Alaska Workers' Compensation Appeals Commission

Sandra Rusch, Appellant, vs. Southeast Alaska Regional Health Consortium and Alaska National Insurance Company, Appellees.	<u>Final Decision</u> Decision No. 245 March 29, 2018 AWCAC Appeal No. 17-001 AWCB Decision No. 16-0131 AWCB Case No. 201210128

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 16-0131, 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, Sandra Rusch; 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.

Sandra Rusch was injured while working for Southeast Alaska Regional Health Consortium, insured by Alaska National Insurance Company (Southeast), on June 21, 2012. Attorney David Graham entered an appearance on Ms. Rusch's behalf on June 26, 2015, and following mediation the parties settled all disputes except for attorney fees. The Compromise and Release (C&R) was approved by the Alaska Workers' Compensation Board (Board) on August 4, 2016. The Board heard the disputed attorney fees issue on October 25, 2016, and the Board issued its decision on December 21, 2016, limiting the

award of fees.[1] Ms. Rusch timely appealed the Board's 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.

2. Factual background and proceedings.[2]

On June 21, 2012, Ms. Rusch injured her low back lifting a heavy box while working for Southeast.[3]

On January 9, 2013, Ms. Rusch underwent back fusion surgery.[4]

On November 7, 2013, Southeast filed a controversion notice denying Temporary Total Disability (TTD) and Temporary Partial Disability (TPD) benefits as of October 18, 2013, Permanent Partial Impairment (PPI) benefits above a 5% rating, and physical and massage therapy after November 5, 2013, and contending Ms. Rusch's low back condition had reached medical stability by October 18, 2013, and a PPI rating of 5% had already been paid.[5]

On April 12, 2014, Ms. Rusch fell and injured her left wrist and arm in Anchorage, Alaska.[6] Southeast, on April 28, 2014, filed a controversion notice denying all benefits associated with Ms. Rusch's fall, contending it occurred outside the course and scope of her employment.[7]

On June 3, 2014, Ms. Rusch visited Patrick E. Ballard, D.O., who noted Ms. Rusch fell earlier that year and "fractured her wrist and aggravated her back injury."[8] Ms. Rusch

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[1] *Rusch v. S.E.A.R.H.C. and Alaska National Insurance*, Alaska Workers' Comp. Bd. Dec. No. 16-0131 (Dec. 21, 2016) (*Rusch*).

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

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

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

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

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

[8] *Id.*, No. 6.

saw Dr. Ballard on September 17, 2014, who noted she "is here to discuss further follow up and discussion about her low back surgery and workman's comp case."[9]

On June 25, 2015, Ms. Rusch filed a claim seeking TTD, PPI, medical costs, transportation costs, review of reemployment benefit eligibility decision, penalty, interest, unfair or frivolous controvert, and attorney fees and costs.[10] On June 26, 2015, Ms. Rusch's attorney filed an entry of appearance.[11]

On July 22, 2015, Southeast controverted Ms. Rusch's June 26, 2015, claim and filed a four-page answer denying benefits. Southeast contended:

> (1) [Ms. Rusch] was not entitled to TTD after the date of medical stability and [Ms. Rusch]'s condition was medically stable;
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> (2) [Ms. Rusch] was not entitled to PPI benefits above the 5% already paid;
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> (3) [Southeast] has either paid or denied all outstanding medical costs in connection with the work injury that it was aware of;
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> (4) No further medical care has been recommended or undertaken in connection with the work injury;
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> (5) The fall which aggravated [Ms. Rusch]'s lower back occurred outside the course and scope of employment and the medical bills for the fall have not been paid;
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> (6) [Ms. Rusch] has not specified the transportation costs requested and a transportation log had not been submitted;
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> (7) There was no eligibility determination from which to seek review as [Ms. Rusch] was not totally disabled for more than 90 consecutive days;
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> (8) Penalty and interest are not owed as all benefits have been timely paid or controverted;
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> (9) All controversions are reasonably based upon fact or law;
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> (10) No attorney fees or costs are due because there is no nexus between benefits paid to [Ms. Rusch] and work performed by [Ms. Rusch]'s attorney.[12]

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[9] *Rusch* at 3, No. 7.

[10] *Id.* at 4, No. 9.

[11] *Id.*, No. 10.

[12] *Id.*, No. 11.

On August 11, 2015, Ms. Rusch filed a medical summary containing medical records for medical treatment received for the fall which occurred on April 12, 2014; the person certifying service was "Susan Royce."[13] Southeast objected to the August 11, 2015, medical summary, contending the medical records were irrelevant and unrelated to the work injury. Southeast requested withdrawal of the records.[14]

On December 11, 2015, Ms. Rusch filed a petition "to extend benefits", contending she had yet to achieve recovery from her work injury and required further medical treatment.[15] She also filed a petition to "compel acceptance of [Ms. Rusch]'s current treating physicians," contending she had to change her physician because Dr. Ballard refused to schedule any follow-up visits due to outstanding medical bills.[16]

Southeast answered Ms. Rusch's December 11, 2015, petition to extend benefits on December 21, 2015, and asserted the only medical benefits at issue were those provided by Dr. Ballard in connection with a fall that occurred outside the course and scope of employment.[17] On December 29, 2015, Southeast objected to Ms. Rusch's December 11, 2015, petition to compel.[18] Southeast, on January 8, 2016, filed a medical summary with 309 pages.[19] Then, on January 29, 2016, Southeast petitioned to compel Ms. Rusch to attend a deposition.[20]

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[13] *Rusch* at 4, No. 12.

[14] *Id.*, No. 13.

[15] *Id.*, No. 14.

[16] *Id.* at 5, No. 15.

[17] *Id.*, No. 16.

[18] *Id.*, No. 17.

[19] *Id.*, No. 18.

[20] *Id.*, No. 19.

On February, 3, 2016, Ms. Rusch agreed to attend a deposition on February 19, 2016, at 11:00 a.m. at the Travelodge in Juneau, Alaska.[21] The deposition took place on February 19, 2016, beginning at 11:00 a.m. and concluding at 4:33 p.m.[22]

On February 18, 2016, Southeast filed a new medical summary with four pages.[23] Southeast, on April 16, 2016, filed a controversion notice denying payment for physical therapy provided on February 22, 2016, contending the physical therapy was prescribed by an unauthorized medical provider and exceeded the treatment frequency standard and, therefore, was not compensable under the Alaska Workers' Compensation Act (Act).[24]

On May 2, 2016, Ms. Rusch filed a claim seeking:

(1) TTD from April 27, 2013 through May 11, 2013; May 19, 2013 through June 8, 2013; June 16, 2013 through October 18, 2013;

(2) TPD from May 24, 2012 through April 12, 2013;

(3) Permanent Total Disability (PTD) from April 13, 2013 and ongoing;

(4) PPI;

(5) Medical costs;

(6) Transportation costs;

(7) Review of reemployment benefit eligibility decision;

(8) Penalty;

(9) Interest;

(10) Unfair or frivolous controvert;

(11) Attorney fees and costs;

(12) Other.[25]

Ms. Rusch filed an addendum explaining each benefit claimed, stating:

> [Ms. Rusch] "was not informed by the adjuster or its agents that she had the option to elect to receive TTD payments instead of unemployment

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21 *Rusch* at 5, No. 20.

22 *Id.*, No. 22.

23 *Id.*, No. 21.

24 *Id.*, No. 23.

25 *Id.* at 5-6, No. 24.

compensation or that she could repay any unemployment benefits received to eliminate any disqualification from receiving TTD" and she was "denied TTD benefits because of receipt of unemployment benefits."

[Ms. Rusch] contended she did not reach medical stability by October 18, 2013. [Ms. Rusch] contended the back fusion surgery was unsuccessful and her condition and symptoms continue to disable her from returning to work.

[Ms. Rusch] contends she was terminated from her employment because she was unable to continue to work due to her work-injury restrictions and have precluded her from obtaining alternative employment.

[Ms. Rusch] requested her PTD be adjusted and no credit be given for any PPI payments. [Ms. Rusch] contended she has not receiving an impairment rating by a physician of her own choice due to [Southeast]'s interference with her selection of physicians and should be allowed to obtain a PPI rating from a physician of her choosing.

[Ms. Rusch] contends [Southeast] failed to pay for medical costs for treatment of her work related injury with Dr. Ballard, for out of pocket medical costs, and for recommended treatment and therapies, and attempted to influence the medical opinions of treating and EME physicians. [Ms. Rusch] contends [Southeast] denied $31.23 in transportation costs and has selectively prepaid transportation costs for some treatments while not doing so for others which precluded [Ms. Rusch] from receiving necessary medical care.

[Ms. Rusch] contends she was not informed by [Southeast] of her eligibility for reemployment benefits and was misled by [Southeast] into believing she had applied for these benefits.

[Ms. Rusch] claimed penalty and interest for all past due amounts of TTD and TPD.

[Ms. Rusch] asserted most, if not all, of [Southeast]'s controversions were either unfair or frivolous. For the "Other" claim, [Ms. Rusch] requested [Southeast] "be precluded from rebutting the presumption of compensability as to all claims and for such other and further relief as may be deemed proper once the full extent of [Southeast]'s" interference with the selection of physicians and improperly attempting to influence physician's medical opinions has been discovered.[26]

On May 23, 2016, Southeast answered Ms. Rusch's May 2, 2016, claim, contending the claim for TTD was time barred and no benefits were due after medical stability; she

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[26] *Rusch* at 6-7, No. 24.

had not provided evidence of lost earning capacity for TPD and the claim was barred; she did not provide evidence of permanent disability, she had the ability to perform at least light duty work, and her claim was time barred; she failed to identify medical costs being requested and Southeast was only aware of the two bills for Dr. Ballard which were rejected for non-work related conditions; she failed to identify the transportation costs claimed and, to Southeast's knowledge, all transportation costs due had been timely paid; she did not sustain more than 90 consecutive days of TTD documented by a medical provider so she was not entitled to an eligibility evaluation and her request for an evaluation was time barred; she failed to identify the basis of her claims for penalty and interest; she failed to identify which controversion was frivolous or unfair, and any and all of Southeast's controversions had been reasonably based upon fact or medical opinion; and, Southeast reserved the right to dispute the factual assertions in the addendum.[27]

On May 24, 2016, Southeast filed a medical summary with 42 pages.[28]

On June 23, 2016, the parties participated in mediation with a Board hearing officer and reached a settlement on all disputed issues except attorney fees and costs.[29] The parties filed a C&R on July 29, 2016, which required Board approval because Ms. Rusch was waiving future medical benefits.[30] On August 4, 2016, the C&R was approved. According to the settlement, Ms. Rusch was to be paid $100,000.00 to resolve all disputes with respect to medical and transportation benefits, TTD, TPD, PPI, penalties, interest, and reemployment benefits. The payment was apportioned among certain benefits with $40,000.00 for future medical costs, $40,000.00 for AS 23.30.041(k) stipend benefits, and $20,000.00 for disputed TTD benefits. The C&R also provided that Southeast would pay up to $1,000.00 for outstanding medical bills for services provided by Dr. Ballard related to Ms. Rusch's fall.[31]

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27 *Rusch* at 7, No. 25.

28 *Id.*, No. 26.

29 *Id.*, No. 27.

30 *Id.*, No. 28.

31 *Id.*, No. 29.

On September 28, 2016, a hearing was scheduled for October 25, 2016, on Ms. Rusch's claim for attorney fees and costs. The prehearing officer notified the parties each side would be allowed 30 minutes for opening and closing statements.[32]

On October 12, 2016, Ms. Rusch filed documentary evidence, including a draft of a settlement agreement received by Ms. Rusch before retaining counsel.[33]

On October 19, 2016, Ms. Rusch filed a hearing brief in support of her claim for attorney fees and costs under AS 23.30.145(b). She argued full and actual attorney fees and costs were reasonable due to the moderate to high complexity of the claims, the aggressive defense by Southeast, the contingent nature of attorney fees in workers' compensation cases, the objective of ensuring competent counsel is available to represent employees, her attorney's legal experience, and the amounts involved and the benefits which resulted. Ms. Rusch further contended her attorney's requested hourly rate was appropriate based on his 35 years of experience representing injured people in civil tort and workers' compensation cases; his almost 20 years of experience representing injured workers in Alaska workers' compensation cases; his ability to earn fees in the Alaska marketplace at a rate equal to or higher than the hourly rate awarded in this case doing work other than representing claimants in Alaska workers' compensation cases; his willingness to handle cases in southeast Alaska, and the fact the Board has awarded fees to other attorneys working in more metropolitan areas of Alaska with equal to or less experience at an hourly rate of $400.00 or more.[34]

Ms. Rusch cited several evidentiary and procedural issues as indicative of the complexity of this case. Specifically, Ms. Rusch referenced the following:

a. The October 5, 2012 controversion, contending it was unfair and frivolous because [Southeast] stated no evidence had been received to support disability beyond the three da[y] waiting period yet [Ms. Rusch] had attended at least 34 medical provider visits and late penalty and interest was not paid on TPD;

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32 *Rusch* at 7-8, No. 30.

33 *Id.* at 8, No. 31.

34 *Id.*, No. 32.

b. [Southeast]'s failure to report its first EME records review;

c. [Southeast]'s excessive and illegal changes of physician;

d. [Southeast]'s misrepresentation to [Ms. Rusch] about the cause of her termination, unemployment insurance benefits and retraining benefits;

e. [Southeast]'s interference with [Ms. Rusch]'s medical case by scheduling a follow up appointment after surgery with [Ms. Rusch]'s physician;

f. [Southeast]'s failure to inform [Ms. Rusch] of her physician's referral to a specific doctor for a PPI rating;

g. [Southeast]'s assertion there was no evidence of a failed fusion;

h. [Southeast]'s assertion [Ms. Rusch] made an excessive change of physician after it agreed [Ms. Rusch]'s physician change would not count as a change of physician;

i. [Southeast]'s failure to provide complete discovery and subsequent deposition of [Ms. Rusch]; and

j. [Southeast]'s intention to make an ethically impermissible global settlement offer covering all claims, including attorney fees and costs.[35]

Ms. Rusch argued these issues required extensive review of documents, multiple discovery requests, research into issues related to the production of documents and discovery violations, and fact investigation. Ms. Rusch stated she prepared a 30-page cross-referenced chronology and a 41-page mediation brief discussing 14 separate legal issues at length. Ms. Rusch's attorney also cited 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 his obtaining work on behalf of Southeast Alaska Regional Health Consortium and Alaska National Insurance Company, workers' compensation representation is similar to providing legal representation in tort cases in southeast Alaska, and the full and actual fee is similar to or lower than the fee that could be realized from handling a similarly situated tort claim.[36]

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

(1) [Ms. Rusch] will testify concerning any fact at issue in this hearing, including but not limited to her experience based on her participation in

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[35] *Rusch* at 8-9, No. 33.

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

these proceedings, her expectations, and her level of satisfaction with the results obtained.

(2) [Ms. Rusch]'s attorney will testify concerning any matter at issue in this hearing.

(3) Jack G. Poulsen, Esq., will testify concerning his knowledge of the experience and abilities of [Ms. Rusch]'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.

(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 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.

(5) Robert J. Malone, Esq., will testify concerning his knowledge of [Ms. Rusch]'s attorney's legal abilities and experience and his demonstrated ability to earn large fees handling personal injury cases.[37]

On October 19, 2016, Southeast filed a hearing brief acknowledging Ms. Rusch was entitled to attorney fees and costs under AS 23.30.145(a). Southeast contended time incurred by Ms. Rusch's attorney in arguing or processing undisputed or unsuccessful claims was not awardable; her attorney's anticipated hourly rate was excessive; and the 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 the complexity and nature of the disputes and the settlement achieved did not warrant an award of high fees. Southeast included its claimed hours in this case as an exhibit.[38]

On October 20, 2016, Ms. Rusch's attorney filed an affidavit outlining his attorney fees and costs from April 28, 2015, through October 20, 2016, billed at $425.00 per hour

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[37] *Rusch* at 9-10, No. 35.

[38] *Id.* at 10, No. 36.

for a total of 277.55 hours, equaling $117,958.75. Her attorney's affidavit documented $670.00 in total costs.[39]

On October 25, 2016, Ms. Rusch's attorney participated in two hearings before the Board against Southeast in Juneau, Alaska, including the hearing this decision addresses. The total time spent on both hearings was approximately 5.7 hours.[40]

At hearing on October 25, 2016, deadlines for post-hearing documents were set. The deadline for Ms. Rusch's supplemental affidavit of attorney fees was October 28, 2016. The deadline for Southeast's response to Ms. Rusch's affidavit of attorney fees and supplemental affidavit of attorney fees was November 4, 2011. Ms. Rusch requested leave from the panel to submit a reply to Southeast's responses and Southeast did not object. The deadline for Ms. Rusch's response was set for November 11, 2016. The parties agreed to serve the Board and the other party the post-hearing documents by email.[41]

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

> 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.
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> 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

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[39] *Rusch* at 10, No. 37.

[40] *Id.*, No. 38.

[41] *Id.*, No. 39.

> 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.
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> 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.[42]

At hearing on October 25, 2016, the Board overruled Southeast's objection to Ms. Rusch's testimony, finding her testimony regarding the success achieved by her attorney was relevant. The Board sustained Southeast's objection to witnesses Mr. Poulsen and Mr. Malone, finding their testimony would be irrelevant. The Board sustained Southeast's objection to witness Mr. Constantino, finding his testimony would be irrelevant and unduly repetitious. The Board sustained Southeast's objection to Ms. Rusch's attorney's testimony, finding Ms. Rusch had sufficient time and opportunity in additional argument time, briefs, and post hearing documents to address any matter at issue in the hearing.[43]

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[42] *Rusch* at 11, No. 41.

[43] *Id.* at 12, No. 42.

At hearing on October 25, 2016, Ms. Rusch credibly testified she was satisfied with the lump sum she received and felt her attorney successfully resolved her case. She stated she settled for more than she was offered by Southeast before she retained counsel. She testified she would not have received the amount in the settlement without counsel and retaining counsel allowed her to reach her successful result.[44]

At hearing on October 25, 2016, Ms. Rusch's attorney contended he should be awarded an hourly rate of $425.00 because he has been a practicing attorney for 35 years in three different states and in federal courts, including the practice of workers' compensation in Colorado, New Mexico, and Alaska, although his primary area of practice is personal injury cases. Ms. Rusch argued this case involved a fairly complicated medical issue due to the medical films showing a lack of incorporation after the back fusion surgery. Ms. Rusch also argued there was a significant discovery dispute and Ms. Rusch uncovered missing evidence and statutory violations by Southeast. Ms. Rusch contended Southeast's own actions caused fees to increase and the fees claimed are a direct result of Southeast's resistance. Ms. Rusch argued the claimed hours were reasonable because the timesheets for Southeast's attorney listed 222 hours leading up to mediation, and Ms. Rusch only claimed 217 hours leading up to mediation. Ms. Rusch acknowledged her attorney billed in quarter-hour increments, but contended it did not enlarge attorney fees because if he spent 18 minutes on a task, he would bill for only 0.25 of an hour and not 0.50 of an hour. Ms. Rusch also asserted Southeast unethically made a global settlement offer including attorney fees.[45]

At hearing on October 25, 2016, Southeast contended Ms. Rusch's attorney's claimed hourly rate was egregious based on her attorney's workers' compensation experience. Southeast argued the awarded fee should be determined by the benefits awarded in the C&R that were claimed and actually disputed. Southeast contended

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44 *Rusch* at 12, No. 43.

45 *Id.*, No. 44 (The Commission notes the Alaska Bar Association issued Ethics Opinion No. 2017-1 on May 9, 2017, finding such global settlement offers were not unethical as long as counsel comply with the Rules of Professional Conduct).

Ms. Rusch was not successful in obtaining time loss benefits because Ms. Rusch was awarded the same amount of time loss benefits in the C&R as was offered in a previous settlement offer before Ms. Rusch retained counsel. Southeast acknowledged Ms. Rusch was successful on the issue of reemployment benefits, but argued she was not successful on the issue of medical benefits because the prior settlement offer to Ms. Rusch provided $20,000.00 in medical benefits and left medical benefits open for one year for a back fusion which she had and for which Southeast paid. Southeast stated the case was not complex or complicated and resolved in approximately one year. Southeast contended the failed back surgery was never at issue because there was no evidence of a failed back fusion, and Southeast only refuted medical benefits associated with Ms. Rusch's fall. Southeast argued her 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 further contended Ms. Rusch's brief contained factual allegations demonstrating intent to disparage Southeast. Southeast argued it did not make an impermissible unethical global settlement offer; it merely proposed a settlement of the attorney fees at mediation, as it did for other benefits claimed by Ms. Rusch.[46]

On October 28, 2016, Ms. Rusch 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. Rusch's supplemental affidavit documented $255.00 in total costs.[47] In summary, Ms. Rusch documented $124,121.25 in attorney fees and $925.00 in costs.[48]

On November 4, 2016, Southeast filed an objection to Ms. Rusch's October 20, 2016, affidavit of attorney fees and costs. Southeast did not object to 37 entries totaling 47.70 hours, but objected to the remaining entries totaling 229.85 hours. Southeast made specific objections to each remaining entry and, based on those objections, argued

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[46] *Rusch* at 12-13, No. 45.

[47] *Id.* at 13, No. 46.

[48] *Id.*, No. 47.

Ms. Rusch should be awarded 92.08 total hours at an hourly rate of $275.00, equaling $25,322.00, and contended that for administrative tasks Ms. Rusch should be awarded 0.65 of an hour at $130.00 per hour, equaling $84.50. Southeast also argued Ms. Rusch's costs should be limited to $320.00 upon presentation of travel receipts. Southeast's brief included 32 exhibits containing the letters, emails, and pleadings concerning its specific objections.[49]

On November 4, 2016, Southeast filed an objection to Ms. Rusch's supplemental affidavit dated October 28, 2016. Southeast argued no supplemental fees should be awarded unless the Board awarded greater fees than those offered in mediation or with the offer of judgment because the services would not have resulted in greater success. Southeast also argued that Ms. Rusch should be limited to an award of 8.75 hours at an hourly rate of $275.00, equaling $2,406.25. Southeast did not object to two entries totaling 1.25 hours, but made specific objections to each of the remaining entries which totaled 13.25 hours, reducing those entries to 7.5 hours. Southeast argued Ms. Rusch's costs should be limited to $255.00 upon presentation of receipts.[50]

On November 14, 2016, Ms. Rusch filed a response to Southeast's objections. Ms. Rusch argued the hourly rate of $425.00 was appropriate because her attorney had represented other employees where an hourly rate of $350.00 had been approved in C&Rs. She also contended the effects of inflation. She pointed to her attorney's additional workers' compensation experience since the approval of the prior settlements, which included an hourly rate of $350.00. Ms. Rusch also indicated that attorneys with less experience, specifically Eric Croft, received an hourly rate of $400.00. She further argued the additional costs inherent in workers' compensation practice in southeast Alaska mandated a higher hourly rate. She 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. Rusch argued the presumption of compensability applies to

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[49] *Rusch* at 13, No. 48.

[50] *Id.* at 14, No. 49.

an award of attorney fees and Southeast failed to provide substantial evidence sufficient to overcome the presumption that the fees are reasonable.[51]

Ms. Rusch's attorney fee affidavits contained block-billing which made it difficult for the Board to determine how much time her attorney spent on each task listed in each entry, and if time spent on each task was reasonable. Ms. Rusch's affidavits also failed to include sufficient detail to determine whether specific tasks were related to issues prevailed upon or benefits which were controverted and awarded. Her attorney also billed in quarter-hour increments, whereas the Board found workers' compensation attorneys customarily bill in tenth of an hour increments. The Board prepared the chart below detailing the reduced hours for entries containing excessive time claimed as a result of her attorney's billing methods for the tasks listed:[52]

Table I

Date	Hours Claimed	Hours Reduced	Hours Remaining
April 28, 2015	1.50	0.90	0.60
May 25, 2015	2.25	1.35	0.90
July 29, 2015	3.00	1.50	1.50
July 31, 2015	1.25	0.55	0.70
August 3, 2015	3.50	3.10	0.40
August 24, 2015	3.00	1.70	1.30
August 26, 2015	1.00	0.70	0.30
September 2, 2015	1.75	1.55	0.20
September 23, 2015	1.00	0.20	0.80
September 29, 2015	0.50	0.30	0.20
September 30, 2015	0.75	0.65	0.10
October 19, 2015	0.75	0.45	0.30
December 11, 2015	3.25	1.95	1.30
January 14, 2016	0.75	0.55	0.20
January 19, 2016	0.75	0.35	0.40
January 23, 2016	0.75	0.45	0.30
January 24, 2016	1.00	0.70	0.30
January 26, 2016	3.50	2.80	0.70
January 27, 2016	5.00	3.00	2.00
January 28, 2016	4.75	3.45	1.30
February 2, 2016	2.00	1.40	0.60

[51] *Rusch* at 14, No. 50.

[52] *Id.* at 15-16, No. 54.

February 18, 2016	8.25	6.25	2.00
February 20, 2016	2.50	2.00	0.50
March 11, 2016	1.25	0.75	0.50
March 23, 2016	2.50	1.00	1.50
March 24, 2016	2.50	2.50	0.00
April 5, 2016	3.00	1.80	1.20
April 10, 2016	3.50	0.80	2.70
April 11, 2016	2.25	2.05	0.20
May 4, 2016	2.25	1.85	0.40
May 11, 2016	1.50	1.50	0.00
May 22, 2016	2.75	1.25	1.50
October 3, 2016	0.25	0.15	0.10
Totals	**74.50**	**49.50**	**25.00**

The Board found the attorney for Ms. Rusch billed an excessive amount of time for relatively simple tasks. The Board also produced another chart showing reductions for entries containing unreasonable time spent on relatively simple tasks:[53]

Table II

Date	Hours Claimed	Hours Reduced	Hours Remaining
July 6, 2015	0.25	0.15	0.10
July 25, 2015	0.50	0.20	0.30
October 9, 2015	0.50	0.30	0.20
October 19, 2015	0.75	0.75	0.00
December 16, 2015	0.50	0.20	0.30
December 31, 2015	0.75	0.55	0.20
January 5, 2016	0.75	0.45	0.30
January 8, 2016	0.75	0.45	0.30
January 29, 2016	1.00	0.90	0.10
February 21, 2016	1.00	0.30	0.70
March 2, 2016	0.75	0.55	0.20
April 18, 2016	0.50	0.30	0.20
May 16, 2016	0.75	0.75	0.00
Totals	**8.75**	**5.85**	**2.90**

Ms. Rusch's attorney claimed 3.5 hours for "Detailed Review of medical records and medical research; prep. of summary" on June 22, 2015. The Board found this entry contained block-billing and made the following findings:

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[53] *Rusch* at 16, No. 55.

> the last task, "prep. of summary" refers to the medical summary dated August 11, 2015, as it is the only medical summary [Ms. Rusch] filed. [Ms. Rusch]'s attorney did not certify service of the medical summary. The preparation of this simple medical summary is a paralegal task and 0.2 hours is reasonable to complete this task. The first task does not clearly distinguish the medical records reviewed or research conducted and does not state which issue the medical records and research addressed. The remainder of time is unreasonable.[54]

Ms. Rusch's attorney claimed 3.5 hours for "TC client; Prep claim; prep notice appearance; review SSI information" on June 24, 2015. Again, the Board found this entry contained block-billing making it difficult to determine how much time was spent on each task; her attorney failed to provide the issue or benefit addressed in the telephone call; 0.2 hour is reasonable for this telephone call. The attorney for Ms. Rusch prepared the claim filed June 25, 2015, and 1.0 hour is reasonable to prepare the two-page claim. Preparation of a notice of appearance is a paralegal task and 0.2 of an hour was reasonable to complete this task. SSI or social security information was not at issue and the time claimed to review it was unreasonable. The reasonable time for this entry is 1.4 hours, including 1.2 attorney hours and 0.2 paralegal hours.[55]

Ms. Rusch's attorney claimed 1.5 hours and $200.00 in costs to travel to Klawock for a conference on July 29, 2015, with Ms. Rusch. The Board found her attorney did not explain why he needed to meet with Ms. Rusch in person rather than confer with her by telephone. The time and costs claimed were found to be unnecessary and unreasonable.[56]

Similarly, the Board found Ms. Rusch's attorney claimed 0.25 of an hour for "emails to/from Nina Bingham re depo" on January 21, 2016. Scheduling a deposition is a paralegal task and 0.25 of an hour was a reasonable amount for the paralegal task.[57]

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[54] *Rusch* at 17, No. 56.

[55] *Id.*, No. 57.

[56] *Id.*, No. 58.

[57] *Id.*, No. 59.

The Board reviewed the claim by Ms. Rusch's attorney of 12.0 hours for "travel to/fr Juneau; prep for deposition; multiple conf with client; attend deposition" on February 19, 2016. The Board again found this entry contained block-billing which made it difficult to determine how much time was spent on each task. The Board noted the deposition took 5.6 hours and travel to and from Juneau takes less than 2.0 hours. The remaining hours were reduced by 4.0 hours; 8.0 hours was found reasonable in light of Ms. Rusch's previous preparation for deposition.[58]

The attorney for Ms. Rusch, according to the Board's review, claimed 2.5 hours for "prep draft letter to [Southeast] re issues" on February 28, 2016; 0.75 of an hour for "tc client re settlement proposal" on February 29, 2016; and 2.25 hours to "prep draft of settlement ltr to [Southeast] and prep email to client" on March 2, 2016. The Board found that Southeast did not receive any settlement letter from Ms. Rusch at that time and Ms. Rusch did not provide any letter or proof of service of any such letter. Therefore, the hours claimed for preparing a draft settlement letter not provided to Southeast were unreasonable and the hours could not be reasonably claimed.[59]

The Board again noted Ms. Rusch's attorney claimed 1.25 hours to "prep an email to [Southeast]" on March 31, 2016. Southeast did not receive any email on that date and Ms. Rusch did not provide proof of any email sent on this date. Therefore, the Board found this time was unreasonable.[60]

Ms. Rusch's attorney claimed, according to the Board, 4.25 hours to "Prep email to [Southeast]; Review email from [Southeast]; Review add'l discovery; prep SDT and depo notices" on April 4, 2016. The Board found this entry contained block-billing which made it difficult to determine how much time was spent on each task. Ms. Rusch did not file and serve a subpoena duces tecum on Southeast and so claiming time spent on this

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[58] *Rusch* at 17, No. 60.

[59] *Id.* at 17-18, No. 61.

[60] *Id.* at 18, No. 62

task was unreasonable. The Board reduced the hours sought by 1.45 hours with 2.8 hours being reasonable.[61]

The Board also reviewed the claim for 2.75 hours for "Depo notice; email to TH; review duces tecum rules" on April 6, 2016. Ms. Rusch's attorney had already requested time to prepare a deposition notice and Ms. Rusch did not file or serve a subpoena duces tecum. Therefore, the Board allowed 0.1 of an hour as being reasonably claimed.[62]

After review, the Board found Ms. Rusch's attorney claimed 1.5 hours for "TC [Hearing Officer] re various, inc. ethical issues, discovery; amended claim research; TC court reporter" on April 12, 2016. The Board held scheduling or arranging a deposition is a paralegal task for which 0.2 of an hour is reasonable for the telephone call with the court reporter and awarded the time as a paralegal cost.[63]

The Board found Ms. Rusch's attorney claimed 2.25 hours to "Prep for deposition, email w/ court reporter" on April 14, 2016. Again, the Board found scheduling or arranging a deposition is a paralegal task and awarded 0.1 of an hour as reasonable for the email with the court reporter.[64]

The attorney for Ms. Rusch, according to Board review, claimed 1.25 hours to "Review updated medical summary with SEARHC medical records" on April 29, 2016. The Board further found, however, the last medical summary was filed on February 18, 2016, and did not contain SEARHC medical records. The next medical summary was filed by Southeast on May 25, 2016. Neither Ms. Rusch nor Southeast filed any such documentation with the Board at this time. The Board then held that any hours claimed for reviewing a document that does not exist were unreasonable.[65]

Further analysis by the Board revealed Ms. Rusch's attorney claimed 3.5 hours on May 1, 2016, to "Prep and research for Amended Claim/Addendum and discovery;" and

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[61] *Rusch* at 17, No. 63.

[62] *Id.* at 18, No. 64.

[63] *Id.*, No. 65.

[64] *Id.*, No. 66.

[65] *Id.*, No. 67.

5.25 hours on May 2, 2016, to "Prep email to [Southeast], finalize Amended Claim/Addendum; prep Notice of Change of Physician." Ms. Rusch submitted an amended claim and a 4-page addendum providing specific information on the benefits and issues in the amended claim. The Board found the amount of time spent on the amended claim and addendum to be excessive, and reduced the hours sought by 6.75 hours, finding 2.0 hours to be reasonable for this task.[66]

Again, the Board noted Ms. Rusch's attorney claimed 1.5 hours for "Ethics research and tcw bar counsel Maria Bahr" on May 5, 2016, and 1.0 hour for "Research re ethical attorney fee negotiation" on May 16, 2016. The Board found researching an ethical issue with the bar is an issue between the bar and counsel and not an issue to be decided by the Board. Therefore, any hours claimed for this task were unreasonable.[67]

The attorney for Ms. Rusch claimed 62.25 hours to prepare for mediation, research and write a 41-page brief for mediation on 14 issues, and schedule mediation on numerous dates from May 22, 2016, through June 23, 2016. The Board found the requested time to be excessive because her attorney failed to allocate the time spent preparing for mediation on benefits awarded. Ms. Rusch gained only three controverted benefits in the C&R and, therefore, the hours were reduced by 49.85 hours. The Board found 12.0 hours were reasonable.[68]

Ms. Rusch's attorney claimed 9.5 hours to review and finalize the C&R after mediation from June 24, 2016, to June 27, 2016. The Board found Southeast prepared the C&R and sent it to Ms. Rusch 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 Board found the time claimed was excessive and reduced it by 5.0 hours, and awarded 4.5 hours as reasonable.[69]

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[66] *Rusch* at 18-19, No. 68.

[67] *Id.* at 19, No. 69.

[68] *Id.*, No. 70.

[69] *Id.*, No. 71.

Next, Ms. Rusch's attorney claimed 10.25 hours to prepare a mediation brief on attorney fees after mediation ended, on several dates from August 3, 2016, through August 12, 2016. The Board reduced the hours by 10.25 hours to reflect unrequired time spent in preparation of an unnecessary mediation brief.[70]

Ms. Rusch's attorney claimed 0.1 of an hour for a telephone call with a division hearing officer in two different entries for the date of August 25, 2016, on page 5 of his affidavit in lines 12 and 19. The Board found that since this appeared to be a duplicate entry, only one entry was included in the calculation of attorney fees.[71]

The attorney for Ms. Rusch claimed 0.5 of an hour to "Research re attorneys with history with [Southeast's attorney]" on September 30, 2016. The Board found that since Ms. Rusch did not prevail on admitting testimony on this topic at hearing, no time was awardable.[72]

Ms. Rusch's attorney claimed 0.5 of an hour for "TC Mike Jensen; TC Steve Constantino; outline testimony of witnesses" on October 4, 2016. The Board held this entry contained block-billing making it difficult to determine how much time was spent on each task. Since, Ms. Rusch did not prevail on Mr. Constantino's testimony, the time allowed was reduced by 0.3 of an hour with 0.2 of an hour reasonable for this task.[73]

The Board further found Ms. Rusch's attorney claimed 2.25 hours to "Review documents for exhibit list; research; TC pot witness x3" on October 6, 2016. The Board noted this entry contained block-billing which made it difficult for the Board to determine how much time was spent on each task. Furthermore, Ms. Rusch failed to provide the issue researched and Ms. Rusch was successful on admitting testimony for only one witness. The Board found 1.5 hours were reasonable for this task.[74]

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[70] *Rusch* at 19, No. 72.

[71] *Id.*, No. 73.

[72] *Id.*, No. 74.

[73] *Id.* at 19-20, No. 75.

[74] *Id.* at 20, No. 76.

Ms. Rusch's attorney claimed 2.75 hours to "Prep witness outline/exhibits' TC pot witnesses x 9; TC AWCB" on October 7, 2016. The Board noted, again, this entry contained block-billing which made it difficult to determine how much time was spent on each task. Ms. Rusch was successful on admitting testimony from only one witness and failed to provide the witnesses contacted in the telephone calls. The Board thus reduced the hours claimed by 2.0 hours, finding 0.75 of an hour to be reasonable.[75]

Ms. Rusch's attorney claimed 0.75 of an hour for "TC with S. Constantino; work on strategy for fee hearing" on October 10, 2016. Again, the Board noted this entry was block-billed and Ms. Rusch was unsuccessful in admitting Mr. Constantino's testimony at hearing. The Board reduced the time by 0.25 of an hour with 0.5 of an hour as reasonable.[76]

Ms. Rusch's attorney claimed 3.0 hours to "Prep argument and exhibits; travel to Juneau for hearing" on October 24, 2016. The Board recognized her attorney traveled to Juneau to attend two hearings before the Board against the same employer, but claimed the full travel time to Juneau for both clients. The Board stated travel to Juneau from Sitka takes approximately one hour by plane. The Board held her attorney could only claim time for such travel once, either claiming the total in one case or splitting it between the two cases, with the whole equaling the total time spent in travel. The Board also found the only exhibit Ms. Rusch entered was the two-page declaration and, accordingly, held the claimed time was excessive. The Board reduced the time by 1.0 hour, finding 2.0 hours to be reasonable.[77]

Similarly, the Board found Ms. Rusch's attorney claimed 6.0 hours to "Prep for/attend oral hearing in Juneau; travel to Sitka" on October 25, 2016. Again the Board complained this entry contained block-billing, making it difficult to determine how much time was spent on each task. The Board noted Ms. Rusch's attorney traveled to Juneau to attend two hearings before the Board against the same employer and claimed travel

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75 *Rusch* at 20, No. 77.

76 *Id.*, No. 78.

77 *Id.*, No. 79.

time to Sitka. Travel to Sitka from Juneau takes approximately one hour by plane. The Board again found Ms. Rusch's attorney could only claim time for such travel once, either claiming the total in one case or splitting it between the two hearings with the whole equaling the total time spent in travel. The two hearings lasted a total of 5.7 hours; approximately half is attributable to each hearing. The Board held the claimed time was excessive and accordingly reduced it 2.0 hours, allowing 4.0 hours as reasonable.[78]

Ms. Rusch itemized the following costs:

Table III

Date	Cost	Amount
July 29, 2015	Travel for Conference	$200.00
February 19, 2016	Airfare for Employee Deposition	$320.00
February 19, 2016	"Per Diem" for Deposition	$100.00
June 22, 2016	Meal Conference	$50.00
October 24, 2016	Airfare to/from Hearing	$180.00
October 24, 2016	Lodging/Meal for Hearing	$75.00
Total		**$925.00**

Ms. Rusch did not explain the "per diem" expense on February 19, 2016.[79] Round-trip airfare from Sitka to Juneau is approximately $380.00. Ms. Rusch's attorney attended two hearings in Juneau on October 25, 2016; $180.00 was reasonable.[80] The Board held reasonable costs for Ms. Rusch's attorney were as follows:[81]

Table IV

Date	Cost	Amount
February 19, 2016	Airfare for Employee Deposition	$320.00
October 24, 2016	Airfare to/from Hearing	$180.00
October 24, 2016	Lodging/Meal for Hearing	$75.00
Total		**$575.00**

Ms. Rusch's attorney previously represented 7 cases at hearing before the Board in the 19 years he has practiced in Alaska workers' compensation. Her attorney entered

78 *Rusch* at 20-21, No. 80.

79 *Rusch* at 21, No. 82.

80 *Id.*, No. 83.

81 *Id.*, No. 84.

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).[82]

The Board prepared a visual comparison of the awarded hourly rate of attorneys handling Alaska workers' compensation cases based on appearances entered in a case[83]:

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

Back injuries are among the most common injuries claimed by injured workers.[84]

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.[85] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[86] "The question of whether the quantum of evidence

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82 *Rusch* at 21, No. 85.

83 *Rusch* at 21-22, No. 86.

84 *Id.* at 22, No. 87.

85 AS 23.30.128(b).

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

is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[87] 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.[88] 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.[89]

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."[90]

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

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[87] *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).

[88] AS 23.30.122.

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

[90] AS 23.30.128(b).

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.

(b) A fee under AS 23.30.145 (a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145 (a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

(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.[91] An abuse of discretion occurs when an award is manifestly unreasonable.[92] An award of attorney fees is to be upheld unless it is manifestly unreasonable.[93]

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."[94] This is the same standard that applies to review of exclusion of evidence.[95]

4. Discussion.

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

Ms. Rusch 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;
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> (2) sufficient notice of the claim has been given;
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> (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being

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[91] *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).

[92] *Id.*

[93] *Williams v. Abood,* 53 P.3d 134 (Alaska 2002).

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

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

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.

Therefore, she further asserts since the Board did not apply the presumption to her request for attorney fees, the award was erroneous on its face.

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.
>
> (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."[96] Stated another way, a more specific statute controls over a more general

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

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 23.30.120 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).[97]

Moreover, there is no presumption that the fees requested are reasonable.[98] 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."[99] 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.[100] The Board is obligated to review any request for attorney fees using the above criteria. Any award of fees is, thus, 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.[101] An abuse of discretion occurs

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97 *See*, *Lewis-Walunga*, App. Comm'n Dec. No. 123 at 13.

98 The Commission also takes notice 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 (Aug. 1994).

99 AS 23.30.145(a).

100 *Lewis-Walunga*, App. Comm'n Dec. No. 123 at 13.

101 *Bouse*, 932 P.2d 222, 241; *Lewis-Walunga*, App. Comm'n Dec. No. 123 at 12.

when an award is manifestly unreasonable.[102] An award of attorney fees is to be upheld unless it is manifestly unreasonable.[103]

The Board looks to the "nature, length, and complexity" of the services performed along with looking at the benefits obtained.[104] 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 reasonable and compensatory fee.

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. As noted above, the Board reviewed the request for attorney fees in detail and made substantial findings of fact. 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.[105] Here, the Board analyzed the request for fees in great detail and explained at length its reasons for reducing or eliminating an entry.

The Alaska Supreme Court (Court) has affirmed the right of the Board to award fees using the criteria in AS 23.30.145.[106] 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*.[107] "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."[108]

The Board found the issues in Ms. Rusch's case were not complex, unique, or without prior Board consideration. The disputed issues were time loss, medical stability,

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102 *Id.*

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

104 AS 23.30.145.

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

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

107 747 P.2d at 533-534.

108 *Id.*

ongoing need for medical treatment, and right to reemployment benefits. These issues are common to most workers' compensation cases. For example, medical stability is a medical issue that must be supported by medical opinions. Whether an employee is entitled to ongoing TTD or TPD is based either a medical opinion stating the employee is medically stable or on the statutory presumption of medical stability (no change in medical condition for over 45 days).[109] An experienced workers' compensation attorney knows this standard and presents the appropriate medical opinions to the Board.

Again, evidence that this was not a complex case is shown by the fact that no depositions of doctors were taken and no Second Independent Medical Evaluation (SIME) was requested or needed. The medical issues were straightforward and did not require deposing either the treating doctor or the Employer's Medical Evaluation doctor. The only deposition in this case was that of Ms. Rusch. Neither party nor the Board required an SIME.

Moreover, this case was not lengthy. Ms. Rusch's attorney entered his appearance in June 2015, the parties settled Ms. Rusch's claims at a mediation, and the C&R was approved by the Board on August 4, 2016, one year and 2 months later.

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. Rusch's attorney billed to both this case and its companion case, *Dockter v. Southeast Alaska Regional Health Consortium*.[110]

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 reduced in value. While an attorney for a claimant who prevails in a matter should be

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[109] AS 23.30.095.

[110] *See, Dockter v. Southeast Alaska Regional Health Consortium*, Alaska Workers' Comp. App. Comm'n Appeal No. 17-002.

reasonably compensated, there is no justification 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. Rusch'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 Ms. Rusch's 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.[111] 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 considerable time was discounted by the Board was on whether Ms. Rusch 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 wrongful termination, which is properly raised in the superior court. Considerable time was spent on the alleged wrongful termination, but again, it was not an issue the Board could address and, therefore, the Board rightfully found this time was not compensable.

The Board objected to the block-billing by Ms. Rusch'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 Ms. Rusch's attorney spent on particular issues or tasks because he often lumped clerical or paralegal

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

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.

Ms. Rusch's attorney 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.

Ms. Rusch 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 indicated that her attorney, having taken her case, might never be retained by Southeast to represent it. However, she did not provide any evidence of past representation of Southeast. She also asserted he had to turn down civil litigation in order to represent her, but 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. Furthermore, 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. Rusch'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, Ms. Rusch's 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 attorneys' 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. Rusch 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
>
> (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 (emphasis added).

The Alaska Administrative Procedures Act (APA) applies to workers' compensation matters only if there is a gap in the Act.[112] 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;
>
> (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

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

> 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 regulations, 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."[113] This is the same standard that applies to the review of exclusion of evidence.[114]

d. Were Ms. Rusch'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.[115] Ms. Rusch 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."[116] 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. Rusch'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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113 *Orchitt*, 161 P.3d 1232, 1246.

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

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

116 *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. 245 issued in the matter of *Sandra Rusch vs. Southeast Alaska Regional Health Consortium and Alaska National Insurance Company*, AWCAC Appeal No. 17-001, 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