Alaska Workers' Compensation Appeals Commission

Shawn D. Hudak, Petitioner, vs. Pirate Airworks, Inc. and Liberty Mutual Insurance Company, Respondents.	MEMORANDUM OF DECISION Decision No. 214 July 24, 2015 AWCAC Appeal No. 15-009 AWCB Decision No. 15-0022 AWCB Case No. 200615619

Memorandum of Decision on Petition for Review of Alaska Workers' Compensation Board Interlocutory Decision and Order No. 15-0022, issued at Juneau, Alaska, on February 24, 2015, by southern panel members Marie Marx, Chair, Bradley Austin, Member for Labor, and Charles Collins, Member for Industry.

Appearances: Michael J. Jensen, Law Offices of Michael J. Jensen, for petitioner, Shawn D. Hudak; Martha T. Tansik, Burr, Pease & Kurtz, P.C., for respondents, Pirate Airworks, Inc. and Liberty Mutual Insurance Company.

Commission proceedings: Petition for Review filed March 10, 2015; Opposition to Petition for Discretionary Review filed March 20, 2015; Order on Petition for Review distributed April 13, 2015.

Supreme Court proceedings: Petition for review filed April 22, 2015; Opposition to Petition for Discretionary Review filed May 5, 2015; Order No. 88 issued June 16, 2015.

Commissioners: James N. Rhodes, S. T. Hagedorn, Andrew M. Hemenway, Chair.

By: Andrew M. Hemenway, Chair.

1. Introduction.

Shawn Hudak filed a petition for review of a decision by the Alaska Workers' Compensation Board (board) granting the petition of Yes Bay Lodge, Inc. (Yes Bay) to exclude certain medical records pursuant to 8 AAC 45.082(c). By order dated April 7, 2015, we denied the petition. We now state our reasons for the denial.

2. Factual Background.[1]

Shawn Hudak injured his right shoulder in 2006 while employed by Yes Bay.[2] He was treated by Dr. David Anderson in September 2006,[3] and obtained (on self-referral) a second opinion from Dr. Michael Nemanich in May 2007.[4] Mr. Hudak reinjured his shoulder and in July 2007 was treated again by Dr. Anderson.[5] In March 2008, on referral from Dr. Anderson, Mr. Hudak saw Dr. Michael Freehill for a second opinion on Dr. Anderson's recommendations for treatment of his right shoulder.[6] On May 23, 2008, Mr. Hudak had surgery performed by Dr. Anderson.[7]

---

[1] We make no findings of fact. We state facts as set forth in the board's decision, except as otherwise noted. To the extent that Mr. Hudak contends there is not substantial evidence in the record to support the board's factual findings, absent the full record we are in no position to assess that argument.

[2] *Hudak v. Yes Bay Lodge, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 15-0022, pp. 1, 3 (No. 2) (February 24, 2015). *See* Pet. Ex. D, p. 3. Mr. Hudak's petition for review identifies Pirate Airworks, Inc. and Liberty Mutual Insurance Company as respondents, notwithstanding that the board decision does not identify either of those entities as a party. The board's decision identifies the defendant parties as Yes Bay Lodge, Inc. (employer) and Employers Insurance Co. of Wausau (insurer). Counsel for Yes Bay and its insurer before the board filed an opposition to the petition on behalf of the respondents, which states that Pirate Airworks was the "employer below" and identifies Liberty Mutual Insurance Company as Pirate Airworks' insurer. Resp., pp. 1, 2. We disapprove of the substitution of named parties without notice and an appropriate order by the board or by the commission. Counsel to the proceedings before the commission should rectify the record in this regard.

[3] *Hudak*, Bd. Dec. No. 15-0022, p. 3 (No. 3). *See* Pet. Ex. D, p. 3.

[4] *Hudak*, Bd. Dec. No. 15-0022, p. 3 (No. 4). *See* Pet. Ex. B.

[5] *Hudak*, Bd. Dec. No. 15-0022, p. 3 (No. 5). *See* Pet. Ex. D, p. 5.

[6] *Hudak*, Bd. Dec. No. 15-0022, p. 4 (Nos. 9, 10). *See* Pet. Ex. D, p. 6.

[7] *Hudak*, Bd. Dec. No. 15-0022, p. 4 (No. 11).

On May 29, 2008, the parties filed a settlement agreement which resolved all disputes other than future medical treatment and related transportation costs.[8] In October 2009, on referral from Dr. Anderson, Mr. Hudak saw Dr. Bill Simonet for a second opinion on his continuing right upper extremity pain.[9] Dr. Anderson treated Mr. Hudak again on March 3, 2010.[10]

On April 27, 2010 (on self-referral), Mr. Hudak saw his family physician, Dr. Samuel Dardick, for a physical examination.[11] Dr. Dardick, on that occasion, treated Mr. Hudak for his work injury.[12] He referred Mr. Hudak to Dr. Kirk Aadalen (an orthopedic surgeon) and Dr. Daniel Kurtti for evaluation of his continued right upper extremity pain.[13] Those physicians subsequently referred Mr. Hudak to multiple other providers for evaluation and treatment of his work injury.[14]

Following an employer's medical examination in July 2013, Yes Bay controverted the payment of additional medical benefits.[15] In March 2014, Mr. Hudak filed a claim,

---

[8] *Hudak*, Bd. Dec. No. 15-0022, p. 4 (No. 12); Pet. Ex. D. The settlement agreement (which identifies the employer as "Pirate Airworks, Inc./Yes Bay Lodge, Inc.") purports to resolve all disputes relating to the 2006 work injury, defined as including "any aggravation . . . of employee's . . . injury through his last date of employment in September 2006." Pet. Ex. D, p. 1. The settlement agreement does not mention a reinjury in July 2007 (or at any other time) and does not mention Mr. Hudak's consultation with Dr. Nemanich in May 2007.

[9] *Hudak*, Bd. Dec. No. 15-0022, p. 5 (Nos. 16-17).

[10] *Hudak*, Bd. Dec. No. 15-0022, p. 5 (No. 18).

[11] *Hudak*, Bd. Dec. No. 15-0022, p. 5 (No. 19). *See* Pet. Ex. F.

[12] *Id.* This is the board's finding. We express no opinion as to whether there is substantial evidence in the record to support it. It is undisputed that Dr. Dardick referred Mr. Hudak to other physicians for treatment related to his shoulder injury. *See* Ex. F, p. 4 ("Referral to TRIA Hand Rehab. If not improving, would obtain second opinion from a Park Nicollet hand surgeon.").

[13] *Id.*

[14] *Id.*

[15] We assume, for purposes of our discussion, that this is what occurred. *See* Pet., p. 4. ("On the basis of Dr. Jhanjee's opinion further medical benefits were denied.").

requesting reinstatement of his medical benefits, and an independent medical examination.[16] In April 2014, Yes Bay filed a petition to exclude medical records retroactive to the effective date of 8 AAC 45.082(c) (July 9, 2011), on the ground that in April 2010, Mr. Hudak made a change of physician from Dr. Anderson to Dr. Dardick that was not authorized under AS 23.30.095(a), and therefore all medical opinions and reports generated by Dr. Dardick or physicians seen on referral by Dr. Dardick or on a subsequent referral by those physicians were inadmissible under 8 AAC 45.082(c).[17] The board granted the petition in a decision issued on February 24, 2015, and Mr. Hudak filed a petition for review.

3. Issues Presented For Review.

Mr. Hudak's petition for review lists fourteen issues raised by the board's decision.[18] It identifies three questions for review by the commission: (1)(a) whether obtaining a second opinion constitutes a "change of attending physicians" within the meaning of AS 23.30.095(a),[19] and (b) whether returning to the prior attending physician after obtaining a second opinion constitutes a "change of attending physicians" within the meaning of AS 23.30.095(a);[20] (2) whether, under the settlement agreement, Yes Bay waived any objection to a change of physician based on Mr. Hudak's consultation with Dr. Nemanich and return to Dr. Anderson in 2007;[21] and

---

[16] Pet., p. 4.

[17] We do not have a copy of the petition. Our understanding of its contents rests on the board's characterization of the employer's position. *See Hudak*, Bd. Dec. No. 15-0022, pp. 1-2, 5 (No. 19).

[18] Pet., pp. 9-10.

[19] Pet., p. 12.

[20] *Id.*

[21] *See* Pet., pp. 13-14. Specifically, Mr. Hudak contends that Yes Bay "waived any 'change in attending physician' defense arising from the 2007 second opinion." *Id.*, at 14. Mr. Hudak's petition also asserts that the insurer's conduct was in violation of 3 AAC 26.100(a). *Id.* We do not read the petition as presenting this specific question for our review, however, except insofar as it might affect our reading of the settlement agreement.

(3) whether the board is precluded from applying equitable principles to avoid application of 8 AAC 45.082(c).[22]

4. Reasons Asserted For Granting Review.

We have discretion to grant a petition for review when we conclude that the policy that appeals be taken only from final decisions is outweighed because (1) postponement of review will result in injustice because of impairment of a legal right or because of unnecessary delay, expense, hardship, or other related factors; (2) the decision involves an important question of law on which there is a substantial ground for difference of opinion, and immediate review will materially advance the ultimate resolution of the claim; (3) the board has so far departed from the accepted and usual course of proceedings as to call for our review; or (4) the issue is one that might evade review and an immediate decision for the guidance of the board is required.[23]

(a) Postponement of Review Resulting In Injustice.

Mr. Hudak asserts that postponing review will "add to the injustice already imposed by the Board's determination."[24] In that regard, he points out that the board's decision excludes from evidence records of treatment that the employer has already accepted and paid for, and that after the board issued its decision, Yes Bay filed a petition to terminate compensation for all treatment after March 2010.[25] He asserts that to proceed to hearing will add unnecessary delay, expense and hardship.[26]

---

[22] Pet., pp. 14-15.

[23] 8 AAC 57.073(b).

[24] Pet., p. 11.

[25] *Id.* *See* 8 AAC 45.082(c) ("If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer."); Pet. Ex. G. Yes Bay objects to Mr. Hudak's reference to this petition, asserting that any pleadings filed after the decision that is the subject of the petition for review "are not properly before the Commission." Resp. at 1, note 1. Yes Bay did not cite, and we are not aware of, any legal authority for the proposition that a pleading filed after a petition for review has been filed may not be placed in the record for purposes of the commission's consideration whether to grant or to deny the underlying petition for review.

[26] Pet., p. 11.

Yes Bay responds that intervention will likely cause increased delay and expense, because Mr. Hudak will likely appeal the final decision in the case anyway.[27] It asserts (without explanation) that the issues raised "are more properly suited to an appeal of a Final Decision."[28] Yes Bay asserts that there will be no injustice to Mr. Hudak if review awaits a final decision, because he can raise the same issues on appeal from a final decision, and in the meantime he has alternative insurance (through Medicare) for his medical expenses.[29]

Mr. Hudak's assertion that injustice will result if review is postponed until after a final decision is not persuasive. According to Yes Bay, Mr. Hudak has access to health care coverage from an alternative source. Given an alternative source of medical care, Mr. Hudak's assertion that it is unjust to require him to proceed to hearing without the excluded medical records rests on his position that the board's decision was in error, which, if that were sufficient to establish injustice, would be grounds for granting a petition for review every time the commission is persuaded that a board's decision is erroneous. In short, that the board has erred does not establish that it is unjust to proceed without correcting the error: correcting errors is why we provide for appeals.

Mr. Hudak's assertion that delaying review until after a final decision will result in additional delay and expense is entirely speculative. It rests on the assumption that the board will hear his claim on its merits (rather than granting Yes Bay's pending petition to terminate compensation based on the same facts that led the board to exclude medical records), rule against him, and be reversed on appeal based on the argument Mr. Hudak wishes us to address now. But it is also possible that the board will grant Yes Bay's petition to terminate medical benefits, which would speedily bring this matter before us on appeal from a final decision. If the board does not dismiss the petition, it may grant Mr. Hudak medical benefits (based on medical records from a source outside

---

[27] Resp., p. 5.

[28] *Id.*

[29] *Id.*

the scope of AS 23.30.095(a),[30] or from a board-ordered independent medical examination), thus mooting an appeal by Mr. Hudak altogether. In any event, intervening at this time will not terminate the proceedings regardless of our ruling. Since the course of events is far from clear, we do not see that Mr. Hudak has established that injustice is likely to occur as a result of any additional delay or expense that may result from postponement of review.

(b) Important Questions of Law, Grounds for Disagreement, Advance Resolution.

Mr. Hudak asserts that the petition raises important questions of law "concerning the applicability of a future regulation on a past act" and regarding "the effects of the Commission's prior decision" and "the meaning of 'change' and 'attending physician' as applied by the Act."[31] The board's decision, he asserts, concerns "the meaning and intent of a prior agreement and whether the Board should exercise equitable principles when applying a regulation."[32]

i. Retroactive Application of 8 AAC 45.082.

Mr. Hudak's assertion that his petition calls upon us to consider "the applicability of a future regulation on a past act" refers, presumably, to the board's decision to apply the evidentiary bar of 8 AAC 45.082(c) to materials that were generated by a change of physician that occurred prior the effective date of that regulation. We note, in this regard, that Mr. Hudak's discussion of the questions presented for our review does not make any legal argument regarding this issue, mentioning it only in connection with his

---

[30] According to Yes Bay, Mr. Hudak "has Medicare coverage and currently treats with a large conglomerate medical practice" and he has "solicited yet another opinion from . . . a . . . [physician] in the conglomerate, . . . without a referral." Resp., p. 3. The board's exclusionary ruling covers medical records generated by Dr. Dardick and subsequent referrals. There is no indication that it includes medical records generated by a physician outside Dr. Dardick's referral chain, in connection with Medicare benefits. *See Gianni v. Pfeifer Construction*, p. 11, Alaska Workers' Comp Bd. Dec. No. 08-0184 (October 10, 2008) ("Records not produced as a result of medical benefits under the Alaska Workers' Compensation Act are still admissible in our proceedings").

[31] Pet., p. 11.

[32] *Id.*

equitable argument.[33] Inasmuch as Mr. Hudak did not present any legal argument regarding this issue, it is not surprising that Yes Bay does not do so, either. Moreover, nothing in the board's decision suggests that it considered the legal question of whether the application of 8 AAC 45.082(c) to materials generated by a change of physicians that occurred prior to the effective date of the regulation is an impermissible retroactive application of the regulation. Absent any indication that this legal issue was raised before the board, or any legal argument to support it, we decline to consider it in the context of Mr. Hudak's petition for review.

ii. Interpretation of AS 23.30.095(a).

The first question that Mr. Hudak identifies as presented for our review concerns the proper interpretation of AS 23.30.095(a) with respect to "change" and "attending physician."[34] The proper interpretation of that statute is an important question of law. Mr. Hudak suggests there is a substantial ground for a difference of opinion regarding the board's interpretation, asserting that the board's interpretation is inconsistent with our cases.[35] He also asserts that it is inconsistent with other board panel decisions (*Wolde*, *Sawicki,* and *Clifton*).[36] He argues that to obtain a second opinion (by self-referral) and then return to the prior attending physician is not to make a change of attending physicians, within the meaning of AS 23.30.095(a).[37]

Yes Bay argues that the board's decision applied well-settled law, and that the prior board decisions that Mr. Hudak contends are in conflict were distinguished by the

---

[33] *See* Pet., p. 15.

[34] *See* Pet., pp. 11-13.

[35] *See* Pet., pp. 12-13.

[36] *See* Pet., pp. 6-7, *quoting Wolde v. Westward Seafoods*, p. 5, Alaska Workers' Comp. Bd. Dec. No. 00-0236 (November 21, 2000), *Sawicki v. Great Northwest, Inc.*, p. 7, Alaska Workers' Comp. Bd. Dec. No. 06-0029 (February 6, 2006), *Clifton, Jr. v. Swenson Construction*, Inc., at 7, Alaska Workers' Comp. Bd. Dec. No. 06-0311 (November 24, 2006).

[37] Pet., p. 13.

board, and, in any event, have no precedential value.[38] According to Yes Bay, the board's decision in this case "clarified the 'course of practice' regarding excessive changes of physicians" and its analysis was "firmly within the bounds" of existing law and precedent.[39] In particular, Yes Bay says, the interpretation of a "change" of attending physicians that Mr. Hudak would have the commission adopt would be contrary to 8 AAC 45.082(b)(2).[40]

To provide context for these arguments, we summarize the pertinent board findings. The board found that Mr. Hudak's initial attending physician was Dr. David Anderson, and that Mr. Hudak changed his attending physician in May 2007 when he obtained (on self-referral) a second opinion from Dr. Michael Nemanich.[41] The board found that Mr. Hudak again changed his attending physician from Dr. Nemanich to Dr. Anderson in July 2007.[42] The board found that Yes Bay waived any objection to the July 2007 change in the settlement agreement.[43] The board found that Mr. Hudak once again changed his attending physician from Dr. Anderson to Dr. Dardick in April 2010.[44] The board concluded that the April 2010 change was Mr. Hudak's second change of attending physician, and as such was unlawful, that is, not permitted by AS 23.30.095(a) and 8 AAC 45.082.[45]

As may be seen, the only purported changes of physician that are relevant to the board's ruling are from Dr. Anderson to Dr. Nemanich in May 2007, and from Dr. Anderson to Dr. Dardick in April 2010. Under the board's analysis, the former

---

[38] Resp., p. 5 and note 3.

[39] *See* Resp., pp. 5-6.

[40] *See* Resp., p. 6.

[41] *Hudak*, Bd. Dec. No. 15-0022, p. 3 (Nos. 3, 4).

[42] *Hudak*, Bd. Dec. No. 15-0022, p. 3 (No. 5).

[43] *Hudak*, Bd. Dec. No. 15-0022, p. 3 (No. 5).

[44] *Hudak*, Bd. Dec. No. 15-0022, p. 5, No. 19).

[45] *Hudak*, Bd. Dec. No. 15-0022, p. 5 (No. 19). *See* 8 AAC 45.082(c) (board may find a change "unlawful" if the change is made in violation of AS 23.30.095(a) or 8 AAC 45.082).

purported change was permitted and the latter was not, leading the board to conclude that all referrals from Dr. Dardick were also not permitted. Mr. Hudak's position is that the May 2007 purported change does not count as a change of attending physician, because it was only for the purpose of obtaining a second opinion.[46] A physician who only provides a second opinion is not an "attending physician" within the meaning of AS 23.30.095(a), Mr. Hudak says, asserting that we have held that the attending physician is the physician who provides all medical and related care.[47]

---

[46] This was not the only basis on which Mr. Hudak objected to the board's characterization of this as a change of attending physician. In addition, he argued that it should not be considered a change because Dr. Anderson and Dr. Nemanich are both affiliated with Minnesota Orthopaedic Specialists, P.A. *See Hudak*, Bd. Dec. No. 15-0022, at 2, 15; Pet., pp. 2, 7-8. Although he listed the board's ruling on this issue as one of the legal issues raised in the case, Mr. Hudak did not identify it as a question for review by the commission. *See* Pet., pp. 9 (No. 4), 11-15. Accordingly, we do not consider this issue to be before us in this petition.

Mr. Hudak also argues that the purported change from Dr. Nemanich back to Dr. Anderson was not a change within the meaning of AS 23.30.095(a), because it was a return to his prior attending physician. *See* Pet., p. 13 ("Returning to the attending physician after a 'second opinion' is not a second change in physicians."). However, as we have observed above, whether the board erred in characterizing Mr. Hudak's return to Dr. Anderson after obtaining a second opinion from Dr. Nemanich is immaterial. The board did not include that purported change in determining that the subsequent change from Dr. Anderson to Dr. Dardick was a second change of attending physician. The board counted only the purported change from Dr. Anderson to Dr. Nemanich.

[47] Pet., p. 12, *citing Guys With Tools, Ltd. v. Thurston*, at 20, Alaska Workers' Comp. App. Comm'n Dec. No. 062 (November 8, 2007) *quoting Witbeck v. Superstructures, Inc.*, at 26 note 142, Alaska Workers' Comp. App. Comm'n Dec. No. 014 (July 14, 2006).

We do not see that the board was presented with this argument.[48] Nothing in the decision addresses it. Moreover, Mr. Hudak's petition does not cite to any board decision holding that a consultation with a physician to obtain a second opinion does not constitute a change in attending physicians (absent a referral). This is not surprising in light of 8 AAC 45.082(b)(2), which provides that "an employee . . . designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury[.]" Given that an "attending physician" is defined in AS 23.30.395(3) to mean the medical professional "designated by the employee under AS 23.30.095(a) or (b)[,]" 8 AAC 45.082(b)(2) in effect provides the board's definition of the term "attending physician" for purposes of AS 23.30.095(a). Under the board's definition, the "attending physician" is not necessarily the "treating physician" as defined in 8 AAC 45.900(a)(12) ("the physician designated by the employee as the person responsible for coordinating the medical treatment.").

The board's distinction between an "attending physician" and a "treating physician" is reflected throughout 8 AAC 45.082(b), which addresses when an employee

---

[48] It appears that Mr. Hudak's primary argument to the board was that AS 23.30.095(a) does not apply under the circumstances of this case, based on three prior board decisions (*Wolde*, *Sawicki*, and *Clifton*). *See Hudak*, Bd. Dec. No. 15-0022, pp. 17-18. None of those cases discussed whether consulting a physician for a second opinion constitutes a change of attending physicians. Rather, the issue they address is whether an employee may substitute another physician without consent when medical benefits have been denied or controverted. Mr. Hudak's petition lists that as an issue raised by the board's decision, but does not identify it as a question for our review. *See* Pet., pp. 6-7, 10 (No. 10), 11-13. Consequently, we do not consider that issue to be before us. We note the cited board decisions all addressed a change of physicians occurring after a denial of medical benefits. *See Sawicki*, p. 7 ("the employer is simply denying all medical care"); *Clifton*, p. 7 ("an employee whose claim is controverted may seek treatment with a substitute physician"). Moreover, the first case, which was the genesis of the other two, involved an unjustified denial of benefits. *See Wolde*, p. 5 ("We find that an employer's unjustified refusal to pay . . . constitutes grounds to 'substitute' a new physician"). In this case, Yes Bay did not deny future medical benefits until 2013, long after the changes of physician had occurred. *See* Pet., p. 4. Moreover, Mr. Hudak has not identified anything about that denial as improper other than that Yes Bay is not entitled to raise the defense of AS 23.30.095(a), which is precisely the issue raised by his petition.

may "change treating physicians" for injuries occurring before July 1, 1988,[49] and how an employee "designates an attending physician" for injuries occurring on or after that date,[50] and which also specifies certain circumstances that are "not a change of an attending physician."[51] We cannot say, based on the plain language of 8 AAC 45.082(b)(2), that Mr. Hudak has presented a substantial ground for a difference of opinion as to whether a physician consulted for a second opinion (absent a referral and regarding an injury that occurred on or after July 1, 1988) is an attending physician.[52]

iii. Effect of Settlement Agreement.

The second question raised by Mr. Hudak is whether, under the settlement agreement, Yes Bay waived any objection to a change of physician based on Mr. Hudak's consultation with Dr. Nemanich and return to Dr. Anderson in 2007. Mr. Hudak asserts that the board's decision concerns "the meaning and intent of a prior

---

[49] 8 AAC 45.082(b)(1).

[50] 8 AAC 45.082(b)(2).

[51] 8 AAC 45.082(b)(4).

[52] Whether 8 AAC 45.082(b)(2) is consistent with AS 23.30.095(a) in this regard is a far different question, and one that Mr. Hudak did not raise in his petition for review. Assuming we have authority to address that issue, we decline to do so in the context of a petition for review when it has not been identified as a question for our review. We have *in dicta* discussed the term "attending physician" as it is used in AS 23.30.095(a), without reference to AS 23.30.395(3) or the board's regulations. *See supra*, note 47.

We note that Mr. Hudak did assert that the board's decision raises the issue of whether 8 AAC 45.082(c) is contrary to AS 23.30.095(a). *See* Pet., p. 10 (No. 8). He did not, however, identify that specific issue as a question for review, and, assuming we have authority to address it, we decline to do so in the context of a petition for review when it has not been presented as a question for our review. We have stated that, absent a regulation, "we cannot support the blanket exclusion of medical records solely because the reports were written by physicians chosen in excess of an allowable change." *Guys With Tools*, p. 27, App. Comm'n Dec. No. 062. We also stated, "We find no basis in statute for such a rule, and much in the statute that militates against its adoption." *Id.*, p. 19.

agreement[.]"[53] He does not, however, identify any important question of law as at issue. Rather, he simply argues that the board erred because under the terms of the settlement agreement, the employer could not have consented to the change from Dr. Nemanich to Dr. Anderson, while not also consenting to the prior change, from Dr. Anderson to Dr. Nemanich.[54]

The board found that Yes Bay had consented to the change from Dr. Nemanich to Dr. Anderson based not on the board's interpretation of the settlement agreement, but on the employer's concession that "it gave written consent to this change" in the settlement agreement.[55] Mr. Hudak's objection is that the board "does not explain why it determined there had been no consent to change from Dr. Anderson to Dr. Nemanich."[56] But the explanation is obvious: that change was, in the board's view, Mr. Hudak's first change and therefore no consent by the employer was required.

At issue is not whether Yes Bay consented to Mr. Hudak's change from Dr. Anderson to Dr. Nemanich, but whether the settlement agreement on its face bars Yes Bay from characterizing Mr. Hudak's 2007 consultation with Dr. Nemanich as a change of attending physician for purposes of a change of physician that occurred after the 2008 settlement agreement. The settlement agreement does not identify the characterization of Mr. Hudak's purported changes of physician as a matter in dispute.[57] The agreement is silent regarding that issue, and it expressly preserves Yes Bay's right to raise, without restriction, defenses available under the law with respect to future medical treatment. It is not self-evident that in foregoing an "excessive change"

---

53 *Id.*

54 *See* Pet., p. 14.

55 *Hudak*, Bd. Dec. No. 15-0022, p. 3 (No. 5). Yes Bay asserts that this purported change was "authorized in writing . . . in the 2008 Compromise and Release Agreement." Resp., p. 8. Contrary to Yes Bay's assertion, there is no reference to any changes of physician in the settlement agreement. The limited record before us contains no evidence of a concession by Yes Bay regarding this issue at any time prior to the hearing.

56 Pet., p. 14.

57 *See* Pet., Ex. D, pp. 8-9 ("Dispute" section of agreement).

defense, based on a prior change (from Dr. Nemanich to Dr. Anderson), for purposes of the 2008 settlement agreement with respect to past or current medical care, Yes Bay must also have intended to forego that same defense, based on a subsequent change (from Dr. Anderson to Dr. Dardick), with respect to future medical care. Accordingly we are not persuaded, on the limited record before us, that the board's ruling was contrary to the express terms of the settlement agreement. In any event, Mr. Hudak has not shown that its ruling on that issue raises an important question of law on which there is a substantial ground for disagreement.

iv. Application of Equitable Principles.

The third question raised by Mr. Hudak is whether the board had authority to use equitable principles to bar the employer from interposing an evidentiary objection based upon 8 AAC 45.082. Mr. Hudak asserts the board's decision to the contrary is inconsistent with a prior board decision (*Miller*).[58] It is manifestly unjust, Mr. Hudak contends, to exclude medical records based on a change of physicians that occurred at a time when no exclusionary rule existed.[59]

The board's decision on this issue does not conclude that it lacked authority to apply equitable principles to bar the employer's asserted defense. Rather, it concludes that equitable estoppel was inapplicable, because the settlement agreement expressly reserved all defenses, and Yes Bay did not make a representation that it would not assert a defense based on 8 AAC 45.082.[60] Mr. Hudak has not shown that the board's analysis of the defense of equitable estoppel was at odds with established law. The board also concluded that 8 AAC 45.195 did not permit it to waive application of 8 AAC 45.082, because, as stated in §195, "a waiver may not be employed merely to

---

[58] *See* Pet., pp. 8-9, *citing Miller v. NANA Regional Corporation*, Alaska Workers' Comp. Bd. Dec. No. 13-0169 (December 26, 2013).

[59] Pet., p. 15.

[60] *Hudak*, Bd. Dec. No. 15-0022, p. 18 (No. 6).

excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law."[61]

Mr. Hudak argues that it is manifestly unjust to exclude medical records based on a change of physician that occurred at a time when no exclusionary rule was in effect. However, as we have previously observed, he did not present the legal issue of whether the board erred in that respect for our consideration.[62] As for his equitable argument, based on a purported inconsistency with *Miller*, it suffices to observe that the board in that case specifically limited its decision to the "peculiar facts" of the case,[63] which it described as "extraordinarily unique[.]"[64] Among those facts were the absence of any evidence as to how the physician was selected and the absence of any medical records from the physician's consultation,[65] and on those facts (among others), as the board concluded, *Miller* is readily distinguished.[66]

(c) Departure from Usual Course.

Mr. Hudak asserts that "the Juneau panel's decision departed so far from prior decisions of the Board panels in Anchorage and Fairbanks that it now calls for the Commission to reconcile the conflicting opinions[.]"[67] Yes Bay contends that the board's decision "clearly addressed and distinguished"[68] those cases.

The cases cited by Mr. Hudak as inconsistent are three addressing the application of 8 AAC 45.082 to an employee who makes a change of physician after medical benefits have been denied or controverted (*Wolde*, *Sawicki*, and *Clifton*), and one addressing the circumstances under which an employee may be equitably barred

---

61 *Id.* (No. 7).

62 *See supra*, p. 7.

63 *Miller*, Bd. Dec. No. 13-0169, p. 15.

64 *Miller*, Bd. Dec. No. 13-0169, p. 14.

65 *Miller*, Bd. Dec. No. 13-0169, pp. 13-14.

66 *See Hudak*, Bd. Dec. No. 15-0022, p. 18.

67 Pet., p. 11.

68 Rep., p. 5.

from raising an "excessive change" defense, or deemed to have waived it pursuant to 8 AAC 45.195 (*Miller*).

Regarding the first group of cases, we have noted above that the petition did not present the issue addressed in those cases for our consideration and that the facts of this case are materially different than those in the other cases.[69] Regarding *Miller*, as explained above, it is readily distinguished.[70]

(d) Evade Review.

Mr. Hudak does not argue that the issues he has raised are likely to evade review if not addressed at this time. Yes Bay asserts that an appeal is likely, and thus the issues will not evade review.[71] It is apparent, we think, that the issues raised are not likely to evade review if not heard at this time: as Mr. Hudak points out, Yes Bay has already filed a petition to terminate future medical benefits based on the board's interlocutory ruling. Moreover, the issues are recurring and capable of review on appeal from a final decision.

5. Conclusion.

The petition adverts to a variety of interesting issues, but raises only three questions for our review. We are not persuaded that injustice will result if review of those questions is delayed until entry of a final decision. In that regard, we are particularly mindful that Mr. Hudak reportedly has alternative medical coverage, and only medical benefits are at issue. We are also not persuaded that there is a

---

[69] *See supra*, note 48. Prior to 1999, the board had a long standing and consistent policy of permitting an employee to substitute a new physician when the attending physician was either unwilling or unavailable to provide treatment. *See Bloom v. Tekton, Inc.*, 5 P.3d 235 (Alaska 2000). Assuming this same policy would apply in circumstances where the specific provisions of 8 AAC 45.082(c)(4) are inapplicable, the board did not find that Dr. Anderson was either unavailable or unwilling to provide treatment to Mr. Hudak in 2010. Rather, it found that Dr. Anderson had not discharged him from care. *See Hudak*, Bd. Dec. No. 15-0022, p. 15-16. Mr. Hudak did not identify this finding as an issue, or raise it as a question for our review. *See* Pet., pp. 9-10, 11-15.

[70] *See supra*, pp. 14-15.

[71] Resp., p. 5.

substantial ground for a difference of opinion regarding the specific legal questions that he has raised. Even if there were, furthermore, we do not believe that Mr. Hudak has shown that resolving those questions at this time will materially advance the ultimate determination of his claim, given that a petition to terminate all medical benefits is pending, and that the exclusion of the specific medical records at issue in this case will not necessarily deprive the board of an adequate record for a decision if it does not dismiss the claim. Lastly, the prior board decisions cited by Mr. Hudak are easily distinguished, and there is no indication that questions he has raised cannot be addressed on appeal. For these reasons, we denied the petition for review.

Date: *July 24, 2015* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Andrew M. Hemenway, Chair

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Memorandum Decision No. 214, issued in the matter of *Shawn D. Hudak vs. Pirate Airworks, Inc. and Liberty Mutual Insurance Company,* AWCAC Appeal No. 15-009, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 24, 2015.

Date: *July 24, 2015*

Signed
K. Morrison, Appeals Commission Clerk