ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

JEREMY EICHENBERGER, Employee, Applicant v. ALASKA ABATEMENT CORP., Employer, and AMERICAN HOME ASSURANCE CO., Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 200721462 AWCB Decision No. 13-0090 Filed with AWCB Anchorage, Alaska on August 1, 2013

Jeremy Eichenberger's October 10, 2012 claim for stipend and travel costs was heard June 26, 2013 in Anchorage, Alaska. The hearing date was selected at the April 17, 2013 prehearing conference. Mr. Eichenberger (Employee) appeared and testified. Attorney Aaron Sandone represented Alaska Abatement Corp. (Employer) and American Home Insurance Company, insurer. The record closed on June 26, 2013 at the conclusion of the hearing.

ISSUES

Employee contends that he is entitled to a medical expense consisting of a stipend during the time he completed a medical rehabilitation program. He also contends he should be reimbursed the cost of two airplane tickets because the travel was necessitated by his worker's compensation case. Employer contends that Employee waived any claim for the stipend in a compromise and release (C&R) agreement and that the travel was unrelated to Employee's case.

1. *Is employee entitled to a stipend while completing rehabilitation?*
2. *Is employee entitled to reimbursement for his travel costs?*

FINDINGS OF FACT

The following findings of fact and factual conclusions are established by a preponderance of the evidence:

1. Employee worked for Employer doing demolition work. On December 28, 2007, while pulling out carpet, he fell injuring his lower back. (Report of Injury, January 30, 2008; Claim, October 10, 2012).
2. On March 27, 2008, Employer controverted all benefits based on an employer's medical evaluation that concluded the work injury was not the cause of Employee's disability. (Controversion Notice, March 25, 2008).
3. In September 2008, Employee flew to Indiana to live with his sister. He explained he was unable to work and, because of the controversion, could not afford to continue living in Alaska. He did not travel to Indiana for medical treatment related to the work injury. (Employee). Employee also had a fiancé living in Indiana at the time. (Employee Deposition, 126-127).
4. While living in Indiana, Employee worked for Sizemore Construction from November 2008 to June 2009. (Dry Out Systems of Alaska, Application for Employment, September 7, 2009).
5. Employee flew back to Alaska in June 2009. (Employee).
6. On January 29, 2010, Employee filed a claim with the Alaska Department of Labor, Wage and Hour Administration against King Cost Metals. In the claim, Employee stated he was due wages from June 7, 2009 through June 30, 2009 plus $1,350.00 for "travel back home to take this job." Employee swore the contents of the claim were true. (Wage and Hour Claim, January 29, 2010).
7. On March 3, 2010, Employee filed the first of several workers' compensation claims relating to the December 27, 2007 work injury. Employee sought temporary total disability (TTD) benefits, permanent partial impairment (PPI) benefits, unspecified medical and transportation costs, reemployment benefits, interest, and penalty for an unfair or frivolous controversion. (Claim, March 3, 2010; Record).
8. Employer took Employee's deposition on July 8, 2010. (Deposition Transcript, July 8, 2010).

9. After returning to Alaska, Employee first sought medical treatment for his back on August 21, 2010. (Health Status Report, August 21, 2010).
10. On June 28, 2011, J. Michael James, M.D., prescribed the BEAR program, a work-hardening program, for Employee. (Alaska Spine Institute, Visit Note, June 28, 2011). It is unclear when Employee completed the BEAR program, but he was still in the program on October 26, 2012 and had completed 20 sessions at that time. (Alaska Spine Institute, Visit Note, October 26, 2012).
11. On July 28, 2011, Employee filed a second claim seeking TTD from December 28, 2007 through July 23, 2011, PPI, reemployment benefits, penalty and interest. It did not include medical or transportation costs, and did not indicate that it was an amendment to Employee's March 3, 2010 claim. (Claim, July 23, 2011).
12. On August 31, 2011, Employee filed a third claim, which amended his July 23, 2011 claim. Employee sought TTD from December 28, 2007 through August 24, 2011, PPI, transportation costs of "1500.00 to move back from IN," reemployment benefits, penalty, interest, unfair or frivolous controversion, and attorney fees and costs. (Claim, August 24, 2011).
13. On September 22, 2011, Employee filed a fourth claim seeking only transportation costs for "180 miles at 55¢ per." The claim did not state it was an amendment of an earlier claim. (Claim, September 17, 2011).
14. On February 7, 2012, Employee and Employer filed a C&R agreement. Employee was represented by an attorney at that time. Under the agreement, Employee received $70,000.00 "in full and final settlement" of past and future "1) claims for any and all kinds of disability benefits including temporary partial, temporary total, permanent partial and permanent total; 2) permanent partial impairment; 3) compensation rate adjustment; 4) interest; 5) penalties; and 6) vocational rehabilitation/reemployment and .041(k) stipend benefits." Employer remained responsible for "medical benefits and related travel expenses, which although incurred in the future, are attributable" to the work injury. (Compromise and Release Agreement, February 7, 2012). The agreement was drafted by Employer. (Observation).
15. On July 9, 2012, Employee's attorney withdrew. (Notice of Withdrawal, July 9, 2012).
16. On October 10, 2012, Employee filed a claim seeking permanent partial impairment (PPI) benefits, medical costs, and transportation costs. (Claim, October 10, 2012). At the April 17, 2013 prehearing conference, Employee withdrew his claim for PPI benefits. He explained the

medical benefits he was seeking consisted of a stipend of approximately $3,800.00 while he attended the BEAR program. The travel benefits were for the cost of his plane tickets to and from Indiana. (Prehearing Conference Summary, April 17, 2013).

17. At the June 26, 2013 hearing, which was the first hearing in the case, Employee clarified that he was not seeking to set aside the February 7, 2012 C&R. He maintained the benefits he was seeking were not addressed in that agreement. He testified that he believed Employer should pay for his travel to Indiana because he would not have moved but for the fact he could not work and Employer had controverted his workers' compensation benefits. He testified he moved back to Alaska to pursue his workers' compensation claim. He further testified that the BEAR program was so intensive that he could not work while participating in the program and a doctor had told him a stipend was available. (Record; Employee).
18. At hearing, Employer acknowledged the C&R did not preclude a claim for past medical transportation. (Employer hearing representation).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or

> the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

> **AS 23.30.012. Agreements in regard to claims.** (a) At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter, but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose. Except as provided in (b) of this section, an agreement filed with the division discharges the liability of the employer for the compensation, notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245, and is enforceable as a compensation order.

A settlement agreement is a contract. *Reeder v. Municipality of Anchorage*, AWCAC Decision No. 116 (September. 28, 2009). Under *Craig Taylor Equipment v. Pettibone Corp*., 659 P.2d 594, 597 (Alaska 1983), contracts must be interpreted "so as to give effect to the reasonable expectations of the parties," as expressed by the contract language. In *Lambert v. Alaska Corporation*, AWCB Decision No. 93-0168 (July 1, 1993), the Board held that C&Rs should be interpreted to give effect to the reasonable expectations of the parties and that ambiguous C&Rs should be construed against the interests of the party that drafted the agreement.

> **AS 23.30.120 Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter; . . . .

> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Carter*, 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

Application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. *See, e.g., Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). Medical evidence may be needed to attach the presumption of compensability in a complex medical case. *Burgess Constr. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). However, an employee "need not present substantial evidence that his or her employment was a substantial cause of his disability." *Fox v. Alascom, Inc.*, 718 P.2d 977, 984 (Alaska 1986) "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

If the employee establishes the preliminary link, then "if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the [need for medical treatment], etc., the presumption is rebutted." *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011) at 7. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fireman's Fund Am. Ins. Companies v. Gomes*, 544 P.2d 1013, 1015 (Alaska 1976). The determination of whether evidence rises to the level of substantial is a legal question. *Id*. Because the employer's evidence is considered by itself and not weighed at this step, credibility is not examined at this point. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

If the presumption is raised and not rebutted, the claimant need produce no further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Runstrom* at 8.

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g.*, *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005).

> **AS 23.30.185. Compensation for temporary total disability.**
> In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

> **AS 23.30.395. Definitions.**
> In this chapter,
> . . . .
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> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

> **8 AAC 45.084. Medical travel expenses**,
> (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

(2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and

8 AAC 45.180. Costs and attorney's fees

. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:

. . . .

(5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;

. . . .

(13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;

ANALYSIS

Employee is not asking that the February 7, 2012 C&R be set aside, but contends the benefits he is seeking are not addressed by the agreement. The first question becomes whether the C&R precludes the specific benefits. The C&R is interpreted pursuant to *Craig Taylor*, and *Lambert*. If the C&R does not preclude the benefit, the second question is whether Employee is entitled to the benefit under the Act. If so, the normal presumption analysis applies.

1. Is employee entitled to a stipend while completing rehabilitation?

Although Employee claims the stipend is a medical benefit, it is not, it is a disability benefit. "Disability" is defined in AS 23.30.395 (16) as the incapacity to earn wages because of injury. As Employee's testimony made clear, he seeks the stipend because he was unable to work while participating in the BEAR program. The stipend was not for medical treatment, but to replace the wages Employee was unable to earn while participating in the program.

The C&R clearly states it was in full and final settlement of "any and all kinds of disability benefits." It is not ambiguous, and the language reflects the parties' reasonable expectations that all disability benefits were settled. Because Employee waived disability benefits in the C&R, his claim for a stipend is precluded, and, to that extent, his claim will be denied.

2. Is employee entitled to reimbursement for his travel costs?

Employer concedes the C&R does not preclude a claim for reimbursement of past medical travel expenses. As a result, the question becomes whether Employee is entitled to reimbursement of the travel costs under the Act, a question to which the presumption analysis applies.

The Act does not require an employer to pay for, or to reimburse an employee for, every expense an employee may incur as a consequence of a work injury. Under the Act and regulations, an employer may only be required to pay travel expenses when the travel is for medical treatment (8 AAC 45.084), or, if the employee prevails on his or her claim, travel to attend a deposition (AAC 45.180 (5)), or to attend a hearing 8 AAC 45.180 (13).

In determining whether the presumption is met, credibility is not considered nor is the evidence weighed against competing evidence. To attach the presumption, Employee needed only produce "some," or "minimal," evidence his travel was for one of those reasons. He did not do so.

However, assuming Employee had attached the presumption, Employer could rebut it through substantial evidence Employee's travel was for reasons other than those which would entitle him to reimbursement. Again, credibility is not considered at this stage, nor is the evidence weighed against competing evidence. Employer successfully rebutted the presumption through Employee's testimony he did not travel to Indiana for medical treatment, as well as the fact that Employee's deposition did not take place until over a year after Employee returned to Alaska, and the only hearing in the case occurred four years after Employee's return.

Because Employer would have successfully rebutted the presumption, Employee would have had to prove his entitlement to the travel expenses by a preponderance of the evidence. He did not do so.

He testified he did not travel to Indiana for medical treatment, and the first medical record for treatment relating to the work injury after Employee returned to Alaska is dated August 21, 2010, well over a year after his return. His travel was not for medical treatment.

Because he did not file a claim until March 3, 2010, about nine month after his return from Indiana, his travel could not have been for a deposition or hearing, neither of which could occur prior to the filing of his claim. Further, Employer offered substantial evidence Employee's travel was for other reasons. Employee's fiancé lived in Indiana, and he worked there from shortly after his arrival until his return to Alaska. Employee's sworn statement in his wage and hour claim that he returned to Alaska for a job at King Cost Metals, is persuasive evidence he did not return because of his workers' compensation claim. The preponderance of the evidence is that Employee's travel was not for a deposition or hearing. Employee's claim for travel costs will be denied.

CONCLUSION

1. Employee is not entitled to a stipend while completing rehabilitation.
2. Employee is not entitled to reimbursement for his travel costs.

ORDER

1. Employee's October 10, 2012 claim is denied.

Dated at Anchorage, Alaska on August 1, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Ronald P. Ringel, Designated Chair

Patricia Vollendorf, Member

Amy Steele, Member

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the Board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the Board are parties to an appeal. If a request for reconsideration of this final decision is timely filed with the Board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied because the Board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

RECONSIDERATION

A party may ask the Board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the Board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the Board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of JEREMY EICHENBERGER, employee, v. ALASKA ABATEMENT CORP., employer, and AMERICAN HOME ASSURANCE CO., insurer; Case No. 200721462; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties this 1st day of August, 2013.

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Pamela Hardy, Clerk