# Alaska Workers' Compensation Appeals Commission

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| Shawn D. Hudak,<br>Petitioner, | MEMORANDUM DECISION ON PETITION FOR REVIEW |
| vs. | Decision No. 222 January 19, 2016 |
| Pirate Airworks, Inc. and Liberty Mutual Insurance Company,<br>Respondents. | AWCAC Appeal No. 15-009<br>AWCB Decision No. 15-0022<br>AWCB Case No. 200615619 |

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 issued 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, ordering Commission to explain reasons for denying the petition for review; Commission's Memorandum of Decision No. 214 filed July 24, 2015; Order directing Commission to accept interlocutory review issued September 25, 2015; jurisdiction returned to Commission effective September 28, 2015.

Commission proceedings: Shawn Hudak's Petition for Review Merits Brief filed November 20, 2015; Respondents' Supplemental Memorandum filed November 20, 2015; oral argument on petition for review held December 9, 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).[1] We denied the petition, and Mr. Hudak filed a petition for review of our decision in the Alaska Supreme Court. The court directed us to "accept interlocutory review and address the issues raised in Hudak's petition."[2] We provided an opportunity for the parties to submit supplemental briefs on the three issues raised by Mr. Hudak's petition for review to the commission, and heard oral argument. We conclude that the issues raised by Mr. Hudak for our consideration do not warrant reversal of the board's decision.

*2. Factual Background.*

The pertinent facts are set forth in our decision denying Mr. Hudak's petition for review. We repeat them here:

> Shawn Hudak injured his right shoulder in 2006 while employed by Yes Bay. He was treated by Dr. David Anderson in September 2006, and obtained (on self-referral) a second opinion from Dr. Michael Nemanich in May 2007. Mr. Hudak reinjured his shoulder and in July 2007 was treated again by Dr. Anderson. 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. On May 23, 2008, Mr. Hudak had surgery performed by Dr. Anderson.
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> On May 29, 2008, the parties filed a settlement agreement which resolved all disputes other than future medical treatment and related transportation costs. 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. Dr. Anderson treated Mr. Hudak again on March 3, 2010.
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> On April 27, 2010 (on self-referral), Mr. Hudak saw his family physician, Dr. Samuel Dardick, for a physical examination. Dr. Dardick, on

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[1] The caption in this case reflects the parties identified as respondents in the petition for review. The board's decision identifies Yes Bay as the employer. *See Hudak v. Pirate Airworks, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 214 at 2, note 2 (July 24, 2015) (footnotes omitted) (hereinafter, *Hudak*, App. Comm'n Dec. No. 214).

[2] Alaska Supreme Court Order No. 88 (June 16, 2015).

that occasion, treated Mr. Hudak for his work injury. He referred Mr. Hudak to Dr. Kirk Aadalen (an orthopedic surgeon) and Dr. Daniel Kurtti for evaluation of his continued right upper extremity pain. Those physicians subsequently referred Mr. Hudak to multiple other providers for evaluation and treatment of his work injury.

Following an employer's medical examination in July 2013, Yes Bay controverted the payment of additional medical benefits. In March 2014, Mr. Hudak filed a claim, requesting reinstatement of his medical benefits, and an independent medical examination. 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). The board granted the petition in a decision issued on February 24, 2015, and Mr. Hudak filed a petition for review.[3]

*3. Issues Presented For Review.*

In this decision we address the three issues raised for review by the commission in Mr. Hudak's petition for review:[4] (1)(a) whether obtaining a second opinion constitutes a "change of attending physicians" within the meaning of AS 23.30.095(a), and (b) whether returning to the prior attending physician after obtaining a second opinion constitutes a "change of attending physicians" within the meaning of

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[3] *Hudak*, App. Comm'n Dec. No. 214 at 2-4 (footnotes omitted).

[4] *See Hudak*, App. Comm'n Dec. No. 214 at 4-5. As we observed in our prior decision, Mr. Hudak's petition for review included a much broader list of issues raised by the board's decision. *Id.* at 4. We did not, in our prior decision, consider those issues which Mr. Hudak did not identify as presented for review by the commission. *See id.* at 4 (note 21), 10 (note 46), 11 (note 48), 12 (note 52), 16 (note 69). We noted, in addition, that our authority to address some of the issues in the case was unclear. *See id.* at 12 (note 52).

We do not read the supreme court's order as directing us to address in this decision any issues other than those which we had identified in our prior decision as having been raised for our review. We offered the parties the opportunity to broaden the scope of our review beyond those three issues, and neither party asked that we do so. Accordingly, consistent with our prior decision, our reading of the supreme court's order, and the parties' responses to our invitation, we address only the three issues that were raised for our review in Mr. Hudak's petition for review to the commission.

AS 23.30.095(a); (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; and (3) whether the board is precluded from applying equitable principles to avoid application of 8 AAC 45.082(c).

*4. Discussion.*

*i. Interpretation of AS 23.30.095(a).*

Mr. Hudak's petition for review to the commission argued that the board had misinterpreted AS 23.30.095(a) with respect to the terms "change" and "attending physician."[5] Put concisely, Mr. Hudak's argument to the commission was that an employee does not "change" the attending physician by making a one-time visit to another physician for a second opinion, because an "attending physician" within the meaning of AS 23.30.095(a) is the physician responsible for providing all medical care to the employee.[6]

We do not disagree that this is a reasonable interpretation of AS 23.30.095(a), consistent with our reading of that statute in isolation.[7] However, it is an interpretation that disregards 8 AAC 45.082(b)(2) and which is, in our view, inconsistent with the plain language of that regulation, read in conjunction with AS 23.30.395(3).[8] Regulations, insofar as they are consistent with an applicable statute and reasonably necessary to carry out its purposes, provide legally binding interpretations of statutory language.[9] In

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5 *See* Petition for Review (hereinafter, Pet.) at 6-7, 12-13.

6 *See* Pet. at 10. As we observed in our prior decision, it does not appear that Mr. Hudak made this argument to the board. *Hudak*, App. Comm'n Dec. No. 214 at 11; Shawn Hudak's Petition for Review Merits Brief (hereinafter, Hudak Supp. Mem.), Ex. 1.

7 *See Guys With Tools, Ltd. v. Thurston*, Alaska Workers' Comp. App. Comm'n Dec. No. 062 at 20 (November 8, 2007) (hereinafter, *Guys With Tools*); *Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 014 at 26, notes 141, 142, (July 14, 2006). As we noted in our prior decision, we did not, in those cases, consider AS 23.30.395(3) and 8 AAC 45.082(b)(2) in conjunction with AS 23.30.095(a). *See Hudak*, Comm'n Dec. No. 214 at 12, note 52.

8 *Hudak*, App. Comm'n Dec. No. 214 at 11-12.

9 *See* AS 44.62.020-.030.

interpreting AS 23.30.095(a) we cannot ignore a directly applicable regulation, and we see no way to reconcile 8 AAC 45.082(b)(2)'s provision that "an employee. . . designates an attending physician by getting . . . an opinion . . . from a physician for the injury" with Mr. Hudak's proposed interpretation of AS 23.30.095(a).[10] Indeed, it seems Mr. Hudak agrees with us that the regulation cannot be reconciled with his interpretation of the statute, inasmuch as he asserts, in his supplemental memorandum, that the regulation is "contrary to AS 23.30.095(a)[.]"[11]

Mr. Hudak did not ask us, in his petition for review to the commission, to opine on the validity of 8 AAC 45.082(b)(2). The issue raised in Mr. Hudak's petition for review was whether the board had erred in its interpretation of the statute. In light of the plain language of 8 AAC 45.082(b)(2), we are constrained to conclude that it did not, even though in our independent judgment (disregarding the regulation) we have not interpreted AS 23.30.095(a) as the regulation does.[12] We do not address the validity of the regulation because that issue was not raised for our consideration,[13] our authority to address it has not been addressed by the parties, and the department

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[10] We would, of course, interpret 8 AAC 45.082(b)(2) in a manner consistent with our independent judgment as to the meaning of AS 23.30.095(a) if that were possible.

[11] Hudak Supp. Mem. at 5.

[12] *See supra*, note 7.

[13] Similarly, we did not in our prior decision, and we do not now, address whether 8 AAC 45.082(c) is consistent with and reasonably necessary to carry out the purposes of AS 23.30.095(a). *See Hudak*, App. Comm'n Dec. No. 214 at 12, note 52. As we have stated, "We find no basis in the statute for such a rule [as set forth in 8 AAC 45.082(c)], and much in the statute that militates against its adoption." *Guys With Tools* at 19. We think this statement, coupled with our broader discussion in *Guys With Tools* of the board's prior *ad hoc* exclusionary rule, adequately expresses our view as to whether 8 AAC 45.082(c) is consistent with and reasonably necessary to carry out the purposes of AS 23.30.095(a) and other provisions of the Alaska Workers' Compensation Act. The board has chosen, in its characterization, to "overrule" our decision in *Guys With Tools* by adopting 8 AAC 45.082(c). *See Kessler v. Federal Express Corporation*, Alaska Workers' Comp. Bd. Dec. No. 15-0159 at 13 (December 11, 2015).

(which promulgated the regulation upon approval by the board) is not a participant in this proceeding.[14]

*iii. Effect of Settlement Agreement.*

We addressed this issue in our prior decision. We stated:

> . . . 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." 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.
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> . . . The settlement agreement does not identify the characterization of Mr. Hudak's purported changes of physician as a matter in dispute. 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" defense, based on a <u>prior</u> change (from Dr. Nemanich to Dr. Anderson), for purposes of the 2008 settlement agreement with respect to <u>past</u> <u>or</u> <u>current</u> medical care, Yes Bay must also have intended to forego that same defense, based on a <u>subsequent</u> change (from Dr. Anderson to Dr. Dardick), with respect to <u>future</u> medical care.[15]

Mr. Hudak's supplemental memorandum argues that the board "invoked the same stipulated facts . . . both to deny Hudak's claim against [Yes Bay] and to grant [Yes Bay's] claim against Hudak."[16] In effect, Mr. Hudak argues, "the Board found that Hudak was bound by the stipulated facts but [Yes Bay] was not."[17] In support of these arguments, Mr. Hudak asserts that the board disregarded evidence that Mr. Hudak had been referred to Dr. Anderson by the employer's nurse case manager, even though it

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[14] Assuming we have authority to opine on the validity of a regulation, as a matter of comity within the executive branch we are disinclined to do so absent the participation of the director of the Division of Workers' Compensation. In this case, the director was served with a copy of the Notice of Oral Argument on the petition for review, together with copies of the various pleadings filed with the commission and the Alaska Supreme Court, and was provided an opportunity to intervene in this matter pursuant to AS 23.30.127(a). The director did not file a notice of intervention.

[15] *Hudak*, App. Comm'n Dec. No. 214 at 13-14 (footnotes omitted).

[16] Hudak Supp. Mem. at 10.

[17] Hudak Supp. Mem. at 10.

"looked behind the stipulated facts to resurrect Hudak's one-time visit to Dr. Nemanich as a change in attending physician[.]"[18]

This argument requires some additional explication.[19] The board's decision simultaneously disposed of two petitions: Mr. Hudak's petition to exclude medical records generated by an employer's evaluating physician (Dr. Jahnjee) and Yes Bay's petition to exclude medical records generated by an employee's attending physician (Dr. Dardick).

Yes Bay's position before the board was that prior to the settlement agreement Mr. Hudak had twice changed his attending physician: first from Dr. Anderson to Dr. Nemanich, and then from Dr. Nemanich to Dr. Anderson. Yes Bay sought to exclude medical records generated by what it viewed as a third change of physicians (from Dr. Anderson to Dr. Dardick), which occurred after the settlement agreement.

Mr. Hudak's position before the board was that his consultation with Dr. Nemanich did not constitute a "change in attending physician" because Dr. Nemanich worked in the same clinic as Dr. Anderson and, as provided in 8 AAC 45.082(b)(2), "all physicians in the same clinic . . . are considered the employee's attending physician."[20] Alternatively, Mr. Hudak argued that even if the doctors were not in the same clinic, his treatment by Dr. Anderson after the consultation with Dr. Nemanich occurred upon referral by the employer's nurse case manager, and therefore was not a "change in attending physician" pursuant to 8 AAC 45.082(b)(4)(C).[21] Moreover, in his petition to exclude medical records generated by the employer's selected physician, Dr. Janhjee, Mr. Hudak argued that his visit with Dr. Anderson after Mr. Hudak had consulted with Dr. Nemanich should be

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[18] Hudak Supp. Mem. at 11.

[19] This argument is not precisely the same as he made in his petition for review, but is sufficiently related to his prior argument as to warrant our consideration.

[20] Hudak Supp. Mem., Ex. 1 at 17. *See Hudak*, Bd. Dec. No. 15-0022 at 2, 14 (No. 2), 15; *Hudak*, App. Comm'n Dec. No. 214 at 10, note 46.

[21] Hudak Supp. Mem., Ex. 1 at 17. *See Hudak*, Bd. Dec. No. 15-0022 at 2, 14 (No. 1), 15.

considered Yes Bay's initial selection of an employer's physician under AS 23.30.095(e) pursuant to 8 AAC 45.082(b)(2)(B)(i)-(iii) and 8 AAC 45.082(b)(3), such that Dr. Gannon was Yes Bay's first change of physicians, and Dr. Jahnjee was its second (and therefore "unlawful") change of physicians.[22]

With that context, we turn to Mr. Hudak's argument that the board's ruling on Mr. Hudak's petition was inconsistent with its ruling on Yes Bay's petition.[23] The basis for his argument is this: according to Mr. Hudak the board, in denying Mr. Hudak's petition, relied on the stipulated facts in the settlement agreement (by declining to characterize Dr. Anderson as the employer's physician), but in granting Yes Bay's petition "looked behind the stipulated facts" (by characterizing Mr. Hudak's consultation with Dr. Nemanich as a change in attending physician).[24]

We see nothing inconsistent in the board's treatment of the stipulated facts in the settlement agreement, for the simple reason that the settlement agreement did not characterize Mr. Hudak's visit with Dr. Nemanich one way or another: there is no

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[22] Hudak Supp. Mem., Ex. 1 at 20. *See Hudak*, Bd. Dec. No. 15-0022 at 13-14 ("Employee contends the insurer's nurse case manager referred Employee to Dr. Anderson in July 2007, making Dr. Anderson its first EME physician.").

An employer may select a physician under AS 23.30.095(e) to perform a medical examination. 8 AAC 45.082(b)(3) provides that an employer selects a physician by "having a physician . . . give an oral or written opinion or advice after examining the employee [or medical records]." 8 AAC 45.082(b)(2)(B)(i)-(iii) provides that an employee does not designate a physician as an attending physician if the employee "gets service" from a physician whose name was provided by the employer, whom the employer directed the employee to see, or whose appointment was arranged by the employer. The latter regulation describes circumstances that do not constitute a designation of attending physician under AS 23.30.095(a); it does not say those circumstances constitute an employer selection of a physician under AS 23.30.095(e).

[23] Mr. Hudak's additional argument, that the board's decision "is inconsistent with Hudak's express reservation of the right to claim 'future medical benefits'", is frivolous. *See* Hudak Supp. Mem. at 9. Mr. Hudak reserved the right to claim those benefits, but Yes Bay reserved the right to assert defenses "under the Alaska Workers' Compensation Act, case law, and the board's regulations" to such a claim. Pet., Ex. D at 3.

[24] Hudak Supp. Mem. at 11 ("the board looked behind the stipulated facts to resurrect Hudak's one-time visit to Dr. Nemanich as a change in attending physician").

"stipulated fact" regarding that consultation. The parties stipulated that Dr. Anderson was Mr. Hudak's attending physician. Mr. Hudak in effect asks that we construe the settlement agreement as a stipulation that Dr. Anderson was Mr. Hudak's only attending physician prior to the execution of the settlement agreement and, for this reason, that we construe the settlement agreement as a waiver of an "excessive changes" defense based on his consultation with Dr. Nemanich.[25] But, as we have explained, in the absence of any reference to Dr. Nemanich, or to the status of any physician as a matter in dispute, we do not see that the waiver of an "excessive changes" defense for purposes of past medical treatment by Dr. Anderson would necessarily also waive an "excessive changes" defense for purposes of future medical treatment by Dr. Dardick.[26]

Mr. Hudak's supplemental memorandum also raises several arguments based on rules of contract interpretation, none of which were presented to the board,[27] and only one of which was briefly referred to in his petition for review to the commission.[28] Because they were not raised before the board or in his petition for review, we do not consider them in any depth here. We will, however, briefly comment on two of his arguments, in the event that they are raised before the board in further proceedings.

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[25] *See* Hudak Supp. Mem. at 9 ("By characterizing Dr. Anderson as Hudak's attending and treating physician in the agreement and failing to mention Dr. Nemanich, [Yes Bay] waived any claim that the first two changes in attending physicians [*i.e.*, from Dr. Anderson to Dr. Nemanich, and then from Dr. Nemanich to Dr. Anderson] occurred in 2007.").

[26] *See supra*, p. 6; *Hudak,* App. Comm'n Dec. No. 214 at 13-14. In referring to an "excessive changes" defense, we do not mean to suggest that the exclusionary rule created by 8 AAC 45.082(c) constitutes a defense to a claim for medical benefits. 8 AAC 45.082(c) also provides that the board has authority to deny payment after an excessive change, but does not require that it do so. *Id.*

[27] *See* Hudak Supp. Mem., Ex. 1.

[28] *See* Pet. at 13 ("The Compromise and Release Agreement must be construed against the employer who authored the agreement.", p. 14 ("Clearly, the agreement when read in the light most favorably to the non authoring party, Hudak, waived any 'change in attending physician' defense").

We turn first to Mr. Hudak's argument that the board's interpretation of the settlement agreement was contrary to the parties' reasonable expectations.[29] At the time of the settlement agreement there was no exclusionary rule in effect, and thus the parties did not need to address Dr. Nemanich's status as an attending physician, or to characterize any particular visit to a physician as a change in attending physician. Both parties reasonably expected that no exclusionary rule would be applied, based on applicable law. But in interpreting the settlement agreement the pertinent question is, what were the parties' reasonable expectations based on the settlement agreement?[30]

The agreement provides that it is "not to be construed as a waiver of any future defenses under the Alaska Workers' Compensation Act, case law, and the board's regulations[.]"[31] The reference to "future defenses" appears to reserve the right to assert defenses to a non-settled claim based on future changes in the law. This does not mean that a non-settled claim is governed by a change in the law, since in general the law in effect on the date of injury governs an employee's right to compensation.[32] But neither does it mean that a future dispute regarding an employee's right to compensation will be adjudicated under the evidentiary rules in effect at the time of the settlement agreement, since in general a claim is adjudicated under the rules in effect at the time the claim is adjudicated.[33] Accordingly we cannot say that the board's interpretation is contrary to the parties' reasonable expectations based on the language of the settlement agreement.

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[29] Hudak Supp. Mem. at 8, 10.

[30] *See*, *e.g.*, *City of Kenai v. Watson*, Alaska Workers' Comp. App. Comm'n Dec. No. 127 at 24 (January 25, 2010) (hereinafter, *Watson*), quoting *Craig Taylor Equip. Co. v. Pettibone Corp.*, 659 P.2d 594, 597 (Alaska 1983) ("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.'").

[31] Pet., Ex. D at 3.

[32] *See*, *e.g.*, *Louie v. BP Exploration (Alaska), Inc.*, 327 P.3d 204, 209 (Alaska 2014).

[33] *See*, *e.g.*, *Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947, 948-949 (Alaska 1989).

Our view as to the parties' reasonable expectations is based on the language of the settlement agreement in isolation. The interpretation of a settlement agreement, to the extent that it is based on undisputed facts, presents a matter of law to which we apply our independent judgment.[34] However, when the express terms of a settlement agreement are subject to interpretation, extrinsic evidence of the parties' reasonable expectations may be introduced.[35] In this case, Mr. Hudak did not argue to the board that the settlement agreement should be interpreted as a waiver of an "excessive changes" defense with respect to future medical treatment by an attending physician other than Dr. Anderson, or, more specifically, that the parties' reasonable expectation was that any future dispute regarding medical claims would be adjudicated under the evidentiary rules in effect at the time of the agreement.[36] Accordingly, neither party introduced any extrinsic evidence and the board made no factual findings regarding the parties' intentions and reasonable expectations.

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[34] *Reeder v. Municipality of Anchorage*, Alaska Worker's Comp. App. Comm'n Dec. No. 116 at 7 (September 28, 2009).

[35] *See*, *e.g.*, *Watson*, App. Comm'n Dec. No. 127 at 24.

[36] Yes Bay states that Mr. Hudak "never asserted any argument about the scope or intent of the Compromise and Relase Agreement or its implications at hearing before the Board." Respondents' Supplemental Memorandum (hereinafter, Yes Bay Supp. Mem.) at 10. We note that, consistent with Yes Bay's statement, Mr. Hudak's hearing brief did not assert that the settlement agreement should be interpreted as a waiver of any "excessive changes" defense. *See Hudak* Supp. Mem., Ex. 1.

The board's decision identified seven arguments made by Mr. Hudak in response to Yes Bay's petition. *Hudak*, Bd. Dec. No. 15-0022 at 2, 14. One was that Yes Bay had waived (or was equitably estopped) to assert an "excessive changes" defense. *Id*. The board did not characterize his argument as being that the settlement agreement should be interpreted as waiving the defense. *Id*. The board did observe, however, that Mr. Hudak's argument was contrary to the express retention of defenses in the settlement agreement. *Id.* at 18 (No. 6).

Second, we turn to Mr. Hudak's argument that we should interpret the agreement in a manner favorable to him, because it was drafted by Yes Bay.[37] This rule applies only when there is no other means of determining the parties' reasonable expectations.[38] Moreover, the record does not establish that the settlement agreement was unilaterally drafted by Yes Bay, rather than the product of bilateral negotiations between equally-situated parties, both represented by counsel.[39] For these reasons, Mr. Hudak has not shown that the board erred in its application of this rule under the facts of this case.

*iii. Application of Equitable Principles.*

Mr. Hudak's petition for review argued that the board had improperly concluded that it lacked authority to rely on equitable principles to bar the employer from interposing an evidentiary objection based upon 8 AAC 45.082.[40] As we explained in our prior decision that argument is not a correct characterization of the board's decision. The board recognized that equitable principles could be applied; however, it concluded that Mr. Hudak had not established grounds for relying upon them.[41]

Mr. Hudak's supplemental memorandum raises an issue that the petition for review did not: whether the evidence before the board was sufficient to support the board's findings with respect to equitable estoppel. Because Mr. Hudak did not make

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[37] Hudak Supp. Mem. at 10 ("if the agreement is ambiguous, ambiguities must be construed against the drafter[.]"). *See also id.* at 7, note 29, citing *Uncle Joe's Inc. v. L. M. Berry and Co.*, 156 P.3d 1113, 1118 (Alaska 2007). The general rule is a standard tenet of contract law. Its application in *Uncle Joe's Inc.* was specific to the context of that case, namely, a public utility tariff rate. *See* 156 P.3d at 1118, note 15.

[38] *Zamarello v. Reges*, 321 P.3d 387, 392 (Alaska 2014).

[39] *See Little Susitna Construction Co., Inc. v. Soil Processing, Inc.*, 944 P.2d 20, 25, note 7 (Alaska 1997) ("LSC's proposed rule . . . applies only to contracts of adhesion where the parties are 'of such disproportionate bargaining power that the insured could not have negotiated for variations in the terms of the standard policy'. . . Here, the lease agreement was negotiated at arm's length between equally situated parties.") (citations omitted).

[40] Pet. at 14-15.

[41] *Hudak*, App. Comm'n Dec. No. 214 at 14; *Hudak*, Bd. Dec. No. 15-0022 at 18 (No. 6).

this argument in his petition for review, our prior decision did not address the sufficiency of the evidence to support the board's findings, other than to observe that Mr. Hudak had not shown that the board erred in this aspect of its ruling.[42]

The argument Mr. Hudak makes in his supplemental memorandum is that there is sufficient evidence in the record to support findings that (1) (a) neglecting to mention Dr. Nemanich in the settlement agreement and (b) making payments for treatment by Dr. Dardick constitutes an implied waiver (representation) by Yes Bay of an "excessive changes" defense to treatment by Dr. Dardick,[43] (2) Mr. Hudak reasonably relied on that representation when he failed to obtain evidence that would support his assertions that (a) Dr. Anderson and Dr. Nemanich or Dr. Dardick worked in the same clinic, and that (b) Dr. Anderson discharged Mr. Hudak as a patient or referred him to Dr. Dardick,[44] and (3) Mr. Hudak's ability to obtain such evidence was prejudiced due to Yes Bay's delayed assertion of an "excessive changes" defense.[45]

To establish an implied waiver, a party must show "direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel[.]"[46] Neglect to insist upon a legal right, such as the right created by 8 AAC 45.082(c) to exclude medical records or seek to avoid payment for otherwise-compensable medical costs based an employee's excessive changes of physicians, may result in an implied waiver if the neglect "is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal

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[42] *See Hudak*, App. Comm'n Dec. No. 214 at 14 ("Mr. Hudak has not shown that the board's analysis of the defense of equitable estoppel was at odds with established law.").

[43] Hudak Supp. Mem. at 13.

[44] *See* Hudak Supp. Mem. at 13-14.

[45] Hudak Supp. Mem. at 13-14.

[46] *See, e.g.*, *Kinley's Restaurant & Bar v. Gurnett*, Alaska Workers' Comp. App. Comm'n Dec. No. 121 at 25, note 67 (November 24, 2009), quoting *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978).

right in question."[47] We have stated that "[e]quitable application of implied waiver must be supported by findings of fact of specific instances of direct, unequivocal conduct that demonstrate a clear intent to abandon a known right."[48]

The only instances of conduct that Mr. Hudak has identified relating to implied waiver are the settlement agreement and Yes Bay's failure to assert an "excessive changes" defense when presented with medical bills from Dr. Dardick. As to the first point, as we have previously explained, the language of the settlement agreement does not support a finding that Yes Bay intended to abandon an "excessive changes" defense with respect to future medical claims.[49] With respect to the second point, the payment of medical bills upon presentment does not constitute a waiver of defenses.[50] There is no merit to Mr. Hudak's assertion that these two facts, taken together, establish an implied waiver of an "excessive changes" defense.

We observe, in any event, that while Mr. Hudak asserts that Yes Bay's delayed assertion of an "excessive changes" defense prejudiced his ability to show that no excessive change occurred, he does not state <u>how</u> his ability to fully develop the record was impaired.[51] Thus, even if it were true that there was an implied waiver, Mr. Hudak

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[47] *Alaska Airlines v. Nickerson*, Alaska Workers' Comp. App. Comm'n Dec. No. 21 at 16 (October 19, 2006) (citations omitted).

[48] *Northstar Earthmovers v. Sanders*, Alaska Workers' Comp. App. Comm'n Dec. No. 46 at 17 (June 7, 2007), citing *Wausau Ins. Companies v. Van Biene*, 847 P.2d 584, 588 (Alaska 1993).

[49] *See supra*, at 6-12.

[50] *Childs v. Copper Valley Elec. Association*, 860 P.2d 1184, 1190 (Alaska 1993). *See generally*, *S & W Radiator Shop v. Flynn*, Alaska Workers' Comp. App. Comm'n Dec. No. 016 at 18-21 (August 4, 2006). *See also id.*, at 20, note 93 ("The right combination of facts and circumstances may establish an equitable bar against the employer denying coverage, but the question here is whether payment alone constitutes acceptance of liability.").

[51] To a large extent, Mr. Hudak seems to be asking that we reweigh the evidence. *See* Hudak Supp. Mem. at 14 (objecting that the board "chose to give greater weigh" to certain evidence, "relied on" other evidence, and based its decision on the absence of a chart note in disregard of "common experience"). This is not allowed. *See* AS 23.30.122, -.129(b).

has not established the board erred in declining to apply the doctrine of equitable estoppel to bar Yes Bay from raising an "excessive changes" defense.

*5. Conclusion.*

Mr. Hudak's petition for review raised three issues for our review. We considered the arguments he made in his petition for review with respect to those issues in our prior decision. The additional arguments he made for the first time in his supplemental memorandum are either without merit, or are premature in the context of interlocutory review, because the board was not presented with those arguments.[52] On the current record, Mr. Hudak has not shown grounds for reversing the board's decision with respect to the issues raised in his petition for review.

Date: *January 19, 2016* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

*Signed*
James N. Rhodes, Appeals Commissioner

*Signed*
S. T. Hagedorn, Appeals Commissioner

*Signed*
Andrew M. Hemenway, Chair

This is a not a final Commission decision or order on the merits of an appeal from a final board decision or order on a claim. This is a non-final order of the Commission on the merits of a petition for review of a non-final board decision. The effect of this order is to allow the board to proceed toward a hearing on the merits of the employee's workers' compensation claim. The petitioner may still appeal a final board decision when it is reached on the claim.

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[52] Because this matter is before us on a petition for review of an interlocutory decision, we do not dictate the course and scope of any further proceedings before the board.

This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted (started).[53] For the date of distribution, see the box below.

PETITION FOR REVIEW

A party may file a petition for review of this order with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this order's[54] distribution.[55]

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

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

RECONSIDERATION

This is a not a final decision issued under AS 23.30.128(e). It is not an appealable decision, so reconsideration is not available.

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[53] A party has 10 days after the distribution of a non-final decision or order of the Commission to petition for review to the Alaska Supreme Court. If this non-final decision or order was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time after Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

[54] *See* Appellate Rule 403.

[55] *See* n. 53, *supra*.

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Memorandum Decision on Petition for Review No. 222 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 January 19, 2016.

Date: *January 21, 2016*

*Signed*

K. Morrison, Appeals Commission Clerk