Alaska Workers' Compensation Appeals Commission

<table>
<tr><td>Manuel Hernandez,
Appellant,

vs.

Ocean Beauty Seafoods, LLC and Liberty Insurance Corporation,
Appellees.</td><td><u>Memorandum Decision</u>

Decision No. 300 February 21, 2023

AWCAC Appeal No. 22-005
AWCB Decision No. 22-0005
AWCB Case No. 201711427</td></tr>
</table>

Memorandum decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 22-0005, issued at Anchorage, Alaska, on January 21, 2022, by southcentral panel members Jung M. Yeo, Chair, and Bronson Frye, Member for Labor.

Appearances: Justin S. Eppler, Law Office of Justin S. Eppler, LLC, for appellant, Manuel Hernandez; Krista M. Schwarting, Griffin & Smith, for appellees, Ocean Beauty Seafoods, LLC and Liberty Insurance Corporation.

Commission proceedings: Appeal filed April 8, 2022; briefing completed November 9, 2022; oral argument was not requested.

Commissioners: James N. Rhodes, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Appellant, Manuel Hernandez, injured his upper back and sustained inguinal, umbilical, and epigastric hernias while working for his employer, Ocean Beauty Seafoods, insured by Liberty Insurance Corporation (collectively, Ocean Beauty) on August 7, 2017. Four decisions have been issued in Mr. Hernandez's claim: a 2019 interlocutory decision granting a Second Independent Medical Evaluation (SIME) to address Mr. Hernandez's left shoulder and spine; a 2020 interlocutory decision denying an SIME of Mr. Hernandez's anxiety, depression, and pain; a 2021 interlocutory decision continuing the hearing of Mr. Hernandez's claim before the Alaska Workers' Compensation Board (Board); and a

2022 final decision.[1] Mr. Hernandez timely filed a petition for reconsideration of the final decision with the Board which was deemed denied due to lack of action by the Board. Mr. Hernandez then timely filed his appeal of the Board's Final Decision and Order No. 22-0005 with the Alaska Workers' Compensation Appeals Commission (Commission).

2. Factual background and proceedings.[2]

On August 7, 2017, Mr. Hernandez injured his upper back pushing a large cart of canned salmon while working for Ocean Beauty, which incident also caused inguinal, umbilical, and epigastric hernias.[3] He saw Kayla M. Gordon, PAC, on August 9, 2017, for inguinal hernia and muscular back pain. She restricted him to light-duty without heavy lifting.[4] He continued to work light-duty operating a salmon egg processing machine until October 3, 2017.[5]

On September 28, 2017, Janet Abadir, M.D., reviewed the inguinal and epigastric ultrasounds and stated, "I actually do see hernias on the ultrasound but they were read as negative. CT abdomen/pelvis shows a possible epigastric hernia with fat in the midline on my review, and a small fat-containing left inguinal hernia, and an umbilical hernia on my review." Dr. Abadir diagnosed Mr. Hernandez with epigastric, umbilical, and bilateral inguinal hernias caused by the work injury.[6] On October 4, 2017, Dr. Abadir repaired the

---

1 *Hernandez v. Ocean Beauty Seafoods, LLC*, Alaska Workers' Comp. Bd. Dec. No. 19-0107 (Oct. 17, 2019)(*Hernandez I*); *Hernandez v. Ocean Beauty Seafoods, LLC*, Alaska Workers' Comp. Bd. Dec. No. 20-0085 (Sept. 24, 2020)(*Hernandez II*); *Hernandez v. Ocean Beauty Seafoods, LLC*, Alaska Workers' Comp. Bd. Dec. No. 21-0082 (Sept. 10, 2021)(*Hernandez III*); and *Hernandez v. Ocean Beauty Seafoods, LLC*, Alaska Workers' Comp. Bd. Dec. No. 22-0005 (Jan. 21, 2022)(*Hernandez IV*).

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 R. 0001.

4 R. 1884-85.

5 R. 2780-800.

6 R. 1852-54.

umbilical, epigastric, and bilateral inguinal hernias.[7] On October 12, 2017, Dr. Abadir stated Mr. Hernandez would be released to "regular work without restrictions" on November 1, 2017.[8]

On December 21, 2017, x-rays showed there was no fracture, dislocation, disc space narrowing, or osteophyte formation in Mr. Hernandez's cervical spine.[9] On December 22, 2017, PAC Gordon reported the cervical x-ray showed "mild scoliosis but no obvious injuries or acute changes."[10]

Laura Creighton, D.C., on January 9, 2018, opined Mr. Hernandez's low back, neck, and thoracic pain were "consistent with the injury he had" on August 7, 2017, and she expected full recovery from those musculoskeletal complaints in two or three visits.[11]

On January 24, 2018, Curtis Mortensen, M.D., diagnosed Mr. Hernandez with an anxiety attack and referred him to a counselor. Dr. Mortensen reported Mr. Hernandez

> was feeling exceptionally anxious because he felt that maybe his employer may send someone to "get him." It sounds like he may have watched something like this on a movie recently. . . . [Mr. Hernandez] also has significant financial stressors and social stressors as he is trying to petition for his wife to come to the United States from Mexico. He is worried that his current issues with his employer may keep him from being able to do this. [Mr. Hernandez] has no history of severe mental illness. Anxiety is a relatively new complaint which has pretty much been around the issues discussed above.[12]

On January 30, 2018, PAC Gordon released Mr. Hernandez "for full duty from his previous injury." She noted that "he may still have some recurrent flares" and requested accommodation "with breaks during very strenuous work or less strenuous duties as needed and as available."[13]

---

[7] R. 1840-42.

[8] R. 2003.

[9] R. 1794-95.

[10] R. 1787-88.

[11] R. 2010-11.

[12] R. 1748-52.

[13] R. 1730.

On February 13, 2018, a cervical computerized tomography (CT) showed "loss of the normal cervical lordosis" that was nonspecific, which might "be positional or could indicate muscle spasm." No significant degenerative changes were present.[14] A thoracic CT showed normal vertebral disc spaces, spinal canal, neural foramina, and paravertebral soft tissues; the impression was an unremarkable thoracic CT.[15]

On February 25, 2018, Steven W. Smith, M.D., saw Mr. Hernandez, opined his anxiety was being made worse from depression, and reported:

> Patient states that he came here this morning because he has been awake part of the night thinking about his current situation. He states that he is worried about finances, trying to work with ongoing back pain, worried about obtaining a visa for his wife in El Salvador. . . . He states that it became worse when he tried to go back to work 2 weeks ago. . . . He is worried about what his employer will do if he is not able to work and whether he will have a job.[16]

On March 6, 2018, John Koller, M.D., opined it was extremely unusual to develop several hernias on a single event. More likely, Mr. Hernandez had developing hernias, which were aggravated by the work injury. He also said the mechanism of Mr. Hernandez's injury would not produce significant neck pain or injury. Although Mr. Hernandez reported pain in the mid-thoracic area between his shoulders, it was muscular in nature.[17] On March 20, 2018, Dr. Koller placed Mr. Hernandez on a 10-day work restriction for his mid-thoracic and low back pain.[18] On April 10, 2018, Dr. Koller released Mr. Hernandez to work with a 10-pound lifting restriction.[19]

On April 30, 2018, Dr. Koller opined "from a work-comp stand point," Mr. Hernandez's thoracic back strain had resolved. Any residual pain or discomfort could be caused by a previous stab injury. His umbilical hernia was repaired and resolved.

---

14 R. 1720-21.

15 R. 1722-23.

16 R. 1715-16.

17 R. 2553-54.

18 R. 1699.

19 R. 1693.

Dr. Koller said Mr. Hernandez was "ripe for return to work [. . .] at light duty with limited hours," but also noted there may be "some psychosocial issues not relevant to the work comp injury that might be precluding his return to work." Dr. Koller stated, "I did determine during this interview that he has had the back pain issue prior to the work comp injury and also anxiety and insomnia issues as well prior and these seem to have been exacerbated by the injury."[20] On May 4, 2018, Dr. Koller released Mr. Hernandez to light-duty work.[21]

On June 9, 2018, in response to an inquiry from the adjuster, Dr. Koller responded:

> [Mr. Hernandez's] mid-thoracic back strain resolved, and any further pain is attributed to previous impalement in area (pre-existing); (2) hernia (multiple) likely preexisting – unusual to have multiple hernias develop over one incident. However, all are repaired and stable – no further treatment needed. Likely aggravation of previous existing condition (multiple herniation).

Dr. Koller also said Mr. Hernandez became medically stable on May 4, 2018, and he would not have any impairment.[22]

On June 22, 2018, R. David Bauer, M.D., saw Mr. Hernandez for an employer's medical evaluation (EME) and diagnosed (1) inguinal and epigastric hernias, substantially caused by the August 7, 2017, work injury, surgically treated; (2) thoracic spine strain, substantially caused by the August 7, 2017, work injury, resolved; and (3) admitted history of anxiety and panic attacks. He stated Mr. Hernandez "suffers from an unrelated anxiety and panic attack condition that is not substantially caused by work." The Commission notes Dr. Bauer did not explain to what the anxiety and panic attacks were attributable. Dr. Bauer opined Mr. Hernandez had pre-existing spinal degenerative changes, but these were not aggravated by the work injury, and he reached medical stability by January 22, 2018, without any impairment. He stated further medical treatment would not be reasonable or necessary, and Mr. Hernandez was physiologically

---

20 R. 1709-10.

21 R. 2025.

22 R. 2027-28.

capable of performing the job he held at the time of injury. Mr. Hernandez's ongoing complaints are probably related to his anxiety and psychological condition.[23]

On August 15, 2018, Brady R. Ulrich, PAC, diagnosed Mr. Hernandez with lumbar spondylosis, cervical spondylosis with left upper extremity radiculopathy, and thoracic spondylosis with right-sided radiculopathy in T10-T12 levels. PAC Ulrich opined Mr. Hernandez likely has some component of a cervical or thoracic disk herniation that could be contributing to his symptoms.[24] On August 22, 2018, Mr. Hernandez reported having left shoulder pain to William Helmick, PAC, who diagnosed him with left rotator cuff tendonitis and left shoulder bursitis. PAC Helmick injected lidocaine and bupivacaine into Mr. Hernandez's left subacromial space.[25]

On September 6, 2018, Jonathan M. Van Ravenswaay, M.D., saw Mr. Hernandez and diagnosed depressive disorder, anxiety, and tension-type headache.[26] Dr. Van Ravenswaay is a family practitioner. On September 12, 2018, a thoracic magnetic resonance imaging (MRI) was unremarkable except for "very slight disc desiccation and disc space narrowing at T4-5."[27]

On September 17, 2018, PAC Ulrich discussed Mr. Hernandez's September 12, 2018, MRI with Dr. Marc Beck. Soft tissues at T1-T4 levels appeared as disruption, scar tissues, and atrophy of the left latissimus dorsi muscle. This finding correlated with Mr. Hernandez's stab wound. PAC Ulrich diagnosed left hand paresthesias, thoracic spine pain, chronic left shoulder pain, and latissimus dorsi muscle atrophy.[28]

---

23 R. 2030-61.

24 R. 2525-27.

25 R. 2520-22.

26 R. 2178-80.

27 R. 2096.

28 R. 2067-69.

In September and October, 2018, Mr. Hernandez saw Dr. Van Ravenswaay for depressive disorder and migraine,[29] chronic low back pain and left shoulder pain,[30] and chronic pain, anxiety, and depressive disorder.[31] Dr. Van Ravenswaay next saw Mr. Hernandez on December 8, 2018, for depressive disorder, tension type headache, chronic back pain, and left shoulder pain.[32] He saw Mr. Hernandez in December 2018 and January 2019 for the same complaints[33] and on January 26, 2019, he reviewed Mr. Hernandez's medical records from September 28, 2018, through January 26, 2019, and opined his left shoulder injury was work-related, unrelated to a prior stabbing to the left upper back, and "still active." He did not comment on Mr. Hernandez's thoracic injury.[34]

On February 15, 2019, Dr. Van Ravenswaay diagnosed a depressive disorder,[35] and on February 19, 2019, he diagnosed pain in thoracic spine.[36] On April 10, 2019, Dr. Van Ravenswaay stated a left shoulder MRI showed a subacromial subdeltoid bursitis and no other abnormality or evidence of injury.[37] On September 4, 2019, Dr. Van Ravenswaay diagnosed (1) acute thoracic back pain, chronic back pain, and a depressive disorder.[38]

On April 21, 2020, Paul C. Murphy, M.D., saw Mr. Hernandez for an SIME and diagnosed (1) inguinal and epigastric hernias substantially caused by the August 7, 2017, work injury, surgically treated; (2) thoracic spine sprain substantially caused by the

---

29 R. 2184-86.

30 R. 2193-96.

31 R. 2198-200.

32 R. 2206-08.

33 R. 2842-45.

34 R. 2167.

35 R. 2852-53.

36 R. 2854-55.

37 R. 1339.

38 R. 3632-33.

August 7, 2017, work injury, medically stable; and (3) history of anxiety, depression, and panic attacks. Dr. Murphy opined (1) Mr. Hernandez's August 7, 2017, injury did not aggravate his preexisting condition; (2) his anxiety and panic attacks are not substantially caused by the August 7, 2017, injury; (3) his work-related disability is no longer present; (4) he reached medical stability and his disability ended on September 17, 2018; (5) his physical examination is essentially normal with no evidence of neurological deficit, motor weakness, or structural abnormalities; (6) no further medical treatment will relieve or cure his ongoing complaints; (7) he did not sustain a work-related injury to his left shoulder; (8) there is no structural damage to his left shoulder; based on Mr. Hernandez's "lack of response to the cortisone injection . . . further ongoing treatment to the left shoulder is also not indicated"; (9) the August 7, 2017, injury is the substantial cause of Mr. Hernandez's current condition; (10) except for anti-inflammatory medication to treat subjective complaints, there is no indication for any treatment or modality; and (11) there is not any structural abnormality to warrant work restrictions. The Commission notes Dr. Murphy did not discuss the cause or origin of the anxiety and panic attacks. Dr. Murphy gave Mr. Hernandez a two-percent permanent partial impairment (PPI) rating on the thoracic spine.[39]

On May 17, 2020, Dr. Van Ravenswaay opined "the August 7, 2017 injury is the most likely cause of Mr. Hernandez's anxiety, panic attacks, depression, chronic pain, shoulder and spine complaints and his inability to work."[40] He did not address the basis for his opinion.

On September 16, 2020, Dr. Murphy testified he is "well-versed in psychiatric illnesses, including anxiety, panic attacks and depression," but would "defer the psychology discussion to an expert in that field." He said while Mr. Hernandez had chronic pain, the condition was medically stable, and it was unlikely to change with further treatment. Dr. Murphy said his prior opinion regarding Mr. Hernandez's ability to return to work remained unchanged but "[w]ith regards to anxiety, depression and panic

---

[39] R. 2578-640.

[40] R. 0614-15.

attacks," he would defer that to a psychologist. Dr. Murphy reiterated that orthopedically, Mr. Hernandez required no further treatment.[41]

On December 2, 2020, a functional capacity evaluation determined that Mr. Hernandez was able to perform full-time light-duty work. Mr. Hernandez showed self-limiting behavior.[42]

On March 11, 2021, Dr. Van Ravenswaay stated he did not know the legal definition of "the substantial cause" despite opining on causation issues; however, he said, "I would guess that it would the main reason for the condition." Also, he did not review the SCODRDOTs despite opining on Mr. Hernandez's physical capacity evaluation and the light-duty classification. When he was asked whether he knew of any research about chronic pain and its connection with depression, Dr. Van Ravenswaay responded, "I probably am. But not at the front of my mind."[43]

On June 17, 2021, Arthur D. Williams, Ph.D., saw Mr. Hernandez for an EME and diagnosed unspecified anxiety disorder and somatic symptom disorder, which involves excessive thoughts, feelings, or behaviors related to the somatic symptoms or associated health concerns as manifested by at least one of the following: (1) disproportionate and persistent thoughts about the seriousness of one's symptoms; (2) persistently high level of anxiety about health or symptoms; and (3) excessive time and energy devoted to these symptoms or health concerns. Dr. Williams opined the work injury was not the substantial cause of Mr. Hernandez's current condition, and "[f]rom a psychological perspective, he has been stable since 1/30/18 when Ms. Gordon release him for full duty." He stated, "Any psychological treatment would be unrelated to [the work injury]." Dr. Williams opined Mr. Hernandez's symptoms were "excessive and disproportionate based on the lack of objective findings." He stated Mr. Hernandez has no work restrictions from a

---

[41] Paul C. Murphy, M.D., Dep., Sept. 16, 2020, at 19:25 – 20:19, 27:6-8, 29:25 – 30:4.

[42] R. 2663-70.

[43] Jonathan Van Ravenswaay, M.D., Dep, Mar. 11, 2021, at 34:8-14, 33:11-21.

psychological perspective.[44] He did not discuss or provide an opinion as to the origin and cause of Mr. Hernandez's anxiety and panic attacks.

On July 27, 2021, Dr. Williams opined Mr. Hernandez did not have injury depressive disorder and noted the difference between the lack of objective findings and his responses to the pain disability questionnaire and the catastrophizing scale. Dr. Williams opined that Mr. Hernandez's pain and functioning scores were inconsistent at every evaluation and noted that unverified subjective complaints were not ratable under the AMA *Guides*. He noted the increasing scale by Mr. Hernandez for his pain going from 95 when examined by Dr. Bauer, going up to 107 when examined by Dr. Murphy, and at the time he was examined by Dr. Williams it was 129. He testified the scale has very good reliability, which means it is consistent over time. He stated that if you give it at one point, it should be very similar the next time you give it. But in this case the scale increases from 95 to 107, which is a big leap, and then it increased to 129, which was a sizable leap, especially from 95. He also stated that Mr. Hernandez said he could not walk or run at all, which would indicate to him that he needed to be in a wheelchair. He had no gait problems. He seemed to walk normally from his perspective as a psychologist. He also said that he had severe depression. Dr. Williams testified he had seen people with severe depression, and he did not function like someone with severe depression in terms of psychomotor retardation, very slow movement and speech, crying throughout the interview, et cetera. And he didn't meet the criteria for major depressive disorder. In Chapter 2 of the AMA *Guides*, it says subjective complaints are not usually ratable, are not generally ratable. "Number 13: Subjective complaints that are not clinically verifiable are generally not ratable under the Guides." He then added that for major depressive disorder, the first one is that he needs to be depressed most of the day. So it is five or more of the following symptoms have been present during the same two-week period and represent a change from previous functioning. At least one of the symptoms is either depressed mood or loss of interest and pleasure. But it is depressed mood most of the day, nearly every day, as indicated by either subjective report or

---

[44] R. 2780-800.

observation by others. He further stated that infrequently in cases of chronic pain, depressive symptoms are secondary to the medical condition, and so we would not diagnose a depressive disorder if chronic pain was the primary complaint, which it is for him. And he made a point of saying that depression and anxiety were not the cause of his inability to work and that both of those emotional factors followed pain rather than precipitated it.[45] The Commission notes Dr. Williams did not address the cause of the chronic pain, just noting he had it.

At the time of the hearing on August 11, 2021, the parties asked for the hearing to be continued stating they had reached an agreement. They stipulated to the following terms on the record: Ocean Beauty would pay $3,540.00 based on a two percent PPI rating plus $21,261.00 in temporary total disability (TTD) benefits from May 17, 2020, through June 17, 2021.[46] The parties stated this was in part an agreement so the parties could arrange for a mediation.[47] The Board accepted the stipulation and reluctantly continued the hearing.[48]

The next day, on August 12, 2021, Ocean Beauty filed a Notice to Mr. Hernandez with the Board stating that the total TTD benefit from May 17, 2020, through June 17, 2021, should have been $15,483.00, not $21,261.00, as it had agreed to pay. It stated that it would pay $15,483.00 in TTD benefits and $3,540.00 in PPI benefits instead.[49]

On December 17, 2021, Mr. Eppler billed $80,992.25 for 190.57 attorney hours, $20,562.75 for 111.15 paralegal hours, and $1,803.94 in litigation costs, totaling $103,358.94.[50] At hearing on December 22, 2021, Mr. Eppler testified he is entitled to $425.00 per hour based on the quality of his legal work, and contended hours spent on this case were reasonable. He requested six hours at $425.00 per hour for the time he

---

[45] Arthur D. Williams, Ph.D., Dep., July 27, 2021, at 18:20 – 26:20.

[46] R. 1420-26.

[47] R. 1423.

[48] R. 1425.

[49] R. 1623-24.

[50] R. 1666-92.

spent between December 17, 2021, and December 22, 2021, bringing the total to $105,908.94.[51]

On December 17, 2019, Jackey L. Hess testified she (1) works as a paralegal for Mr. Eppler, (2) has thirty years of experience in Alaska workers' compensation as a paralegal or adjuster; (3) handled over 1,200 claims; (4) taught Alaska Workers' Compensation Act (Act) courses to adjusters, self-insured entities, national insurance companies, and employers; (5) provided claims auditing services to self-insured entities; and (6) testified as an expert witness in workers' compensation in Alaska Superior Court.[52]

The Board discounted Mr. Eppler's time and stated that an "Entry of Appearance" is a one-page document with boilerplate language.[53] A "Claim for Workers' Compensation Benefits," commonly referred to as a "WCC," is a one-page form with fillable fields and checkboxes. The Board further found Mr. Hernandez's December 23, 2019, medical summary contained a cover page and four pages of scanned documents. A "Request for Conference" is a one-page document with fillable fields and checkboxes. An "Affidavit of Readiness for Hearing," commonly referred as an "ARH," is a one-page form with fillable fields and checkboxes.[54] The Board then stated these documents do not require specific training, expertise, research, or analysis to be completed, and the Board opined that a legal assistant, paralegal, or attorney may adequately complete such a document in five to ten minutes without further reviews or revisions.[55]

At hearing on December 22, 2021, the panel noted a lack of evidence supporting Mr. Hernandez's compensation rate adjustment or total permanent disability benefit claims. Mr. Eppler said Mr. Hernandez was withdrawing his compensation rate adjustment claim, but Mr. Hernandez orally disagreed. After a brief discussion with his

---

51 Hr'g Tr. at 89:20 – 90:11, Dec. 22, 2021.

52 R. 1643-65.

53 The Commission notes the Board did not discuss the basis for its conclusions about the time involved in these activities and did not provide Mr. Eppler with an opportunity to respond.

54 *Hernandez IV* at 16-17, No. 60.

55 *Id.*

client, Mr. Eppler said Mr. Hernandez was still seeking a compensation rate adjustment. Mr. Hernandez did not provide any evidence to support his compensation rate adjustment claim.[56] When the panel inquired about Ocean Beauty's position regarding reemployment benefits, Ms. Schwarting responded that she would communicate with the adjuster, but it did not dispute the claim or offer any defenses. Mr. Hernandez said he could not obtain a PPI rating for his hernias because Ocean Beauty declined payment. Ocean Beauty admitted the compensability of Mr. Hernandez's hernias. Mr. Hernandez provided no evidence or argument for the medical transportation costs issue.[57]

The Board found that Dr. Van Ravenswaay practices family medicine and does not specialize in internal, pain, psychiatric, or orthopedic medicine. He diagnosed Mr. Hernandez with depression using PHQ-9. Addressing the connection between Mr. Hernandez's depression and the work injury, Dr. Van Ravenswaay said, "It wasn't exactly super clear at the beginning, but as I got to know him and as I continued to speak with him, he always said that it was directly related. He felt like he wouldn't be depressed if he could have a normal life, if he wasn't experiencing limitations. . . . Every time I say . . . you have depression he'll say, 'No, it's all because of this pain or . . . my inability to have a normal life.'"[58]

The Board found that Mr. Eppler had limited workers' compensation experience having appeared in two merits hearings and several procedural hearings and that he had no experience in workers' compensation appellate proceedings. The Board then added that experienced claimants' attorneys have been awarded $425.00 per hour.[59] Mr. Hernandez, among his other points on appeal, appealed the award of legal fees.

On June 24, 2020, Mr. Hernandez asked for an SIME for his anxiety, depression, and chronic pain.[60] He listed Dr. Van Ravenswaay's May 17, 2020, opinion and EME

---

56 Hr'g Tr. at 12:18 – 13:5, 14:9 – 15:9.

57 Hr'g Tr. at 84:3-22, 59:18 – 60:5, 83:25 – 84:2.

58 Hr'g Tr. at 22:2-3, 24:21 – 25:10.

59 *Hernandez IV* at 18, Nos. 65, 66.

60 R. 0532.

Dr. Bauer's June 22, 2018, opinion in the SIME form.[61] The Board denied a second SIME, stating that an SIME is a lengthy and costly process.[62]

In *Hernandez III*, the Board noted that on May 5, 2021, the parties agreed to have a merits hearing on August 11, 2021.[63] However, at the hearing on August 11, 2021, the parties asked for a continuance. They had agreed to mediate but could not find a mediator. At this hearing, the parties placed a stipulation on the record which was never reduced to writing and for which Ocean Beauty the next day changed a material component. The panel reluctantly granted the continuance request and ordered them to submit a mediation date by August 18, 2021.[64]

The matter on appeal is the decision following the December 22, 2021, hearing.

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.[65] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[66] "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."[67] 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.[68] The

---

61 R. 3458-59.

62 *Hernandez II* at 4, No. 15; 6.

63 R. 4261-65.

64 R. 1420-26.

65 AS 23.30.128(b).

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

67 *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).

68 AS 23.30.122.

Board's conclusions regarding credibility are binding on the Commission since the Board has the sole power to determine credibility of witnesses.[69]

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but exercises its independent judgment.[70] Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.[71]

4. Discussion.

The Board held in *Hernandez IV*, among other findings, that the agreement/stipulation placed on the record on August 11, 2021, was not enforceable because it had not been reduced to writing; that although Mr. Hernandez was entitled to a reemployment evaluation, he was only entitled to AS 23.30.041(k) (.041(k)) benefits once he was actively participating in the process; and that he was entitled to past medical benefits, but he was not entitled to benefits related to either his chronic pain or his anxiety/panic attacks. The Board held that Ocean Beauty had not unfairly or frivolously controverted any benefits, and that Mr. Eppler's claims for attorney fees should be reduced based on his lack of experience and because some of his billings were excessive and duplicative. The Board found both Mr. Eppler and his paralegal not credible about the billings without allowing either to address the Board's concerns. Ocean Beauty had not objected to any of the billings prior to hearing.

Mr. Hernandez timely appealed this decision, contending that the Board erred in the following decisions:

1. In relying on Dr. Bauer and Dr. Williams to find that Mr. Hernandez's psychological and pain conditions were not work related;
2. In not addressing Mr. Hernandez's contention that his chronic pain is a separate physical disability and is the cause of his disability and need for medical

---

69 AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013); *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

70 AS 23.30.128(b).

71 *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

treatment (Mr. Hernandez points to Dr. Murphy's testimony that chronic pain is a disabling entity, that the diagnosis fit Mr. Hernandez, and that his chronic pain was a cause of his disability and need for medical treatment);

3. In relying on Dr. Williams to find that anxiety and panic attacks were not substantially caused by the work injury;
4. In finding that the agreement/stipulation placed on the record on August 11, 2021, was unenforceable since it had not been reduced to writing;
5. In finding that Mr. Hernandez's eligibility for .041(k) benefits began on December 23, 2019, and not on the day he was eligible for referral for an evaluation;
6. In denying Dr. Van Ravenswaay's testimony regarding medical stability, chronic pain, and Mr. Hernandez 's ability to return to work;
7. In finding Mr. Hernandez medically stable without considering his chronic pain and anxiety conditions;
8. In finding that Ocean Beauty's controversions were not unfair and frivolous as not based on substantial evidence;
9. In reclassifying TTD to .041(k) stipend benefits contrary to the terms of the stipulation/agreement placed on the record on August 11, 2021; and
10. In reducing Mr. Hernandez's claim for attorney fees by failing to consider the Alaska Supreme Court's (Court) decisions in *Rusch I* and *II* and in failing to calculate the fees awarded pursuant to Alaska Rule of Professional Conduct 1.5 (Rule 1.5).

Ocean Beauty, on the other hand, asserts that the Board correctly decided all of the above points. Ocean Beauty, in particular, relies on its cross examination of Dr. Van Ravenswaay and its questioning regarding how a general practitioner could render opinions on orthopedic, pain management, and psychological issues. Dr. Van Ravenswaay testified that while he was not certified in those fields his practice contained in a mixture of urgent and primary care patients, and he had seen a number of chronic pain patients which he referred to other physicians. Ocean Beauty also points to the testimony of Dr. Murphy, the SIME physician, that while Mr. Hernandez has chronic

pain the condition was medically stable because it was unlikely to change with further treatment. In his opinion, Mr. Hernandez was able to return to work. He deferred to an expert on psychological treatment. Dr. Williams, a board-certified neuropsychologist, was the only expert on psychological conditions to examine and testify about Mr. Hernandez's psychological conditions. He contended that neither the chronic pain nor the anxiety and panic attacks were the result of the work injury because he did not meet the criteria in the AMA *Guides*. He did not provide an alternative explanation for the causation of either the chronic pain, the depression, or the anxiety. Ocean Beauty supported the Board's decision regarding the lack of enforcement of the agreement/stipulation placed on the record on August 11, 2021. Ocean Beauty orally stated to the Board that Mr. Hernandez would be paid $21,261.00 in TTD for the period of May 17, 2020, to June 17, 2021, plus PPI and attorney fees, and hence the Board should grant a continuance of the hearing so the parties could seek mediation. The next day Ocean Beauty notified the Board that the correct amount of TTD for this period of time was $15,483.00 which is what Ocean Beauty would pay. Ocean Beauty did not file a motion to change the stipulation, but took unilateral action. Ocean Beauty also asserts the Board correctly reduced the claim for attorney fees and relied on Rule 1.5 in doing so.

a. Is a stipulation on the record null and void when not reduced to writing pursuant to AS 23.30.012?

AS 23.30.012 requires an agreement regarding a claim for injury to be reduced to writing in a form prescribed by the Board.

> (a) At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter, but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose. Except as provided in (b) of this section, an agreement filed with the division discharges the liability of the employer for the compensation, notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245, and is enforceable as a compensation order.
>
> (b) The agreement shall be reviewed by a panel of the board if the claimant or beneficiary is not represented by an attorney licensed to practice in this state, the beneficiary is a minor or incompetent, or the claimant is waiving

> future medical benefits. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter, and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. A lump-sum settlement may be approved when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

However, the Board has a regulation that specifically addresses stipulations. It is accepted, pursuant to the regulation at 8 AAC 45.050(f), that parties may put a stipulation on the record at a hearing. The regulation specifically provides for an oral stipulation "in the course of a hearing or prehearing."[72] The regulation further provides that "[s]tipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party of the terms of the stipulation."[73] The regulation provides that stipulations upon the record "have the effect of an order." Therefore, when the parties on August 11, 2021, put the stipulation on the record and the Board relied on it in deciding to continue the hearing, it became a Board order. The Board abused its discretion and erred as a matter of law in finding the stipulation null and void because it was not reduced to writing. The Board likewise did not make a finding of good cause for relieving Ocean Beauty of the terms of the agreement.

Here, the parties placed a stipulation on the record, asking the Board to continue the hearing because some of the benefits in dispute were going to be paid by Ocean Beauty. Ocean Beauty advised the Board it would pay Mr. Hernandez $21,261.00 for TTD and a two-percent PPI rating. Once the Board reluctantly granted the continuance of the hearing, it became a Board order because the Board granted the continuance based on the stipulated agreement. Then the next day, Ocean Beauty informed the Board, without filing a motion, that it had made a mathematical error and unilaterally

---

72 8 AAC 45.050(f)(2).

73 8 AAC 45.050(f)(3).

announced it would be paying Mr. Hernandez a substantially reduced sum of money for the disputed TTD - $15,483.00.

Ocean Beauty never asked the Board for permission to modify the agreement arguing that the agreement was null and void because it was never reduced to writing pursuant to AS 23.30.012. Ocean Beauty contends that the agreement, placed on the record before the Board and accepted by the Board as the basis for continuing the hearing, was never reduced to writing and it is, therefore, void for any purpose. Ocean Beauty asserts that even though it offered $21,261.00 in TTD to continue the hearing, Mr. Hernandez, if he had done the math, would have recognized that TTD for the stated period of time was only $15,483.00. Therefore, Ocean Beauty asserts Mr. Hernandez should not have relied on Ocean Beauty's statement as to the amount nor expected Ocean Beauty to pay the miscalculated sum.

When the Board agreed to continue the hearing based on the stipulation, the Board's decision became an order and made the stipulation binding upon the parties. At a minimum, Ocean Beauty was obliged to request the Board to modify the agreement to correct its mathematical error in the offer. It was not up to Mr. Hernandez to question the amount of money Ocean Beauty was offering him as an inducement to enter into mediation and to agree to continue the hearing until after mediation could be arranged.

Moreover, Mr. Hernandez did not waive any benefits when he accepted the additional TTD and the proffered PPI which the EME physician had calculated. Both benefits were owed to him. Further, Ocean Beauty had a remedy once it paid the proffered $21,261.00. It could, in addition to a motion to modify the terms of the agreement, have requested that the Board approve an offset for an overpayment, either by deducting from future benefits owed or by seeking a 100% offset from any future lump sum.[74]

Therefore, the Commission remands the question of the terms of the stipulation and whether Ocean Beauty has good cause for seeking a change in the terms. The stipulation was valid as a Board order continuing the hearing. The terms were those

---

[74] See, AS 23.30.155(j).

placed on the record. Ocean Beauty agreed to pay TTD and the Board should not have found the agreement null because the parties did not put it into writing. The Board had already approved it with its order to continue the hearing. The terms could only be changed by the Board upon a motion determining changes in terms were for good cause. The matter is remanded to the Board to enforce the stipulation/Board order with regard to the payment of TTD as agreed on August 11, 2021, and to recalculate when .041(k) benefits should start.

b. Is the Board's finding that Mr. Hernandez is medically stable with no need of future treatment supported by substantial evidence?

The Board found Mr. Hernandez medically stable from the physical effects of the work injury. Ocean Beauty asserts the Board made the correct decision because it is the Board's prerogative to select which doctors' opinions upon which it will rely. That the Board chose to rely on the opinions of Drs. Bauer, Murray, and Williams and to discount the opinion of Dr. Van Ravenswaay is its right.[75] Ocean Beauty also points out that the treating doctors released Mr. Hernandez to return to work following the hernia operation in 2017. The reports of Dr. Abadir of November 1, 2017, and Dr. Koller's report of April 17, 2018, indicate he was medically stable from the hernia operation.

The Board also chose not to rely on Dr. Van Ravenswaay because he was a general practitioner and did not rely on the legal definition for medical stability. However, Mr. Hernandez contends the Board failed to consider Mr. Hernandez's chronic pain and anxiety/panic attacks which all started shortly after the hernia operation. He asserts the Board failed to consider and apply the law in *Vue* and *Huit*.[76]

In *Huit*, the Court held that when the employer failed to present evidence of an alternative source for Mr. Huit's infection, the employer failed to rebut the presumption of compensability. The Court noted that prior to the changes to the Act in 2005, an employer could rebut the presumption of compensability by providing substantial

---

[75] *See, Traugott v. ARCTEC Alaska*, 465 P.3d 499 (Alaska 2020).

[76] *See, Vue v. Walmart Assocs., Inc.*, 475 P.3d 270 (Alaska 2020) (*Vue*); *Huit v. Ashwaster Burns, Inc.*, 372 P.3d 904 (Alaska 2016) (*Huit*).

evidence that there was either an alternative explanation which would exclude work related factors as the substantial cause of the disability, or by providing evidence which would directly eliminate any reasonable possibility that employment was a factor in causing the disability.[77] The Court then stated that the revisions to the Act in 2005 required that the Board must "evaluate the relative contribution of different causes of the . . . need for medical treatment."[78] If the work injury is not a cause of the need for medical treatment this declaration must be supported by substantial evidence that the work injury is not the cause.[79] The evidence must show that there is no relationship between the work injury and the need for medical treatment.[80]

In *Vue*, the issue was whether the employee developed depression following the shooting incident.[81] The employer presented evidence Mr. Vue was medically stable from the physical injury to his eye, but was unable to establish he was medically stable from the psychological condition that arose from the shooting. Mr. Hernandez was required to present some evidence his chronic pain and anxiety/panic attacks arose out of the work injury. He did this with the testimony of Dr. Van Ravenswaay. Then Ocean Beauty must present evidence ruling out the work injury as the substantial cause of the need for medical treatment and whether he is medically stable. Mr. Hernandez, like Mr. Vue, has contended he had no preexisting condition or evidence of chronic pain or anxiety prior to the work injury. Ocean Beauty needed substantial evidence to rebut the presumption that the work injury was a substantial cause of his chronic pain and anxiety. Based on *Vue* and *Huit*, Ocean Beauty did not rebut the presumption because no alternative cause for the chronic pain were discussed.

---

77 *Huit*, 372 P.3d at 917.

78 *Id.*

79 *Id.* at 919.

80 *Id.* at 920.

81 *Vue*, 475 P.3d at 282.

Dr. Murphy, the SIME physician, stated in his April 21, 2020, report that the anxiety/panic attacks were "not substantially caused by this work injury."[82] However, he did not explain why this is so or point to an alternative cause. The records he reviewed first indicated an anxiety attack when Mr. Hernandez saw Dr. Mortenson on January 24, 2018. Dr. Mortenson indicated anxiety was a new complaint.[83] He found Mr. Hernandez to have chronic pain, but thought he was medically stable because additional treatment would not help.

The medical records provided to Dr. Bauer and Dr. Williams likewise did not contain any references to a history of anxiety or panic attacks prior to the work injury on August 7, 2017. Dr. Bauer, in his report of June 22, 2018, notes that Dr. Smith, an emergency doctor who saw Mr. Hernandez on December 19, 2017, reported that he was very anxious.[84] On December 20, 2017, Dr. Smith diagnosed Mr. Hernandez's headaches as tension headaches.[85] On January 22, 2018, Mr. Hernandez was reported as being depressed and having an anxious affect.[86] Dr. Mortenson, on January 24, 2018, reported Mr. Hernandez feeling exceptionally anxious.[87] Dr. Bauer diagnosed "panic attacks and pain. He has mood swings, anxiety, and depression."[88] Subsequently, Dr. Bauer lists "admitted history of anxiety and panic attacks."[89] He further states, "Mr. Hernandez has a history of increasing anxiety, and his current complaints are on a more-probable-than-not basis related to his psychological condition rather than any physiologic condition."[90]

---

82 R. 2628.

83 R. 2599-600.

84 R. 2033.

85 R. 2035.

86 R. 2037.

87 R. 2038.

88 R. 2046.

89 R. 2049.

90 R. 2057.

However, he does not indicate what that psychological condition is nor does he indicate the cause or origin of the condition.

Dr. Williams saw Mr. Hernandez on June 17, 2021, for a neuropsychological evaluation for Ocean Beauty. Dr. Williams diagnosed Mr. Hernandez with somatic symptom disorder and unspecified anxiety disorder. He stated these were not related to the work injury because "assuming the lack of objective findings, the work injury of 2017 is not the substantial cause of his current condition."[91] He did not identify an alternative cause and admitted he did not have any records from before the work injury. He added Mr. Hernandez was vague as to when the symptoms began.[92] Dr. Williams stated Mr. Hernandez was medically stable from a psychological point of view.[93] He did recommend psychotherapy with a pain psychologist, but stated this was not due to the work injury.[94]

In deposition, Dr. Williams stated Mr. Hernandez told him the depression first arose in 2018.[95] He added Mr. Hernandez was vague about the panic attacks.[96] He found a lack of objective findings and these discrepancies were of concern to Dr. Williams.[97] Dr. Williams stated Mr. Hernandez did have chronic pain complaint.[98] He also stated that the psychological factors were not related to the work injury, but he did not discuss an alternative explanation.[99] He agreed that Mr. Hernandez stated he had no psychological diagnoses or treatment prior to the work injury in 2017.[100] Under the DSM-5, somatic

---

91 R. 2795-96.

92 R. 2795-96.

93 R. 2798.

94 R. 2798.

95 Williams Dep. at 12:11-13.

96 Williams Dep. at 14:19-25.

97 Williams Dep. at 18:4-15.

98 Williams Dep. at 24:6-10.

99 Williams Dep. at 27:1-6.

100 Williams Dep. at 32:17-22.

symptom disorder includes chronic pain.[101] He agreed that Mr. Hernandez said the pain led to anxiety and depression, not the other way around.[102] Mr. Hernandez's diagnosis is specified as having predominant pain.[103] Chronic pain is that which persists beyond the expected healing time.[104] Nonetheless, Dr. Williams found that Mr. Hernandez's reports of pain were disproportionate to the objective measures which led him to the discrepancies which raised concerns.[105] For Dr. Williams the work injury was not the substantial cause of his current condition.[106] He did discuss an alternative cause. It was not the psychological condition that precluded Mr. Hernandez from returning to work and Dr. Williams deferred to the medical doctors for a determination of physical causes.[107] When asked about the substantial cause of Mr. Hernandez's current condition, Dr. Williams stated he could only hypothesize about it.[108] However, he added it was not speculation, based on the AMA *Guidelines*, to say that Mr. Hernandez's work was not the substantial cause.[109]

In *Huit*, the Court reiterated the pre-2005 analysis which required substantial evidence to rebut the presumption of compensability that either (1) there is an alternative explanation that would exclude work-related factors as a substantial cause of the disability or (2) there is substantial evidence which eliminates any reasonable possibility that the work was a factor in causing the disability.[110] AS 23.30.010(a) requires the Board to evaluate "relative contribution of different causes of the disability . . . or the need for

---

101 Williams Dep. at 35:1-19.

102 Williams Dep. at 37:3-4.

103 Williams Dep. at 41:3-12.

104 Williams Dep. at 41:24 – 42:7.

105 Williams Dep. at 45:1-17.

106 Williams Dep. at 45:21 – 46:5.

107 Williams Dep. at 48:3-13.

108 Williams Dep. at 53:12-25.

109 Williams Dep. at 54:7-13.

110 *Huit*, 372 P.3d 904, 917.

medical treatment."[111] The Court noted in *Huit* that no other cause was identified as contributing to Mr. Huit's disability.[112] Therefore, the presumption of compensability was not rebutted.

Nonetheless, the Board was required to determine that the employer had provided substantial evidence that the disability did not arise out of and in the course of the employment.[113] The Court further stated that " an opinion establishing that a cause is not a substantial factor of the disability rebuts the presumption using either 'a substantial factor' or 'the substantial cause' . . . because something cannot be the substantial cause of a disability if it is not a cause at all."[114] In *Huit*, the Court found that there was no competing cause. The Court held that where there is no competing cause the employer must show that the disability did not arise out of the employment.[115] The Court noted that in *Norcon, Inc. v. Alaska Workers' Compensation Board*, the doctors all testified that there was no reasonable possibility that the long working hours was a risk factor for sudden cardiac arrest.[116] In *Safeway, Inc. v. Mackey*, the experts on fibromyalgia testified that trauma and development of fibromyalgia had not been reliably related.[117] Doctors must provide substantial evidence ruling out work-related causes by identifying another explanation.[118] The mere possibility of another cause is not substantial evidence.[119]

The Commission remands this issue for further discussion regarding whether the work injury is the substantial cause of the diagnosis of chronic pain, whether additional treatment is needed, and whether Mr. Hernandez is medically stable from the chronic

---

111 AS 23.30.010(a); *Huit*, 373 P.3d at 917.

112 *Huit*, 373 P.3d at 917.

113 *Id.*

114 *Id.* at 919.

115 *Id.*

116 *Id.* at 920, citing *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051 (Alaska 1994).

117 *Id.*, citing *Safeway, Inc. v. Mackey*, 965 P.2d 22, 28 (Alaska 1998).

118 *Id.*

119 *Id.*

pain condition. If he is, and the chronic pain is work-related, when did he become medically stable?

c. *When is an employee entitled to AS 23.30.041(k) benefits when an employer fails to notify either employee or the Reemployment Benefits Administrator (RBA) that employee has been unable to return to work for more than 90 days?*

The Act requires an injured worker to be informed of his potential right to reemployment benefits when the injured worker has been unable to return to the job at the time of injury for more than forty-five days. AS 23.30.941(c) provides:

> (c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.

The regulations place the onus on the employer to advise the RBA when an injured worker has been off work for at least forty-five days and may be entitled to reemployment benefits. Specifically, 8 AAC 45.507 provides that an employer is obligated to inform the RBA when an injured worker has been unable to return to work for more than forty-five days. The regulation further states:

> (a) For compensable injuries occurring on or after November 7, 2005, if the employee has been totally unable to return to the employee's

> employment at the time of injury for 45 consecutive days as a result of the injury, the employer shall notify the administrator in writing on the 46th day. The notification must be completed on a form prescribed by the administrator. No more than 14 days after the 45th day, the administrator shall notify the employee of the employee's rights to reemployment benefits.
>
> (b) If the employee has been totally unable to return to the employee's employment at the time of injury for 90 consecutive days, as a result of the injury, the employer shall notify the administrator, in writing, on the 91st day. The notification must be completed on a form prescribed by the administrator.

These requirements are mandatory for the employer.

The question is when the employer fails to inform the RBA, who has no knowledge an injured worker should be referred for an eligibility evaluation, when does the claimant's entitlement to stipend benefits commence?[120] Between the injured worker and the employer the burden of paying stipend benefits should fall on the employer. When the employer either deliberately or negligently fails to provide the required notice to the RBA and the injured worker, the employer should be obligated to pay for stipend benefits if no other benefits are due to the employee.

Here, the RBA was not given notice that Mr. Hernandez had been off work due to the work injury for over ninety days. The burden is not on Mr. Hernandez to notify the RBA and thus "begin to actively pursue reemployment benefits." The requirement that an injured worker be actively pursuing reemployment benefits must commence only after the employer has performed its obligation to advise both the injured worker and the RBA that Mr. Hernandez is entitled to be evaluated for eligibility for reemployment benefits. Ocean Beauty cannot ignore its statutory obligation and then claim that benefits are not due because Mr. Hernandez was not actively pursuing reemployment benefits, especially since he was unrepresented by counsel and English is not his primary language.

The Board ordered Ocean Beauty to pay .041(k) stipend benefits from December 23, 2019, through August 11, 2021. That award is incorrect because while Mr. Hernandez is entitled to .041(k) from date of medical stability based on the date he

---

[120] AS 23.30.041(k).

was eligible for a reemployment evaluation, he is entitled to the TTD benefits which Ocean Beauty agreed to pay from May 17, 2020, to June 17, 2021, in the request for a continuance on August 11, 2021. Thus, .041(k) benefits should be paid at least to May 17, 2020, at which time the TTD benefits from the stipulation are paid. Since Ocean Beauty also agreed to pay PPI benefits based on the two percent rating, this amount needs to be prorated to determine when .041(k) benefits should commence payment for the reemployment evaluation process to be completed.

This issue is remanded to the Board for reconsideration as to the periods of time for which .041(k) stipend benefits should be paid.

d. Did the Board adequately address the issue of Mr. Eppler's request for attorney fees when it failed to consider his non-workers' compensation experience and in failing to explain how it used the criteria in Alaska Rule of Professional Conduct 1.5?

The Board, in reducing Mr. Hernandez's claim for attorney fees, abused its discretion when it reduced Mr. Eppler's hourly fee based on his limited experience before the Board and when it denied Mr. Eppler an opportunity to explain the Board's charges of excessive billings.

In *Rusch I*, the Court stated that the Board must consider an attorney's entire legal experience when calculating a reasonable hourly fee.[121] The Board may not base its determination solely on the attorney's workers' compensation experience. The Court noted that "[n]othing in the regulation or statute ties an attorney's hourly rate solely to his experience in Alaska workers' compensation law."[122] The Court explicitly stated that "the Board must consider all of the factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney's fee."[123] Further, the Board must address the contingent nature of representing injured workers when reducing an

---

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

[122] *Id.*

[123] *Id.*

attorney's hourly rate.[124] The Court admitted that workers' compensation is a specialized area of law, but added that "an attorney's experience in related legal fields . . . should be relevant as well."[125] In *Rusch II*, the Court reiterated that "workers' compensation experience, while relevant, is not the only factor . . . when considering the claimant's fee request."[126] The Court again noted the difficulty claimants have in finding competent counsel.[127] One of the purposes of awarding a reasonable fee is to ensure that attorneys are reasonably compensated which will ensure competent attorneys are willing and able to represent injured workers.[128] The Act "is to be construed and applied to ensure that competent counsel are available to represent claimants."[129]

The Board stated it was utilizing Rule 1.5(a) when it determined the reasonableness of the fees requested, but the Board did not address how it used factors 1, 3, 4, and 7 in its determinations.[130] It then stated that it was reducing Mr. Eppler's request for an hourly rate of $425.00 to $350.00, based on his lack of workers' compensation experience and the fact that his hearing brief did not address all of the hearing issues.[131] The Board did not address the contingent nature of the practice of representing injured workers. The Board also questioned time billed for various activities without allowing Mr. Eppler an opportunity to explain why the billings might be accurate. The Board erred in its award of fees to Mr. Eppler because it did not discuss, other than stating it was considering them, the factors in Rule 1.5(a). This is an abuse of discretion by the Board.

---

[124] *Rusch I*, 453 P.3d 784, 799.

[125] *Id.*

[126] *Rusch v. Southeast Alaska Reg'l Health Consortium*, 517 P.3d 1157, 1167 (Alaska 2022) (*Rusch II*).

[127] *Id.*

[128] *Id.*

[129] *Rusch I* at 806.

[130] *Hernandez IV* at 44.

[131] *Id.* at 45.

The Commission remands the issue of attorney fees due to the abuse of discretion by the Board. Since other issues are also being remanded, the issue of attorney fees will need to be revisited as well. On remand the Board needs to apply Rule 1.5 and discuss how the factors are used in coming to a reasonable fee for Mr. Eppler. The Board needs to address the contingent nature of representing claimants and how that is factored into determining a reasonable rate for the representation.

5. Conclusion and order.

The Commission REMANDS *Hernandez IV* to the Board for reconsideration. The Board needs to determine whether the agreement put on the record on August 11, 2021, should be revised to reflect the correct sum of TTD benefits for the period of May 17, 2020, through June 17, 2021. The Board also needs to determine if the terms of the agreement, i.e., payment of TTD benefits, should be modified to reflect payment of .041(k) benefits. The Board also needs to revisit the question of Mr. Hernandez's chronic pain and his anxiety/panic attacks, and to ascertain if the work injury is the substantial cause of either or both.

The Board further needs to consider whether the presumption of compensability of ongoing disability and need for medical treatment for the chronic pain condition and/or the anxiety/panic attacks was overcome with substantial evidence as required, since none of the experts relied on by the Board: Drs. Murphy, Bauer, and Williams, addressed the relative causes of the need for medical treatment for chronic pain and anxiety/panic attacks, merely stating that they could not connect these problems to the work injury and, therefore, work was not the substantial cause.

Once the Board reconsiders these issues, the Board will then need to readdress the issue of attorney fees, pursuant to the Court directive that an award of fees must be

made utilizing the criteria in Rule 1.5 of the Rules of Professional Conduct and the contingent nature of representing injured workers.

Date: ___*21 February 2023*____ Alaska Workers' Compensation Appeals Commission

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

PETITION FOR REVIEW

A party may file a petition for review of this order with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this order's distribution.

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

The Alaska Supreme Court ruled in *Warnke-Green vs. Pro West Contractors, LLC*, 440 P.3d 283 (Alaska 2019), that "AS 23.30.128(f) does not prohibit the Commission from reconsidering orders other than the final decisions described in AS 23.30.128(e) because the authority to reconsider is necessarily incident to the Commission's express authority to 'issue other orders as appropriate.'"

A party may ask the Commission to reconsider this order by filing a motion for reconsideration no later than 10 days after the date shown in the notice of distribution (the box below). If a request for reconsideration of this order is filed on time with the Commission, any proceedings to file a petition for review with the Alaska Supreme Court must be instituted no later than 10 days after the reconsideration decision is distributed to the parties.

I certify that, with the exception of the corrections set out in the February 24, 2023, Errata (replacing "Final" with "Memorandum" in the title, and replacing the Alaska Supreme Court appeal procedure with the Alaska Supreme Court petition for review procedure) and changes made in formatting for publication, this is a full and correct copy of Decision No. 300 issued in the matter of *Manuel Hernandez v. Ocean Beauty Seafoods, LLC and Liberty Insurance Corporation*, AWCAC Appeal No. 22-005, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on February 21, 2023.

Date: *February 24, 2023*

Signed

K. Morrison, Appeals Commission Clerk