

Alaska Workers' Compensation Appeals Commission

State of Alaska, Department of
Corrections,
Appellant,

vs.

John R. Wozniak,
Appellee.

Final Decision

Decision No. 276 March 26, 2020

AWCAC Appeal No. 19-008
AWCB Decision No. 19-0044
AWCB Case No. 201303191

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 19-0044, issued at Anchorage, Alaska, on April 5, 2019, by southcentral panel members William Soule, Chair, and Bronson Frye, Member for Labor.

Appearances: Kevin G. Clarkson, Attorney General, and Adam R. Franklin, Assistant Attorney General, for appellant, State of Alaska, Department of Corrections; Joseph A. Kalamarides, Kalamarides & Lambert, substituting for Estate of Burt Mason/Law Offices of Burt Mason, for appellee, John R. Wozniak.

Commission proceedings: Appeal filed April 18, 2019; briefing completed September 16, 2019; oral argument held January 14, 2020; supplemental briefing filed February 3, 2020.

Commissioners: James N. Rhodes, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

John R. Wozniak sought permanent total disability (PTD) benefits as a result of his 2013 work injury with the State of Alaska, Department of Corrections (SOA). SOA ultimately accepted his claim and converted his temporary total disability (TTD) benefits to PTD in March 2018. Mr. Wozniak retained attorney Burt Mason to represent him in his dispute with SOA over PTD benefits. Following SOA's acceptance of Mr. Wozniak as permanently and totally disabled, the remaining issue was the amount of attorney fees that might be owed to Mr. Mason for his efforts in obtaining PTD benefits for his client.

The Alaska Workers' Compensation Board (Board) heard this issue on March 7, 2019, and issued its decision on April 5, 2019, awarding Mr. Mason \$22,520.00 for his time leading up to and including the hearing, and awarding ongoing attorney fees on future PTD benefits.¹ SOA timely appealed this decision to the Alaska Workers' Compensation Appeals Commission (Commission) and included a motion to stay payment of future attorney fees. Since both parties stipulated to a stay of payment of future attorney fees pending appeal, the Commission granted the stay on May 7, 2019.²

Oral argument on the issue of attorney fees was heard on January 14, 2020.³ The Commission now affirms the Board's award of attorney fees.

2. *Factual background and proceedings.*⁴

Mr. Wozniak had his first injury as an employee of SOA on August 31, 2010, while working as a correctional officer. He hurt his right knee while trying to restrain a prisoner.⁵ He previously injured his right knee in Michigan in 1999, and underwent surgical repair of his ACL.⁶ Then in 2009, while working at the Millennium Hotel in Anchorage, Mr. Wozniak

¹ *Wozniak v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 19-0044 (Apr. 5, 2019) (*Wozniak II*). The Board, in 2012, issued *Wozniak v. State of Alaska, Dep't of Corrections*, Alaska Workers' Comp. Bd. Dec. No. 12-0102 (June 14, 2012) (*Wozniak I*) involving Mr. Wozniak's 2010 injury with SOA. In reviewing the file on appeal, the Commission Chair discovered that both Chair Deirdre D. Ford and Industry Member Amy M. Steele participated in this 2012 decision. Neither remembered participating in the 2012 decision. Neither Mr. Wozniak nor SOA raised an objection to either Ms. Ford or Ms. Steele participating in this appeal. Both affirm they are able to review this appeal with impartiality. Moreover, the issue on appeal is a legal issue regarding Mr. Wozniak's entitlement to attorney fees on PTD benefits from the 2013 injury, and does not involve any issues from the 2012 decision.

² *State of Alaska, Dep't of Corrections v. Wozniak*, Alaska Workers' Comp. App. Comm'n Appeal No. 19-008 Order on Motion for Stay (May 7, 2019) (*Wozniak III*).

³ Attorney Joseph A. Kalamarides substituted in as Mr. Wozniak's attorney at oral argument and for supplemental briefing following the untimely death of Mr. Mason.

⁴ 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.

⁵ *Wozniak I* at 3, No. 1.

⁶ *Id.*, No. 2.

slipped on a stairway. On June 14, 2012, the Board found Mr. Wozniak's claim for medical and other benefits for the 2010 injury to be compensable.⁷

Mr. Wozniak sustained a second injury with SOA on March 9, 2013, when he slipped on the ice at work.⁸ He subsequently, in April 2014, had a total knee replacement.⁹

On February 17, 2015, Mr. Wozniak filed a claim for PTD benefits, TTD benefits, past and future medical care, permanent partial impairment benefits when rated, interest, and attorney fees and costs.¹⁰ On April 1, 2015, SOA denied Mr. Wozniak's claim, including his claim for PTD benefits.¹¹

On February 17, 2016, the Board approved a stipulation between the parties in which SOA stipulated to pay \$13,022.00 to Mr. Wozniak, representing all past-due TTD plus penalties and interest. The stipulation also required SOA to initiate paying TTD benefits effective February 26, 2016, and to continue paying these benefits in accordance with the Alaska Workers' Compensation Act (Act). The parties stipulated to withdraw all previous claims and controversions effective February 17, 2016. The stipulation and order also required SOA to pay Mr. Mason \$21,620.00 in attorney fees and costs through February 17, 2016, at \$400.00 per hour.¹² The parties agreed all compensation was paid pursuant to the approved stipulation and order.¹³

Between February 17, 2016, and March 8, 2018, SOA filed numerous medical summaries and Mr. Wozniak filed one on March 8, 2018. Mr. Wozniak filed no other documents during this period.¹⁴

⁷ *Wozniak I.*

⁸ Appellant's Opening Brief at 1.

⁹ *Id.*

¹⁰ R. 0111-0112.

¹¹ R. 0007-0008.

¹² R. 0312-0322.

¹³ *Wozniak II* at 3, No. 4; Hr'g Tr., Mar. 7, 2019.

¹⁴ *Id.*, No. 5.

Between February 17, 2016, and February 15, 2019, vocational rehabilitation and reemployment efforts were underway. Mr. Wozniak's attorney filed a response he received from Mr. Wozniak's attending physician stating Mr. Wozniak was not currently able to participate in a reemployment plan. SOA's counsel communicated with the reemployment specialist assigned to create a retraining plan for Mr. Wozniak and eventually asked for an informal reemployment conference. The various entries during this period reflect SOA's efforts to move Mr. Wozniak's reemployment plan development forward. There is no evidence SOA was resisting paying reemployment-related benefits to Mr. Wozniak and no evidence Mr. Wozniak was either moving the reemployment process forward or obstructing it.¹⁵

The Board held that between February 17, 2016, and March 26, 2018, SOA had no controversion in effect, having withdrawn all controversions effective February 17, 2016, and was not resisting any benefit payments due to Mr. Wozniak.¹⁶

However, in 2018, Mr. Wozniak's attorney wrote SOA asking it to commence payment of PTD. On April 9, 2018, Mr. Wozniak's attorney received a letter from SOA rejecting his proposal to have SOA accept Mr. Wozniak as permanently and totally disabled.¹⁷ The Board found that on April 9, 2018, SOA began resisting acceptance of Mr. Wozniak as permanently and totally disabled.¹⁸

On April 18, 2018, Mr. Wozniak filed a claim for PTD benefits, among other benefits. Mr. Wozniak asserted there were no realistic treatment options available to him and, therefore, he was permanently and totally disabled.¹⁹

On April 24, 2018, SOA, in response to the claim, said, among other things, "[SOA] denies no realistic treatment options exist for [Mr. Wozniak]"; "[SOA] denies [Mr. Wozniak] is totally disabled"; "[SOA] denies [Mr. Wozniak] cannot participate in

¹⁵ *Wozniak II* at 3, No. 6.

¹⁶ R. 0312-0322.

¹⁷ R. 0267-0274.

¹⁸ *Wozniak II* at 4, No. 9.

¹⁹ R. 0195-0196.

reemployment”; “[SOA] denies [Mr. Wozniak] cannot be gainfully employed”; and “[SOA] maintains [Mr. Wozniak] may have unreasonably refused to submit to medical treatment.”²⁰

Between April 24, 2018, and February 26, 2019, Mr. Wozniak filed no documents with the Board in this case, but contended his attorney continued developing his claim.²¹

On or about February 26, 2019, SOA “accepted [Mr. Wozniak] as permanently and totally disabled.”²²

On February 28, 2019, Mr. Mason filed a fee affidavit totaling 130.6 hours at \$400.00 per hour, requesting \$52,240.00 in total attorney fees and \$727.91 in litigation costs. Mr. Mason’s attorney fee affidavit spanned from February 19, 2016, through February 28, 2019.²³ The Board found that between February 2016 and April 2018, SOA was not resisting any benefits due to Mr. Wozniak.²⁴ The Board further found that there was no basis for awarding attorney fees for time between February 17, 2016, and March 30, 2017, and held that his right to attorney fees commenced on April 9, 2018, the date upon which SOA began resisting payment of PTD.²⁵

The Board also found that during the times requested in the February 28, 2019, fee affidavit, Mr. Mason performed some duties secretarial or paralegal in nature.²⁶ Some entries were block-billed making it difficult to determine how much time Mr. Mason spent on any particular task. The Board, therefore, found some of the requested hours reduced to reflect either secretarial or paralegal duties or block-billing.²⁷ The Board also reduced the June 19, 2018, request for eight hours of time for attending Mr. Wozniak’s deposition

²⁰ R. 0207-0208.

²¹ *Wozniak II* at 4, No. 12.

²² *Id.*, No. 13; R. 0257-0258.

²³ R. 0267-0274.

²⁴ *Wozniak II* at 3, No. 7.

²⁵ *Id.* at 18.

²⁶ *Id.* at 4-5, No. 15.

²⁷ *Id.*

based on Mr. Mason’s admission at hearing that he probably should have brought additional work with him to do after Mr. Wozniak’s deposition was over.²⁸ The Board otherwise found the following fully compensable attorney fees were reasonable and necessarily incurred in obtaining benefits for Mr. Wozniak during a period while SOA otherwise resisted payment of PTD compensation:

Table I

Date Services Rendered	Explanation	Hours Requested	Hours Awarded
4/9/18	Review letter from ER rejecting offer	.2	.2
4/17/18	T/C with EE re-rejection of offer; file PTD claim; review file; prepare claim and summary	2.8	2.8
4/18/18	Review letter from RBA; letter to RBA; review email re-EME; T/C with EE	1.4	1.4
4/23/18	Extended T/C with EE; review letter re-EME; review medical summary and records	1.1	1.1
4/25/18	Review letter re-EME; review plan update; review pleadings from oh/C; T/C with EE	1.3	1.3
4/30 - 5/1/18	Emails to and from oh/C; review medical summary and records	.6	.6
5/7/18	Review demo notice; T/C with O/C; T/C with EE	.5	.5
5/14/18	Receive medical summary and review records	.3	.3
6/3/18	Receive medical summary and review EME report	1.4	1.4
6/17/18	Travel to Kenai for EE deposition	3.5	3.5
6/18/18	Prepare for deposition of EE; review case	3.8	3.8
6/19/18	Participate in EE’s deposition; review file and conference with client	8.0	3.0
6/20/18	Return travel from EE’s deposition	3.5	3.5
7/26/18	Review file; T/C with EE; research on surgical issues	3.8	2.0
7/28/18	Review meds summary and records; research on surgical issues	1.8	.5

²⁸ *Wozniak II* at 4-5, No. 15.

9/26/18	T/C with EE re-claim status, surgery, settlement and hearing	.4	.4
10/24/18	Review file and prepare ARH for PTD claim	1.2	.5
11/11/18	Review opposition to ARH	.1	.1
11/12/18	Review copy of letter to Tamara and meds summary; study and make notes to file regarding impact on settlement; extended T/C with EE	2.5	1.0
11/14/18	Review file; prepare request for conference	.3	.3
12/6/18	Prepare for and attend PHC; T/C with EE	1.2	1.2
12/12/18	Review PHC; no deadlines; counter PHC	.6	.6
1/4/19	Receive letter with emails; review objections PHC; letter to O/C; T/C with EE; review compensation report	1.8	1.8
1/9/19	Review medical summary and records	.3	.3
1/17/19	Review email from oh/C re-EME; T/C with EE; T/C with O/C	.8	.8
1/24/19	T/C with EE re-EME; T/C to O/C; notes to file	.5	.3
1/25/19	Review file and prepare for hearing; outline hearing brief; T/C with O/C; T/C with EE	3.7	3.7
2/5/19	Review email; T/C with EE resettlement; prepare stipulation to resolve PTD; email to O/C	1.8	1.8
2/7/19	Receive email from O/C re-stipulation; some reply	.3	.3
2/13/19	T/C with O/C re-stipulation versus C&R; revised stipulation; email to O/C	.9	.9
2/14/19	T/C with EE re-rehab conference; participate in rehab conference; notes to file an emails to and from O/C	.9	.9
2/15/19	Emails to and from O/C resettlement; T/C with EE	.5	.5
2/16/19	Review file re-billings; detailed email to O/C	1.3	1.3
2/26/19	Review file; outline hearing brief; draft hearing brief	1.5	1.5
2/27/19	Work on hearing brief; research	5.0	5.0
2/28/19	Finished brief	2.3	2.3
Total awarded			51.4

In support of its contention that SOA did not resist payment of PTD, SOA filed several documents for the March 7, 2019, hearing.²⁹ These documents, to which Mr. Wozniak had no procedural objection, include:

- Mason's supplemental fee schedule.
- Franklin's October 24, 2018, letter to Elisa Lear-Rayborn, DPM, seeking referral to a medical professional to treat Employee's injury.
- Franklin's October 24, 2018, letter to Jennifer Jansma, DPM, seeking referral to a medical professional to treat Employee's injury.
- A November 5, 2018, email from Franklin to Alaska Neurology Center asking if the clinic can perform diagnostic testing on Employee.
- A November 6, 2018, email from "Rose" at Alaska Neurology Center to Franklin stating her clinic could perform certain testing for Employee.
- Franklin's November 8, 2018, letter to PA-C Tamara Brothers-McNeil, seeking information about potential, evidenced side effects from Employee's medications.
- Franklin's November 8, 2018, letter to Jared Kirkham, M.D., inquiring if Dr. Kirkham can evaluate Employee's peroneal nerve or refer him to someone who can.
- A November 13, 2018, letter from Shawn Johnston, M.D., to Franklin recommending Employee go to a tertiary care center like the University of Washington for additional testing and possible surgery.
- Franklin's November 28, 2018, letter to Jeffrey Jarvik, M.D., inquiring if Dr. Jarvik can evaluate Employee's peroneal nerve or refer him to someone who can.
- Franklin's December 10, 2018, email to Mason listing physicians who said they would evaluate and possibly treat Employee's peroneal nerve issue and offering to pay costs related to such evaluation.
- Franklin's December 10, 2018, email to Mason asking him to respond to his same-dated email within two weeks.
- Franklin's December 26, 2018, letter to Mason following up on his December 10, 2018 letter discussing an appointment for Employee to obtain additional evaluation and testing.

²⁹ *Wozniak II* at 6, No. 16.

At hearing on March 7, 2019, Mr. Mason submitted an affidavit for additional attorney fees.³⁰ SOA did not object to these. The Board found the amounts in the right column to be reasonable:

Table II

Date Services Rendered	Explanation	Hours Requested	Hours Awarded
3/4/19	Read and study ER's hearing brief; make notes re-objections	1.7	1.7
3/5/19	Prepare opening and closing argument	1.3	1.3
3/6/19	Review <i>Harnish</i> ; modify closing argument	.4	.4
Total		3.4	3.4

Mr. Wozniak contended, although SOA paid benefits under the February 17, 2016, stipulation, his leg condition "had a future that had not been resolved." He contended SOA previously controverted his claim for PTD and clearly SOA did not consider him permanently and totally disabled. Mr. Wozniak's attorney contended he spent considerable time counseling with Mr. Wozniak, who takes blood thinners, to determine whether surgery on his knee was the best option given risks associated with bleeding. When evidence showed Mr. Wozniak might be permanently totally disabled, his attorney attempted to obtain agreement from SOA on Mr. Wozniak's status. When this proved unsuccessful, Mr. Wozniak filed his April 18, 2018, claim. Mr. Wozniak contended, even after receiving an unfavorable evaluation from its physician, SOA continued to resist paying him PTD benefits. Eventually, SOA sent Mr. Wozniak's attorney an email accepting Mr. Wozniak as permanently and totally disabled.³¹

SOA contended it had not controverted Mr. Wozniak's most recent claim or failed to pay any benefits. It contended that it accepted Mr. Wozniak as PTD based on its own efforts to find treatment for him and did not convert him to PTD as a result of Mr. Mason's efforts. Nonetheless, SOA paid Mr. Mason \$25,000.00 in attorney fees and costs for his representation of Mr. Wozniak since February 16, 2016. Thus, SOA contended the real issue was whether his attorney was entitled to additional fees for services rendered after

³⁰ *Wozniak II* at 7, No. 18; R. 0365.

³¹ R. 0261-0266.

February 16, 2016. It contended his attorney did nothing to assist Mr. Wozniak in obtaining any reemployment benefits. Similarly, SOA contended Mr. Wozniak's attorney did nothing to communicate that Mr. Wozniak had no desire or ability to complete the plan or that he could not participate in one. It contended Mr. Wozniak's real claim, and the only claim on which Mr. Wozniak's attorney obtained a benefit, was that SOA did not voluntarily convert Mr. Wozniak from TTD to PTD in April 2018. SOA contended it could not have converted Mr. Wozniak to PTD any sooner than it did, as a matter of law. Specifically, it asserted he was not PTD as long as he was involved in the reemployment process. SOA undertook a search for a medical provider who would treat the peroneal nerve problem, but could find none. Once it found no medical provider willing to treat Mr. Wozniak, SOA "gave up" on helping Mr. Wozniak obtain medical treatment to resolve his chronic nerve pain and converted him to PTD.

Mr. Mason was licensed to practice law in 1979 and began representing insurance companies in workers' compensation cases in 1980, which was 39 years ago. He contended Joe Kalamarides was the only practicing attorney with more experience in workers' compensation law in Alaska than he had. Mr. Mason's fees were contingent because in this practice area, you "win some and you lose some." He spent "an awful lot of time" speaking to potential clients. Mr. Mason tried to help injured workers understand the law, but frequently ended up not representing them; he received no attorney fees for these cases. He has represented clients statewide; some he has never met. Injured workers in Alaska have difficulty finding an attorney to represent them in their claims. Mr. Mason contended he represented some people he probably should not have represented because their cases were not "very good." Nevertheless, he contended he provided a valuable service to injured workers who would have otherwise gone without advice or would have gotten no "cash in their pocket." In some cases, he contended his net fee might have been \$20.00 to \$40.00 per hour. On the other hand, Mr. Mason contended when he had a "strong case," and the employer conceded benefits, he "[got] paid handsomely" at \$400.00 per hour. Mr. Mason did not take many cases to hearing because he believed "a bird in the hand is worth two in the bush." He contended injured workers take a significant risk by putting their fate in the hands of a three-member Board

panel at hearing. Therefore, even in good cases, if his client was willing to give up a little bit, he was willing to give up some of his attorney fees, and they settled the case. Mr. Mason contended, even in these cases when he gave up some fees, his compensation was closer to \$200.00 per hour than \$400.00 per hour. Mr. Wozniak contended, in this case, SOA controverted his claim for PTD in 2015, and never rescinded the controversion until SOA stipulated to begin paying Mr. Wozniak's TTD benefits on February 17, 2016. Mr. Wozniak contended SOA continued to resist his PTD claim until SOA gave up resisting on or about February 16, 2019.³² When SOA rejected his settlement offer to accept Mr. Wozniak as PTD, Mr. Wozniak filed a claim.³³

Mr. Mason agreed he received a check from SOA for \$25,000.00. Mr. Mason stated he had not deposited the check because he needed Board approval before actually accepting the attorney fees, to avoid violating the law.³⁴ SOA cited attorney/client privilege in declining to state its basis for the payment of this amount in fees.³⁵

The Board found that former experience as a defense counsel in workers' compensation claims can be beneficial to an attorney who switches sides and represents injured workers. For example, an attorney experienced in defending against workers' compensation cases may be more familiar with tactics and strategies used to defeat injured workers' claims. Former defense attorneys may also have a better understanding of negotiation tactics that employers use during settlement discussions and what discovery should be obtained from the employer and adjuster.³⁶

The Board found that once SOA rejected Mr. Wozniak's settlement proposal on April 9, 2018, SOA vigorously defended against Mr. Wozniak's PTD claim. Therefore, Mr. Mason provided valuable legal services to Mr. Wozniak once SOA resisted his request for PTD. He succeeded in obtaining these benefits for Mr. Wozniak, which will continue

³² Hr'g Tr. at 34:21 – 38:15, 39:6 – 40:15.

³³ *Id.* at 47:2 – 48:7.

³⁴ *Id.* at 15:6-12.

³⁵ *Id.* at 82:3 – 83:6.

³⁶ *Wozniak II* 12-13, No. 29.

until his disability status changes. The Board also stated that while the nature, length, and complexity of the services performed were not unusual, the benefits resulting from Mr. Mason's services are significant as Mr. Wozniak will continue to receive PTD benefits while he remains in that status. The Board found that given the relative shortage of competent attorneys available to represent injured workers, and the hourly rate in Mr. Mason's prior awards, \$400.00 per hour for the period beginning in 2018 was a reasonable and fully compensable attorney fee rate.³⁷

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.³⁸ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.³⁹ "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."⁴⁰ 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.⁴¹ The Board's conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine credibility of witnesses.⁴² On questions of law

³⁷ *Wozniak II* at 13, No. 30.

³⁸ AS 23.30.128(b).

³⁹ *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁴⁰ *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, 1188-1189 (Alaska 1984)).

⁴¹ AS 23.30.122.

⁴² AS 23.30.122; AS 23.30.128(b); *see, Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013).

and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment.⁴³

4. Discussion.

SOA agrees Mr. Wozniak's attorney is entitled to a reasonable fee, but further contends that his attorney should not be entitled to any additional fees for his representation of Mr. Wozniak. In particular, SOA contends the lump sum payment of \$25,000.00 it "voluntarily made" was, in fact, an overpayment for the time and effort put in by Mr. Mason in securing PTD benefits for Mr. Wozniak. SOA asserts the award of attorney fees on future PTD benefits is an excessive payment of fees.

The Act provides for an award of attorney fees in AS 23.30.145. The section of that statute at issue here is as follows:

(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

⁴³ AS 23.30.128(b).

For an award of fees to be made, the Board must first decide that the employee prevailed on the claim for benefits and that the employer did or did not controvert benefits. If the employer did not controvert benefits, but otherwise resisted payment of subsequently awarded benefits, the attorney fees are awarded under subsection (b) of the above statute. If the employer controverted benefits, then statutory attorney fees are awarded under subsection (a) and are ten percent of the benefits awarded.

Here, the Board awarded \$22,520.00 plus fees on the future payment of PTD benefits to Mr. Wozniak, and awarded fees under AS 23.30.145(a). The Alaska Supreme Court (Court) has stated that fees may be awarded to the same claimant under both subsections.⁴⁴ The Commission took notice of this in *Porteleki*.⁴⁵ The Board discussed SOA's resistance to payment of PTD benefits, and concluded that SOA's notice on April 9, 2018, that it would change Mr. Wozniak's benefits to PTD constituted a controversion-in-fact. This controversion-in-fact led it to award what it considered to be a full, reasonable attorney fee under AS 23.30.145(a), for the time spent obtaining PTD benefits for Mr. Wozniak, in the amount of \$22,520.00.⁴⁶ The Board then awarded fees to be paid on future payments of PTD benefits, also pursuant to AS 23.30.145(a).

Awards of attorney fees to successful injured claimants are important to ensure continuing representation for injured workers. When an attorney obtains a significant benefit for an injured worker it is necessary that the fees awarded be full and reasonable to compensate the attorney. In *Rusch*, the Court clarified criteria for considering an attorney's hourly rate.⁴⁷ "Nothing in the regulation or statute ties an attorney's hourly rate solely to his experience in Alaska workers' compensation law."⁴⁸ Rather, "the nature,

⁴⁴ *Circle De Lumber Co. v. Humphrey*, 130 P.3d 941, 952, n. 76 (Alaska 2006).

⁴⁵ *Uresco Constr. Materials, Inc. v. Porteleki*, Alaska Workers' Comp. App. Comm'n Dec. No. 152 at 15 (May 11, 2011)(*Porteleki*).

⁴⁶ *Wozniak II* at 18.

⁴⁷ *Rusch v. Southeast Alaska Reg'l Health Consortium*, 453 P.3d 784, 798 (Alaska 2019)(*Rusch*).

⁴⁸ *Id.*

length, and complexity of the services,' the amount of benefits, and 'the benefits resulting from the services,'" are the criteria to be used.⁴⁹

The Board, in fact, found that work Mr. Mason billed for between 2016 and 2018 did not lead to SOA's acceptance of Mr. Wozniak as permanently and totally disabled, and it did not include those hours in the amount of fees awarded. However, the Board looked carefully at time billed beginning in April 2018, which did lead to SOA to commence payment of PTD benefits. The Board carefully weighed the objections of SOA, looked at the time expended on certain issues, and considered the admissions of Mr. Mason as to some possibly incorrect entries. The Board then awarded Mr. Mason 56.3 hours at the rate of \$400.00 per hour for a total of \$22,520.00 for his work in obtaining PTD benefits for Mr. Wozniak. This award is supported by substantial evidence in the record as a whole.

On one aspect of this award, the Board erred. Under *Rusch*, the Board should not have reduced the fees for time spent on paralegal activities, since Mr. Mason performed those tasks himself.⁵⁰ The Court there said "[r]educing an attorney's hourly rate to a paralegal rate for work the attorney performed discourages rather than encourages representation of injured workers."⁵¹ Rather, an attorney should not be penalized for performing these tasks when the attorney does not employ a paralegal.⁵² However, Mr. Mason did not raise this issue on appeal and, therefore, the Commission does not remand this matter for a recalculation of fees.

The issue in dispute is the award by the Board of ongoing attorney fees on future PTD benefits. In its brief, SOA stated it "does not contest the Board's decision to award Mr. Mason \$400 per hour for his services."⁵³ Nor did SOA contest his entitlement to some fees. What SOA questions is whether Mr. Mason should be entitled to fees beyond the

⁴⁹ *Rusch*, 453 P.3d 784, 798 (citations omitted).

⁵⁰ *Rusch*, 453 P.3d 804.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Appellant's Opening Brief at 12.

\$25,000.00 it paid to him when it converted Mr. Wozniak from TTD to PTD. SOA contends it was not the representation by Mr. Mason that prompted it to change Mr. Wozniak to PTD benefits, but rather its own research into what medical treatment might be available is what prompted the change. Therefore, an award under AS 23.30.145(a) of actual fees and an award of statutory fees on future PTD benefits is excessive. However, the Commission, in *Porteleki*, held that an injured worker may be entitled to fees under both (a) and (b).⁵⁴ If an award under both (a) and (b) is reasonable, then an award of statutory fees of ten percent of the benefits awarded, but divided between actual fees through time of hearing and fees on future benefits, is likewise reasonable. This is what the Board did.

AS 23.30.145(a) provides for an award of fees at ten percent of benefits awarded when a claim has been controverted in whole or in part. The award is based on the benefit controverted and awarded. Here, the Board found SOA controverted PTD benefits when it rejected Mr. Mason's offer in April 2018 and controverted when it filed its answer denying Mr. Wozniak's claim for PTD. The Court, in *Alaska Interstate v. Houston*, acknowledged that a claim may be controverted by resistance and a formal controversy is not always needed.⁵⁵ The Court also looked at the award there of ongoing attorney fees on benefits the claimant would receive for the rest of his life. "It is debatable whether a percentage attorney fee of essentially 10% is generally too high. . . . The 10% fee in workers' compensation cases is contingent. If the claim is lost the attorney is ordinarily unpaid. The most common contingent fee in court actions is 33 1/3%."⁵⁶

Mr. Wozniak was awarded PTD benefits based on SOA's concession that he is permanently and totally disabled. PTD benefits were a significant benefit to Mr. Wozniak. Up until Mr. Mason requested SOA convert Mr. Wozniak to PTD, SOA was paying TTD per a stipulation. It could, therefore, controvert payment of TTD benefits at any time it decided Mr. Wozniak was not cooperating with reemployment or was medically stable.

⁵⁴ *Porteleki*, App. Comm'n Dec. No. 152 at 15.

⁵⁵ *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978).

⁵⁶ *Id.* at 621.

In 2018, SOA resisted conversion to PTD, asserting Mr. Wozniak was still in the reemployment process even though no progress was being made on plan development, and the evidence suggests Mr. Wozniak could not participate in a plan even if a plan were developed. The Court, in *Underwater Constr., Inc. v. Shirley*, held that the change from TTD to PTD is “very important to an employee since TTD payments end with medical stability while PTD benefits do not.”⁵⁷ Just as in *Shirley*, SOA retained the right to controvert ongoing TTD benefits if it decided Mr. Wozniak was medically stable. That changed with the change in benefits to PTD and the Board’s confirmation of the change. SOA needed evidence of a change in disability before it could controvert PTD. Thus, the change to PTD is a significant benefit to Mr. Wozniak.

Although the weekly amount of benefits to him did not change, the change in type of benefit is important in several ways. TTD is payable only as long as the injured worker is not yet medically stable. Medical stability is defined as “the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment. . . .”⁵⁸ If the worker’s condition does not change and no additional treatment is predicted, an employer may decide to terminate TTD, based on the statute, even if the injured worker is unable to return to work. Then, the claimant would need to file a claim and request a hearing.

PTD is based on whether the person is able to work at all. Disability “means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”⁵⁹ Once SOA accepted Mr. Wozniak as entitled to PTD, SOA may not stop payment of his PTD benefits without evidence of his ability to return to some form of employment, generally based on a labor market

⁵⁷ *Underwater Constr., Inc. v. Shirley*, 884 P.2d 156, 159 (Alaska 1994) (citation omitted).

⁵⁸ AS 23.30.395(28).

⁵⁹ AS 23.30.395(16).

survey.⁶⁰ PTD is a significant benefit to Mr. Wozniak and Mr. Mason's efforts in this regard merit a reasonable and fully compensable attorney fee.

Mr. Wozniak asserted in his brief he is now 58 years old and has a potential lifespan of 20.8 years. His potential PTD benefits at his weekly rate of \$621.79 if he lives out his estimated lifespan will exceed \$600,000.00 of which ten percent would be \$60,000.00. The Board awarded Mr. Wozniak \$22,520.00 for the work his attorney did in order to obtain PTD benefits for him, plus ongoing fees on the PTD payments. Using \$600,000.00 as a possible amount of lifetime benefits, less \$22,520.00, comes to \$577,480.00 of which ten percent is \$57,748.00. Thus, the payment of \$22,520.00 does not equal ten percent of the compensation awarded.⁶¹ The Board awarded a lump sum for fees incurred to the date of hearing and then awarded ongoing fees on his ongoing PTD benefits. This is a reasonable and compensatory award of fees for the benefit obtained, based on the statutory ten percent of compensation awarded. The ongoing fees are not excessive nor unreasonable for the benefit obtained for Mr. Wozniak. The award of fees of \$22,520.00 plus ten percent of each future PTD payment is supported by law and substantial evidence in the record as a whole.

5. Conclusion.

The Board's decision and order is AFFIRMED.

Date: 26 March 2020 Alaska Workers' Compensation Appeals Commission



Signed

James N. Rhodes, Appeals Commissioner

Signed

Amy M. Steele, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

⁶⁰ AS 23.30.180(a).

⁶¹ AS 23.30.145(a).

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. 276, issued in the matter of *State of Alaska, Department of Corrections v. John R. Wozniak*, AWCAC Appeal No. 19-008, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 26, 2020.

Date: April 1, 2020



Signed

K. Morrison, Appeals Commission Clerk