ALASKA WORKERS' COMPENSATION BOARD

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

DIANNE L. WILSON, Employee, Claimant, v. STATION, INC., Employer, and REPUBLIC INDEMNITY COMPANY OF AMERICA, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201504635 AWCB Decision No. 16-0037 Filed with AWCB Anchorage, Alaska On May 4, 2016

Dianne Wilson's (Employee) and Station, Inc.'s (Employer), joint request for approval of their March 9, 2016 compromise and release agreement (C&R) was heard on April 5, 2016, in Anchorage, Alaska. The hearing date was selected on March 22, 2015. Employee appeared by telephone, represented herself, and testified. Attorney Michelle Meshke appeared and represented Employer and its workers' compensation insurer. The record closed on April 5, 2016. This decision examines the oral order denying the proposed C&R as not being in Employee's best interest and memorializes the oral order in the event a party wants to appeal.

ISSUE

The parties submitted a proposed C&R concerning an injury occurring on March 8, 2015. On that date, Employee was working as a bartender for Employer when she fell from a stool and

fractured her hip, eventually requiring hip replacement surgery, for which Employer paid. The proposed settlement agreement is for $10,000 with medical benefits remaining open. All indemnity and time loss benefits including reemployment benefits would close. Employer contended the settlement is in Employee's best interest, and requested approval. After deliberation, the panel issued an oral order denying the March 9, 2016 C&R. The parties requested written findings of fact and conclusions of law.

Was the oral order denying the parties' C&R correct?

FINDINGS OF FACT

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

1) On March 8, 2015, Employee presented to Providence Alaska Medical Center in Anchorage, where she was seen by orthopedic surgeon Douglas Prevost, M.D. Dr. Prevost's chart note states:

> The patient is a 77 year old female who sustained a work-related fall on 03/08/2015. She was noted in the emergency room to have a displaced subcapital femoral neck fracture. The patient has been indicated for either hemiarthroplasty or total hip arthroplasty based on the injury. Due to the patient's high level of activity and high function, she has been indicated for a total hip arthroplasty over hemiarthroplasty. (Prevost Chart Note, March 8, 2015).

2) On March 10, 2015, Dr. Prevost performed left hip replacement surgery. (Prevost Operative Report, March 13, 2015).

3) On March 20, 2015, a report of injury was filed, which indicates Employee was hired on January 10, 1984. The report states on March 8, 2015, Employee "fell off bar stool and broke hip." (First Report of Occupational Injury or Illness, March 20, 2015).

4) On March 24, 2015, Dr. Prevost authored a work release note, which states, "Total impairment -- dates 3/8/2015-5/11/2015." The same note releases Employee to work for "light duty." (Prevost Chart Note, March 24, 2015). Examining Employee after the hip surgery, Dr. Prevost notes his impression: "1. Status post left total hip replacement without apparent complications, 2. Degenerative joint disease/degenerative disc disease of the lumbar spine with degenerative scoliotic deformity with the apex towards the patient's right." (*Id.*).

5) Employee attended physical therapy at United Physical Therapy in Anchorage through the spring and summer of 2015. (United Chart Notes, *Passim*). The handwritten treatment and progress notes from most sessions are illegible. (Observations). Employee continued through this period to treat with Dr. Prevost for follow-up on the hip surgery and physical therapy. (Record).

6) On June 6, 2015, a chart note by Dr. Prevost states, "The patient would like at some point to return to work. She does not feel as if she is able to return to work in her previous capacity at this point. I have suggested that she undergo a work hardening program. . . . The patient has not yet reached maximum medical improvement. . . ." (Prevost Chart Note, June 6, 2015).

7) On June 9, 2015, Dr. Prevost authored a work release note, which states, "Total impairment – dates 6/9/2015-8/1/2015." (Prevost Chart Note, June 9, 2015).

8) On July 1, 2015, Dr. Prevost authored a work release note releasing Employee to light duty work with a lifting restriction of ten pounds, no repetitive lifting over five pounds, no prolonged standing or walking, no excessive bending or twisting and "no forceful use of the injured extremity." (Prevost Chart Note, July 1, 2015).

9) On July 2, 2015, the Reemployment Benefits Administrator's designee (RBA designee) sent Employee a letter informing her because she had missed 90 consecutive days of work, rehabilitation specialist Farooz Sakata was being assigned to complete a reemployment benefits eligibility determination. (Letter, July 2, 2015).

10) On September 9, 2015, Michael Gevaert, M.D., performed an impairment evaluation using the *AMA Guides, Sixth Edition* (*Guides*). (Gevaert Report, September 9, 2015). After explaining his methodology, Dr. Gevaert stated Employee had reached medical stability and he assigned her an eight percent whole person impairment rating based on the *Guides*. (*Id.*).

11) Also on September 9, 2015, Dr. Prevost completed an occupational data questionnaire in response to Ms. Sakata's request. At the box stating, "Do you predict Mrs. Dianne Wilson will have the permanent physical capacities to perform the physical demands detailed in the [bartender helper] job description?" Dr. Prevost checked "yes." (Prevost Questionnaire, September 9, 2015).

12) On December 1, 2015, the RBA designee informed Employee she was not eligible for reemployment benefits, based on Dr. Prevost's September 15, 2015 prediction Employee will have the permanent physical capacities to perform the physical demands of the job Employee

held at the time of injury, which was bartender/waitress/bartender helper, as described in the Dictionary of Occupational Titles (SCODRDOT). (Letter, December 1, 2015).

13) On March 9, 2016, the parties filed a C&R. (C&R, March 9, 2016). Because Employee is not represented by an attorney in this case, the C&R requires Board approval. (*Id.*). The C&R listed the following compensation paid to Employee:

TYPE	FROM/THROUGH	WKS/DAYS	RATE	AMOUNT
TTD	03/09/15-03/11/15	0/3	$749.02	$321.00
TTD	03/12/15-08/09/15	19/4	$749.02	$14,659.38
TTD	08/10/15-08/19/15	1/3	$749.02	$592.16
PPI	08/20/15-08/23/15	0/4	$414.60	$236.84
PPI	08/24/15-12/27/15	18/0	$414.60	$7,462.80
PPI	Lump Sum			$3,628.36

The March 9, 2016 C&R proposes to release Employer from liability for any and all past, present and future compensation benefits due under the Act, including temporary total disability, temporary partial disability, permanent partial impairment, and permanent total disability, as well as penalties and interest thereon, and waives reemployment benefits under AS 23.30.041. Employee reserves her right to medical care arising from or necessitated by the March 8, 2015 injury, with Employer reserving appropriate defenses. In exchange, under the proposed C&R, Employee is to receive $10,000.00. (C&R, March 9, 2016).

14) On March 18, 2016, the Board sent the parties a letter, which states:

> The Alaska Workers' Compensation Board (Board) has reviewed the compromise and release agreement filed on March 9, 2016. The Board may only approve a settlement agreement if a preponderance of the evidence demonstrates approval is in the employee's best interest. 8 AAC 45.160(a). The settlement agreement is not approved at this time for the following reasons:
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> The Board is unable to determine if the agreement is in Employee's best interest and would like an opportunity to obtain Employee's testimony concerning the agreement. . .
>
> Upon a party's request a hearing will be scheduled to determine whether the agreement should be approved. A party may request a hearing by calling the Board's office at the telephone number above. . . (Letter, March 18, 2016).

15) On March 22, 2016, attorney Michelle Meshke filed an entry of appearance on Employer's behalf. (Entry of Appearance, March 22, 2016). Also on that date, a Board clerk noted the

parties requested a hearing for approval of the March 9, 2016 C&R. (ICERS Database Note, March 22, 2016).

16) Employee is not represented by an attorney. (Record).

17) Employee has filed no claim for benefits. (*Id.*).

18) Employer has filed no controversion notices. (*Id.*).

19) On April 5, 2016, the parties' joint request for approval of their March 9, 2016 C&R agreement was heard. (Record).

20) Employer's attorney argued:

> EMPLOYER ATTORNEY: For background, Ms. Wilson did have, sometime before she fractured her left hip, she had a bilateral knee replacement that was not related to a work injury. She felt that because of her bilateral knee replacements as well as just ongoing healing, it takes a while that kind of an injury, especially at 71 years old, as she just decided that she did not really want to go back to work at this time. She's not interested in really pursuing reemployment benefits. She feels that after she heals a bit more, she may feel like going back to part time work, but because of her age she doesn't really feel like retraining into a new career, doesn't think that that's the right thing to do for her, and feels that at some point when she, if she is so inclined she'll be able to return to some kind of part time work in the future. So the benefit, or the medical benefits that have been, or excuse me the $10,000 that's been offered to her as a settlement is fair, it's a $5,000 job dislocation benefit, which is what she would be entitled to if she doesn't, if she – even if she were found eligible and declined to participate in reemployment, she would get a $5,000 deduct – $5,000 job dislocation. The other $5,000 we've allocated to TTD, but you know, there's really no indication that she'll be missing work in the future but it is just to, as a payment consideration for waiving future benefits. So, based on this information we feel that this settlement is in Ms. Wilson's best interest and we ask that the Board approve it. . . .
>
> I just want to point out that all of her medical doctors have told her that she can go back to work, so she's choosing not to work and, in part, due to an unrelated condition and due to her age. So, she was released to return to work. There's no evidence that would support a claim for reemployment benefits or anything else at this point. So, that's the reason that the settlement amount is what it is. . . . (Employer's Hearing Argument).

21) When questioned, Employee testified:

> DESIGNATED CHAIR: All right, thank you Ms. Meshke. Ms. Wilson did you get all that?

EMPLOYEE: Yes, I did.

DESIGNATED CHAIR: Okay. So I'm still unclear on what's your work status right now? Are you back to work or are you not back to work right now?

EMPLOYEE: Not back to work.

DESGINATED CHAIR: And why is that?

EMPLOYEE: Mainly because between the two injuries I don't feel that I'm able to work right now. And also I was told that until the workman's comp is settled you can't really get another job so I haven't looked for another job. And I don't think physically I'll be able to work more than, like, four hours a day so, if I decide to go back to work, because I am 71, whether I can get hired or not would be the question. It would only be able to be some kind of a part time basis.

DESGINATED CHAIR: Who told you you can't get another job?

EMPLOYEE: Um, I forget. A couple people actually said that until it's, that, that when you were getting, while I was getting benefits you can't work somewhere or it takes the money out of your benefits. . . .

I mean a hip replacement's a pretty big deal and, it's still painful and I get tired and I've just, I'm assuming that to work is going to be really difficult for me, but I'm not saying I won't ever try, you know, you just don't know what you're going to do.

DESGINATED CHAIR: Okay. So when do you think you'll be back to work?

EMPLOYEE: I don't know. I might never go back to work, I don't know. It just depends.

DESINGATED CHAIR: Is that, is that based on you and your doctor's, conversations with your doctor, or is that just kind of your thoughts. . . .

EMPLOYEE: Those are my opinions because I know how I feel, I know how, you know, what my limitations are. It's been a long slow recovery. I don't know how I'm going to feel down the road, though. I might feel better but I do tire out really easily right now and I just don't think I'd be a good worker, you know, until I get over this.

DESGINATED CHAIR: Okay. So can you tell me then in your own language then why you want to settle the case for this amount of money? If you're not back to work yet? Because you do understand that if you accept this settlement agreement, this will be the most you get out of this case? So if you can never return to work, and I understand your age and that you may not be eager for

retraining or to start a new career at this point, but you understand that once this money runs out you can't re-open this case for, for time loss. Your medicals are open as I understand it, but as far as, like, paying your bills or your rent or your mortgage, if your money runs out of this settlement, that's it. You understand that?

EMPLOYEE: Yes, I do.

DESGINATED CHAIR: So can you explain to me why you want to settle it for this amount, then?

EMPLOYEE: That's just what they offered to me. I don't, I don't know what my options are actually, I'm just kind of being lead around by workman's comp and I'm just kinda doing what they tell me I'm supposed to do. And this was the last part of it, so I don't know what other options there are. . . .

You know I lost my job over this fall, my boss kinda let me go. So, that was a lot of money, I made pretty good money at my job and it was unexpected and I probably could have worked another few years there before I had to retire. Yeah, it was just kind of the whole thing was just thrown at me, so. You know, one day you're working and the next day you're out of work and you can't function very well so you just kinda go 'okay,' you know.

DESIGNATED CHAIR: Okay. So there was never a prehearing conference in this case that I can see. So you never had a chance to, like, come in to our office and talk with one of our staff members, or have you, have you talked to one of our staff, Ms. Wilson?

EMPLOYEE: No. . . .

DESGINATED CHAIR: Did anyone ever tell you that you could get an attorney in this case?

EMPLOYEE: No. . . .

EMPLOYER ATTORNEY: I'd like to point out that she, well, she did have conversations with the adjuster in this case. Did you ever receive a copy of the "Workers' Compensation and You" form, ma'am?

EMPLOYEE: Which one?

EMPLOYER ATTORNEY: Did you ever get online at the Workers' Compensation Board and get a copy of the booklet that they hand out called "Workers' Compensation and You"?

EMPLOYEE: No, I didn't. To be truthful, the only paperwork I've ever received is when I was getting compensation checks in the mail and then these paperworks [sic] from, about this hearing, here. And, that's about it. . .

DESGINATED CHAIR: Okay. Would you like to return to work? I mean if your hip was okay right now would you, would you be back at work?

EMPLOYEE: Of course I would but I moved from Anchorage. I'm living in Palmer now, which is why I'm doing this over the phone, so I wouldn't be able to work at that job. He wasn't willing to hire me back, anyway. . . .

And probably that kind of work is going to be really hard for me because it's a lot of, you're always on your feet. . . .

And you're always running, constantly. So I don't think that that would be the kind of work I'd be able to do. If I did anything I would probably look at a greenhouse type of thing where you could, you know work the counter there, part time, because I do like to do flowers and stuff, but. . . .

It probably wouldn't pay too much money but that would be. . . . I think about things I can do. I can run a cash register, you know, that kind of stuff, but I'm not going to try again an eight-hour-a-day job. I just know that that would be really hard on me, so.

DESGINATED CHAIR: Are you married right now?

EMPLOYEE: No. . . . I'm living with my son. He lives out here. I sold my house in Anchorage and used the money from the house to give to him to buy a house in Palmer, because he got a job out here. So I'm living with him.

DESIGNATED CHAIR: Okay. All right and so you, you would like us to approve this agreement as it is today, right? You think that this agreement is in your best interest? Or you're not. . . .

EMPLOYEE: I do, I don't. . . .

DESIGNATED CHAIR: Or you're not so sure.

EMPLOYEE: Well, no I'm not so sure, but I, I think it, it's fine. . . .

22) Employee is credible. (Experience, judgment and inferences from all the above).

23) After deliberation, the panel issued an oral order denying the March 9, 2016 C&R as not in Employee's best interest. (Record).

24) On April 25, 2016, the parties attended a prehearing conference. The prehearing conference summary states:

> After some discussion, the parties jointly requested a written decision and order containing findings of fact and conclusions of law related to the April 5, 2016 C&R denial. . . . In the interest of expediency, Board Designee waives the requirement that request for written findings of fact and conclusions of [sic] be made in writing. (Prehearing Conference Summary, April 25, 2016).

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 this chapter
> > . . . .
> >
> > (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.

A decision may be based not only on direct testimony and other tangible evidence, but also on "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). A factual finding reasonable persons could make is, "as are all subjective determinations, the most difficult to support." However, there is no reason to suppose Board members who make findings are either irrational or arbitrary. That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable" (*Id.* at 534). "Substantial evidence" to support findings of Workers' Compensation Board is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1007 (Alaska 2009).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

> **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.
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> (b) The agreement shall be reviewed by a panel of the board if the claimant or beneficiary is not represented by an attorney licensed to practice in this state, the beneficiary is a minor or incompetent, or the claimant is waiving future medical benefits. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter, and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. A lump-sum settlement may be approved when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

The Alaska Workers' Compensation Board has discretion to order a medical examination or hold a hearing, but it is not required to do so, prior to approving a C&R entered into by claimant and employer. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001 (Alaska 2009). *Smith* applied a regulation stating an agreed settlement in which the employee waives medical or temporary or permanent benefits before the employee's condition is medically stable and the degree of impairment is rated, is presumed not in employee's best interest, and will not be approved absent a showing by a preponderance of the evidence that the waiver is in the employee's best interest. The employee in *Smith* was not medically stable when the partial C&R was filed. *Smith* held the Board erred as a matter of law by ignoring this regulation when it approved the partial C&R. (*Id.* at 1012).

> **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.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

In *Clark v. Municipality of Anchorage*, 777 P.2d 1159 (Alaska 1989), the Alaska Supreme Court directed the board to carefully examine settlement agreements, noting courts treat workers' compensation settlement agreements differently than they do a simple tort liability release. *Clark* noted under AS 23.30.012, approved settlement agreements "have the same legal effect as [Board] awards, except they are more difficult to set aside." *Citing, Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1158 (Alaska 1993). Because of this instruction, settlement agreements are closely scrutinized prior to approval. *Long v. Soft Touch Express, LLC*, AWCB Decision No. 12-0043 (March 6, 2012).

In considering a proposed C&R, the fact-finder must find evidence to overcome the presumption that any future medical benefit waiver or lump sum settlement contravenes the employee's best interest. This requirement derives, in part, from AS 23.30.135, which places an affirmative duty on the board to determine the parties' rights. Although an employee's belief a settlement agreement is in his best interest is not controlling, the employee's position is considered. *Kline v. Swanson*, AWCB Decision No. 00-0094 (May 11, 2000).

> **8 AAC 45.160. Agreed settlements.** (a) The board will review a settlement agreement that provides for the payment of compensation due or to become due and that undertakes to release the employer from any or all future liability. A settlement agreement will be approved by the board only if a preponderance of evidence demonstrates that approval would be for the best interest of the employee or the employee's beneficiaries. The board will, in its discretion, require the employee to attend, and the employer to pay for, an examination of the employee by the board's independent medical examiner. If the board requires an independent medical examination, the board will not act on the agreed settlement until the independent medical examiner's report is received by the board.
>
> (b) All settlement agreements must be submitted in writing to the board, must be signed by all parties to the action and their attorneys or representatives, if any, and must be accompanied by form 07-6117.

(c) Every agreed settlement must conform strictly to the requirements of AS 23.30.012 and, in addition, must

(1) be accompanied by all medical reports in the parties' possession, except that, if a medical summary has been filed, only those medical reports not listed on the summary must accompany the agreed-upon settlement;

(2) include a written statement showing the employee's age and occupation on the date of injury, whether and when the employee has returned to work, and the nature of employment;

(3) report full information concerning the employee's wages or earning capacity;

(4) state in detail the parties' respective claims;

(5) state the attorney's fee arrangement between the employee or his beneficiaries and the attorney, including the total amount of fees to be paid;

(6) itemize in detail all compensation previously paid on the claim with specific dates, types, amounts, rates, and periods covered by all past payments;

(7) include a written statement from all parties and their representative that

(A) the agreed settlement contains the entire agreement among the parties;

(B) The parties have not made an undisclosed agreement that modifies the agreed settlement;

(C) the agreed settlement is not contingent on any undisclosed agreement; and

(D) an undisclosed agreement is not contingent on the agreed settlement; and

(8) contain other information the board may from time to time require.

(d) The board will, within 30 days after receipt of a written agreed settlement, review the written agreed settlement, the documents submitted by the parties, and the board's case file to determine

(1) if it appears by a preponderance of the evidence that the agreed settlement is in accordance with AS 23.30.012; and

(2) if the board finds the agreed settlement

> (A) is in the employee's best interest, the board will approve, file, and issue a copy of the approved agreement in accordance with AS 23.30.110(e); or
>
> (B) lacks adequate supporting information to determine whether the agreed settlement appears to be in the employee's best interest or if the board finds that the agreed settlement is not in the employee's best interest, the board will deny approval of the agreed settlement, will notify the parties in writing of the denial, and will, in the board's discretion, inform the parties
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> > (i) of the additional information that must be provided for the board to reconsider the agreed settlement; or
> >
> > (ii) that either party may ask for a hearing to present additional evidence or argument for the board to reconsider the agreed settlement; to ask for a hearing under this paragraph, a party may write to the board or telephone the division; an affidavit of readiness for hearing is not required; the procedures in 8 AAC 45.070 and 8 AAC 45.074 do not apply to a hearing under this subparagraph unless a party requests a hearing by filing an affidavit of readiness for hearing. If a hearing is held under this section, the board will, in its discretion, notify the parties orally at the hearing of its decision or in writing within 30 days after the hearing; if after a hearing the board finds the preponderance of evidence supports the conclusion that the agreed settlement appears to be in the employee's best interest, the board will approve and file the agreed settlement in accordance with AS 23.30.110(e); the evidence is insufficient to determine whether the agreed settlement appears to be in the employee's best interest, the board will deny approval of the agreed settlement and request additional information from the parties; or the agreed settlement does not appear to be in the employee's best interest, the board will deny approval of the agreed settlement; the board will not prepare a written decision and order containing findings of fact and conclusions of law unless, within 30 days after the board's notification, a party files with the board a written request for findings of fact and conclusions of law together with the opposing party's written agreement to the request.

(e) An agreed settlement in which the employee waives medical benefits, temporary or permanent benefits before the employee's condition is medically stable and the degree of impairment is rated, or benefits during rehabilitation training after the employee has been found eligible for benefits under AS 23.30.041(g) is presumed not in the employee's best interest, and will not be approved absent a showing by a preponderance of the evidence that the waiver is in the employee's best interest. In addition, a lump-sum settlement of board-ordered permanent total disability benefits is presumed not in the employee's best

> interest, and will not be approved absent a showing by a preponderance of evidence that the lump-sum settlement is in the employee's best interests. . . .
>
> (g) The employee or the employee's beneficiaries and the employer may agree to partially resolve a claim or a single issue . . . and submit a partial agreed settlement for board approval under AS 23.30.012 to resolve only a part of the claim or a single issue. . . .
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> **8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

Was the oral order denying the parties' C&R correct?

The regulations do not provide for a written decision and order where a C&R is denied at hearing, unless a party files a written request for findings of fact and conclusions of law and the opposing party submits its written agreement to the request. 8 AAC 45.160(d)(2)(B)(ii). Here, no request was made in writing; rather, the parties made an oral request at the April 25, 2016 prehearing conference for written findings of fact and conclusions of law concerning the April 5, 2016 C&R denial. To ensure quick, efficient, fair, and predictable delivery of indemnity and medical benefits to Employee if she is entitled to them, at a reasonable cost to Employer, this decision will examine and memorialize the oral order declining to approve the C&R, without a written request. AS 23.30.001; AS 23.30.005(h); 8 AAC 45.195. This procedure allows the panel to perform its investigation and inquiry and conduct its hearing in the manner by which it may best ascertain the parties' rights. AS 23.30.135. It also provides the parties with an analysis as to why the C&R was not approved, in case either or both parties choose to seek appellate review.

Both statutory and decisional law require close scrutiny of settlement agreements in cases where the employee is not represented by an attorney, or where the employee waives her right to medical benefits. AS 23.30.012; *Smith*; *Clark*. A lump sum settlement may be approved when it appears by a preponderance of the evidence to be in the employee's best interest. AS 23.30.012; 8 AAC 45.160. Here, Employee is not represented by an attorney and is, under the terms of the

proposed settlement agreement, waiving her right to time loss, permanent total disability, and vocational rehabilitation benefits under the Act in exchange for $10,000.

The hearing giving rise to this decision began as a joint request for approval of the parties' settlement agreement. However, Employee vacillated during her hearing between requesting approval and describing uncertainty, especially concerning her ability to return to work and earn a wage. When asked why she wanted to accept a settlement on the proposed terms, Employee candidly responded, "That's just what they offered to me. I don't know what my options are actually, I'm just kind of being led around by workman's comp and I'm just kind of doing what they tell me I'm supposed to do." Employee then testified, "Hip replacement's a pretty big deal and, it's still painful and I get tired and I've just. . . . I'm assuming that to work is going to be really difficult for me. . . . [I] probably could have worked another few years there before I had to retire." Concerning her ability to return to work, Employee testified, "I might never go back to work, I don't know. It just depends. . . . When questioned, Employee expressed doubts on whether the agreement should be approved at all: "Well, no I'm not so sure, but I, I think it's, it's fine." These are simply not compelling reasons to find this C&R is in Employee's best interest. AS 23.30.001; AS 23.30.012; AS 23.30.135; 8 AAC 45.160; *Smith*; *Rogers & Babler*; *Clark*; *Long; Kline*.

The medical records document Drs. Prevost and Gevaert opined Employee has reached medical stability, and is able to return to work, although at a restricted physical capacity. However, regarding her purported inability to return to work, Employee testified, "Those are my opinions because I know how I feel, I know how, you know, what my limitations are." Employee's credible testimony concerning her own physical condition and limitations is given considerable weight. AS 23.30.122; *Smith*; *Rogers & Babler*. Employee also testified she had little familiarity with the workers' compensation system or C&R agreements, and is not represented by an attorney, intimating she simply accepted what was offered, feeling she had little or no other options. *Id.* Serious concerns remain about whether Employee can return to work and support herself. The $10,000 proposed settlement amount is unlikely to compensate Employee for what she anticipated was at least "another few years of work" with Employer before she was injured. *Id.* Employee and Employer failed to convince the panel by a preponderance of the

evidence this settlement is in Employee's best interest. Therefore, the oral decision denying it was correct. AS 23.30.001; AS 23.30.012AS 23.30.135; 8 AAC 45.160; *Smith*; *Clark.*

The parties may submit a revised settlement agreement for consideration. AS 23.30.012. Employee is advised if the parties are not able to reach a new settlement agreement given the above-mentioned issues and concerns, she may file a workers' compensation claim seeking any and all benefits to which she believes she is entitled. If she has any questions about how to file a claim or petition or if she has any other questions about her case, she may review the Division's website or she may consult with a Workers' Compensation Technician by calling 907-269-4980.

CONCLUSION OF LAW

The oral order denying the parties' C&R was correct.

ORDER

1) The parties' request for approval of the March 9, 2016 C&R is denied.

2) The parties are directed to file any revised settlement agreement, if they choose to file one, to the designated chair's attention.

Dated in Anchorage, Alaska on May 4, 2016.

ALASKA WORKERS' COMPENSATION BOARD

_____
Matthew Slodowy, Designated Chair

_____
Ron Nalikak, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. 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 due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the 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 ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord 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 Final Decision and Order in the matter of Dianne L. Wilson, employee / claimant v. Station, Inc., employer; Republic Indemnity Co. of America (RIG), insurer / defendants; Case No. 201504635; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on May 4, 2016.

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Charlotte Corriveau, Office Assistant