ALASKA WORKERS' COMPENSATION BOARD

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

GREG F. LESTER, Employee, Claimant, v. NORTHWEST TECHNICAL SERVICES & SUPPLY, INC., Employer, and COMMERCE AND INDUSTRY, Insurer, Defendants.	DECISION AND ORDER ON RECONSIDERATION AWCB Case No. 201015036 AWCB Decision No. 15-0001 Filed with AWCB Fairbanks, Alaska on January 8, 2015

Greg Lester's (Employee) December 30, 2014 petition requesting reconsideration of *Lester v. Northwest Technical Services & Supply, Inc.*, AWCB Decision No. 14-0167 (December 16, 2014) (*Lester I*), was heard on the written record on December 31, 2014, in Fairbanks, Alaska, a date selected on December 31, 2014. Attorney Jason Weiner represented Employee. Attorney Aaron Sandone represented Northwest Technical Services & Supply, Inc., and its workers' compensation insurer (Employer). There were no witnesses and the record closed on December 31, 2014.

ISSUE

In summary, Employee contends *Lester I* should have been a "final" rather than an "interlocutory" decision because it extinguishes all his rights. He contends his preexisting

medical conditions discussed in *Lester I* were irrelevant to Employer's petition to dismiss. Employee further contends *Lester I* failed to mention "admissions and concessions" Employer made on the hearing record. He contends *Lester I* ignored AS 23.30.110(c) and how it applies to his case. Employee seeks clarification of *Lester I*'s holding. He also contends *Lester I*'s finding he lacked credibility was not adequately explained and may have arisen from collusion between two hearing officers. Lastly, Employee contends *Lester I* is internally inconsistent and he queries how he could have been expected to obtain necessary medical care within the open, two-year, post-Compromise & Release (C&R) period given Employer's resistance.

The time for Employer's answer has not yet expired and it has yet to file an answer. Consequently, Employer's position on the petition is not known but presumably is in opposition.

Should *Lester I* be reconsidered?

FINDINGS OF FACT

All factual findings and factual conclusions from *Lester I* are incorporated in this section by reference. Some *Lester I* factual findings and conclusions are reiterated. Additional facts and factual conclusions are established by a preponderance of the evidence:

1) On September 13, 2012, the board, including the same hearing officer who mediated Employee's case, reviewed and approved a C&R. The C&R waived Employee's right to all benefits under the Alaska Workers' Compensation Act (Act) for this injury except medical care, which remained open for two years (C&R at 20; observations).

2) Employer did not agree in the C&R to pay for any and all medical care Employee might request or require for his work injury during the two-year, post-C&R period at issue (experience, judgment, observations, C&R).

3) On February 12, 2014, Employer controverted Employee's right to medical benefits related to his right forearm synovitis and tenosynovitis based upon PA Timmons' August 27, 2013 report, which stated Employee's symptoms came from his increased "use of heavy lifting" at his new job washing dishes. Employer served this notice on Employee and his attorney (Controversion Notice, February 10, 2014).

4) On February 26, 2014, Employer again controverted Employee's right to medical benefits related to his right forearm synovitis and tenosynovitis for the same reasons set forth in the February 10, 2014 controversion. Employer served this notice on Employee and his attorney (Controversion Notice, February 24, 2014).

5) On March 5, 2014, Employer again controverted Employee's right to medical benefits for his right forearm synovitis and tenosynovitis, for the same reasons set forth in the February 10, 2014 and February 24, 2014 denials. Employer served this notice on Employee and his attorney (Controversion Notice, March 5, 2014).

6) On March 18, 2014, Employee through counsel filed a claim requesting medical costs and related transportation expenses, a penalty, interest, a finding there was an unfair or frivolous controversion, and attorney's fees and costs. The reason given for filing the claim was: "Medical benefits, unfair controversion, penalties, interest & attorney's fees" (Workers' Compensation Claim, March 18, 2014).

7) On April 15, 2014, the parties through counsel attended a prehearing conference. No party requested a hearing and none was scheduled (Prehearing Conference Summary, April 15, 2014).

8) On May 19, 2014, Employer's adjuster controverted Employee's right to medical benefits for his right elbow resulting from an April 21, 2014 slip-and-fall in a bathroom. Employer cited an April 21, 2014 Fairbanks Memorial Hospital emergency department record noting the slip and fall, which resulted in a right elbow injury. Employer contended this accident and resulting injuries were independent and unrelated to Employee's October 10, 2010 work injury. Employer served this notice on Employee (Controversion Notice, May 14, 2014).

9) On May 28, 2014, the parties through counsel attended a prehearing conference. No party requested a hearing, and none was scheduled (Prehearing Conference Summary, May 28, 2014).

10) On June 12, 2014, Employer controverted Employee's claim for medical benefits after August 24, 2013. Employer contended Employee's recent injury with Gulf Coast Enterprises was the cause of his then current symptoms and need for medical treatment. Employer served this notice on Employee and his attorney (Controversion Notice, June 10, 2014).

11) On September 12, 2014, Employee for the first time requested a hearing on his March 18, 2014 claim (Affidavit of Readiness for Hearing, September 12, 2014).

12) At midnight on September 12, 2014, Employer's liability for any medical benefits incurred from that moment forward was extinguished through the Board-approved C&R (experience, judgment, observations, C&R).

13) On September 15, 2014, Employer filed a petition seeking to "dismiss the employee's claim for benefits subsequent to September 12, 2014," based solely on the C&R (Petition, September 12, 2014).

14) On October 2, 2014, Employee answered Employer's petition to dismiss. Employee contended: "The agreement never stated that the actual medical expenses had to be incurred during the two year period." He argued the C&R allowed him to make a claim for medical benefits within the two year period but did not allow Employer to controvert the claim or litigate it slowly while the two years ran out, and then assert the two years had expired. Employee argued he had two years to file an affidavit of readiness for hearing, and the time for doing so had not yet run. Employee contended there was no basis for Employer to file the dismissal petition because his claim for medical benefits was made well within the two year period. He suggested the only reason additional medical benefits, including surgery, had not been provided was that Employer had objected to paying these benefits. Employee argued Employer's objection contravened the C&R's intent (Answer to Petition to Dismiss, October 2, 2014).

15) On November 24, 2014, Employee filed his hearing brief in which he contended the C&R stated he "would be entitled" to future medical benefits two years from the date the board approved the agreement (Employee Greg Lester's Prehearing Memorandum, November 24, 2014, at 3-5).

16) On November 25, 2014, Employer filed its hearing brief. Employer argued it is not responsible for non-work-related medical care incurred even within the two-year open-medical timeframe. Employer also argued the C&R protected it from liability for any otherwise work-related medical benefits Employee incurred after September 12, 2014 (Employer's Hearing Brief, November 24, 2014, at 7-10).

17) At hearing on December 4, 2014, Employee suggested the parties stipulate to numerous facts. Employer did not stipulate to these facts but stipulated that the "pleadings are the pleadings," they say what they say, and they were filed when they were filed. Thus, there were no specific stipulations entered orally at the hearing (record).

18) The designated chair specifically advised Employee that Employee retained the right to pursue other parts of his pending claim including but not limited to attorney's fees (*id*.).

19) Employer stated it was not seeking an order dismissing Employee's claim for medical costs incurred during the two-year post-C&R period. Employee was free to litigate such claims. However, Employer objected to any and all medical benefits incurred after September 12, 2014, based on the waiver and release provided in the C&R. It sought an order enforcing the C&R's terms in this regard (*id*.).

20) Employee's counsel stated he had not previously understood factual finding 19 to be Employer's position. Nevertheless, Employee contended the C&R allowed him to receive any medical care recommended during the two-year period (*id*.).

21) Employee testified he understood the C&R to mean he had "full coverage" on his arm and Employer would pay for any medical care his physicians recommended for his work-related injury during the two-year period following the Board-approved C&R. This included medical benefits recommended during the two-year period, but not obtained until after the two-year period had expired. Employee said he never would have signed the C&R if he understood it to mean what Employer now says it means. He conceded he would not expect Employer to pay for medical bills associated with his ankle, as that was not part of his injury. Employee testified Employer "fought him all the way" by filing numerous controversion notices and oppositions to his requests for a hearing and for joinder. Employee said in reference to Employer and its representatives, he "didn't trust them then" and "I don't trust them now." He admitted Employer voluntarily paid for two post-C&R surgeries to his right upper extremity. Employee through counsel implied there was a new recommendation for additional right upper extremity surgery from his physician, which was suggested before the two-year post-C&R period expired. However, Employee did not testify he could not afford surgery and had no way of obtaining the surgery or an order requiring Employer to pay for any recommended surgery before the two-year period in question expired (Employee).

22) Employee's attorney argued Employee could not afford to pay for his own surgery, no doctor or hospital would provide services without some assurance they would be paid and he could not obtain an order requiring Employer to provide medical services before the two-year period expired (record).

23) Employee testified he tried calling his adjuster an unspecified number of times between October and December 2013, and in January 2014 the adjuster finally got back to him. Employee did not specify what he wanted when he called the adjuster. He told the adjuster she was "breaking the contract that we signed" (Employee).

24) Employee's attorney argued recommended surgery could have "easily" been obtained before the two-year period expired if only Employer had simply agreed to fund it (record).

25) On December 16, 2014, *Lester I* made factual findings and analyzed the facts and law pertaining to Employer's petition to dismiss Employee's claims for medical benefits incurred after September 12, 2014. Pertinent to Employer's petition for reconsideration, *Lester I* ordered:

1) Employer's petition to dismiss is granted.
2) Employer is not liable to Employee for any medical benefits incurred after September 12, 2014 (*Lester I* at 26).

26) *Lester I* in the first two lines of the second paragraph on page 24 said:

> If a benefit in a C&R is not expressly waived, it is by implication subject to further claims. By contrast, if a benefit is expressly waived, or as in this case expressly waived as of a date certain, it is not subject to further claims after the agreed date. Employee's future medical care remained not waived and thus subject to claims for two years after the C&R was approved (*id.* at 24).

27) *Lester I* did not dismiss or otherwise decide Employee's March 18, 2014 claim requesting medical costs and related transportation expenses incurred between September 13, 2012 and September 12, 2014, penalty, interest, a finding there was an unfair or frivolous controversion, and attorney's fees and costs related to these issues. *Lester I* expressly stated: "Employee is free to litigate his pending claim for benefits incurred on or before September 12, 2014." *Lester I* only resolved claims for medical benefits incurred after September 12, 2014 (*id*. at 26).

28) *Lester I* includes 60 factual findings or conclusions. Three factual findings mentioned Employee's preexisting medical issues concerning his right upper extremity (*id*. at 3-14).

29) *Lester I* includes six and one-half pages of analysis. One sentence in the analysis addresses Employee's preexisting right upper extremity injuries and how they should have factored into his decision to settle his case with Employer (*id*. at 25).

30) On December 30, 2014, Employee filed a petition seeking reconsideration of *Lester I*. The following is a summary of Employee's contentions:

- *Lester I* is a "final" rather than an "interlocutory" decision and it should be re-characterized.
- *Lester I* dismissed his claim for medical benefits.
- If *Lester I* "stands" as is "there would be no further action Mr. Lester could take in the above-captioned matter."
- *Lester I*'s reference to his pre-injury medical history, comprising "most of its decision and order," is irrelevant, or its relevance should be better explained.
- *Lester I* failed to mention "admissions and concessions" Employer made on the hearing record, related to Employer's knowledge of Employee's medical care in October 2013, and requests from Employee for benefits prior to February 2014.
- Employer acknowledged it had received a recommendation for surgery from Employee's attending physician in June 2014, but decided to controvert the request.
- Employer deliberately stalled and did nothing to "move the case forward" so the two-year open medical period would expire.
- *Lester I* ignores AS 23.30.110(c)'s requirements for requesting a hearing.
- *Lester I*'s intent as to his right to receive medical care after September 12, 2014, needs to be clarified.
- *Lester I* fails to explain why it addressed Employee's credibility and found him not credible.
- There may have been collusion between recused hearing officer Robert Vollmer and the designated chair before the December 4, 2014 hearing because Employee's attorney saw hearing officers Vollmer and Soule walking down the hallway and speaking to each other prior to the hearing. Employee's attorney infers collusion between the two hearing officers because he claims to have said "hello" to Vollmer and Soule and alleges "both gave him a negative look and ignored him." These perceptions may have been the reason *Lester I* found Employee not credible.

- *Lester I* is internally inconsistent, particularly in respect to the first line of the second paragraph on page 24. Employee agrees with the assertion stated in that line, but contends the stated rubric is inconsistent with *Lester I*'s conclusion.
- *Lester I* did not mention his testimony or arguments stating he could not receive medical care until he had approval for payment from Employer's carrier. Employee contends *Lester I* should be reconsidered to "at least acknowledge this testimony" and to explain how Employee was supposed to obtain medical care "that should have been provided by the Employer under the 2012 C&R" when no one was willing to pay for the care and he could not afford to pay for it from his own pocket (Petition for Reconsideration of December 16, 2014 "Interlocutory" Decision and Order, December 30, 2014).

31) Employee already requested a hearing on his March 18, 2014 claim by filing a request. However, at a subsequent prehearing conference, he agreed to a preliminary hearing on Employer's petition, which was set for December 4, 2014. All Employee needs to do to obtain a hearing on remaining issues in his March 18, 2014 claim is request a prehearing conference and obtain a hearing date (Affidavit of Readiness for Hearing, September 12, 2014; Prehearing Conference Summary, October 30, 2014; experience, judgment, observations, unique facts of the case, and inferences drawn from all the above).

32) *Lester I* specifically cited and discussed AS 23.30.110(c) (*Lester I* at 16 and 23).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony 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 23.30.007. Workers' Compensation Appeals Commission.** (a) There is established in the Department of Labor and Workforce Development the Workers' Compensation Appeals Commission. The commission has jurisdiction to hear appeals from final decisions and orders of the board under this chapter. . . .

The Alaska Workers' Compensation Appeals Commission (AWCAC) has jurisdiction to hear appeals from final Board decisions and has implied jurisdiction to review non-final Board

decisions. In *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341 (Alaska 2011), the Alaska Supreme Court held the AWCAC has "implied jurisdiction to review interlocutory Board orders" because the Commission "performs a quasi-judicial function that is akin to appellate review" (citations omitted). *Monzulla* noted in some circumstances "delay of review until a final decision on the merits can make review pointless." For example, review of an improper refusal to change venue is pointless after a final decision on the merits when there may be no further proceedings. Similarly, if the Board improperly required an employee to undergo a psychiatric examination, a delay in review could subject the employee to an intrusive and unnecessary examination. Discretionary appellate review of non-final orders may at times be necessary "to ensure fundamental fairness" to the parties (*id*. at 346).

To determine whether a decision is a "final judgment" that triggers the time limit for an appeal, "the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment" (citation omitted). "A 'final judgment' is one that disposes of the entire case and ends the litigation on the merits." *Richard v. Boggs*, 162 P.3d 629, 633 (Alaska 2007).

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires. . . .
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> **AS 23.30.110. Procedure on claims**. (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability following an injury, or at any time after death, and the board may hear and determine all questions in respect to the claim.
> . . .
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> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request . . . together with an affidavit stating . . . the party has completed necessary discovery, obtained necessary evidence, and is prepared for . . . hearing. . . .
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> **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 . . . is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
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> **AS 44.62.540. Reconsideration**. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

"The appropriate recourse for allegations of legal error is a direct appeal or petition to the board for reconsideration of the decision within the time limits set by AS 44.62.540(a)." *George Easley Co. v. Estate of Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). "Reconsideration" implies a "re-examination" and possibly a different decision by the entity which initially decided a case. *Union Oil Co. v. State, Department of Natural Resources*, 526 P.2d 1357 (Alaska 1974).

> **8 AAC 45.065. Prehearings**. . . .
> . . .
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> e) The board or designee may set a hearing date at the time of the prehearing. The board or designee will set the hearing for the first possible date on the board's hearing calendar unless good cause exists to set a later date. The primary considerations in setting a later hearing date will be whether a speedy remedy is assured and if the board's hearing calendar can accommodate a later date. . . .
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> **8 AAC 45.070. Hearings**. . . .
> . . .
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> (2) Except as provided in (1) of this subsection, a party may not file an affidavit of readiness for hearing until after the opposing party files an answer under 8 AAC 45.050 to a claim or petition or 20 days after the service of the claim or petition, whichever occurs first. . . .
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> **8 AAC 45.106. Procedures for board panel members to avoid conflict of interest, impropriety, and appearance of impropriety**. . . .
> . . .
>
> (d) If before a scheduled hearing begins, a party has knowledge of a potential conflict of interest or knowledge that a board panel member's circumstances may

> present a potential impropriety or appearance of impropriety, the party may file a petition with the commissioner, or the commissioner's designated hearing officer under AS 23.30.005(b), objecting to the board panel member and briefly outline the reasons. If a petition is filed under this subsection, the commissioner, or the commissioner's designated hearing officer, shall forward the objection to the board panel member who is the subject of the petition for the member's review. If the board panel member does not recuse oneself from the proceeding, the remaining board panel members shall determine whether the board panel member who is the subject of the petition may hear the case.

ANALYSIS

Should *Lester I* be reconsidered?

Employee's timely petition requesting reconsideration raises numerous issues, which will be addressed in order. AS 44.62.540.

- *Lester I* is a "final" rather than an "interlocutory" decision and it should be re-characterized.

Lester I in both form and effect does not dispose of Employee's entire case or end the litigation on the merits. As stated on the hearing record and in *Lester I*, Employee has full right to a hearing on the remaining issues in his March 18, 2014 claim. Remaining issues include medical costs and related transportation expenses incurred on or after September 13, 2012, but prior to midnight September 12, 2014, related transportation expenses, a penalty, interest, a finding there was an unfair or frivolous controversion, and attorney's fees and costs. Therefore, as these claims remain to be decided, *Lester I* is not a final decision and is not subject to "appeal." *Boggs*. However, Employee is not left without an interim appellate remedy. If Employee believes *Lester I* needs an immediate appellate assessment "to ensure fundamental fairness," or for any other reason, he may petition the AWCAC for review. *Monzulla*. Employee's request to change *Lester I* to a "final" decision will be denied.

- *Lester I* dismissed his claim for medical benefits.

Employee's contention is incorrect. *Lester I* only dismissed Employee's claim for medical treatment and travel obtained after midnight on September 12, 2014. It did not dismiss his claims for medical benefits obtained before midnight September 12, 2014. As conceded by Employer at hearing, and as stated on the hearing record and in *Lester I*, Employee retains his

right and ability to litigate his pending claim for any disputed medical benefits obtained after September 13, 2012, and before midnight September 12, 2014.

- If *Lester I* stands as is "there would be no further action Mr. Lester could take in the above-captioned matter."

As stated above, *Lester I* does not affect Employee's right to a hearing on his pending, March 18, 2014 claim for medical benefits obtained prior to midnight September 12, 2014, a penalty, interest, a finding there was an unfair or frivolous controversion, and attorney's fees and costs. Therefore, since Employee has already requested a hearing on his March 18, 2014 claim all he has to do to obtain further action on his claim is to attend a prehearing conference and obtain a hearing date. 8 AAC 45.065(e).

- *Lester I*'s reference to his pre-injury medical history, comprising "most of its decision and order," is irrelevant, or its relevance should be better explained.

Lester I included 60 factual findings or factual conclusions. Only three factual findings concerned Employee's right upper extremity history. Approximately one sentence in *Lester I*'s six and one-half page analysis addressed Employee's right upper extremity history. It can hardly be said that "most" of *Lester I* addresses irrelevant preexisting conditions. Some factual findings and conclusions are included in a decision and order to provide the reader with a factual context to better understand the decision. The three factual findings addressing Employee's right upper extremity history serve this purpose. Further, Employee did not enter into this settlement in a vacuum. Employee was aware of his medical history. These three factual findings demonstrate Employee knew, or should have known, and should have taken into account the fact he had previous difficulties with the same extremity and thus may have more problems with it in the future. This should have factored into Employee's decision-making when he negotiated with Employer and limited his future work-related medical care to two years. Thus, these are relevant factual findings.

- *Lester I* failed to mention "admissions and concessions" Employer made on the hearing record, related to Employer's knowledge of Employee's medical care in October 2013, and requests from Employee for benefits prior to February 2014.

The hearing record shows Employee suggested the parties stipulate to various facts. However, the record also shows Employer declined to stipulate to specific facts but merely agreed the pleadings said what they said and were filed when they were filed. Therefore, contrary to Employee's assertion, *Lester I* did not fail to mention admissions or concessions Employer made at hearing, as there were none. Alternately, even had Employer made concessions concerning its knowledge of Employee's medical care in October 2013, and "requests" from Employee for benefits prior to February 2014, these facts would not change *Lester I*'s outcome.

The C&R provided Employee with open medical care for two years. If a dispute arose between the parties, depending upon when it arose, Employee had a varying amount of time to seek legal redress, and if he prevailed, obtain the medical care before the two-year period expired. If a dispute had arisen the day after C&R's approval, Employee would have had almost two full years to litigate the dispute and get the treatment if he prevailed at hearing. Conversely, the later in the two-year period a dispute arose, the less time Employee had to litigate the matter to resolution and, if he won, get any awarded treatment before time ran out. To be clear: if Employee's claim for medical care prescribed during the two-year period in question had been heard before September 12, 2014, and had Employee prevailed, Employer would still not be liable for the medical care and treatment awarded if it could not be obtained before midnight September 12, 2014, under the C&R's express terms.

- Employer acknowledged it had received a recommendation for surgery from Employee's attending physician in June 2014, but decided to controvert the request.

This contention is troublesome on at least two levels. First, the record presented at hearing does not show Employer had received a surgical recommendation from Employee's attending physician in June 2014. It is undisputed Employer paid for two, post-C&R surgeries for Employee after September 2012. In August 2013, Employee reported a new injury with a new employer. The record shows Employer's adjuster received a medical report concerning this new injury on December 2, 2013. There was no evidence presented proving it was received any earlier. Twice in February and once in March 2014, Employer controverted Employee's right to

medical care for his right forearm synovitis and tenosynovitis, based upon his physician's assistant's medical report. Even assuming for argument's sake Employer had received a surgical recommendation in June 2014, this would not change *Lester I*'s result. Employee implies Employer's receipt of a surgical recommendation in June 2014 somehow extended the express, two-year limitations period for medical care set forth in the approved C&R as a matter of law. Employee fails to explain how.

Second, Employee's argument demonstrates he believes the C&R was a guarantee of payment for any and all medical care any medical provider might recommend for his right upper extremity during the two-year period in question, regardless of whether the medical care was work-related with Employer, compensable under the Act or could be accomplished within the two-year period. The C&R made no such guarantee. As stated in *Lester I*, the C&R simply left medical care for Employee's work-related injury not waived and subject to voluntary payment as well as claims and defenses until midnight, September 12, 2014. If Employee is suggesting Employer's exercise of its statutory right to controvert medical care somehow extended the two-year limitations period for medical care set forth in the C&R, as a matter of law, he has failed to cite any statute, regulation, case law, or C&R language to support this contention.

- Employer deliberately stalled and did nothing to "move the case forward" so the two-year open medical period would expire.

This contention sounds more like a request to modify a *Lester I* factual finding than it does an argument concerning an alleged legal error subject to reconsideration. *Lindekugel*. Nevertheless, neither the facts nor the law support Employee's allegation. He presented no evidence Employer "deliberately stalled" providing compensable medical care to Employee. The facts show Employer exercised its statutory right to controvert Employee's right to medical care for his right upper extremity when it received medical evidence demonstrating a subsequent work injury with another employer necessitated additional medical care. There is no doubt Employer "deliberately" controverted. If by "stalled" Employee means "exercised its rights," he provided no legal support for this argument. Furthermore, if by "move the case forward," Employee means Employer had some obligation to expedite treatment it controverted, he is

mistaken. The law required Employer to either furnish medical benefits or controvert them. AS 23.30.095(a); AS 23.30.155(a). In this instance, Employer controverted.

If Employee had difficulty contacting the adjuster in late 2013 or at any other time, or disagreed with the February 2014 controversion notices, he could have filed a claim sooner, and immediately requested a hearing on the merits well before the two-year period expired. AS 23.30.110(a), (c); 8 AAC 45.065(e). On the other hand, it was always possible the need for additional medical care might not arise until one-fourth, one-third, half-way, three-quarters or nine-tenths through the two-year period at issue. Employee accepted that risk when he settled for two years open medical care. In retrospect, perhaps he should have negotiated for three, four or even five years open medical care as he originally demanded so disputes could have been resolved before his time expired. In short, Employer cannot be faulted for Employee's decision to settle for two years open medical care.

- *Lester I* ignores AS 23.30.110(c)'s requirements for requesting a hearing.

Contrary to Employee's assertion, *Lester I* discussed AS 23.30.110(c), noting Employee never requested a hearing on his pending claim until the very day his medical benefits expired under the C&R's terms. Employee could have requested a hearing on April 8, 2014, the day after Employer answered his March 2014 claim. 8 AAC 45.070(b)(2). Had he done so, he could have had a hearing and, if successful, obtained a decision and order requiring Employer to pay for additional medical care. AS 23.30.110(a), (c); 8 AAC 45.065(e). Perhaps he could have obtained the awarded medical care before September 12, 2014. Employee's failure to request a hearing until the day his medical benefits expired guaranteed this would not be the result.

Lester I cited AS 23.30.110(c) to show Employee could have requested and had a hearing on his claim to resolve any disputes well before the two-year period expired. *Lester I* did not deny Employee's claim for medical care obtained after midnight September 12, 2014 because he failed to timely file a hearing request under §110(c). The record shows Employee timely filed a hearing request. To the contrary, *Lester I* denied Employee's request for medical care after midnight September 14, 2014 because he waived this right in his C&R. Therefore, at this juncture AS 23.30.110(c) is irrelevant.

- *Lester I*'s intent as to his right to receive medical care after September 12, 2014, needs to be clarified

To be clear: Employee has no right to receive medical care from Employer for his work injury after midnight September 12, 2014. This waiver was negotiated through mediation resulting in an approved C&R. If Employee has medical bills he paid from his own pocket or from a third-party insurer, or if he has unpaid medical bills he claims are related to his work injury with Employer, and these were incurred after September 13, 2012, but before midnight September 12, 2014, Employee retains his right to litigate those to a final decision and order.

- *Lester I* fails to explain why it addressed Employee's credibility and found him not credible.

Lester I addressed Employee's credibility because it had authority to do so. AS 23.30.122. Contrary to Employee's assertion, *Lester I* explained why it found him not credible. *Lester I* found Employee not credible because, given the fact the C&R's language was clear and unequivocal, he was at all times represented by an attorney, and had participated in a hearing-officer-led mediation, the fact-finders concluded Employee's hearing testimony about what he thought the C&R meant was self-serving. Employee's retrospective understanding of what the C&R meant to him would have rendered the two-year limit meaningless. Under Employee's reading, on September 12, 2014, his physician could have recommended "lifetime treatment for his right upper extremity as needed" and Employer would have had to cover it. *Lester I* simply did not believe Employee's testimony on this point was genuine.

- There may have been collusion between recused hearing officer Robert Vollmer and the designated chair before the December 4, 2014 hearing because Employee's attorney saw hearing officers Vollmer and Soule walking down the hallway and speaking to each other prior to the hearing. Employee's attorney infers collusion between the two hearing officers because he claims to have said "hello" to Vollmer and Soule and alleges "both gave him a negative look and ignored him." These perceptions may have been the reason *Lester I* found Employee not credible.

Employee's speculation and perceptions are not evidence. He presented no evidence of collusion and did not request the designated chair's disqualification prior to hearing, when such allegations could have been raised, vetted and addressed. 8 AAC 45.106(d). The reasons for the credibility finding regarding Employee are set forth above.

- *Lester I* is internally inconsistent, particularly in respect to the first line of the second paragraph on page 24. Employee agrees with the assertion stated in that line, but contends the stated rubric is inconsistent with *Lester I*'s conclusion.

Employee's argument on this point is difficult to follow. *Lester I*, on page 24, in the first line of the second paragraph states: "If a benefit in a C&R is not expressly waived, it is by implication subject to further claims. By contrast, if a benefit is expressly waived, or as in this case expressly waived as of a date certain, it is not subject to further claims after the agreed date. Employee's future medical care remained not waived and thus subject to claims for two years after the C&R was approved." Employee says he agrees with this statement but contends it is inconsistent with *Lester I*'s conclusion. But *Lester I* found Employee expressly waived his right to ongoing medical care from Employer effective midnight September 12, 2014. This benefit was expressly waived as of "a date certain." Therefore, the logical, consistent conclusion with these findings is that, as a matter of law, Employer is not liable to Employee for medical benefits obtained after midnight September 12, 2014. This is true regardless of when the medical care was prescribed. Whether Employer is liable to Employee for the disputed medical treatment he already obtained between September 13, 2012, and midnight September 12, 2014, whether already paid for or not, remains to be determined at a merits hearing.

- *Lester I* did not mention his testimony or arguments stating he could not receive medical care until he had approval for payment from Employer's carrier. Employee contends *Lester I* should be reconsidered to "at least acknowledge this testimony" and to explain how Employee was supposed to obtain medical care "that should have been provided by the Employer under the 2012 C&R" when no one was willing to pay for the care and he could not afford to pay for it from his own pocket.

This contention also sounds like a request for modification of a factual finding rather than a reconsideration request. *Lindekugel*. Nevertheless, the record shows Employee offered no testimony at hearing stating he could not afford to pay for medical care from his own pocket and thus could not obtain any without Employer's approval. Employee's attorney offered these arguments at hearing; but his arguments are not evidence. Even assuming Employee could not have afforded to pay for recommended treatment from his own pocket, this fact would not change the result in *Lester I* as a matter of law.

Employee again demonstrates he believes Employer was obligated to pay for any and all medical care recommended for his right upper extremity during the two-year period in question. There are in his mind no limitations. Employee is incorrect. Whether any medical care "should have been provided by the Employer under the 2012 C&R" is a factual and legal question subject to a hearing and a decision and order. Employee does not have authority to make a unilateral compensability ruling. Employee had ample time in which to file a claim, request a hearing and obtain a decision addressing not-yet-accomplished medical care before the two-year period expired. AS 23.30.110(a), (c); 8 AAC 45.065(e). This is the procedure an injured worker follows to force an employer into paying for recommended medical treatment. If it turned out he did not have enough time to do this, Employee should have taken this possibility into account before he negotiated for two years open medical care. Employee demonstrated no legal basis to reconsider *Lester I* and his petition will be denied.

CONCLUSION OF LAW

Lester I will not be reconsidered.

ORDER

Employee's petition for reconsideration is denied.

Dated in Fairbanks, Alaska on January 8, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Sarah Lefebvre, Member

_____
Lake Williams, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

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 the foregoing is a full, true and correct copy of the Decision and Order on Reconsideration in the matter of GREG F. LESTER, employee / claimant v. NORTHWEST TECHNICAL SERVICES & SUPPLY, INC., employer; COMMERCE AND INDUSTRY, insurer / defendants; Case No. 201015036; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on January 8, 2015.

_____
Darren Lawson, Office Assistant