February 5, 2014, PPI, medical costs, transportation costs, and a compensation rate adjustment.[7] Southeast filed its answer on September 9, 2015, contending both Ms. Dockter's physician and the employer's medical evaluation (EME) physician deemed her medically stable. Southeast contended further physical therapy would exceed the treatment frequency standard of AS 23.30.095(c) and 8 AAC 45.082(f), and the EME physician found further therapy and hydrocodone were neither reasonable nor necessary in connection with the work injury. According to Southeast, Ms. Dockter had not submitted the documentation required to determine whether transportation expenses were due, and Ms. Dockter's compensation rate was based upon her work history predating the work injury and not upon her subsequent work history.[8]

On September 25, 2015, Southeast filed another controversion denying "physical therapy prescribed by Dr. Hunter and Dr. Lehman." Southeast stated:

> Treatment exceeds frequency standards and a treatment plan has not been provided. Payment is no (sic) required. AS 23.30.095(c) Reg 8 AAC 45.082(f)
>
> Dr. Lehman, the designated attending physician, has referred the employee to Dr. Harrah for surgical consult. He has not indicated any further medical care other than the consult for the knee condition. Moreover, the prescribed physical therapy exceeds frequency standards but Dr. Lehman

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6 *Dockter* at 3, No. 4.

7 *Id.* at 4, No. 5.

8 *Id.*, No. 6.

has not provided an adequate treatment plan required by AS 23.30.095(c). Nor did Dr. Hunter provide one with his prescription.[9]

On October 6, 2015, Ms. Dockter visited Daniel Harrah, M.D., who reviewed her MRI results. Dr. Harrah recommended an isolated medial unicompartmental knee arthroplasty with an anterior cruciate ligament (ACL) reconstruction and opined Ms. Dockter was not yet medically stable.[10]

On November 24, 2015, the parties attended a prehearing conference (PHC). The summary provided:

> [Ms. Dockter] has requested preauthorization for knee replacement surgery that has been recommended in one form or another by both the treating and [EME] physician. [Southeast] stated that no controversion is in place regarding the knee injury/treatment. When asked why [Southeast] will not pre-authorize the surgery, [Southeast] stated that 'they were not saying that the surgery was not medically necessary, just that there is not yet any objective evidence to support the surgery.'
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> Despite AS 23.30.095(a) seemingly unambiguously stating that [Southeast] is responsible for medical expenses incurred as a result of a work injury, the Board designee ("designee") cannot order [Southeast] to preauthorize or pay for surgery, not even physician-recommended surgery and not even "medically necessary" surgery. That would need to be done at hearing (if the parties cannot come to an agreement prior thereto). [Southeast] stated that all discovery on this issue has been completed. Therefore, designee believes it is ripe for a hearing on the issue whether 1) [Ms. Dockter] is entitled to an order requiring [Southeast] to preauthorize and pay for the knee surgery and 2) [Southeast]'s refusal to preauthorize the surgery constitutes a "controversion in-fact", allowing [Ms. Dockter] to file an additional claim for penalty, interest and/or unfair and frivolous controversion.[11]

On December 4, 2015, Southeast filed a letter objecting to the PHC summary and requesting clarification:

> Your summary seems to indicate an obligation on the part of [Southeast] to preauthorize surgery when there is no statutory obligation to do so, as found by the Alaska Supreme Court on more than one occasion. Rather, an employer has the statutory right to take up to 30 days to consider

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9 *Dockter* at 4, No. 7.

10 *Id.*, No. 8.

11 *Id.* at 4-5, No. 9.

> whether payment or denial should issue after receipt of medical records and billing. My clients are simply choosing to exercise their statutory right to do so and should not be penalized for same, questioned for doing what the statute allows, or threatened with penalty like your summary seems to imply.[12]

On December 7, 2015, Ms. Dockter's counsel filed an entry of appearance.[13] On the same day, Ms. Dockter filed a claim seeking TTD from an unknown date to the present, medical costs, transportation costs, penalty, interest, unfair or frivolous controversion, and attorney fees and costs for an injury to her left knee on February 5, 2014.[14] Ms. Dockter, on December 21, 2015, filed a letter responding to Southeast's December 4, 2015, letter:

> [Southeast's attorney] appears to provide inaccurate information when she states in her letter to you that there is no statutory obligation to preauthorize surgery, referring to unspecified Supreme Court decisions. Perhaps she is not aware that the Alaska Supreme Court just last year reaffirmed that the statute in issue must be construed to afford an EE the right to a prospective determination of compensability of a proposed medical procedure and to allow imposition of a penalty where on a medical benefit that has been prescribed by not yet paid. See, *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014), where the Court stated:
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> > "We have previously recognized the importance of medical care in workers' compensation cases. In *Summers v. Korobkin Construction*, we held that "an injured worker who has been receiving medical treatment should have the right to a prospective determination of compensability," noting that "[i]njured workers must weigh many variables before deciding whether to pursue a certain course of medical treatment or related procedures. A salient factor in many cases will be whether the indicated treatment is compensable under [the act]." We later construed the penalty provision in AS 23.30.155 as including medical benefits because the threat of a penalty gives the insurer "an incentive" to pay medical bills promptly. The same policy consideration applies here. Without the possibility of a penalty, an insurer would be able to controvert expensive medical care for no reason and

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12 *Dockter* at 5, No. 10.

13 *Id.*, No. 11.

14 *Id.*, No. 12.

> escape without sanction, even when the care is critical to an employee's health." [Citations omitted].
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> Thus, [Southeast's attorney]'s clients can indeed be penalized for refusing to preauthorize this surgical procedure. It appears that the references made in the Prehearing Summary to an obligation on the part of [Southeast] to preauthorize surgery is indeed a correct statement of the law, contrary to [Southeast's attorney]'s unsupported assertion to the contrary. Indeed, imposition of a penalty would foster the purposes of the Act and is particularly compelling under the facts of this case: Both the treating and the [EME] physicians' reports agree that this surgery is medically necessary; ER has not filed a written controversion; and the prehearing summary indicates that ER does not dispute that the surgery is medically necessary, is related to this claim, and that all its discovery on this issue has been completed.[15]

On December 29, 2015, Southeast filed a controversion notice denying "TTD benefits other than those paid, until and unless [Ms. Dockter] undergoes further knee surgery; penalty; interest; declaration of unfair or frivolous controversion; attorney fees." Southeast stated:

> All TTD benefits due have been paid during periods of disability and lack of medical stability. [Ms. Dockter] has not shown a factual basis warranting further payment of these benefits at this time although further surgery is anticipated and [Southeast] has committed to re-instituting payment of TTD benefits when and if surgery takes place.
>
> There is no factual basis for a claim for penalty or interest in this matter.
>
> All controversion[s] issued by [Southeast] have been reasonably based upon fact and/or law.
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> There is no factual basis for an award of attorney fees.[16]

Also, on December 29, 2015, Southeast filed a five-page answer with accompanying compensation report in response to Ms. Dockter's claim dated December 7, 2015.[17]

On January 7, 2016, Southeast filed a new controversion denying medical services provided December 18, 2015, and stated:

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[15] *Dockter* at 5-6, No. 13.

[16] *Id.* at 6-7, No. 14.

[17] *Id.* at 7, No. 15.

> [Ms. Dockter] did not obtain written consent from [Southeast] for more than one change of attending physician. AS 23.30.095(a)
>
> [Ms. Dockter] has entered into a pain contract with Nurse Nichols. This is not a medical service prescribed by Dr. Lehman, the authorized attending physician, and hence, lacks the medical support warranting payment.[18]

On February 9, 2016, Ms. Dockter filed an affidavit of readiness for hearing (ARH) on her claim dated December 7, 2015, "as to predetermination of compensability of medical treatment."[19] On the same day, she also filed a request for conference to schedule a hearing on the ARH with a two-page attachment arguing Southeast's failure to preauthorize the knee surgery constituted a controversion in fact.[20] She also filed a notice of intent to rely, providing notice she intended to rely on seven letters from Southeast's attorney to her and to two physicians, including a letter dated November 20, 2015, from Southeast's attorney to Ms. Dockter.[21]

On February 18, 2016, Southeast filed an opposition to Ms. Dockter's ARH stating,

> [Southeast] has been hesitant to actually preauthorize the surgery with Dr. Harrah because it appears to be at odds with other medical opinions. For example, he is the only physician who is recommending partial knee replacement to address subjective pain complaints rather than knee degeneration. He is the only physician who is recommending ACL repair when all objective medical testing shows the ACL to be intact. [Southeast] has requested explanation but has not been provided any.
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> Notwithstanding [Southeast]'s concerns about the surgery recommendation, [Southeast] agrees that were [Ms. Dockter] to undergo the recommended surgery, it would be compensable and payable under the Act. Given this agreement on compensability, there is no need for an advisory ruling from the Board. The issue is effectively moot and the hearing request should, thus be denied.[22]

On March 1, 2016, Ms. Dockter filed an affidavit objecting to Southeast's use of a letter from Southeast to Ms. Dockter dated November 20, 2015, on the basis that it was

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18 *Dockter* at 7, No. 16.

19 *Id.*, No.17.

20 *Id.*, No. 18.

21 *Id.*, No. 19.

22 *Id.* at 7-8, No. 20.

"correspondence extending a settlement proposal to [Ms. Dockter]. In accord with Evidence Rule 408 and regulations, documents pertaining to settlement are excluded for use at hearing."[23]

On March 14, 2016, Southeast filed a letter clarifying "[Southeast]'s position on payment for the knee surgery. It stated:

> Several months ago, [Ms. Dockter] asked [Southeast] to preauthorize the surgery; she wanted [Southeast] to guarantee payment for same. [Southeast] declined to do so because all doctors previously and the objective medical evidence showed no basis for the recommended surgery. It appeared to [Southeast] that the recommended surgery was to address subjective complaints only and was medically unnecessary. For these reasons, it was hesitant to preauthorize the surgery.
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> Earlier this year, [Ms. Dockter] filed a Petition seeking an advisory ruling from the Board as to whether the surgery would be compensable. In Answer, [Southeast] conceded the Board would likely issue an advisory ruling that the surgery would be compensable; the recommendation fell within the first two years of treatment. This Answer made the Petition moot and apparently was sufficient for Dr. Harrah to agree to proceed with surgery. When we met at the prehearing conference, there was no need for a hearing to be set on the Petition.
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> [Southeast] has not affirmatively preauthorized surgery. Nor has [Southeast] agreed to pay for the surgery at this point. It is exercising its statutory right to await records and the billing to determine whether to pay or controvert. At this point, though, [Southeast] has acknowledged that it will not deny payment on the basis the surgery is not compensable. Some other reason would need to arise to form the basis of denial and neither party anticipates that happening at this point.[24]

On March 28, 2016, Ms. Dockter underwent a left medial unicompartmental knee arthroplasty and ACL reconstruction.[25] Southeast paid for the March 28, 2016, knee surgery.[26]

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[23] *Dockter* at 8, No. 22.

[24] *Id.*, No. 23.

[25] *Id.* at 9, No. 24.

[26] *Id.*, No. 25.

On June 24, 2016, the parties participated in mediation with a Board hearing officer and reached a settlement on all disputed issues except attorney fees and costs.[27]

On July 29, 2016, the parties filed a C&R which, since Ms. Dockter was waiving future medical benefits, required Board approval.[28] The Board approved the C&R on August 4, 2016. According to the terms of the C&R, Southeast paid Ms. Dockter $122,500.00 to resolve all disputes with respect to all medical and related transportation benefits, compensation rate, TTD, TPD, PPI, permanent total disability benefits, penalties, interest, and reemployment benefits. The benefits were apportioned with $20,000.00 for disputed past and future TTD benefits, $8,850.00 for additional PPI benefits, $13,300.00 for stipend under AS 23.30.041(k), $5,000.00 for future medical related transportation costs, and $73,350.00 for medical benefits.[29]

On September 28, 2016, a hearing was scheduled for October 25, 2016, on Ms. Dockter's claim for attorney fees and costs. The prehearing officer notified the parties they would each be allowed 30 minutes for opening and closing statements.[30] On September 28, 2016, Southeast filed an offer of judgment in the amount of $20,000.00 for attorney fees and costs.[31]

On October 12, 2016, Ms. Dockter filed documentary evidence,[32] and on October 19, 2016, she filed a hearing brief in support of her claim for attorney fees and costs under AS 23.30.145(b). Ms. Dockter argued full and actual attorney fees and costs were reasonable due to the moderate complexity of the claims, the aggressive defense by Southeast, including its resistance to provide preauthorization for the knee surgery, the contingent nature of attorney fees in workers' compensation cases, the objective of

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27 *Dockter* at 9, No. 26.

28 *Id.*, No. 27.

29 *Id.*, No. 28.

30 *Id.*, No. 29.

31 *Id.*, No. 30.

32 *Id.*, No. 31.

ensuring competent counsel is available to represent employees, Ms. Dockter's attorney's legal experience, and the benefits resulting from her attorney's efforts.[33]

Ms. Dockter cited several evidentiary and procedural issues as indicative of the complexity of this case, including the following:

a. Discovery issues;
b. The predetermination of compensability issue;
c. The issue of whether a finding of medical instability after an EME finding of stability required the resumption of TTD; and
d. The complex factual and legal issue surrounding the adjustment to the wage rate, including analysis of the yet evolving legal question of the applicability of a *pseudo-Gilmore* adjustment that is the subject of conflicting board decisions.[34]

Ms. Dockter argued these issues required complex factual and/or legal analysis and the time required to address each of the issues was reasonable and necessary to fully develop and settle the claims. Ms. Dockter argued Southeast created the complexities and substantially increased the number of hours reasonably required to pursue the claims. Ms. Dockter also cited to the Alaska Code of Professional Responsibility, DR 2-106(B), arguing full and actual attorney fees were reasonable because acceptance of this case would limit or preclude her attorney obtaining work on behalf of Southeast Alaska Regional Health Consortium and Alaska National Insurance Company. She further asserted workers' compensation representation is similar to providing representation in tort cases in Southeast Alaska, and the full and actual fee was similar to or lower than the fee that could be realized from handling a similarly situated tort claim.[35]

On October 19, 2016, Southeast filed a hearing brief acknowledging Ms. Dockter was entitled to attorney fees and costs under AS 23.30.145(a). Southeast contended

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[33] *Dockter* at 9, No. 32.

[34] *Id.* at 10, No. 33.

[35] *Id.*, No. 34.

time incurred by Ms. Dockter's attorney in arguing or processing undisputed or unsuccessful claims was not awardable; Ms. Dockter's anticipated hourly rate was excessive; and Ms. Dockter's anticipated time claimed was grossly excessive. Southeast anticipated an objection based upon block-billing and for quarter-hour billing instead of tenth of an hour billing. Southeast argued Ms. Dockter should not be awarded fees for time spent addressing preauthorization of medical care for the knee surgery because it was not an issue upon which Ms. Dockter prevailed, it was not an issue upon which Ms. Dockter would have prevailed at hearing under the Alaska Workers' Compensation Act (Act), Ms. Dockter only filed a petition for an advisory opinion after Southeast explained the process to Ms. Dockter, and Southeast should not be responsible for fees "incurred in pursuing an erroneous course of action." Southeast contended if the Board awards fees for time spent on the preauthorization issue, the fees should be restricted to the time taken to prepare the petition for an advisory opinion. Southeast argued the complexity and nature of the disputes and the settlement achieved do not warrant an award of high fees. Southeast included its claimed hours in this case as an exhibit.[36]

On October 19, 2016, Ms. Dockter filed a witness list:

> (1) [Ms. Dockter] will testify concerning any fact at issue in this hearing, including but not limited to her experience based on her participation in these proceedings, her expectations, and her level of satisfaction with the results obtained.
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> (2) [Ms. Dockter's] attorney will testify concerning any matter at issue in this hearing.
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> (3) Jack G. Poulsen, Esq., will testify concerning his knowledge of the experience and abilities of [Ms. Dockter]'s attorney, the fees earned by personal injury attorneys practicing in Southeast Alaska, and his experience with requests for representation in and the reasons why he declines to accept Alaska compensation cases.
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> (4) Steve Constantino, Esq., will testify concerning his knowledge of hourly rates received by experience[d] Alaska compensation attorneys, the contingent nature of fees in compensation practice, the practical difficulties employees face when seeking legal representation, the percentage of employees who are unable to obtain representation, his experience that the process is fairer and smoother where employees are able to obtain

[36] *Dockter* at 10-11, No. 35.

> representation, his impressions about the difficulties faced and the results obtained in this case, and his experience in working on cases where [Southeast]'s attorney is defending.
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> (5) Robert J. Malone, Esq., will testify concerning his knowledge of [Ms. Dockter]'s attorney's legal abilities and experience and his demonstrated ability to earn large fees handling personal injury cases.[37]

On October 20, 2016, Ms. Dockter's attorney filed an affidavit outlining his fees and costs from October 28, 2015, through October 20, 2016, billed at $425.00 per hour for a total of 180.00 hours, coming to $76,500.00. The affidavit also documented $218.40 in total costs.[38]

The Board found that on October 25, 2016, Ms. Dockter's attorney participated in two hearings before the Board in Juneau, Alaska, and the total time spent on both hearings was 5.7 hours. Ms. Dockter filed a witness list in both cases containing four of the same witnesses and the same proposed testimony for the same four witnesses.[39] On October 25, 2016, deadlines for post-hearing documents were set. The deadline for Ms. Dockter's supplemental affidavit for attorney fees was October 28, 2016. The deadline for Southeast's response to Ms. Dockter's affidavit of attorney fees and supplemental affidavit of attorney fees was November 4, 2011. Ms. Dockter requested leave from the panel to submit a reply to Southeast's responses and Southeast did not object. The deadline for Ms. Dockter's response was set for November 11, 2016. The parties agreed to serve the Board and opposing party with the post-hearing documents by email.[40]

At hearing on October 25, 2016, Ms. Dockter sought to submit a declaration for hearing. Southeast had no objection and Ms. Dockter was permitted to submit it as evidence. The declaration contained statements from Ms. Dockter's attorney attesting to the following:

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37 *Dockter* at 11, No. 36.

38 *Id.*, No. 37.

39 *Id.* at 11-12, No. 38.

40 *Id.* at 12, No. 39.

I have been continuously engaged in the private practice of law since my admission to the Colorado Bar in 1981. I have been a member of the Alaska Bar since February of 1997.

Throughout my career I have derived the majority of my revenues from representing personal injury and workers' compensation claimants on a contingent fee basis. I have formally represented hundreds of personal injury clients and dozens of worker compensation clients. I estimate in my career I have tried more than fifty cases to verdict and written the briefs in more than two dozen reported appellate decisions.

I estimate that I have personally reviewed the status and the legal and factual issues of more than 500 Alaska workers' compensation claimants over the last 20 years. In many of these cases I have provided a number of hours of my time, almost all of it on a pro bono basis, in an effort to assist the claimants with their understanding of the process and procedures. For a number of reasons, not the least of which is the difficulties presented for earning a fee, I have been very selective in entering my appearance in these cases, and have done so in only about a dozen of them. I have been very successful in resolving those cases I have accepted, and therefore had few opportunities to participate in hearings before the Alaska Workers' Compensation Board.

For the last 4 or 5 years, I have requested and been approved for payment of my fees at the rate of $350 per hour in the Alaska Workers' Compensation cases I have settled. Since the beginning of 2016, I have requested $400 per hour for my services in these cases, to try to keep my fee in line with increases in insurance and other overhead costs.

I believe however, that a rate of $425 per hour is a fair market rate today for payment of these contingent fees to an attorney with more than 35 years of experience practicing in this specialized area of the law. I believe that the market hourly rate for attorneys who represent personal injury and worker compensation claimants on a contingent basis is or should be about twice the hourly rate of defense attorneys. This is because the pay for defense counsel is guaranteed, there is no risk of nonpayment, and payment promptly follows the work. Claimants' attorneys, by contrast, rarely earn a fee until the case is resolved, typically bear the risk of non-payment in the event their client does not prevail, finance their case costs themselves, and pay their own ongoing expenses and overhead costs while working the case towards resolution. These are significant risks which represent substantial costs.[41]

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[41] *Dockter* at 12-13, No.41.

At the hearing, the Board overruled Southeast's objection to Ms. Dockter's testimony, finding her testimony regarding the success achieved by her attorney to be relevant. The Board sustained Southeast's objection to witnesses Mr. Poulsen and Mr. Malone as it found the testimony would be irrelevant. The Board sustained Southeast's objection to witness Mr. Constantino as it found the proposed testimony to be irrelevant and unduly repetitious. The Board sustained Southeast's objection to Ms. Dockter's attorney's testimony as it found she was provided sufficient time and opportunity in additional argument time, briefs, and post-hearing documents to address any matter at issue in the hearing.[42] Ms. Dockter credibly testified she was satisfied with the outcome of her case, and further testified she would not have been able to have the second knee surgery or receive the settlement she received without counsel.[43]

Her attorney contended Ms. Dockter was in a "catch 22" because her physician opined Ms. Dockter needed surgery, Southeast would not preauthorize the surgery, and her physician refused to perform the surgery without a preauthorization. Ms. Dockter contended Southeast placed her in an extremely difficult financial situation because she could not work and Southeast had not paid her any TTD. Ms. Dockter argued Southeast's refusal to preauthorize the surgery constituted a controversion in fact and Southeast paid for the surgery after Ms. Dockter hired counsel as a result of Ms. Dockter's attorney's efforts. Ms. Dockter argued the claimed hours were reasonable because Southeast's timesheets listed 156.00 hours leading up to mediation and Ms. Dockter claimed 131.75 hours leading up to mediation. Ms. Dockter contended Southeast made an ethically impermissible global settlement offer including attorney fees.[44]

Southeast contended it was not required by law to preauthorize the knee surgery and had a statutory right to assess medical necessity when it received the surgery report and bill. Southeast acknowledged preauthorization was an issue in the case but was not necessary to resolve the claim. Southeast also argued the awarded fee should be

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42 *Dockter* at 13, No. 42.

43 *Id.*, No. 43.

44 *Id.* at 13-14, No. 44.

determined by the benefits awarded in the C&R which were claimed and actually disputed. Southeast contended time loss benefits, specifically TTD, were in dispute and would fall within those benefits claimed, disputed, and awarded, but PPI and reemployment benefits were never in dispute. Southeast argued Ms. Dockter was not successful in obtaining medical benefits because the prior settlement offer to Ms. Dockter provided $80,000.00 plus benefits related to a future left knee replacement. Southeast stated the case was not complex and the law was well established on the issues. Southeast argued Ms. Dockter's attorney's quarter-hour billing increments increased the claimed hours because the smallest billing increment was larger than the customary billing increment in workers' compensation of a tenth of an hour. Southeast contended Ms. Dockter's claimed hourly rate was too high based on her attorney's workers' compensation experience. Southeast argued it did not make an impermissible unethical global settlement offer; it proposed a settlement on attorney fees at mediation, as it did for other benefits claimed by Ms. Dockter.[45]

On October 28, 2016, Ms. Dockter filed a supplementary affidavit of attorney fees and costs from October 21, 2016, through October 27, 2016, billed at $425.00 per hour for a total of 14.50 hours, equaling $6,162.50. Ms. Dockter's supplemental affidavit documented $255.00 in total costs.[46] In summary, Ms. Dockter sought a total of $82,662.50 in attorney fees and $473.40 in costs.[47]

On November 4, 2016, Southeast filed an objection to Ms. Dockter's October 20, 2016, affidavit of attorney fees and costs. Southeast did not object to 52 entries totaling 67.25 hours. Southeast made specific objections to each remaining entry and based on those objections, argued Ms. Dockter should be awarded 79.25 total hours at an hourly rate of $275.00, equaling $21,793.75; and for administrative tasks Ms. Dockter should be awarded 2.20 hours, at $130.00 per hour, equaling $286.00. Southeast agreed Ms.

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45 *Dockter* at 14, No. 45.

46 *Id.*, No. 46.

47 *Id.*, No. 47.

Dockter's claimed costs of $218.40 are awardable. Southeast's brief included 23 exhibits containing the letters, emails, and pleadings concerning its specific objections.[48]

On November 4, 2016, Southeast filed an objection to Ms. Dockter's supplemental affidavit dated October 28, 2016. Southeast argued no supplemental fees should be awarded unless the Board awarded greater fees than those offered at mediation or in its offer of judgment because the services did not result in greater success. In the event Ms. Dockter was awarded a greater amount than previously offered, Southeast argued Ms. Dockter should be limited to an award of 10.25 hours at an hourly rate of $275.00, equaling $2,818.75 as Southeast did not object to five entries totaling 5.50 hours and made specific objections to the two remaining entries totaling 9.00 hours, reducing the entries to 4.75 hours. Southeast argued Ms. Dockter's costs should be limited to $255.00 upon presentation of receipts.[49]

On November 14, 2016, Ms. Dockter filed a response to Southeast's objections. Ms. Dockter argued the hourly rate of $425.00 is appropriate because her attorney had represented other employees with an hourly rate of $350.00 being approved in prior C&Rs, the effects of inflation, her attorney's workers' compensation experience since the approval of C&Rs with an hourly rate of $350.00, attorneys with less experience, specifically Eric Croft, received an hourly rate of $400.00, and the additional costs inherent in workers' compensation practice in Southeast Alaska. Ms. Dockter also argued awarding fees at $275.00 per hour as Southeast suggested would have a chilling effect on attorneys representing other employees in the future. Ms. Dockter argued the presumption of compensability applied and Southeast failed to provide substantial evidence sufficient to overcome the presumption the fees are reasonable.[50]

The Board found Ms. Dockter's attorney's fee affidavits contained block-billing making it difficult for the Board to determine how much time he spent on each task listed in each entry and if time spent on each task was reasonable. Her attorney's affidavits

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48 *Dockter* at 14-15, No. 48.

49 *Id.* at 15, No. 49.

50 *Id.*, No. 50.

also failed to include sufficient detail to determine whether specific tasks were related to issues prevailed upon. The attorney for Ms. Dockter also billed in quarter-hour increments, whereas workers' compensation attorneys customarily bill in tenth of an hour increments. The Board held the following reduced hours accounted for entries containing excessive time claimed as a result of her attorney's billing methods for the tasks listed[51]:

Table I

Date	Hours Claimed	Hours Reduced	Hours Remaining
December 4, 2015	5.50	2.50	3.00
January 10, 2016	1.50	0.50	1.00
March 7, 2016	2.50	1.50	1.00
May 4, 2016	2.50	1.00	1.5
May 9, 2016	0.50	0.30	0.20
June 19, 2016	2.50	1.50	1.00
Totals	15.00	7.30	7.70

The Board also found Ms. Dockter's attorney billed an excessive amount of time for relatively simple tasks. The following reduced hours accounted for entries containing unreasonable time spent on relatively simple tasks[52]:

Table II

Date	Hours Claimed	Hours Reduced	Hours Remaining
October 28, 2015	1.50	0.00	1.50
October 30, 2015	0.75	0.35	0.40
December 1, 2015	2.50	1.00	1.50
December 7, 2015	1.50	1.00	0.50
December 9, 2015	0.50	0.20	0.30
December 17, 2015	0.25	0.15	0.10
December 20, 2015	2.25	1.75	0.50
December 29, 2015	0.75	0.45	0.30
January 4, 2016	1.25	0.85	0.40
January 19, 2016	0.25	0.15	0.10
February 1, 2016	7.75	6.75	1.00
February 4, 2016	1.00	0.60	0.40
March 30, 2016	0.50	0.30	0.20
March 31, 2016	2.00	1.80	0.20
April 1, 2016	1.75	0.75	1.00

[51] *Dockter* at 16, No. 54.

[52] *Id.* at 16-17, No. 55.

April 5, 2016	1.75	1.35	0.40
April 6, 2016	1.25	0.75	0.50
April 7, 2016	1.75	0.75	1.00
May 30, 2016	1.00	1.00	0.00
October 3, 2016	0.25	0.15	0.10
Totals	30.50	19.10	11.40

Then the Board further found Ms. Dockter's attorney claimed 5.00 hours for "tcw client; review documents; outline action plan; prep retainer agreement; discovery requests and notice of appearance" on December 2, 2015. This entry contained block-billing making it difficult to determine how much time was spent on each task. The attorney for Ms. Dockter failed to provide the issue or benefit addressed in the telephone call; 0.2 of an hour is reasonable for this telephone call. Preparation of a notice of appearance is a paralegal task and 0.2 of an hour is reasonable to complete this task. The reasonable time for this entry is 1.5 hours, including 1.3 attorney hours and 0.2 paralegal hours.[53]

In addition, the Board found Ms. Dockter's attorney claimed 0.25 of an hour to "Staff case with CP" on December 8, 2015. This is an administrative task which is not awardable under the Act; therefore, no hours were reasonably claimed.[54]

The attorney for Ms. Dockter claimed 4.25 hours for "Review of Discovery received; research re predetermination of compensability; prep draft ARH" on January 31, 2016. This entry contained block-billing, making it difficult for the Board to determine how much time was spent on each task. The Board held preparation of an ARH was a paralegal task and 0.2 of an hour was reasonable.[55]

Ms. Dockter's attorney claimed 8.25 hours to "Prep email and TC client re response to 2/1 ltrs; prep draft ARH and addendum; Add'l research re medical stability and continue work on TTD ltr to ER" on February 5, 2016. This entry also contained block-billing, which again made it difficult for the Board to determine how much time was spent on

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53 *Dockter* at 17, No. 56.

54 *Id.*, No. 57.

55 *Id.* at 17-18, No. 58.

each task; 0.4 of a hour is reasonable for the email and telephone call. Claiming additional time to draft the letter and prepare the ARH is unreasonable. The Board allowed 1.4 hours as a reasonable time for this entry.[56]

The Board next reviewed the claim by Ms. Dockter's attorney for 7.00 hours to "Continue prep ARH, Addendum, and request for emergency prehearing; draft notice of intent to rely; Update medical chronology from discovery received" on February 8, 2016. Again, the Board found this entry contained block-billing making it difficult to determine how much time was spent on each task. The Board found additional time to prepare an ARH and addendum was unreasonable. Preparing a request for a prehearing conference and a notice of intent to rely are paralegal tasks and 0.6 of an hour is reasonable to complete both. The Board held that the reasonable time for this entry is 1.6 hours, including 1.0 attorney hour and 0.6 of a paralegal hour.[57]

The Board then reviewed the claim by the attorney for Ms. Dockter of 8.25 hours for "Add'l research on TTD offsets, finalize ARH, Addendum, Request for Prehearing, & update general chronology from discovery received; prep amended notice intent to rely" on February 9, 2016. The Board found claiming additional time to prepare an ARH and addendum, a request for prehearing, a notice of intent to rely, and examine discovery to be excessive and unreasonable. Therefore, the Board allowed no hours for these tasks.[58]

Ms. Dockter's attorney claimed 0.50 of an hour for "tc worker's comp rep Brian re scheduling prehearing" on February 16, 2016. Since scheduling a prehearing is a paralegal task, 0.2 of an hour is reasonable billing for the telephone call.[59]

The next entry examined by the Board was the claim for 0.75 of an hour to "Prep amended claim" on April 12, 2016. The Board found Ms. Dockter did not file an amended

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56 *Dockter* at 18, No. 59.

57 *Id.*, No. 60.

58 *Id.*, No. 61.

59 *Id.*, No. 62

claim, and so, any hours claimed for preparing an amended claim that was not filed is unreasonable.[60]

The next claim for time examined by the Board was the 1.5 hours for "Research re ethics of attorney fee negotiations" on April 20, 2016. Researching an ethical issue with the bar is an issue between the bar and counsel and is not an issue to be decided by the Board. Therefore, any hours claimed for this task are unreasonable.[61]

The Board looked at the claim for 0.75 of an hour to "Review emails re termination" on May 6, 2016. The Board noted Ms. Dockter's termination was not an issue that could be decided by the Board, and, therefore, any hours claimed for this task were unreasonable.[62]

Similarly to the above findings, the claim by Ms. Dockter's attorney for 1.25 hours for "Partial review deposition and Prep deposition summary" on May 12, 2016, was found to be a paralegal task and 1.25 paralegal hours were reasonable to complete this task.[63]

The Board found the claim for 1.25 hours for "Research re Gilmore wage rate adjustment" on May 16, 2016, was not awardable because Ms. Dockter did not successfully prosecute a compensation rate adjustment claim.[64] Likewise, The Board found the 4.75 hours claimed to review and finalize the C&R after mediation from July 19, 2016, to July 25, 2016, was excessive. Southeast prepared the C&R and sent it to Ms. Dockter for review. The final C&R is 10 pages long and the parties had already agreed on the benefits awarded in the agreement. Therefore, the time claimed was excessive and reduced by 2.25 hours; 2.5 hours were reasonable.[65]

The Board found Ms. Dockter's attorney claimed 10.25 hours to prepare a mediation brief on attorney fees after the mediation ended, claiming time on several

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60 *Dockter* at 18, No. 63.

61 *Id.*, No. 64.

62 *Id.* at 19, No. 65.

63 *Id.*, No. 66.

64 *Id.*, No. 67.

65 *Id.*, No. 68.

dates from August 3, 2016, to August 12, 2016. The attorney's hours were reduced by 10.25 hours to reflect preparation of an unnecessary mediation brief.[66]

Ms. Dockter's attorney claimed 0.5 of an hour to "Research re attorneys with history with [Southeast attorney]" on September 30, 2016. Since, Ms. Dockter did not prevail on admitting testimony on this topic at hearing, the Board awarded no time.[67]

The attorney for Ms. Dockter claimed 0.5 of an hour for "TC Mike Jensen; TC Steve Constantino; outline testimony of witnesses" on October 4, 2016. This entry contained block-billing making it difficult for the Board to determine how much time was spent on each task. Moreover, Ms. Dockter did not prevail on having Mr. Constantino testify. The Board also found her attorney claimed time to complete an outline of witness testimony for both hearings on October 25, 2016, and the outlines in both hearings contained four of the same witnesses and provided the same proposed testimony for the four witnesses. Therefore, the Board found it was unreasonable to claim time to complete the same tasks on the same issues in both cases. The Board allowed 0.1 of an hour as reasonable.[68]

Ms. Dockter's attorney claimed 2.25 hours to "Review documents for exhibit list; research; TC pot witnesses x3" on October 6, 2016. As the Board noted, this entry is block-billed which made it difficult for the Board to determine how much time was spent on each task. Ms. Dockter failed to provide the issue researched and Ms. Dockter was successful on admitting testimony for only one witness. Therefore, the Board reduced the time allowed by 1.75 of an hour, finding 0.5 of an hour to be reasonable.[69]

The attorney for Ms. Dockter claimed 2.75 hours to "Prep witness outline/exhibits' TC pot witnesses x 9; TC AWCB" on October 7, 2016. Again, the Board found this entry contained block-billing, which made it difficult to determine how much time was spent on each task. Ms. Dockter was successful on admitting testimony from only one witness and failed to provide the witnesses contacted in the telephone calls. The Board further noted

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66 *Dockter* at 19, No. 69.

67 *Id.*, No. 70.

68 *Id.*, No. 71.

69 *Id.* at 19-20, No. 72.

her attorney claimed time to complete an outline of witness testimony for both hearings on October 25, 2016, and the outlines in both hearings contained four of the same witnesses and provided the same proposed testimony for the four witnesses. The Board reduced the claimed time by 2.55 hours, finding 0.2 of an hour to be reasonable.[70]

Ms. Dockter's attorney claimed 0.75 of an hour for "TC with S. Constantino; work on strategy for fee hearing" on October 10, 2016. Like other entries, this entry was block-billed and Ms. Dockter was unsuccessful in admitting Mr. Constantino's testimony at hearing. The Board reduced the time allowed by 0.25 of an hour finding 0.50 of an hour to be reasonable for these tasks.[71]

The attorney for Ms. Dockter claimed 3.00 hours to "Prep argument and exhibits; travel to Juneau for hearing" on October 24, 2016. The Board noted Ms. Dockter's attorney traveled to Juneau to attend two hearings before the Board against the same employer and claimed travel time to Juneau for both. The Board held that travel to Juneau from Sitka takes approximately one hour by plane, and held Ms. Dockter's attorney could only claim time for such travel once. Her attorney must either claim the total in one case or split the time between the two hearings, with the whole equaling the total time spent in travel. The only exhibit Ms. Dockter entered was the two-page declaration, so time claimed for preparation of an exhibit was excessive. The claimed time was reduced by 1.00 hour with a total of 2.00 hours as reasonable.[72]

Ms. Dockter's attorney claimed 6.0 hours to "Prep for/attend oral hearing in Juneau; travel to Sitka" on October 25, 2016. The Board found this entry, like the others above, contained block-billing making it difficult to determine how much time was spent on each task. Her attorney traveled to Juneau to attend two hearings before the Board against Southeast and claimed travel time to Sitka. Travel to Sitka from Juneau takes approximately one hour by plane. The Board held Ms. Dockter's attorney could only claim time for such travel once, either claiming the total in one case or splitting it between the

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70 *Dockter* at 20, No. 73.

71 *Id.*, No. 74.

72 *Id.,* No. 75.

two hearings with the whole equaling the total time spent in travel. The two hearings lasted a total of 5.7 hours; approximately half was attributable to the Dockter hearing. The claimed time was excessive and was reduced by 2.00 hours, with 4.00 hours as reasonable.[73]

Round-trip airfare from Sitka to Juneau is approximately $380.00. Ms. Dockter's attorney attended two hearings in Juneau on October 25, 2016; $180.00 was a reasonable cost for the Dockter travel.[74]

The attorney for Ms. Dockter itemized the following costs which were reasonable costs for her attorney[75]:

Table III

Date	Cost	Amount
May 05, 2016	Deposition Copy	$218.40
October 24, 2016	Airfare to/from Hearing	$180.00
October 24, 2016	Lodging/Meal for Hearing	$75.00
Total		$473.40

Ms. Dockter's attorney previously represented 7 cases at hearing before the Board in the 19 years he has practiced in Alaska workers' compensation. He entered his appearance before the Board in 13 other claims for other injured workers; 9 of those resolved through settlements and 1 by hearing. He was awarded minimum attorney fees under AS 23.30.145(a) in 1 case, *Bauder v. Alaska Airlines*, *Inc.*, Alaska Workers' Comp. Bd. Dec. No. 99-0144 (July 6, 1999).[76]

The Board prepared the chart below as a visual comparison of the awarded hourly rate of attorneys handling Alaska workers' compensation cases based on appearances entered in a case[77]:

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[73] *Dockter* at 20, No. 76.

[74] *Id.* at 21, No. 77.

[75] *Id.*, No. 78.

[76] *Id.*, No. 79.

[77] *Id.*, No. 80.

Table V

Attorney Name	Clients Represented	Years WC Experience	Awarded Hourly Rate
Chancy Croft	2,168	40+	$400
Joseph Kalamarides	1,494	40+	$400
Robert Rehbock	1,342	30+	$400
Michael Patterson	977	30+	$400
Michael Jensen	317	30+	$400
John Franich	303	30+	$400
Robert Beconovich	148	16+	$400
Kennan Powell	121	11+	$400
Eric Croft	95	6+	$400
Steve Constantino	153	18+	$395
Burt Mason	80	20+	$375
Elliot Dennis	66	15+	$330
Heather Brown	1	1	$275

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.[78] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[79] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[80] The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.[81] The Board's findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.[82]

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[78] AS 23.30.128(b).

[79] *See*, *e.g.*, *Norcon, Inc. v. Alaska Workers' Comp. Bd.,* 880 P.2d 1051, 1054 (Alaska 1994).

[80] *McGahuey v. Whitestone Logging, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-89 (Alaska 1984).

[81] AS 23.30.122.

[82] AS 23.30.122; AS 23.30.128(b).

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."[83]

An award of attorney fees is governed by AS 23.30.145:

> (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.
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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 within 15 days after they become 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.
>
> (c) If proceedings are conducted for review of a compensation or medical and related benefits order before a court, the court may allow or increase an attorney's fees. The fees are in addition to compensation or medical and related benefits ordered and shall be paid as the court may direct.

The regulation at 8 AAC 45.180 sets forth the procedure for requesting attorney fees and defines what are allowable costs.

> (a) This section does not apply to fees incurred in appellate proceedings.
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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

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[83] AS 23.30.128(b).

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.

(c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed. Board approval of an attorney fee is not required if the fee

(1) is to be paid directly to an attorney under the applicant's union-prepaid legal trust or applicant's insurance plan; or

(2) is a one-time-only charge to that particular applicant by the attorney, the attorney performed legal services without entering an appearance, and the fee does not exceed $300.

. . . .

(e) Fee contracts are not enforceable unless approved by the board. The board will not approve attorney's fees in advance in excess of the statutory minimum under AS 23.30.145.

(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 an applicant:

(1) costs incurred in making a witness available for cross-examination;

(2) court reporter fees and costs of obtaining deposition transcripts;

(3) costs of obtaining medical reports;

(4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;

(5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;

(6) costs for telephonic participation in a hearing;

(7) costs incurred in securing the services and testimony, if necessary, of vocational rehabilitation experts;

(8) costs incurred in obtaining the in-person testimony of physicians at a scheduled hearing;

(9) expert witness fees, if the board finds the expert's testimony to be relevant to the claim;

(10) long-distance telephone calls, if the board finds the call to be relevant to the claim;

(11) the costs of a licensed investigator, if the board finds the investigator's services to be relevant and necessary;

(12) reasonable costs incurred in serving subpoenas issued by the board, if the board finds the subpoenas to be necessary;

(13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;

(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk

(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;

(15) duplication fees at 10 cents per page, unless justification warranting awarding a higher fee is presented;

(16) government sales taxes on legal services;

(17) other costs as determined by the board.

(g) Costs incurred in attending depositions not necessitated by a Smallwood objection may be awarded only where the board finds that attendance at the deposition was reasonable . . . .

AS 44.62.460 Evidence Rules, provides:

(a) Oral evidence may be taken only on oath or affirmation.

(b) Each party may

(1) call and examine witnesses;

(2) introduce exhibits;

(3) cross-examine opposing witnesses on matter relevant to the issues, even though that matter was not covered in the direct examination;

(4) impeach a witness regardless of which party first called the witness to testify; and

(5) rebut the adverse evidence.

(c) If the respondent does not testify in behalf of the respondent, the respondent may be called and examined as if under cross-examination.

(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repetitious evidence shall be excluded.

(e) Unless a different standard of proof is stated in applicable law, the

(1) petitioner has the burden of proof by a preponderance of the evidence if an accusation has been filed under AS 44.62.360 or if the renewal of a right, authority, license, or privilege has been denied;

(2) respondent has the burden of proof by a preponderance of the evidence if a right, authority, license, or privilege has been initially denied or not issued.

Whether the fee is reasonable is reviewed by looking at whether the Board has abused its discretion.[84] An abuse of discretion occurs when an award is manifestly unreasonable.[85] An award of attorney fees is to be upheld unless it is manifestly unreasonable.[86]

The scope of review when the Board applies its own regulations is "whether the agency's decision was arbitrary, unreasonable, or an abuse of discretion."[87] This is the same standard that applies to review of exclusion of evidence.[88]

4. Discussion.

a. Does the presumption of compensability in AS 23.30.120 apply to attorney fees?

Ms. Dockter contends that the presumption of compensability in AS 23.30.120(a) applies to a request for attorney fees. This statute provides:

> (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;
>
> (2) sufficient notice of the claim has been given;
>
> (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
>
> (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

Ms. Dockter asserts that since the Board did not apply the presumption to her request for attorney fees, the award was erroneous on its face.

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84 *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 241 (Alaska 1997); *Lewis-Walunga v. Municipality of Anchorage*, Alaska Workers' Comp. App. Comm'n Dec. No. 123 at 12 (Dec. 28, 2009).

85 *Id.*

86 *Williams v. Abood,* 53 P.3d 134 (Alaska 2002).

87 *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007).

88 *DeYonge v. NANA/Marriott,* 1 P.3d 90, 94 (Alaska 2000).

However, an award of attorney fees under the Act is governed solely by AS 23.30.145 which states:

> (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.
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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 within 15 days after they become 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.

AS 23.30.120 is the general presumption statute, but it does not apply to an award of attorney fees because such an award is governed solely by AS 23.30.145. "It is a maxim of construction that specific statutes should be given precedence over more general ones."[89] Stated another way, a more specific statute controls over a more general statute. Thus, there is no presumption under AS 23.30.120 that a submitted affidavit for attorney fees is compensable as submitted, and the presumption analysis used for other worker's compensation claims does not apply. The general presumption in AS 23.30.20

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[89] *See, e.g., City of Cordova v. Medicaid Rate Comm'n, Dep't of Health and Social Services,* 789 P.2d 346, 352 (Alaska 1990).

does not apply and the Board must exercise its discretion to determine a reasonable attorney fee to be awarded pursuant to the requirements of AS 23.30.145(a).[90]

Moreover, there is no presumption that the fees requested are reasonable.[91] The express language in AS 23.30.145(a) requires the Board to determine the reasonableness of each request for fees by taking "into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries."[92] The claimant bears the burden of producing evidence to support the claim for fees and must persuade the Board of the reasonableness of the request.[93] The Board is obligated to review any request for attorney fees using the above criteria. Any award of fees is at the discretion of the Board.

b. Did the Board err in its computation of allowable attorney fees in this case?

Pursuant to AS 23.30.145(a), the Board is charged with determining the reasonableness of any attorney fees request. This statute identifies a minimum fee to be awarded when there has been a controversion. However, the Board may award more than the minimum by ascertaining a reasonable fee. Whether the fee is reasonable is based on whether the Board has abused its discretion.[94] An abuse of discretion occurs when an award is manifestly unreasonable.[95] An award of attorney fees is to be upheld unless it is manifestly unreasonable.[96]

The parties here agreed that attorney fees were to be calculated under AS 23.30.145(a) and this is the statute the Board applied in deciding what was a

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90 *See*, *Lewis-Walunga* at 13.

91 The Commission also notes that the Alaska Supreme Court in 1994 reached this conclusion in a memorandum opinion. *See, Soule v. Mid-Town Car Wash*, Supreme Court No. S-5634 (August 1994).

92 AS 23.30.145(a).

93 *Lewis-Walunga* at 13.

94 *Bouse*, 932 P.2d 222, 241; *Lewis-Walunga* at 12.

95 *Id.*

96 *Williams,* 53 P.3d 134.

reasonable and compensatory fee. Under this statute, the Board looks to the "nature, length, and complexity" of the services performed along with looking at the benefits obtained.[97]

While attorney fees under AS 23.30.145(a) are to be fully compensatory and reasonable, it is up to the Board to determine the reasonableness of the fees sought. Moreover, the Board may rely on its own experience, judgment, observations, and/or the unique or peculiar facts of a case when reaching its decisions.[98] Here, the Board analyzed the request for fees in substantial detail and explained at length its reasons for reducing or eliminating an entry. The Board reviewed the request for attorney fees in great detail and made substantial findings of fact.

The Alaska Supreme Court (Court) has affirmed the right of the Board to award fees using the criteria in AS 23.30145.[99] Further, the Court affirmed the right of the Board to rely on its own expertise and observations in *Fairbanks North Star Borough v. Rogers and Babler*.[100] "The Board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the Board's experience, judgment, observations, and unique or peculiar facts of the case."[101]

The Board found the issues in Ms. Dockter's case were neither complex nor unique nor without prior Board consideration. The disputed issues were additional TTD, need for knee surgery, authorization for knee surgery, and additional PPI. These issues are common to most workers' compensation cases. Moreover, the question of medical treatment, including an issue like the need for additional knee surgery, is the kind of issue that is common in workers' compensation cases and is routinely addressed by the Board. This was not a complex medical case as is shown by the fact that no depositions of

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97 AS 23.30.145.

98 *Fairbanks North Star Borough v. Rogers and Babler,* 747 P.2d 528, 533 (Alaska 1987).

99 *See, e.g., Williams,* 53 P.3d at 147.

100 747 P.2d at 533-534.

101 *Id.*

doctors were taken and a Second Independent Medical Evaluation was neither requested nor needed. The medical issues were straightforward and did not require deposing either the treating doctor or EME doctor. The only deposition in this case was that of Ms. Dockter. The medical issue was not complex.

Another issue was whether Southeast impeded Ms. Dockter's medical treatment by refusing to preauthorize surgery. However, this issue was resolved when Ms. Dockter was advised in the prehearing summary she had the right to request a hearing on whether the recommended surgery would be compensable. Ms. Dockter subsequently did file an ARH on the issue of compensability of surgery, to which Southeast immediately filed an affidavit in objection. Southeast contended that there was no need for a hearing because, while Southeast had no obligation to preauthorize the surgery, it did have a legal right to review for payment or controversion any medical bills arising from such surgery. Southeast further acknowledged it could not and would not controvert the surgery on the basis of compensability. Following this statement, Ms. Dockter's doctor agreed to proceed with surgery. This issue did not require extensive preparation.

Moreover, this case was not lengthy. Ms. Dockter's attorney entered his appearance in December 2015 and the parties settled Ms. Dockter's claims at a mediation in June 2016. The C&R was approved by the Board on August 4, 2016. Her attorney's involvement was a little over eight months.

The Board did a detailed and thorough analysis of the submitted affidavit of attorney fees and supporting documentation in line with the Board's obligation to make an award of reasonable fees. The Board properly separated out duplicate billings for travel and time at the hearing which Ms. Dockter's attorney billed to both this case and its companion case, *Rusch v. Southeast Alaska Regional Health Consortium*.[102]

The Board also separated out time spent on matters that should be routinely handled by clerical or paralegal staff and allowed billing for these matters at an appropriate rate. Duplicative and paralegal/clerical items are properly removed or

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[102] *See, Rusch v. Southeast Alaska Regional Health Consortium*, Alaska Workers' Comp. App. Comm'n Appeal No. 17-001.

reduced in value. While an attorney for a claimant who prevails in a matter should be reasonably compensated, there is no basis for overcharging an employer by allowing improper or excessive fees.

Under AS 23.30.145(a), an award of fees is based, in part, on the benefits obtained for the claimant. Issues which are neither within the scope of the Act nor raised in the settlement are not issues for which attorney fees may be awarded. For example, Ms. Dockter's attorney billed for issues he alleged he needed to research, but which are not properly before the Board and/or were not included as issues in the settlement. One issue which her attorney claimed was that Southeast attempted to make an unethical global settlement by including attorney fees in the settlement offer and as part of the settlement at mediation. First, no evidence was proffered that Southeast made such a global settlement offer dependent on the included attorney fees. Moreover, settlement occurred without an inclusion for attorney fees. Nonetheless, whether a global settlement offer is unethical is not within the Board's province to determine. Furthermore, even if a global settlement offer had been made, such offers are not unethical according to a recent ethics opinion by the Alaska Bar Association.[103] Neither the Board nor the settlement agreement addressed this issue, so it was not an issue for which fees could be awarded. Time for this issue was properly denied.

Another item billed for which time was discounted by the Board was on the issue of whether Ms. Dockter had been wrongfully terminated from her job with Southeast. Workers' compensation is a statutory scheme and the Board may address only issues within the parameters of the Act. The Board does not have jurisdiction to address any wrongful termination issue, an issue that would properly be raised in the superior court. The time spent on the alleged wrongful termination was properly discounted because it was not an issue the Board could address. The Board rightfully found this time was not compensable.

Another issue raised, but not addressed, was whether Ms. Dockter was entitled to a compensation rate adjustment, which her attorney called a "Gilmore wage rate

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[103] *See,* Alaska Bar Association Ethics Opinion No. 2017-1 (May 9, 2017).

adjustment." However, this issue was not prosecuted and the C&R did not provide money for resolving this issue. Therefore, the Board found it was not an issue for which fees could be awarded.

The Board objected to the block-billing by Ms. Dockter's attorney because such billing impeded the Board's ability to fulfill its obligation to determine a reasonable fee. Here, the Board was frequently unable to ascertain exactly how much time her attorney spent on particular issues or tasks because he often lumped clerical or paralegal work with work requiring an attorney's legal expertise or with issues not before the Board. Attorneys seeking an award of fees should provide the Board with affidavits which are clear, detailed, and pertinent to the case and to the fees sought. The Board should not have to dissect an affidavit in order to determine a reasonable and compensatory fee. The affidavit here was not clear and pertinent to the issues in the case.

The attorney for Ms. Dockter also contended that he should be awarded a fee based on a higher hourly rate than any other attorney practicing before the Board has sought to date. He asserted that his considerable experience in the area of civil litigation provided him with equivalent experience to attorneys practicing before the Board, notwithstanding the need to understand both the Act and its accompanying regulations. The Board properly found that her attorney's expertise in civil litigation did not support a higher hourly rate in worker's compensation cases for which he had somewhat limited experience.

Ms. Dockter sought to present witnesses to testify about the effect the lack of attorneys practicing in workers' compensation has on claimants seeking attorneys to represent them. She contended her witnesses would have spoken about the choices her attorney had to make when he undertook to represent her. She also indicated that her attorney might never be retained by Southeast to represent it in any other litigation, but she did not provide any evidence of his past representation of Southeast. She also asserted he had to turn down civil litigation in order to represent her. However, this is the kind of choice attorneys make routinely when evaluating whether to represent one client over another.

There is no area of the Act in which the Board has had more opportunity to investigate and decide an issue of fact than that concerning attorney fees. The Board is well aware of the lack of attorneys available to assist large numbers of unrepresented claimants and is well aware of the fact that represented claimants frequently are more successful than unrepresented claimants before the Board, primarily because attorneys are skilled in collecting and presenting the kind of evidence necessary to succeed in a workers' compensation case. The Board knows how much in hourly fees various attorneys seek and presented a well-drafted chart detailing the hourly rate charged by attorneys of varying experience before the Board. The Board measured Ms. Dockter's attorney's experience and expertise against more experienced attorneys and came to a decision supported by the evidence that the hourly rate sought was not justified. As shown above, her attorney wasted a great deal of time in pursuing issues that could never have been decided by the Board, used a wrong standard of evidence, and made other mistakes an experienced workers' compensation attorney would have been unlikely to make.

Since an award of attorney fees is at the discretion of the Board, a decision on fees may be overturned only if the decision is manifestly unreasonable and not supported by the record. The evidence before the Board and the length and depth of the Board's analysis support the Commission's finding that the Board's decision was neither manifestly unreasonable nor an abuse of discretion. The Board's decision is further supported by substantial evidence in the record as a whole.

c. Does either AS 44.62.460 or the Act require the Board to hear witnesses it deems unnecessary?

Ms. Dockter contends that, under AS 44.62.460(b)(1), she had an absolute right to call witnesses in support of her claim for attorney fees. This statute states in part:

> (a) Oral evidence may be taken only on oath or affirmation.
>
> (b) Each party may
>
> i. call and examine witnesses;
>
> ii. introduce exhibits;

iii. cross-examine opposing witnesses on matter relevant to the issues, even though that matter was not covered in the direct examination;

iv. impeach a witness regardless of which party first called the witness to testify; and

v. rebut the adverse evidence.

(c) If the respondent does not testify in behalf of the respondent, the respondent may be called and examined as if under cross-examination.

(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repetitious evidence shall be excluded (emphasis added).

The Alaska Administrative Procedures Act (APA) applies to workers' compensation matters only if there is a gap in the Act.[104] However, the Act has a regulation governing the calling of witnesses at hearing and so this provision of the APA does not apply to Board hearings. The regulation at 8 AAC 45.120 addresses evidence at hearing and states in pertinent part:

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

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

(c) Each party has the following rights at hearing:

(1) to call and examine witnesses;

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[104] *See*, AS 44.62.330(12) "Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act."

(2) to introduce exhibits;

(3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;

(4) to impeach any witness regardless of which party first called the witness to testify; and

(5) to rebut contrary evidence.

(d) A party who does not testify in his own behalf may be called and examined by any party as if under cross-examination.

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

Under both the APA and the Act's regulation, the Board has the discretion to conduct its hearings expeditiously and prudently. The ability to exclude evidence which is irrelevant or unduly repetitious is necessary to ensure hearings are manageable in both content and length. AS 44. 62.460(b)(1) and AAC 45.120 each address this issue in a similar fashion. Both grant the tribunal the authority to conduct and control its own hearings. The tribunal, here the Board, under both the APA and the Board's regulation, has the right to limit irrelevant, duplicative, repetitious, and unnecessary testimony.

The Board has a long history of reviewing requests for attorney fees and calculating what is a reasonable fee. The Board has heard testimony many times over about the efficacy of or need for attorney representation for claimants and how hard it is for some claimants to find competent counsel. The Board also has within its database sufficient information about fees awarded in other cases, the experience of attorneys practicing before the Board, the rates charged by those attorneys practicing before the Board, and other pertinent information upon which to base its decision. Therefore, the

Board did not require additional input from proposed witnesses about these issues. The proffered testimony was unnecessary, duplicative, repetitious, and irrelevant in assisting the Board in determining a reasonable award of fees. In this instance the testimony of the proposed witnesses would not have provided the Board with any information not already within its knowledge. Moreover, an award of attorney fees is an area expressly within the Board's expertise to decide. To allow such evidence would merely prolong the time allocated for hearings and would not yield probative or productive information which would aid the Board in reaching a conclusion.

The scope of review when the Board applies its own regulations is "whether the agency's decision was arbitrary, unreasonable, or an abuse of discretion."[105] This is the same standard that applies to review of exclusion of evidence.[106]

d. Were Ms. Dockter's due process rights violated by her inability to call witnesses?

Neither the Board nor the Commission may address constitutional issues such as due process rights.[107] Ms. Dockter contends the failure to allow her to call witnesses on the issue of attorney fees violated her due process rights. Whether due process rights were violated is an issue outside the scope of the Commission's jurisdiction. The Court, in *Alaska Public Interest Research Group v. State*, held that "[a]dministrative agencies do not have jurisdiction to decide issues of constitutional law."[108] The Commission is an administrative agency and the question of whether due process rights were violated is a constitutional question outside the jurisdiction of the Commission. Therefore, the Commission must decline to decide whether Ms. Dockter's due process rights were violated when the Board did not allow her to call additional witnesses on the issue of attorney fees.

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105 *Orchitt*, 161 P.3d 1232, 1246.

106 *DeYonge*, 1 P.3d 90, 94.

107 *Alaska Public Interest Research Group v. State,* 167 P.3d 27, 36 (Alaska 2007).

108 *Id.*

5. Conclusion.

The Commission AFFIRMS the findings of the Board.

Date: ___*29 March 2018*_____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Michael J. Notar, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 246 issued in the matter of *Brenda Dockter vs. Southeast Alaska Regional Health Consortium and Alaska National Insurance Company*, AWCAC Appeal No. 17-002, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 29, 2018.

Date: *April 2, 2018*

Signed

K. Morrison, Appeals Commission Clerk