

**Case:** *Northstar Earthmovers and American Interstate Insurance vs. Marty J. Sanders, Anchorage Neurological Associates, and John P. Shannon, D.C.*, Alaska Workers' Comp. App. Comm'n Dec. No. 046 (June 7, 2007)

**Facts:** Employer and employee entered into a partial compromise and release agreement on September 1, 2005. Among other terms, the agreement specified that: "The parties agree that the employee's entitlement, if any, to future medical/transportation benefits related to the low back under the Alaska Workers' Compensation Act is not waived by the terms of this agreement, and that the right of the employer to contest liability for future medical benefits is also not waived by the terms of this agreement." After the agreement was signed, the employee submitted a claim for medical benefits for his lower back. The employer controverted in December 2005 based on an April 2005 employer medical report that the parties knew about before the settlement agreement was signed. The employee argued that the settlement agreement was invalid and entered into in bad faith because employer impliedly disavowed the April 2005 medical report when it entered into the agreement, and thus, it could not controvert medical benefits for the lower back unless it relied on evidence developed after the signing of the settlement agreement.

The board did not decide whether the settlement agreement was entered into in good faith. Instead, the board determined that the December 16, 2005, controversion was "not in good faith and is invalid" because "the employer . . . knowingly led the employee to believe that while the employer retained the right to challenge future medical bills that it would do so by exercising its rights under the Act, e.g.: exercising its right to an EME." The employer, through the conduct of its insurer's adjuster, Erickson, the board found, "indicated a purpose to abandon or waive any legal right to rely solely upon the records in the employers' possession prior to the approval of the C&R." The board also assessed a penalty for untimely controversion because no controversion for the lower back was issued immediately after the April 2005 exam. The employer appealed. (The employee did not participate in the appeal.)

**Applicable law:** A compromise and release settlement of workers' compensation benefits is interpreted in the same manner as any other contract. While broad language in settlement agreements implies that all claims are settled, if the parties specifically state that a claim is not settled, it remains contested. *Williams v. Abood*, 53 P.3d 134, 144 (Alaska 2002)(citations omitted).

"As one key element of estoppel is communication of a position, it follows that neglect to insist upon a right only results in an estoppel, or an implied waiver, when 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 right in question." *Wausau Ins. Companies v. Van Biene*, 847 P.2d 584, 589 (Alaska 1993). Equitable 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. *Id.* at 588. An implied waiver may also occur "where neglect to insist upon the right results in prejudice to another party." *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978)(citations omitted).

AS 23.30.155(e) and (o) on penalties and referrals to the Division of Insurance.

**Issues:** Did the settlement prevent the employer from controverting Sanders' claim relying on the April 2005 report? Did employer waive its right to controvert based on the April 2005 report? Was controversion untimely such that penalties should be imposed?

**Holding/analysis:** First, settlement, by its plain terms, did not place any restrictions or limits on the employer's ability to contest medical benefits by requiring the employer to obtain a new employer medical exam. "Because the parties excluded the entire subject of medical benefits for Sanders's lumbar spine from the settlement, no settlement of those benefits occurred." Dec. No. 046 at 10. Second, by its terms, as well as Sanders's sworn statement, the entire agreement was contained in the document. The settlement stated: "Compromise and Release contains the entire agreement among the parties and constitutes the full and complete settlement of all claims, whether actual or potential, described above." Sanders's affidavit stated: "No representations or promises have been made to me by the employer, carrier, or their agents in this matter which have not been set forth in this document." *Id.* at 11. Third, the commission carefully reviewed the hearing transcript and record and found no evidence to support the board's finding that adjuster Erickson knowingly led the employee to believe that if the employer challenged future medical benefits it would do so by seeking an employer medical evaluation, rather than relying on reports in the file. The commission observed that attorneys' arguments are not evidence. Lastly, Sanders testified he knew "medicals" were left open under the settlement but there was no testimony from him about what he believed this provision meant. Therefore, no evidence supported the board's finding that employee entered the settlement agreement with the understanding that the employer would not controvert benefits based solely on reports already in the record.

On the implied waiver issue, the commission did not find the evidence of "direct, unequivocal conduct" by Erickson demonstrating that he intended to waive the employer's statutory rights. There was no evidence that Erickson ever spoke with Sanders or his attorney in the relevant time period (from the date the settlement was approved, September 1, 2005, to the time the controversion was issued, December 16, 2005), much less a communication that the employer was waiving its rights preserved in the settlement agreement. "The only affirmative conduct elicited in the course of the hearing is that Erickson approved a settlement with Sanders, excluding the issue of medical care for Sanders's lower back, even though he had medical evidence in his favor that would support a controversion of such medical benefits. The question is whether this is sufficiently direct and unequivocal conduct that would communicate a clear intent to abandon a known right. We hold as a matter of law that it is not." *Id.* at 18. In addition there was no evidence of reliance by Sanders, nor any evidence that Sanders relied "to his detriment" as he received \$30,000 in settlement and could still file claims for medical benefits for his lower back even after the settlement.

On the penalties for untimely controversion, the commission concluded the board erred. "Failure to controvert benefits when no benefits are due, even if the employer has a

valid basis to controvert, does not subject the employer to penalty." *Id.* at 19. Moreover, controversion was valid as it was based on reliable medical evidence and employer retained its rights to controvert based on the April 2005 report.