Alaska Workers' Compensation Appeals Commission

City of Kenai and Alaska Public Entity Insurance,
Appellants,

vs.

Kathleen Watson, beneficiary, Chelaine Rust, beneficiary, Renetta Hensler, minor beneficiary, of John P. Watson, deceased,
Appellees.

Final Decision
Decision No. 127 January 25, 2010

AWCAC Appeal No. 09-007
AWCB Decision No. 09-0013
AWCB Case No. 200323890

Appeal from Alaska Workers' Compensation Board Decision No. 09-0013 issued on January 21, 2009, at Anchorage by southcentral panel members William Soule, Chair, Don Gray, Member for Industry, and Tony Hansen, Member for Labor.[1]

Appearances: Patricia Zobel, DeLisio, Moran, Geraghty & Zobel, for appellants City of Kenai and Alaska Public Entity Insurance. Kathleen Watson and Chelaine Rust, pro se appellees. Steven Constantino, for appellee Renetta Hensler.

Commission proceedings: Appeal filed February 3, 2009. Appellee Renetta Hensler's motion to stay appeal and remand for further proceedings and motion to extend time to file brief filed May 13, 2009; oppositions filed May 20, 2009. Order on appellants' motion to supplement record issued June 2, 2009. Hearing on appellee's motions held June 10, 2009. Order denying motion to stay commission proceedings and scheduling briefing issued on June 26, 2009. Oral argument on appeal presented October 2, 2009. Filing of legislative history and supplemental briefing on legislative history complete October 27, 2009.

Commissioners: Jim Robison, Stephen T. Hagedorn, Kristin Knudsen.

[1] Mr. Hansen was appointed to the at-large panel, which may sit in any judicial district. AS 23.30.005(a).

By: Kristin Knudsen, Chair.

John P. Watson was a police officer for the City of Kenai who was killed in the line of duty in 2003. He left a daughter of a former marriage, Renetta Hensler, a widow, Kathleen Watson, and a step-daughter, Chelaine Rust, his wife's daughter by a former marriage. The City of Kenai's insurer paid death benefits to Kathleen Watson, Rust, and Hensler pursuant to AS 23.30.215.[2] Hensler, John Watson's child of a former

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[2] When John Watson died, AS 23.30.215 provided in pertinent part:

> **Compensation for death.** (a) If the injury causes death, the compensation is known as a death benefit and is payable in the following amounts to or for the benefit of the following persons:
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> (1) reasonable and necessary funeral expenses not exceeding $5,000;
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> (2) if there is a widow or widower or a child or children of the deceased, the following percentages of the spendable weekly wages of the deceased:
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> . . .
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> (C) 30 percent for the widow or widower with two or more children and 70 percent divided equally among the children;
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> . . .
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> (3) if the widow or widower remarries, the widow or widower is entitled to be paid in one sum an amount equal to the compensation to which the widow or widower would otherwise be entitled in the two years commencing on the date of remarriage as full and final settlement of all sums due the widow or widower;
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> . . .
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> (e) Death benefits payable to a widow or widower in accordance with (a) of this section shall abate as that person ceases to be entitled and does not inure to persons subject to continued entitlement. In the event a child ceases to be entitled, that child's share shall inure to the benefit of the surviving spouse subject to adjustment as provided in (f) of this section.
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> (f) Except as provided in (g) of this section, the death benefit payable to a widow or widower shall terminate 12 years following death of the deceased employee.

marriage who did not reside with Kathleen Watson, received $150 per week, the amount established by a Child Support Order prior to John Watson's death. Kathleen Watson, as John Watson's widow, received 30 percent of the maximum compensation rate of $814 per week, which was $244.20 per week. Rust, as a minor step-daughter of John Watson at his death,[3] received 35 percent of the maximum rate ($284.90) plus the difference between $150 and a 35 percent share, for a total of $419.80 per week.[4]

Two years after Rust reached her majority, the City of Kenai and its insurer reached an agreement to settle its future liability to Kathleen Watson and Rust. The

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> (g) The provisions of (f) of this section do not apply to a widow or widower who at the time of death of the deceased worker is permanently and totally disabled. The death benefits payable to a widow or widower are not subject to reduction under (f) of this section after the widow or widower has attained the age of 52 years.
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> (h) In the event a deceased worker is survived by children of a former marriage not living with the surviving widow or widower, then those children shall receive the amount being paid under a decree of child support; the difference between this amount and the maximum benefit payable under this section shall be distributed pro rata to the remainder of those entitled.
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> (i) In the event the total amount of all benefits computed under (a)(2) of this section exceeds the maximum benefit provided in AS 23.30.175, the maximum benefit under AS 23.30.175 shall be prorated among entitled survivors.

[3] Definitions listed in AS 23.30.395 included at the time of John Watson's death:

> (6) "child" includes a posthumous child, a child legally adopted before the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year before the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on the employee;

This subsection was later renumbered as AS 23.30.395(7). The commission uses the current numbering in this decision.

[4] Benefit payments to Rust and Hensler were later reduced by a social security offset, but that did not affect Kathleen Watson's share.

agreement provided for payment of a lump sum to Watson, purchase of an annuity for monthly payments to her, waiver of Rust's rights to future benefits if she were to attend college, trade school, or vocational school, and a full release of the City of Kenai's liability to Watson and Rust. Hensler, who is still in high school, was not a party to the settlement. The board denied approval of the settlement because (1) settlement agreements must be in the best interests of all beneficiaries, not just beneficiaries who are parties to the agreement; (2) as a beneficiary, Renetta Hensler was a necessary party to the settlement; and (3) as long as the City of Kenai retained the possibility of exerting a defense to a future claim by Renetta Hensler based on AS 23.30.155(j), the settlement was not in Hensler's interests.[5] The City of Kenai and its insurer now appeal the board's decision.

The appellants argue first that the board erred by finding the agreement bound a non-signatory to its terms or affected the rights of a person not a party to the agreement. The appellants argue that the board violated the rights of the parties to negotiate a settlement by requiring that appellants waive future defenses to Hensler's possible assertion of rights and requiring the parties to negotiate with Hensler so that she is included in the agreement. The appellants argue that Hensler's death benefits terminate with expiration of the child support order under AS 23.30.215(h).[6] They contend that the legislative intent was to draw a line between children of a former marriage who lived outside the worker's household and the dependent children who were part of his household when he died. They argue the state did not violate Hensler's constitutional right to equal protection of the laws by doing so, because workers' compensation support is an economic, not a fundamental, right and the distinction drawn by the legislature bears a "fair and substantial relationship to the

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[5] *In re Estate of John P. Watson v. City of Kenai,* Alaska Workers' Comp. Bd. Dec. No. 09-0013, 22 (Jan. 21, 2009).

[6] Appellants' Notice of Appeal ¶ 2. The appellants withdrew their request for a remand because the board failed to give notice to the parties that Hensler's future entitlement to death benefits was an issue to be decided. Reply Br. of Appellants 1.

purposes of the [Alaska Workers' Compensation] Act."[7] Appellees Kathleen Watson and Rust did not oppose the appeal.

Appellee Hensler argues that her status as a child of the deceased worker does not change because she is the subject of a child support order. The purposes of the death benefit statute are not served, she argues, by importing domestic relations concepts. She argues that AS 23.30.215(h) limits the amount of benefits to a valid child support order, but does not affect a person's status as a "child" under AS 23.30.395(8).[8] She contends that the interpretation urged by the appellants would deny her both equal protection of the law by foreclosing her fundamental right to post-secondary education and improperly distinguishing between her and the worker's other children because her parents were divorced.

The parties' contentions require the commission to decide if a child of a deceased worker, who is the subject of a child support order and not living with a surviving widow or widower of the worker, is entitled to receive a percentage share of death benefits under AS 23.30.215(a)(2) after the expiration of the period of child support ordered by the court. The parties' contentions also require the commission to decide if the board misinterpreted the settlement terms and improperly denied the beneficiaries the right to enter into an agreement under AS 23.30.012. This appeal also raises issues of procedural error.

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[7] Reply Br. of Appellants 16 (quoting *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 223 (Alaska 2005)).

[8] At the time of John Watson's death, the definitions in AS 23.30.395 included:

> (7) "child," "grandchild," "brother," and "sister," include only persons who are under 19 years of age, persons who, though 19 years of age or over, are wholly dependent upon the deceased employee and incapable of self-support by reason of mental or physical disability, and persons of any age while they are attending the first four years of vocational school, trade school, or college, and persons of any age while they are attending high school;

This subsection was renumbered in 2005 as subsection (8). The commission uses the current numbering, as the board did in its decision.

The commission holds that AS 23.30.215(h) does not bar the child of a deceased worker from receiving a percentage share of death benefits under AS 23.30.215(a)(2) after expiration of the period of child support ordered by the court, provided that the child remains a "child" as defined by the Act. However, the commission concludes that the proposed settlement agreement did not affect the rights of the non-signatory beneficiary. The commission concludes that the board misinterpreted the Supreme Court's holding in *Barrington v. Alaska Communications Systems Group, Inc.*,[9] and therefore erred by burdening the exercise of one beneficiary's right to reach an agreement with the employer to settle her claim, effectively granting a non-signatory co-beneficiary a "veto" over the exercise of the rights of the signatory beneficiaries. The board failed to provide the parties a hearing notwithstanding the appellants' request for a hearing. The board, having failed to find that the agreement was not in the best interests of the signatory beneficiaries, abused its discretion in refusing approval of the agreement. The commission AFFIRMS in part, REVERSES in part, VACATES the board's order and REMANDS with instructions to hold a hearing and decide if the settlement agreement is in the best interests of Kathleen Watson and Chelaine Rust.

1. Factual background and proceedings before the board.

The material facts are not disputed. John P. Watson was a police officer who was killed in the line of duty on December 25, 2003. When he died, he was married to Kathleen Watson, whose daughter by a prior marriage, Chelaine Rust, resided with John and Kathleen and to whom he stood *in loco parentis*. John Watson also had a child by a prior marriage, Renetta Hensler, for whom he paid child support pursuant to a Child Support Order entered under Civil Rule 90.3. The amount of the child support ordered was $650 per month, which is $150 per week on an annualized basis.[10] Kathleen

[9] 198 P.3d 1122, 1132 (Alaska 2008) (holding that because physician had an independent right to file a claim and worker could not adequately represent his interest, physician had "a cognizable property interest in filing an independent claim and that this interest was entitled to due process protection.").

[10] ($650 x 12 months) / 52 weeks = $150 / week.

Watson was born December 25, 1956; Chelaine Rust was born December 11, 1987; and Renetta Hensler was born March 24, 1993.

Kathleen Watson was initially paid compensation of 30 percent of Watson's total compensation rate, the widow's portion if two or more children survive.[11] If Kathleen Watson, who was 47 years old when John Watson died, reached 52 years of age within 12 years of John Watson's death, her benefits would not cease so long as she remained unmarried.[12] If she remarried, no matter what her age, she would be paid two years of the benefit she was receiving at the time of her remarriage, and benefits would cease.[13] But, if she remained unmarried, as the children attained majority and ceased to be entitled to benefits, the children's shares would accrue to her.

Renetta Hensler was paid compensation equal to her deceased father's child support obligation to her, $150 weekly, as required by AS 23.30.215(h). She is 16 years old, still in high school, and her mother asserts Hensler intends to attend college. Her child support order, entered under Civil Rule 90.3(f) on April 8, 1997, provides in pertinent part:

> The obligor, father, shall pay child support as shown below. These amounts include any adjustment for health insurance. $500.00 for 1 child(ren) per month until house sells $650.00 per month for 1 child(ren) per month.
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> . . . .
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> ☒ Support shall continue while each child is 18 years old if the child is (1) unmarried, (2) actively pursuing a high school diploma or equivalent level of technical or vocational training, and (3) living as a dependent with the obligee parent or guardian or a designee of the obligee parent or guardian.[14]

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[11] AS 23.30.215(a)(2)(C) provides "30 percent for the widow or widower with two or more children and 70 percent divided equally among the children."

[12] AS 23.30.215(f) provides that a widow or widower's portion terminates 12 years after the death of the worker, but AS 23.30.215(g) provides that this does not apply if the widow or widower attains the age of 52 years within the 12-year period. Thus, Kathleen, if she survived John Watson for 5 years would be entitled to a benefit as long as she lived, if she remained unmarried.

[13] AS 23.30.215(a)(3).

[14] R. 0065.

Hensler's benefit is presently reduced by a social security offset under AS 23.30.225(a).

Chelaine Rust, as a step-child who was living with John Watson at the time of his death, was paid compensation until December 11, 2006. She received her 35 percent portion under AS 23.30.215(a)(2)(C) plus the difference between Renetta's child support and the 35 percent benefit that is the "maximum benefit payable" to Renetta, pursuant to AS 23.30.215(h).[15] When Rust turned nineteen years old, her benefits ceased and her benefit amount began to be paid to Kathleen Watson. Rust, who is 23 years of age, is not attending college or vocational school.

In October 2008, Kathleen Watson, Rust, and the City of Kenai entered into a compromise and release agreement that provided a lump sum of $130,000 plus an annuity purchased at $455,000 to Kathleen Watson, Rust's waiver of future benefits, and a release of the City of Kenai's liability to Rust and Watson. Hensler was not a party to the agreement. In the section titled "Introduction," the agreement provided,

> Under the support agreement, Renetta is entitled to benefits until March 23, 2011, which is her 18th birthday, unless she is still attending high school and is unmarried and living as a dependent with her mother. It is expected that she will complete high school as of June 1, 2011 at which point the benefits being paid to Renetta Hensler are payable directly to Kathy Watson under the terms of AS 23.30.215(e) and (h). In computing the value of the sum payable to Ms. Watson, Ms. Hensler's benefits which will inure to Ms. Watson after June 1, 2011, have been taken into account.
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> . . . .
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> . . . Ms. Hensler's benefits will continue subject to the provisions of the Alaska Workers' Compensation Act through June 1, 2011 at which time it is believed that she will no longer be entitled to child support benefits under the child support decree. Benefits to Ms. Hensler are not affected by this settlement and any entitlement she may have to benefits after the above date will be determined independent of this release and based solely on the terms of the Child Support Decree.[16]

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[15] This benefit amount is also reduced by a social security survivor offset under AS 23.30.225(a).

[16] R. 0016-17.

In the section titled "Release of Claim for Past and Further Benefits," the agreement stated: "Benefits due to Ms. Hensler will continue until their termination under the child support agreement and are unaffected by this release."[17]

On November 5, 2008, the board responded by a letter, addressed to counsel for the City of Kenai, Kathleen Watson, Rust, and Hensler. The letter stated that:

> Pursuant to 8 AAC 45.160(a) the settlement agreement . . . is not approved at this time for the following reason(s): Ms. Hensler is a minor . . . . We also note that child support agreements are subject to modification. This settlement agreement appears to affect Ms. Hensler's rights under the Act by requesting our affirmation of an agreement that purports to bind her to the terms of a child support agreement to which we are not privy, and which may be subject to change – all without any notice to Ms. Hensler.[18]

The letter also said that "Ms. Hensler is a necessary party to this agreement because she is a 'person who may have a right to relief in respect to or arising out of the same transaction or series of transactions' and therefore she should be joined as a party."[19] The board said this result was required because *Barrington v. Alaska Communication Systems Group*,[20] held "the board and appeals commission erred by approving a settlement in which a non-party's rights were affected without notice to that person."[21]

The board suggested three ways to "rectify this problem."[22] The parties could obtain Hensler's agreement, strike the language providing that Hensler's death benefits will continue until their termination under the child support order, or rewrite the agreement to state that it is neither intended to, nor does it, waive Hensler's right to make her own claim for benefits. Finally, the board said, "We will reconsider the

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17 R. 0019.

18 R. 0049.

19 R. 0050.

20 198 P.3d at 1122.

21 R. 0050. *See also In re John P. Watson*, Bd. Dec. No. 09-0013 at 8.

22 R. 0050.

agreement upon our own motion following revisions, **and** upon a party's request we will schedule a hearing to determine whether the agreement should be approved."[23]

Less than two weeks later, the City of Kenai filed a revised agreement,[24] and requested a hearing in the cover letter accompanying the agreement.[25] The new agreement was dated November 11, 2008. It states in the introduction:

> Under the support agreement, Renetta is entitled to benefits until March 23, 2011, which is her 18th birthday, unless she is still attending high school and is unmarried and living as a dependent with her mother. It is expected that she will complete high school as of June 1, 2011 at which point the benefits being paid to Renetta Hensler are payable directly to Kathy Watson under the terms of AS 23.30.215(e) and (h). In computing the value of the sum payable to Ms. Watson, Ms. Hensler's benefits which will inure to Ms. Watson after June 1, 2011, have been taken into account. Ms. Hensler's benefits and any entitlement she may have to benefits is unaffected by this release.
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> . . . .
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> . . . Ms. Hensler's benefits will continue subject to the provisions of the Alaska Workers Compensation Act through June 1, 2011 at which time it is believed that she will no longer be entitled to child support benefits under the child support decree. Benefits to Ms. Hensler are not affected by this settlement and any entitlement she may have to benefits after the above date will be determined independent of this release and based solely on the terms of the Child Support Decree and the Alaska Workers' Compensation Act.[26]

In section 2, titled "Payment of Benefits," the revised agreement included the statement that "It is the belief of the parties to this release that Renetta Hensler's benefits will cease on or about June 1, 2011, at which point the total of the $814 weekly benefit would be payable to Kathleen Watson. That amount is included in the settlement

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23 *Id.* (emphasis in original).

24 R. 0026-34.

25 R. 0051.

26 R. 0027-28.

detailed below."[27] In the section titled "Release of Claim for Past and Further Benefits," the revised agreement stated: "Benefits due to Ms. Hensler are unaffected by this release."[28]

Notwithstanding the board's statement that it would schedule a hearing if a party requested, the board again rejected the agreement without a hearing.[29] The board's November 28, 2008, letter states:

> We still have serious concerns about this proposed settlement. Ms. Hensler is a minor and currently not a 'party' to this action and is not signatory to the settlement. There is not really a 'claim' pending before us. However, the settlement does seem to affect her rights, or at least 'may' affect them, if we understand correctly what the employer, Ms. Watson, and Ms. Rust are trying to accomplish. There appears to be a close interplay between the Act and provisions of a child support agreement in this case. Therefore, before we can determine whether this settlement would be in the best interest of Ms. Hensler, who is also a 'beneficiary,' we request the following, specific information and focused briefing from those affected by this settlement:
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> 1) Please provide us with a copy of any and all child support agreements, decrees or orders reflecting the decedent's child support obligation to Ms. Hensler as of the time of his death. We understand from her recent request for a copy of our file that Susan Lee is Ms. Hensler's mother and legal guardian; this information may be best obtained and provided by Ms. Lee.
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> 2) Employer, please advise the board and Ms. Hensler/Lee unequivocally whether or not it is the intent of this agreement to waive Ms. Hensler's right to seek and obtain death benefits from the employer/carrier pursuant to AS 23.30.215 after June 1, 2011 should she decide to attend vocational school, trade school, or college.
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> 3) All parties, please provide no more than five (5) pages of briefing setting forth your respective positions on the question of whether or not Ms. Hensler needs to be joined

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27 R. 0028.

28 R. 0030.

29 R. 0057.

> as a party to this 'action' and whether or not she also needs to sign this settlement agreement. Ms. Watson, Ms. Rust, and Ms. Hensler (and Ms. Lee), your position statement is optional. Should you chose [sic] to respond, however, please understand that your position can be set forth briefly and need not be type-written or in any particular format.[30]

The City of Kenai responded on December 5, 2008. A letter from its attorney stated:

> Your concern apparently is that we somehow can affect the rights of Renetta Hensler who is neither a party nor a signatory to this contract which is embodied in the Compromise and Release. The purpose of the release is to allow Ms. Watson to receive a lump sum and then to assure that she receives ongoing payments through the purchase of an annuity. Her adult daughter, Chelaine Rust has agreed that she would waive any rights that she might have to additional benefits should she decide to go to college. Those are the only two people who are signatories to the Compromise and Release and they are the only two beneficiaries of Mr. Watson whose rights are being affected. Ms. Hensler has never been a party to this release and has never been requested to sign waiving any rights, nothing in the release could ever be argued or asserted as any kind of a bar to any claim that she may in the future choose to make.[31]
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> . . . .
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> On behalf of the employer and the carrier, I can state unequivocally that it was never the intent of this agreement to waive any rights Ms. Hensler has to seek any future benefits under AS 23.30.215. This includes benefits either before or after June 1, 2011. There is nothing in this agreement that forecloses her making any arguments that she deems reasonable as to any entitlement she may have in the future to additional benefits. Because she is not a signatory on the Compromise and Release there is no way the employer can foreclose or ever affect her right to seek further benefits should she decide she has entitlement to same. The employer and carrier reserve any rights that they have to defend against any such claim should they decide that they have a reasonable defense against any claim made. However please be advised that the employer and carrier will never assert that the Compromise and Release

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30 R. 0057-58.

31 R. 0061.

> agreement entered into by Mrs. Watson and Chelaine Rust and the City of Kenai in any way is a defense to any claim that Ms. Hensler may make in the future. Further, the employer and carrier are assuming the risk that they might have to pay benefits to both Mrs. Watson under the release and Ms. Hensler, if she's awarded benefits or is entitled to benefits after 2011.
>
> In order to purchase the annuity, it was necessary to make an assumption as to when Mrs. Watson ordinarily would have received the benefits currently being paid to Ms. Hensler. Without such an assumption, the annuity could not be purchased and still supply Mrs. Watson with her future entitlements including an increase in her benefits when Ms. Hensler ceased to be entitled to benefits. While the employer and carrier do not believe she has an entitlement after the child support decree states payments end, if Ms. Hensler were to graduate from high school at a later date or if there was a final award of benefits to her under some theory, then, the employer and carrier would continue paying benefits to Ms. Hensler even though they would have also paid for the same benefits to go to Mrs. Watson under the annuity. But there has never any intent to deprive Ms. Hensler of any rights she might have to benefits as a beneficiary of Mr. Watson. To the contrary, the employer and carrier never approached her to see if she wanted to compromise her benefits. Her rights were not addressed in the release and she therefore continues to be in the same position she is currently in whether or not the release is approved.[32]

Kathleen Watson also wrote the board a letter stating that she had no intention of affecting Hensler's rights.[33]

Without a hearing, the board again rejected the agreement by letter. On December 8, 2008, the board wrote,

> [T]he board requires additional information in the settlement agreement . . . the settlement agreement should state that "the employer and carrier will never assert that the compromise and release agreement entered into by Mrs. Watson and Chelaine Rust and the city of Kenai in any way is a defense to any claim that Ms. Hensler may make in the future." The settlement agreement should also state that the employer and carrier are waiving any defenses they may have to any claim by

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32 R. 0062.

33 R. 0072.

> Mrs. Hensler pursuant to AS 23.30.115(j). Otherwise, if Ms. Hensler makes a claim for additional death benefits in the future, after the settlement is approved, the employer and its carrier could conceivably argue that they are entitled to withhold from Ms. Hensler's money an alleged "overpayment" or "advanced payment" of compensation previously made to Mrs. Watson, given the context of Ms. Zobel's December 5, 2008 letter. Without this possible defense foreclosed, we cannot find the settlement agreement is in one of the beneficiaries' (Ms. Hensler's) best interest, because her benefits may be diminished as a result of this agreement as currently written.
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> We will reconsider . . . following receipt of the revised [agreement] signed by Ms. Hensler's representative, . . . and decide at that time whether or not a hearing is needed to determine whether the agreement should be approved.[34]

The City of Kenai requested a final order approving or denying the settlement.[35]

The board's final order stated:

> We find the "modified" settlement agreement specifically states that Ms. Hensler's benefits, which Employer "expects" to cease on or about June 1, 2011, would be thereafter payable to Ms. Watson, and that amount is "included in the settlement detailed" in the settlement agreement. We find the settlement agreement purports to pay Ms. Watson funds that would otherwise be payable to Ms. Hensler after June 1, 2011, should Ms. Hensler not graduate from high school as expected on or about June 1, 2011, or more importantly, should she decide to attend vocational school, trade school, or college. We find Ms. Hensler's representative, Ms. Lee, states Ms. Hensler fully expects to attend college for four years. We find under those circumstances, Ms. Hensler would remain a "child" pursuant to §395(8) and would be entitled to continued death benefits. We find Ms. Hensler, post high school, will be in a similar if not identical situation as is Ms. Rust.
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> Though we find Employer repeatedly says the C & R does not affect any right Ms. Hensler has to further death benefits, we find Employer unwilling to waive its §155(j) defense of advance or overpayment of benefits it intends to pay Ms. Watson, and its right to seek an offset pursuant to §155(j). We find Employer

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34 R. 0070.

35 R. 0076-77.

> has specifically reserved its right to "any and all defenses" against any claim Ms. Hensler may file. We find the potential defense of "advance payment" or "overpayment" pursuant to §155(j) looms like a specter over this settlement.
>
> We interpret our above-referenced statutes and regulations to require settlement agreements be in the best interest of all beneficiaries, not just some beneficiaries. We conclude so long as the potential §155(j) defense looms over this case, in respect to any benefits Ms. Hensler might be entitled to in the future, it is not in Ms. Hensler's best interest as a beneficiary to approve this settlement agreement. Therefore, we conclude by a preponderance of the evidence, the C & R is not in the best interest of all beneficiaries, and we will not approve it at this time.
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> Additionally, we find Ms. Hensler is a necessary party for the reasons set forth, *supra*, and we conclude pursuant to 8 AAC 45.160(b), she is a necessary signatory (through her appropriate representative) to any agreement. We find authority to waive our procedural requirements in some instances. Our regulation 8 AAC 45.195 allows us to "waive" or "modify" a "procedural requirement" if "manifest injustice" to a party would result from the rule's "strict application." We find we may not waive, modify, or relax a requirement simply to excuse a party from complying with the law's requirements. We also find relaxation of 8 AAC 45.160(b), as Employer implicitly urges, is not necessary to prevent "manifest injustice." Rather, because Employer expressly refuses to waive its §155(j) overpayment and credit defenses, we find relaxation of this regulation may actually create manifest injustice to Ms. Hensler for the reasons stated, *supra*.
>
> We encourage the parties to work together and resubmit a C & R signed by all parties, which conforms to the law and to this decision.[36]

The City of Kenai appeals, seeking an order reversing the board's decision that Hensler will be entitled to benefits after June 1, 2011, under the Act and directing the board to approve the settlement.

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[36] *In re Estate of John P. Watson*, Alaska Workers' Comp. Bd. Dec. No. 09-0013 at 22-23.

2. Standard of review.

The commission is directed by the Alaska State Legislature to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[37] The commission is required to exercise its independent judgment on questions of law and procedure within the scope of the Alaska Workers' Compensation Act.[38] If we must exercise our independent judgment to interpret the Act, where it has not been addressed by the Alaska Supreme Court, we draw upon the specialized knowledge and experience of this commission in workers' compensation,[39] and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[40]

3. A child whose death benefits are defined by a child support order may remain a child under the Alaska Workers' Compensation Act after the period of child support under the order ends.

AS 23.30.215(h) provides that

> In the event a deceased worker is survived by children of a former marriage not living with the surviving widow or widower, then those children shall receive the amount being paid under a decree of child support; the difference between this amount and the maximum benefit payable under this section shall be distributed pro rata to the remainder of those entitled.

The appellants argue that when AS 23.30.215 was amended in 1977 to add subsection (h), the legislature intended that a child of a former marriage not living with a surviving widow or widower would receive no more or less than what the child would be entitled to receive under the child support order had the worker not died.

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[37] AS 23.30.128(b). The board made no determination of the credibility of the witnesses before it, to which the commission is bound. AS 23.30.128(b).

[38] AS 23.30.128(b).

[39] *See Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

[40] *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979).

The commission, after reviewing the legislative history of SB 131,[41] is not persuaded that the legislature intended that children of a former marriage whose death benefits are established by the amount of a child support order would, on expiration of the child support order, not be equally eligible to be "persons of any age while they are attending the first four years of vocational school, trade school or college" under AS 23.30.395(8). The most compelling segment of the legislative history is the explanation of the amendment offered by Richard "Dick" Block, then Director of the Division of Insurance, to the House Commerce Committee: "Now, Section H on page 4, line 19, is a technical provision added in [House] labor and management [committee] and the thrust of this is to assure that whatever benefits a - - minors of a previous marriage were receiving, would continue."[42] Director Block's specific reference to "*minors* of a previous marriage" as the targets of the amendment's effects, and the absence, in the progress of SB 131 through the legislature, of any proposed amendment to then AS 23.30.265(7),[43] suggests strongly that the legislature did not intend the amendment to restrict the rights of *adult* children to post-secondary death benefits.

The appellants argue that AS 23.30.215(h) excludes children of a former marriage not living with the surviving spouse from the definition of child at AS 23.30.395(8) because § .215(h) states "those children shall receive the amount

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[41] The commission received copies of transcripts of portions of committee hearings on SB 131 from appellants with a Mot. for the App. Comm'n to Take Judicial Notice of the Legis. History of AS 23.30.215 on September 29, 2009. At the direction of the commission, copies of the log notes and all available tapes were provided to appellee's counsel who was given opportunity to review them and respond. Hensler's counsel confirmed "the enormity and difficulty of the tasks averred to by [appellants' attorney's staff]," Appellee Hensler's Supplemental Argument Based on Review of Appellant's Additional Authority – Legis. History, 2. After reviewing the recordings, Appellee Hensler conceded the transcripts were reasonably accurate, *id.* at 3, and characterized the effort to "divine the [legislative intent] from such a fragmentary record is akin to seeking God's will in the entrails of a goat." *Id.* at 4.

[42] Excerpt of House Commerce Comm. #31, Side 1, 2:10-14.

[43] Currently numbered AS 23.30.395(8). The commission uses the current numbering in this decision.

being paid under a decree of child support." Because the decree of child support is silent on the right to post-majority support, the appellants argue that no post-majority death benefits are owed.

AS 23.30.215(h) does not limit the definition of child. With the exception of a 1966 amendment increasing the age of exclusion to 19 years of age,[44] the text of § .395(8) has remained unchanged since enactment. For more than 40 years, the Alaska Workers' Compensation Act's definition of "child," "grandchild," "brother," and "sister," has included "persons of any age" while they attend the first four years of college or vocational training, provided they are not married. The right to receive post-secondary death benefits is not limited to natural children, but extends, if there is no spouse or children, to brothers, sisters, and grandchildren dependent on the worker at the time of his or her death. It includes *any* child, related or not, to whom the deceased had stood "*in loco parentis*" at least a year prior to death.

In contrast, child support is a right of a minor child.[45] Adult children who are not unable to work to maintain themselves have no legal right to support from their parents,[46] regardless of the status of their parents' marriages. Thus, while a child support order issued under Alaska Rule of Civil Procedure 90.3 defines the amount of a minor child's right to support from the non-custodial parent, it does not deprive the child of a post-majority support right enjoyed by children living with their married parents because neither the children of an intact marriage nor those of divorce have an

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[44] § 4 ch 99 SLA 1966.

[45] *But see* AS 25.25.101(1) (defining a child for purposes of the Uniform Interstate Family Support Act as being either over or under the age of majority, which is 18 years in Alaska). Specific provisions exist to allow the court to order support for an unmarried 18-year-old child while attending high school or the equivalent while living as a dependent with a parent or guardian, *e.g.*, AS 25.24.910.

[46] **AS 25.20.030. Duty of parent and child to maintain each other.** Each parent is bound to maintain the parent's children when poor and unable to work to maintain themselves. Each child is bound to maintain the child's parents in like circumstances. *See Dowling v. Dowling*, 679 P.2d 480 (Alaska 1984) (holding the court has no authority to order a parent to pay post-majority educational support to child).

independent *right* to post-majority support if they are able to work to maintain themselves.

Because there is no right to post-majority educational support from a parent, the provision of post-majority workers' compensation death benefits is not a substitute for a right to support that an adult child has to claim from a living parent. Unlike death benefits paid during minority, post-majority death benefits do not compensate the child of the deceased worker for loss of what the child has an enforceable right to claim from the deceased parent during the parent's lifetime. AS 23.30.215(h) does not limit the child's right to post-majority death benefits to the child support decree because, unlike child support during minority, post-majority support is not a right the child can claim in the parent's lifetime under Alaska law. AS 23.30.215(h) simply determines the amount of the death benefit during the child's minority, while the child would have been subject to a child support decree.[47] Payment of death benefits under AS 23.30.215(h) does not transfer the obligation to pay the child support pursuant to a court order,[48] so the child

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[47] Substantial changes in the law concerning child support have occurred since 1977. For example, AS 23.30.215(h) applies only to children of a former marriage who do not live with a surviving spouse; it does not apply to children *not* born of a marriage who may be the subject of child support order. In the years between 1990 and 2008, unwed births increased from 27 percent of the total births in Alaska to 37.6 percent. *See* Alaska Dep't of Health and Social Servs., Div. of Pub. Health, Bureau of Vital Statistics, Alaska Birth Profiles, available online at http://www.hss.state.ak.us/dph/bvs/birth_statistics/Profiles_Census/frame.html (Nov. 25, 2009). In the same period, the number of divorces and the rate of divorce among Alaska residents have declined. *See* Alaska Dep't of Health and Social Servs., Div. of Pub. Health, Bureau of Vital Statistics, Marriage and Divorce Rates for Alaska, available at http://www.hss.state.ak.us/dph/bvs/marriage_divorce_statistics/Marriages_Divorces/body.html (Apr. 24, 2009). In 1977, it may have been unusual that an illegitimate child benefited from a child support order, but that is not the case today. The result is that a child of a prior marriage is paid death benefits determined by the amount of a child support order, but the child of no marriage, notwithstanding the existence of a child support order, receives the full percentage share of death benefits. However, Hensler did not argue that the statute unfairly discriminates against her because her parents had been married compared to a half-sibling whose mother her father had not married, and the commission does not address the issue here.

[48] The obligation to pay child support under a child support decree ends with the death of the obligor parent, because it is an order to the non-custodial parent to

is eligible to receive the death benefits as long as they remain qualified as children, including "persons of *any age* while they are attending the first four years of vocational school, trade school or college."

> *4. There is no rational relationship between the goals of a quick, efficient and predictable delivery of compensation and excluding children of a former marriage from the definition of child for purposes of post-majority death benefits.*

Appellee Hensler argues that limiting the right to post-majority death benefits under AS 23.30.215(h) denies children of divorce equal protection of the law. Hensler asserts post-secondary education is a fundamental right that she cannot be denied solely on the basis of her parents' marital status. The appellants argue that the right to death benefits is not a "fundamental right" and that there is a "rational basis" for reading AS 23.30.215(h) to limit post-majority death benefits to the amount of post-majority support in a child support decree, even if the amount provided in the decree is nothing. Based on the language of the statute and the legislative history, the commission determined above that no such limit exists. However, the commission briefly addresses the arguments advanced by the parties.

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pay the support. The death of a custodial parent does not end the non-custodial parent's obligation to support the child, although it may terminate an obligation to support the obligee parent. However, although the court may require the obligor parent to provide security for future child support payments, it cannot *retroactively* modify the payment amount, *Teseniar v. Spicer*, 74 P.3d 910, 915 (Alaska 2003) (quoting *State, Child Support Enforcement Div. v. Bromley,* 987 P.2d 183, 188 (Alaska 1999) (internal quotation marks omitted)); *see also* AS 25.27.166(d) (allowing retroactive modification after disestablishment of paternity); AS 25.27.195 (allowing retroactive modification to conform support obligations to obligor's actual income where agency had previously calculated support obligations based on default estimate of income); AS 25.27.060(d) (permitting modification or revocation of *prospective* child support). A lien for accrued support may be enforced against the obligor's property, and a child has rights against the estate of the deceased parent, but there is no statutory basis for the principle asserted by the board that a court may order a dead parent to make prospective increased payments of child support or face incarceration. *See* AS 25.27.080(d).

The Alaska Supreme Court, in *Ranney v. Whitewater Engineering*,[49] rejected the equal protection argument of the survivor of an unmarried couple. Applying Alaska's three-step, sliding scale equal protection analysis, the Court repeated that

> We have held that "[w]orkers' compensation benefits are merely an economic interest, and therefore, are entitled only to minimum protection under this court's equal protection analysis." Under this level of protection, the state's ends need only be legitimate and the statute's classification must "bear a fair and substantial relationship to the purposes of the Act."[50]

The Court rejected Ranney's argument that, because the purpose of the death benefit statute was to compensate dependents, not encourage marriage, her exclusion on the basis of a marital classification did not bear a fair relationship to the purposes of the statute. The Court held

> the act also serves another, even broader purpose: to provide benefits in a manner that is "quick, efficient, fair, and predictable," at a reasonable cost to the employer. The act's spousal benefit substantially furthers this overarching purpose, even if it might fall short in compensating all potential "dependents."[51]

Limiting the spousal death benefits to surviving widows and widowers, the Supreme Court held,

> bears a close and substantial relationship to furthering a legitimate state interest, it does not violate Ranney's constitutional right to equal protection. The legislature also had to devise a system that was quick, efficient, and predictable and that could provide benefits without unduly burdening employers. As already noted, the legislature could have taken an ad hoc approach. But it could just as reasonably have concluded that such an approach would be slower, less efficient, and less predictable for beneficiaries and unduly expensive for employers. The legislature's reliance on marriage as the determining factor for spousal death benefits thus bears a fair and substantial

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49 122 P.3d 214 (Alaska 2005).

50 *Id*. at 223 (footnotes omitted).

51 *Id*. (footnotes omitted).

> relationship to the goal of ensuring the "quick, efficient, fair and predictable" delivery of benefits at a reasonable cost.[52]

The commission's review is limited to the board's application of AS 23.30.395(8). The question whether, as appellee argues, education is a "fundamental right," and that, because workers' compensation death benefits may be paid during enrollment in post-secondary education, post-majority death benefits share that classification, is not a question this commission may decide if presented by this appeal. AS 23.30.395(8) does not guarantee, condition, or bar a child's admission to vocational school or college; it merely provides a scheme for periodic monetary payments *if* the child attends some forms of post-secondary training. Workers' compensation death benefits "are merely an economic interest, and therefore, are entitled only to minimum protection under [Alaska's] equal protection analysis."[53] The Act's provision of short-term post-majority support during vocational training or college encourages adult children to overcome any economic disadvantages that may result from the loss of a working parent during their minority through their own efforts. The commission rejects the appellee's argument to the extent that it rests upon classifying death benefits as a fundamental right.

On the other hand, the commission also rejects the argument advanced by the appellants that excluding children of a former marriage from the definition of child in AS 23.30.395(8) (because a child support decree did not order post-majority support) bears a fair and substantial relationship to the legitimate goals of efficiency and predictability and therefore the appellants' interpretation must be adopted by the commission. The legislature's decision to limit payment of a child's death benefits during minority to the child support order has the benefit of simplicity and efficiency, eliminates questions of establishing dependency, and allows the obligee parent to predict that death benefits equal to decreed child support will be paid during the minority of the child. Similarly, the exclusion of married children from those entitled to post-majority death benefits, whether in school or not, bears a strong, rational

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52 *Id.* (footnotes omitted).

53 *Id.* (footnotes omitted).

relationship to the purposes of death benefits, because married adults are obliged to support each other and marriage is a fact readily determined.

But, there is no greater predictability to be gained by foreclosing a right to post-majority death benefits for children of a prior marriage compared to other children. Payment of post-majority child death benefits is inherently unpredictable. There is no time limit on when post-majority death benefit payments can begin, the amount owed is subject to a wide variety of choices by the potential beneficiary regarding post-secondary education or vocational training, and payments may stop and start depending on the potential beneficiary's talents, capacity, and success in school. The legislative deference expressed in AS 23.30.215(h) to the court's judgment of the amount of support owed by the deceased worker to the child of a former marriage results in a degree of predictability. However, AS 23.30.215(h) does not limit the *age* a child is entitled to death benefits, it ties the amount of the death benefit payment to the amount of the deceased worker's child support obligation.[54]

[54] Appellants argue children of divorce are not unfairly denied benefits because a child support order could result in a benefit to the child of a prior marriage receiving more than a child of a current marriage. There is support in the legislative history of a concern about preserving the child support award amount in that case. Following adoption of Alaska Rule of Civ. Pro. 90.3 some 20 years later, however, it is an unlikely result. The standard child support for one child is 20 percent of the non-custodial parent's adjusted income, and the per child share of a standard child support award declines from that percentage. Rule 90.3(a)(2). Under AS 23.30.215, if a spouse survives a deceased worker, the child's share of death benefits begins at 40 percent of the deceased worker's spendable wages (capped at 120 percent of the state's average weekly wage) and drops to an equal share with other children of 70 percent of the deceased worker's spendable wages when there is more than one child (35 percent per child for 2 children, 23.3 percent for 3 children, etc.). If the worker is not survived by a spouse, the child's benefit begins at 100 percent of the deceased worker's spendable wages, and drops to an equal share with other children of the worker. Unless the deceased worker was highly paid, under current law it is unlikely that the standard child support order will result in a higher per child payment than the workers' compensation death benefit calculation.

5. The board erred in concluding that the revised settlement agreement affected Hensler's rights, and, by requiring Hensler's participation, unduly burdened the settlement rights of Watson, Rust, and the City of Kenai.

A workers' compensation compromise and release agreement is a contract "subject to interpretation as any other contract."[55] Contracts are interpreted so as "to give effect to the reasonable expectations of the parties, that is, to give effect to the meaning of the words which the party using them should reasonably have apprehended that they would be understood by the other party."[56] "The words of the contract are . . . the most important evidence of intention," although the parties' conduct, the contract's purposes, and the surrounding circumstances at the time of contract formation also may be relevant.[57]

The November 11, 2008, agreement in this case provided in the "Introduction" that:

> Under the support agreement, Renetta is entitled to benefits until March 23, 2011, which is her 18th birthday, unless she is still attending high school and is unmarried and living as a dependent with her mother. It is expected that she will complete high school as of June 1, 2011 at which point the benefits being paid to Renetta Hensler are payable directly to Kathy Watson under the terms of AS 23.30.215(e) and (h). In computing the value of the sum payable to Ms. Watson, Ms. Hensler's benefits which will inure to Ms. Watson after June 1, 2011, have been taken into account. Ms. Hensler's benefits

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[55] *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093 (Alaska 2008) (citing *Williams v. Abood*, 53 P.3d 134, 139 (Alaska 2002)).

[56] *Craig Taylor Equip. Co. v. Pettibone Corp.*, 659 P.2d 594, 597 (Alaska 1983) (citations omitted). *See also Aviation Assocs. v. TEMSCO Helicopters, Inc.*, 881 P.2d 1127, 1130 n.4 (Alaska 1994) (stating "The primary goal of contract interpretation is to give effect to the parties' reasonable expectations.").

[57] *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 712 (Alaska 2003). *See also Kay v. Danbar, Inc.*, 132 P.3d 262, 269 (Alaska 2006) (stating "the words of the contract remain the most important evidence of intention and, unless otherwise defined, are given their 'ordinary, contemporary, common meaning.'") (citations omitted).

> and any entitlement she may have to benefits is unaffected by this release.[58]
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> . . . .
>
> . . . Ms. Hensler's benefits will continue subject to the provisions of the Alaska Workers Compensation Act through June 1, 2011 at which time it is believed that she will no longer be entitled to child support benefits under the child support decree. Benefits to Ms. Hensler are not affected by this settlement and any entitlement she may have to benefits after the above date will be determined independent of this release and based solely on the terms of the Child Support Decree and the Alaska Workers' Compensation Act.[59]

In section 2, titled "Payment of Benefits," the November agreement stated, "It is the belief of the parties to this release that Renetta Hensler's benefits will cease on or about June 1, 2011, at which point the total of the $814 weekly benefit would be payable to Kathleen Watson. That amount is included in the settlement detailed below."[60] In section 7, titled "Release of Claim for Past and Further Benefits," the revised agreement stated: "Benefits due to Ms. Hensler are unaffected by this release."[61]

The agreement's plain terms clearly state that Hensler's entitlement to death benefits is outside the scope of the release of the employer's liability. Moreover, both Watson and the City of Kenai stated in separate letters to the board that the agreement's intent was not to waive any of Hensler's rights to seek death benefits under AS 23.30.215.[62] In most cases, contracts bind only the parties to the agreement and intended third-party beneficiaries.[63] Here, although Hensler was an accepted

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58 R. 0027.

59 R. 0028

60 *Id*.

61 R. 0030.

62 R. 0062, 0072.

63 *See, e.g., Smallwood v. Central Peninsula General Hosp.*, 151 P.3d 319, 324 (Alaska 2006) (noting that "[w]e will recognize a third-party right to enforce a contract upon a showing that the parties to the contract intended that at least one purpose of the contract was to benefit the third party."); *O.K. Lumber Co. v. Providence Wash. Ins. Co.*, 759 P.2d 523, 525 (Alaska 1988) (injured person cannot maintain a

beneficiary of John Watson's death benefits, she was not a party to the settlement agreement. In addition, Kathleen Watson, Rust, and the City of Kenai plainly did not intend to provide or deny a benefit for Hensler in the revised agreement; they intended to not affect her rights in any way. The agreement states in two different places that "[b]enefits [payable] to Ms. Hensler are not affected by this settlement [or] release."[64] Therefore, based on the agreement's terms and the parties' conduct, the most plausible understanding of the contract is that it did not alter Hensler's rights to death benefits.

Nevertheless, the board did not approve the settlement agreement because of a concern that the City of Kenai would defend against a claim by Hensler by asserting it overpaid benefits. The agreement assumes Hensler's share of the death benefits inures to Watson after Hensler's high school graduation on June 1, 2011, but, as the board decided, Hensler is entitled to death benefits after that date if she attends college and remains unmarried.[65] The board was concerned that if the settlement was approved, the City of Kenai could assert a defense under AS 23.30.155(j)[66] against Hensler since it would have already paid the share of the death benefits it might owe to her after June 1, 2011, to Watson.[67] However, because Hensler is not bound by the contract, the City of Kenai and its insurer cannot use the settlement agreement as a shield to avoid liability to her. The board provided no authority for its assertion that the board

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cause of action for a breach of the implied covenant of good faith and fair dealing against an insurer because the injured person was not a party to the contract between insurer and tortfeasor out of which that duty arises).

[64] R. 0028, 0029.

[65] *See* discussion, *supra*, and AS 23.30.395(7), (8).

[66] AS 23.30.155(j) provides that "[i]f an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due."

[67] *In re Estate of John P. Watson*, Bd. Dec. No. 09-0013 at 21-22.

may direct that overpayments made to, or on behalf of, one beneficiary could be recouped from payments due to an innocent competing beneficiary under AS 23.30.155(j).[68] Finally, because the board ruled that Hensler would be entitled to post-majority death benefits if she attended post-secondary vocational training or college, the only "overpayment" would be benefits due to Watson – and the settlement protected Watson's right to retain benefits paid to her.[69]

The board also concluded that Hensler should be joined as necessary signatory to *any* settlement agreement.[70] The board's regulation on joinder provides in part that:

> (c) Any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party.
>
> (d) Any person against whom a right to relief may exist should be joined as a party.
>
> (e) In a death case, all persons, except minor children, who may be dependants or beneficiaries of the deceased employee, should either join or be joined as parties so the entire liability of the employer or carrier to the dependents or beneficiaries is determined in one proceeding. A minor child's claim must be filed by the surviving parent or other authorized representative.
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> . . . .

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[68] AS 23.30.155(j) provides that

> If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

[69] *See Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 233 (Alaska 1997) (holding that later insurer who mistakenly overpaid compensation could not "shift the burden of erroneous payments to an innocent earlier insurer."). Similarly, the employer could not shift the burden of a negotiated overpayment to an innocent beneficiary who did not participate in the settlement.

[70] The board relied on 8 ACC 45.160(b), which provides that "All settlement agreements . . . must be signed by all parties to the action and their attorneys or representatives, if any, . . ." The board's interpretation bars the settlement of claims against one employer in cases where claims against multiple employers or insurers have been joined.

> (j) In determining whether to join a person, the board or designee will consider
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> . . . .
>
> (2) whether the person's presence is necessary for complete relief and due process among the parties;
>
> (3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations; . . .[71]

Whether joinder is necessary in a particular case is based on practical considerations.[72] Here, Hensler is already a recognized beneficiary, but she cannot be a party to a claim that was not filed. No "action" existed except the petition to approve the settlement. The question is whether all the beneficiaries and the employer must settle all *potential* claims together, that is, whether it is possible for an employer to settle separately with different beneficiaries.

First, the commission concludes that *Barrington v. Alaska Communications Systems Group, Inc.*,[73] does not require that Hensler be joined as a necessary party to the settlement agreement. *Barrington* held that when an ambiguous settlement agreement bears a "real risk" of disposing of a third party's interest, that third party must be notified and given an opportunity to present his claim.[74] This standard is higher than the board's interpretation that the error in *Barrington* was approving "a settlement in which a non-party's rights were *affected* without notice to that person."[75] In *Barrington*, the Court held that a settlement purporting to discharge the employer's entire liability for past medical expenses without requiring payment directly to the medical providers did not bar a provider's claim for payment when he did not receive notice of the settlement of the employee's nor was he provided with an opportunity to

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[71] 8 AAC 45.040.

[72] *Barrington v. Alaska Communications Systems Group, Inc.*, 198 P.3d 1122, 1129 (Alaska 2008).

[73] 198 P.3d 1122 (Alaska 2008).

[74] *Id.* at 1131-32.

[75] R. 0049-50 (emphasis added); *In re Estate of John P. Watson*, Bd. Dec. No. 09-0013 at 8 (emphasis added).

present his claim before the board.[76] The rationale for this holding was, in part, that the medical provider might be left with absolutely no recourse in such a situation because AS 23.30.097(f) prohibits health care providers from suing injured workers for payment of services treating a compensable work injury.[77] *Barrington* does not require the disapproval of a settlement agreement simply because not all the parties want to settle or the employer may negotiate a more generous settlement with one beneficiary than it is prepared to give another. Hensler may be affected by the City of Kenai's disinclination to settle with her if it has paid a generous settlement to another beneficiary, but this does not place her rights at "real risk."

Unlike the situation in *Barrington*, Hensler has been notified of the proposed settlement, the revised settlement is not ambiguous, and there is no "real risk" that Hensler's rights are disposed of in the revised agreement given its explicit terms excluding Hensler's benefits from the scope of the release. Although the settlement agreement exposes the City of Kenai to the risk of incurring inconsistent obligations,[78] the City may choose to accept the risk of overpayment as a tradeoff for reaching a settlement with some of the beneficiaries.[79] The City acknowledged in its December 5, 2008, letter to the board that it was aware of, and willing to assume, this risk.[80]

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[76] *Id*. at 1133. The employer asserted the approved settlement as a shield against Dr. Barrington's claim.

[77] *Id*. at 1131.

[78] The Court in *Barrington* found the risk of inconsistent obligations as an additional reason for joinder of Barrington in the claim. *Id*. at 1131-32. However, in Barrington, the settlement purported to completely discharge the employer's liability, including liability for medical benefits, which is not the case here. Also, in this case, as the board acknowledged, there was no claim filed when the settlement was reached.

[79] *See SKW/Clinton v. Peek*, 855 P.2d 415, 418 (Alaska 1993) (concluding that, by settling her claim against her late husband's last employer, a widow accepted the risk that her claim against her husband's second-to-last employer would be denied under the last injurious exposure rule).

[80] R. 0062. This factor distinguishes the settlement here from *Barrington,* in which the Court held the board erred in failing to join Dr. Barrington to the claim (before approving the settlement) because *the settlement was ambiguous*, there was a *real risk* Barrington would be unable to protect his interest and the existing parties

Moreover, because there is no guarantee that Kathleen Watson would live out her expected lifespan or remain unmarried, or that any of the children would attend college, *any* settlement exposes the City of Kenai to "inconsistent obligations" in the sense that it will have paid more to Watson than she may have been entitled to receive. The board's reasoning that the risk of overpayment is enough to deny approval of a settlement guts the right of the parties to negotiate a settlement agreement, because *every* settlement carries a risk of overpayment.[81] The city and its insurer may have concluded the risk of overpayment was outweighed by other considerations, such as greater certainty as to its outstanding debt to two of the three beneficiaries, the ability to write off the debt it owes Watson and Rust by settling now, and the possible savings in paying Watson and Rust a lump sum and purchasing an annuity, rather than carrying liability for weekly payments over years of Kathleen Watson's lifetime. Therefore, because Hensler may protect her own interests without joining the settlement agreement and because the employer is aware it is assuming the risk of overpayment to Kathleen Watson, the commission does not believe that Hensler is a necessary party to the settlement agreement or the petition to approve the settlement agreement.

Second, the board's actions in considering the interests of Hensler, rather than the best interests of the signatory beneficiaries, unduly burdened Watson's, Rust's, and the City of Kenai's settlement rights. AS 23.30.012 specifically provides that the employer and the employee's beneficiary or beneficiaries "have a *right* to reach an agreement in regard to a claim for injury or death under this chapter, . . ."[82] The Alaska

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might not be afforded complete relief (emphasis added). *Id*. at 1132. The settlement in this case is not ambiguous and there is no real risk to Hensler's interests.

[81] The board's objection appears based on the assumption that Kathleen Watson's settlement should not be calculated on the basis of any more of a payment than she might be reasonably entitled to receive. A settlement is a compromise, and in any settlement of a claimed benefit dependent on future life choices or events, there is a risk of overpayment or underpayment. *See Seybert v. Cominco Alaska Exploration*, 182 P.3d at 1092 (noting "commutation of an award is distinct from compromise of a claim.").

[82] AS 23.30.012 (emphasis added).

Workers' Compensation Act infrequently uses the word "right."[83] The use of the word "right" is meant to emphasize in the strongest possible language the importance of the parties' ability to resolve workers' compensation claims by mutual agreement. Moreover, parties are not required to resolve a claim in its entirety but may partially resolve a claim in a settlement agreement.[84] Here, because the entire liability of the employer was not discharged, the agreement must be considered a partial settlement.

In this case, the board burdened the parties' "right" to such an extent that it was fundamentally impossible for the parties to meaningfully exercise it. The board initially rejected the agreement, and when the parties resubmitted a revised agreement in accordance with the board's requirements, the board again rejected the agreement, imposing further requirements.[85] As a condition of approval, the board eventually required the employer to waive defenses against Hensler's possible claims without negotiating with Hensler or imposing any requirements on Hensler in exchange for a waiver of defenses.[86] This action exceeded the board's discretion in evaluating settlements for the settling beneficiaries' best interests.[87]

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[83] The commission found only four other instances in which the Act explicitly provides for a "right." Injured employees have a "right to compensation for disability" under AS 23.30.105; a "right to file a petition for a protective order" under AS 23.30.107 if the employer requests information not relevant to the injury; a "right of review" by the board if they require medical care longer than two years after the injury under AS 23.30.095(a); and a "right" to choose an attending physician that may not be impaired by an employer's list of preferred doctors under AS 23.30.097(b).

[84] 8 AAC 45.160(g).

[85] R. 0057, 0069.

[86] R. 0070. The waiver drafted by the board was not limited to a claim of overpayment, but to "any claim" it was possible for Hensler to assert.

[87] AS 23.30.012 requires board approval of settlements when the "beneficiary is not represented by an attorney . . . , the beneficiary is a minor or incompetent, or the claimant is waiving all future medical benefits." The board was required to review the settlement because Watson and Rust are not represented by an attorney. 8 AAC 45.160 provides "A settlement agreement will be approved by the board only if a preponderance of evidence demonstrates that approval would be for the best interest of . . . the employee's beneficiaries." The board's interpretation rests on the sentence in 8 AAC 45.160(b) requiring settlement agreements be submitted in

Although the board interpreted its regulation at 8 AAC 45.160(a) as requiring the consideration of whether the agreement served the best interest of *all* the beneficiaries, even those who are not parties to the agreement, this interpretation unfairly gives non-signatory beneficiaries whose interests are not aligned with the settling beneficiaries a "veto" over any settlement agreement. The result is an unfair burden on the exercise of the right to settle a dispute because it subordinates the rights of the parties who wish to settle to the rights of the most stubbornly unreasonable party and is not designed to ascertain what is in the settling beneficiaries' best interest. It prevents the parties from reaching partial settlements, which may be the only way an employer and beneficiary may settle a dispute when beneficiaries who have competing interests. In cases involving multiple or successive families and resulting beneficiaries, the possibility of achieving a single settlement that is equally in the best interest of each potential claimant is remote. 8 AAC 45.160 must be interpreted to give effect to AS 23.30.012, by providing a process for exercise of the right to settle, not to make it impossible to exercise that right. Here, the board failed to analyze in any meaningful way whether the agreement was in the best interest of Watson and Rust, focusing instead on the non-signatory's best interests. This was error. The commission concludes that the board improperly burdened the beneficiaries' and the City's right to enter into an agreement under AS 23.30.012.[88]

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writing and "signed by all parties to the action and their attorneys." The board's interpretation bars employees from settling with one employer while pursuing a claim against another where the claims have been joined due to a defense based on the last injurious employer rule.

[88] The appellants raised other due process issues, notably the board's failure to grant the parties a hearing after the appellants requested one in writing as the board directed. The commission's resolution of this appeal does not require the commission to rule on arguments, uncontested by appellees, that the board's letters were orders containing material conclusions of law issued by the board without notice of the issues to be decided and that the board panel changed composition on reconsideration. However, the board's regulations provide that, if approval of a settlement is denied, the board must notify the parties and inform the parties of a right to request a hearing "to present additional evidence or argument." 8 AAC 45.160(d). The City requested a hearing, but the board did not schedule a hearing for the parties to "present additional

6. Conclusion.

The commission holds that AS 23.30.215(h) requires that amount of the death benefit payable to a child of a former marriage not living with the surviving widow or widower is determined by the amount of child support owed to the child by the deceased employee. However, AS 23.30.215(h) does not limit the time for which death benefits may be paid to a child; so that a child of a former marriage may receive post-majority death benefits while attending the first four years of college or vocational school.

The commission holds that the board erred in concluding that the revised settlement agreement presented a real risk to Hensler's rights to claim death benefits after her majority. The agreement was not ambiguous, there was no claim filed, and the employer was aware of the risk of overpayment of benefits to the beneficiaries signing the agreement. The board's denial of approval of the settlement agreement unfairly burdened the rights of the parties to agree to a settlement, and was an abuse of discretion.

Although the appellants request that the commission reverse with orders to approve the settlement, the commission notes that the parties were denied a requested evidentiary hearing. Only the board may make findings of fact regarding the evidence of the beneficiaries' best interest.

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evidence or argument" before again denying approval of the settlement. This was error. *See Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1013 (Alaska 2009) (holding board's failure to follow its regulations for settlements, approving settlement in absence of hearing testimony from claimant, and allowing waiver of benefit of potentially significant value with little explanation was abuse of discretion). Because the board denied approval without the requested hearing, appellants' request for a final order was not a waiver of the right to an evidentiary hearing.

Therefore, we AFFIRM the board's decision in part, REVERSE in part, VACATE the board's order denying approval of the settlement agreement and REMAND the case with instructions to the board to hold an evidentiary hearing on the settlement in accord with this decision.

Date: *25 Jan 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

signed
Jim Robison, Appeals Commissioner

signed
Stephen T. Hagedorn, Appeals Commissioner

signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal affirming the board's decision in part, reversing in part, vacating Decision and Order No. 09-0013 and remanding the case to the board with instructions. This is a final decision on the law the board should apply, although it is not the final decision approving or denying the Nov. 11, 2008, settlement. The Supreme Court might not accept an appeal under AS 23.30.129.

This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. To see the date this decision is mailed, look at the clerk's Certificate of Distribution in the box on the last page.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If you wish to appeal (or petition for review or hearing) 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

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of the Final Decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors this is a full and correct copy of the Final Decision No. 127 issued in the matter of *City of Kenai v. Watson,* AWCAC Appeal No. 09-007, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 25, 2010.

Date: *2/2/10*

signed

B. Ward, Appeals Commission Clerk