ALASKA WORKERS' COMPENSATION BOARD

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

MUNICIPALITY OF ANCHORAGE, Self-Insured Employer, Petitioner, v. JEFFERY D. HURD, Employee, Respondent.	)	FINAL DECISION AND ORDER AWCB Case No. 201910727 AWCB Decision No. 21-0017 Filed with AWCB Anchorage, Alaska on February 26, 2021

Employer Municipality of Anchorage's September 17, 2020 petition to recover its lien from an injured worker's third-party settlement was heard on January 28, 2021, in Anchorage, Alaska, a date selected on December 8, 2020. A November 10, 2020 hearing request gave rise to this hearing. Attorney Martha Tansik appeared and represented Employer. Attorney William Dennie Cook appeared and represented Jeffery D. Hurd (Employee) who appeared and testified. Employer objected to the panel considering Employee's brief because it was not filed timely; an oral order sustained the objection. This decision examines the oral order to not consider Employee's brief and decides Employer's petition on its merits. The record closed when the panel deliberated on February 5, 2021.

ISSUES

Employer contended Employee's hearing brief was filed and served late. Consequently, it sought an order precluding the panel from considering it.

Employee did not deny his hearing brief was late and offered no mitigating explanation. An oral order sustained Employer's objection and decided the panel would not consider the brief.

1) Was the oral order to not consider Employee's hearing brief correct?

Employer contends it is entitled to recover its statutory workers' compensation lien in full from Employee, who settled a civil action against a third party responsible for his work-related motor vehicle accident. It contends the lien includes all costs to "administer benefits," less its share of Employee's prorated attorney fees and costs. Employer also seeks an order determining its credit.

Employee contends Employer's lien is the gross allowable sum determined on the date he settled his third-party case. He further contends Employer's lien may not include "unnecessary and unreasonable" administrative costs that were not benefits actually paid to him.

2) Does Employer's third-party lien include all administrative costs, do such costs affect the §015(g) credit, and on what date is the lien determined?

Employer contends Employee's refusal to reimburse its statutory lien amounts to "bad faith." It seeks an equitable remedy -- reducing Employee's attorney's fees.

Employee did not express a position on this issue. This decision assumes he opposes.

3) May this decision equitably reduce Employee's third-party attorney fees?

Employer contends Employee refused to reimburse its full lien from his third-party settlement. It seeks an order directing him to pay the lien and contends the panel has subject matter jurisdiction under the Act to enter such an order.

Employee has no objection to the panel issuing an order for him to reimburse the lien, once it is properly determined. He offered no position on the panel's jurisdiction to do so.

4) Does this decision need to reach issues over the panel's subject matter jurisdiction to order Employee to reimburse Employer's lien?

FINDINGS OF FACT

A preponderance of the evidences establishes the following facts and factual conclusions:

1) On August 8, 2019, a motor vehicle collision injured Employee while he was on the job as a project engineer for Employer. (First Report of Injury, August 12, 2019; Employee).

2) On November 5, 2019, John Chiu, M.D., performed lumbar spine surgery on Employee in California. (Operative Report, November 5, 2019).

3) On July 2, 2020, after Employee had retained Cook who had begun negotiating with the third-party who had injured Employee, Cook and he signed an agreement about Employee's third-party case. They agreed its pending settlement and Cook's 331/3 percent fee agreement with Employee were subject to the "eventually agreed to" lien that would be deducted under AS 23.30.015(g) and the *Cooper* Alaska Supreme Court opinion. Employee and Cook agreed to deposit no less than $200,000 into Cook's trust account "until an agreement has been executed between Employee" and Employer for "disbursement of funds equal to the finally agreed to sum of the [workers' compensation] lien." It is unclear who wrote this agreement or whether Employer or its representative ever signed it. (Employer's Hearing Brief, January 21, 2021, Exhibit B).

4) On July 13, 2020, Tansik sent Cook an email approving Employee's acceptance of a policy limits settlement plus "add-ons" in his third-party case, and stating in part:

> We request that you place **all funds** remaining after attorneys (sic) fees and costs are taken out in the Trust account. I estimate this at somewhere around $230,000. There are obvious credit issues under AS 23.30.015 that need to be addressed along with the final lien resolution amount.
>
> In the meantime, you expressed that you didn't believe that NCM's [nurse case managers] were included in the lien amount. Please provide statutory or case authority reasoning for that.
>
> It is my position that they are because all medical treatment fees that are paid under the Act are repayable under the lien. NCMs fit within the scope of AS 23.30.095 for ensuring care coordination and medical management to improve outcomes. AS 23.30.095 requires payment of "(a) . . . 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. . . ." The facilitative services of a Nurse Case Manager fall squarely within this definition of nurse "services." In fact, the American Case Management Association's definition of "case management" appears to support this position: *"Case Management -- in hospital and healthcare systems is a collaborative practice model including patients, nurses, social workers, physicians, other practitioners, caregivers and the community. The Case Management process encompasses communication and facilitates care along a continuum through effective resource coordination. The goals of Case Management include the achievement of optimal health, access to care and appropriate utilization of resources, balanced with the patient's right to self-determination."* I have never seen a case that did not include repayment for those services. (Tansik email, July 13, 2020; italics in original).

5) On December 8, 2020, the parties stipulated to file and serve their hearing briefs by January 21, 2021. The designee referenced 8 AAC 45.114, which gives the parties instructions about filing hearing briefs, and required the parties to file and serve them by January 21, 2021, notwithstanding their stipulation. (Prehearing Conference Summary, December 8, 2020).

6) On January 8, 2021, Employer filed and served evidence upon which it relied at hearing. Included was Samuel Ward's affidavit; he is responsible for adjusting Employee's claim. Ward said Employer is self-insured and must pay both Second Injury Fund (SIF) and Workers' Safety Compensation and Contribution Amount (WSCAA) service fees pursuant to statute. According to Ward, these payments "are based on the amounts of indemnity and medical benefits paid, not including other expenses." Based on Employer's spreadsheet, Ward stated to date, it had paid $75,095.94 in indemnity benefits and $151,392.23 in medical benefits totaling $226,488.17 in benefits subject to Employer's SIF and WSCAA statutory obligations. Due to the time and manner in which SIF and WSCAA benefits are paid, Ward said some of these payments were not included in Employer's January 7, 2021 "lien register." Accordingly, $9,086.01 for additional SIF and WSCAA payments had to be added to the spreadsheet, bringing Employer's §015 lien total to $288,814.87; this is the amount employer seeks to recover from Employee's third-party settlement. Among the documents attached to Employer's January 8, 2021 evidentiary filing was Employer's nine page January 7, 2021 spreadsheet showing "Claimant Bills/Compensation" for Employee's case. The following spreadsheet shows by relevant columns and category, amounts Employer claims in its §015 lien:

Table I

Business	**Coverage**	**Amount**
SIF	Expense	$1,236.95

PACBLU	Expense	$51,991.89
ISO Services	Expense	$11.85
Jeffrey Hurd	Indemnity	$1,223.94
Jeffrey Hurd	Indemnity	$50,862
Jeffrey Hurd	Indemnity	$23,010
Various Medical Providers	Medical	$82,853.37
Miscellaneous	Medical	$11,391.72
Alaska Radiology	Medical	$3,195.33
Anchorage Fire Department/Hurd	Medical	$7,927.43
Various Medical Providers	Medical	$21,520.09
Physical Therapy	Medical	$4,034.43
Various Medical Providers	Medical	$3,951.88
Essential Medical Management	Medical	$16,517.98
Sub-total		$279,728.86
SIF / WSCAA from Ward affidavit		$9,086.01
Total		**$288,814.87**

Entries for what appear to be Employee's medical providers are, with three exceptions, reduced presumably to adhere to Alaska's medical fee schedule; no charges for PACBLU or Essential Medical Management (EMM) are reduced. Three PACBLU payments for service date November 5, 2019, are $5,000 each, totaling $15,000 and several more on that date bring the total PACBLU charges to nearly $20,000; this is the date Dr. Chiu operated on Employee's spine. In a different section, Employer's spreadsheet lists medical providers' charges related to Employee's November 5, 2019 surgery; these are all reduced and reportedly paid. Employer's spreadsheet does not describe services provided on any date, or what payments were for exactly, though a reader could draw reasonable inferences from some entries, which for example appear to be for bi-weekly disability or impairment benefits and, based on the "business" name, payments to Employee's medical providers. (Affidavit of Service, January 8, 2021; inferences drawn from the above).

7) On January 26, 2021, Employee filed and served his hearing brief; it was not timely filed or served. (Brief and Opening Statement of William D. Cook, January 26, 2021; official notice).

8) At hearing on January 28, 2021, Employer moved to strike Employee's hearing brief on grounds it was not timely filed and served. Employee offered no mitigating circumstances that prevented him from filing and serving his brief timely. Consequently, an oral order sustained Employer's objection and Employee's brief was not considered in rendering this decision though

the panel considered Employee's oral opening statement and closing arguments. (Record; judgment).

9) Employer agrees Employee had a serious work-related injury and as a result, may need expensive, probably life-long medication and another knee surgery; he may be entitled to considerable future permanent partial impairment (PPI) benefits. It agrees Employee settled his third-party case with Employer's permission for $346,388.14; it concedes his lawyer is entitled to prorated attorney fees and cost under *Cooper* or *Stone* Alaska Supreme Court opinions. Its "rough estimate" for Employee's ongoing medical care exceeds $250,000 based on calculations its attorney made for a Medicare set-aside agreement, not including PPI and disability benefits. Employer contends its attorney provided Employee's lawyer with legal authority for him to reimburse the "total amount paid" as reimbursement under §015, but Employee refused to "pay the lien in full." It contends the §015 lien, effective January 8, 2021, totaled $288,814.87 and under *Cooper*, Employer's *pro rata* share for attorney fees and costs, effective January 11, 2021, is 83.38 percent of the total recovery; this would leave approximately $38,000 for Employee, which would create a credit against future benefits. Employer further contends under *Stone* that anticipated future medical and indemnity costs must be considered and if those costs are expected to exceed the third-party recovery, Employer actually gets the entire benefit of that settlement. It contends, given Employee's injuries, it will get full reimbursement from the third-party settlement, less prorated attorney fees and costs, because the credit will eat into any remainder to Employee; in other words, either through its lien or credit, Employer will get all the money back it has paid effective January 8, 2021, less Cook's prorated attorney fees and costs. Employer concedes under *Stone* it may be liable for 100 percent of the attorney fees and costs since it will receive full value from the third-party settlement; in that event, Employer contends Employee would retain around $57,000 from the settlement. (Record).

10) Employer did not file any Medicare set-aside agreement data as evidence and called no witnesses to estimate Employee's future benefits. Tansik based Employer's future benefit estimates on her calculations as a "Medicare Set-Aside Consultant Certified" and a "Certified Medicare Secondary Payer Professional." To support its estimates, Employer contends three injured body parts remain un-rated for PPI benefits and when these are rated the PPI ratings will significantly increase Employer's growing future exposure to Employee; it contends future PPI benefits alone could exceed $74,000. Employer contends Employee's prescriptions cost at least

$600 per year and may be as high as $40,000 over his lifetime. It contends Employee has future medical appointments and is looking into surgery for his work injuries. Consequently, Employer contends under either the standard *pro rata* attorney fee calculation under *Cooper* or a 100 percent attorney fee attribution to Employer under *Stone*, it will eventually recover all benefits it paid to Employee. It contends Employee's testimony supports this conclusion; further, it contends if Employer's §015 lien goes down by Employee's requested reductions, the §015 credit simply increases. Employer also contends the Act's overall intent to ensure "quick, efficient, fair and predictable delivery of indemnity and medical benefits" to injured workers supports using nurse case managers to facilitate prompt medical care when providers fail to get information to adjusters promptly. Since the Act requires it to pay medical bills according to Alaska's medical fee schedule, Employer contends hiring a third-party to review and adjust medical bills in accordance with the fee schedule is considered part of "the cost of all benefits actually furnished" by it to Employee. (Record).

11) Without expert testimony or evidence, the panel could not predict Employee's future benefits, given his expressed reluctance to have additional surgery. (Experience; judgment)

12) Employer contends the question of what is and is not included in a §015 lien is not complicated and not a case of first impression. Its attorney fees and costs are not included in its lien and it claimed no attorney fees or costs related to Employee's third-party case. (Record).

13) Employer contends Employee presented "absolutely no legal basis or support" for his contention that the §015 lien should not include Employer's payments for nurse case management or costs to conform its medical payments to the Alaska Medical Fee Schedule. It contends the lien includes "the total amounts [it] paid" less attorney fees and costs. Employer contends the fact §015 requires Employee to repay SIF and WSSCA payments demonstrates legislative intent that he also reimburse Employer for "all the costs necessary to administer benefits appropriately." It contends case law and legislative history supports its position; Employer also referred to a definition of "nurse case management" as support. It contends nothing in the statute or case law suggests a §015 lien may be reduced by nurse case management services, which it contends have been helpful in this case. Employer contends PACBLU is a company that adjusts medical bills in accordance with the Alaska Medical Fee Schedule and sometimes provides case management services. It contends the panel can take official notice that most if not all insurers and adjusting companies utilize outside companies like

PACBLU to review medical bills, which requires expertise and training in medical coding. Employer further contends such third-party medical coding services constitute a "medical benefit" to Employee included in its §015 lien and nothing in case law or statute provides for deducting these amounts. (Record).

14) Employer relies on §015(e)(1)(A) to support its position on the lien issue and cites therefrom, stating, "The referenced subsections address 'expenses incurred by the employer with respect to the action. . . ." (Employer's Hearing Brief, January 21, 2021, at 4).

15) Employer contends Employee's "bad faith" caused prejudice because it had to hire an attorney to obtain "proper repayment" and it has lost the time value on the funds that should have been repaid "per statute." It suggests because Employee "refused to comply with Alaska law," reducing Employee's attorney fees from the third-party settlement "by the amount it costs for another counsel to obtain an order" and repayment is an equitable remedy. (Employer's Hearing Brief, January 21, 2021 at 8).

16) Employer made no claim for attorney fees or costs related to Employee's third-party claim; it made no claim for interest on the lien. (Employer's Hearing Brief, January 21, 2021; record).

17) Employee objected to anything in Employer's opening statement or closing argument being considered "evidence" because he objected to Tansik calling herself as a witness; he noted a difference between Tansik offering estimates for Employee's future compensation benefits during settlement discussions versus presenting those estimates as evidence at hearing. He asked that Tansik's calculations be stricken because Employer called no experts as witnesses. (Record).

18) Employee contends he had $2,525 in third-party litigation costs; $2,500 was attributable to an expert he paid to calculate a Medicare set-aside agreement in the event the parties settled the workers' compensation case; the instant parties did not settle Employee's case. (Record).

19) Employer did not object to or dispute Employee's third-party case costs. (Record).

20) Employee made no claim for attorney fees or costs for services his lawyer rendered before the board. (Agency file; record).

21) Employee contends the primary issue for hearing is what is included in Employer's §015 "lien." He contends PACBLU is an entity Employer hired to do work that could be done by Employer's staff and adjusters. Employee contends EMM provided a nurse case manager to follow him around to his doctors' appointments. He contends neither PACBLU nor EMM

provided any medical care or treatment to him and their fees should not be included in Employer's §015 lien. Employee contends charges for PACBLU and EMM were significant but not "reasonable or necessary" because as an intelligent adult, he could have found his way to and from doctors' offices and directed his providers to send medical records and information to the adjuster without assistance from EMM's nurse case manager. He contends PACBLU and EMM did, and are doing, nothing to restore his health. Employee contends Employer's lien is the includable amounts it had paid effective the date Employee settled his third-party case. He contends the lien's "gross sum" includes benefits actually paid to Employee in medical or disability benefits, not administrative costs passed on to contractors PACBLU or EMM. He is also concerned that PACBLU and EMM duplicated services to Ward. (Record).

22) Employee did not object to Ward's affidavit or to the SIF or WSSCA amounts. (Record).

23) Employee, currently age 58, had serious medical complications from his work-injury related spinal surgery, including blood clots for which he takes blood thinners. He plans on near-future visits with orthopedic surgeons for treatment recommendations for his shoulder and spine. Employee returned to work for Employer on "full duty" though he does not perform all duties because he cannot physically handle some responsibilities. Ward, Employer's in-house case manager, he called Employee to ask if he had "a problem" with a nurse case manager working on his case; Employee said he had no objection but Ward never told him he would have to pay for her services out of his third-party recovery. Employee was under the impression he could have refused nurse case management services. Employer hired and assigned nurse case manager EMM's Mielle Tuccillo to Employee's case; Ward told Employee he hired Tuccillo because Ward was having difficulty obtaining information from Employee's doctors timely. Employee had no difficulty finding his way to and from doctors' offices and following up on various medical referrals; Employee's wife is in the medical field and was able to assist him. Employee concluded, "It [EMM] was more for him [Ward] than it was for me." Tuccillo accompanied Employee to California for his spinal surgery and told him she had to contact Ward for approval whenever physicians made treatment recommendations, which is why Employee thought she was working for Ward and not for him. Employee's wife accompanied him on his second trip to California for follow-up care; Tuccillo did not attend on that occasion. Employee is an Army veteran; he occasionally receives treatment from the Veterans Administration (VA). The VA is

currently prescribing and providing Employee's blood thinners for his work injury; the VA is aware Employee had a work-related motor vehicle accident. (Hurd).

24) Employee's blood thinners costs about $465 per month and he may need to be on them for life. He understands this medication should be billed to Employer's adjuster, but the VA likes to monitor its patients' "whole-health." Employee further understands the VA may someday assert a lien for this medication. He agreed Tuccillo was a "great person" who did a "great job," and her being involved "speeded up the process." However, when Employee had severe nerve pain, he found it would take three months to see a doctor. Not wanting to wait that long, he contacted a California physician who said he could assist and Employee obtained a referral by himself when Ward told him one was necessary. Tuccillo's "understanding of the system is beneficial" but he was unaware he would end up paying for her services through Employer's lien and implied he could do much of what Tuccillo did himself. Employee's physicians told him he will "definitely" need more surgery and have his knee replaced again. However, given his past experience he does not want to rush into any surgeries. (Hurd).

25) Evidence about Tuccillo's duties was limited to Employee's description: she provided no medical care to Employee; she obtained information from his medical providers and passed it on to Ward; Employee considered her Ward's "advisor." He does not know who or what PACBLU is, but it was not one of his medical providers. (Hurd).

26) Medical providers' offices frequently contact adjusters directly to request authorization to provide recommended treatment to injured workers, without going through a nurse case manager. There is no evidence that an attending physician recommended a nurse case manager and Employee could have objected to Tuccillo's participation in his case. Employer presented no evidence describing Tuccillo's duties. She was primarily Ward's agent and consultant, provided no medical care or treatment to Employee, and any "benefit" Employee received from her services was incidental to her primary role. If most employers or carriers use nurse case managers, and contractors to adjust bills to the medical fee schedule, it is likely these costs are factored into premiums or budgets. (Experience; judgment; inferences drawn from the above).

27) There is no evidence that an attending physician recommended PACBLU. It provided no medical care or treatment to Employee. (Agency file; Hurd; record).

28) EMM's and PACBLU's bills were administrative costs; they provided no "compensation" or "benefits" to Employee. They account for $68,509.87 of Employer's requested lien

($16,517.98 + $51,991.89 = $68,509.87). (Experience, judgment and inferences from the above).

PRINCIPLES OF LAW

The board may base its decision on not only 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). "Ripeness" is a legal question, which requires "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Nelson v. Municipality of Anchorage*, 267 P.3d 636, 639 (Alaska 2011).

> **AS 01.10.040. Words and phrases; meaning of "including."** (a) Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those that have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning.
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> (b) When the words "includes" or "including" are used in a law, they shall be construed as though followed by the phrase "but not limited to."

Underwater Construction, Inc. v. Shirley, 884 P.2d 150, 155 (Alaska 1994) said the Court "generally construes statutes *in pari materia* where two statutes were enacted at the same time, or deal with the same subject matter," and in such a way "to produce a harmonious whole." The only law with which a section of the Act must be harmonious is the Act itself. *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010), said, "The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others." When construing a statute, the Court looks at three factors: (1) the statute's language, (2) its legislative history and (3) the legislative purpose behind the statute. *Croft v. Pan Alaska Trucking, Inc*., 820 P.2d 1064, 1066 (Alaska 1991), explained *expressio unius est exclusio alterius*, which establishes an inference that "where certain things are designated in a statute, all omissions should be understood as exclusions." *Nelson*, 267 P.3d 636 at 642 provided further guidance on how the Court construes a statute:

> When construing a statute, this court "presume[s] that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous" (citation omitted). "[A]ll sections of an act are to be construed together so that all have meeting and no section conflicts with another" (citations omitted).

Harris v. M-K Rivers, 325 P.3d 510, 515 (Alaska 2014), said statutes are interpreted according to "reason, practicality and common sense," considering their purpose. Generally, the same words used twice in the same statute have the same meaning. *ARCTEC Services v. Cummings*, 295 P.3d 916 (Alaska 2013). "Dictum is not holding"; to be binding precedent, a previous appellate decision must actually resolve "the issue before us." *Joseph v. State*, 26 P.3d 459, 468-69 (Alaska 2001).

> **AS 23.05.067. Service fees for administration of workers' safety and compensation programs.** (a) Each . . . employer who is self-insured . . . for purposes of AS 23.30 in this state shall pay an annual service fee to the department for the administrative expenses of the state for workers' safety programs under AS 18.60 and the workers' compensation program under AS 23.30 as follows:
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> (1) for each employer,
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> (A) except as provided in (b) of this section, the service fee shall be paid each year to the department at the time that the annual report is required to be filed. . . ; and
> (B) the service fee is 2.9 percent of all payments reported to the division of workers' compensation in the department under AS 23.30.155(m) or (n), except second injury fund payments; and
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> (2) for each insurer, the director of the division of insurance shall, under (e) of this section, deposit from funds received from the insurer . . . a service fee of 2.5 percent of the direct premium income for workers' compensation insurance received by the insurer during the year ending on . . . December 31. . . .
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> . . . .
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> (e) Annual service fees . . . collected under this section . . . shall be deposited in the workers' safety and compensation administration account in the state treasury. . . . The legislature may appropriate money from the account for expenditures by the department for necessary costs incurred by the department in the administration of the workers' safety programs contained in AS 18.60 and of the Alaska Workers' Compensation Act contained in AS 23.30. . . .

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
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> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
> . . . .
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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.
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> **AS 23.30.015. Compensation where third persons are liable**. . . .
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> (d) An employer under an assignment may either institute proceedings for the recovery of damages or may compromise with a third person, either without or after instituting an action.
> (e) An amount recovered by the employer under an assignment, whether by action or compromise, shall be distributed as follows:
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> (1) the employer shall retain an amount equal to
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> (A) the expenses incurred by the employer with respect to the action or compromise, including a reasonable attorney fee determined by the board;
> (B) the cost of all benefits actually furnished by the employer under this chapter;
> (C) all amounts paid as compensation and second-injury fund payments, and if the employer is self-insured or uninsured, all service fees paid under AS 23.05.067;
> (D) the present value of all amounts payable later as compensation, computed from a schedule prepared by the board, and the present value of the cost of all benefits to be furnished later under AS 23.30.095 as estimated by the board; . . .
> . . . .
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> (g) If the employee or the employee's representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (e)(1)(A)-(C) of this section insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter. . . .

The Act does not define "benefits." *Castillo v. J.J. Welcome, Inc*., AWCB Decision No. 86-204 (August 8, 1986). It defines "compensation" but *Castillo* noted "obvious difficulties" with the way the Act uses that word and said the board "must <u>always</u> determine the meaning of

'compensation' in a particular section with regard to the purpose of the section." *Id*. at 3 (emphasis in original). *Castillo* held an employer could not recover late-payment penalties out of a worker's third-party settlement because penalties could not be considered "compensation" or "a benefit" to the employee primarily because they could never form a basis for requiring a third-party to pay damages. Allowing an employer to recover late payment penalties would result in the employee receiving less from the third-party case then he would have received had there been no workers' compensation injury involved, and would defeat the statutory purposes for the penalty.

Cooper v. Argonaut Ins. Companies, 556 P.2d 525, 526 (Alaska 1976), said under §015 "the employee shall promptly pay to the employer out of the third-party recovery all amounts paid out by the employer or the compensation carrier. . . ." *Cooper* did not interpret what constitutes "all benefits furnished by the employer" or "all amounts paid as compensation" under §015. The issue in *Cooper* was attorney fees and costs the injured worker incurred to recover damages from the third-party tortfeasor and whether the employer should contribute to those fees out of its lien, to avoid an employer windfall since it was the employee's lawyer who obtained a settlement that benefited the employer. *Cooper* held §015 requires proration between the carrier and the employee of third-party litigation costs and attorney's fees, which must be calculated according to the ratio of the total compensation payments to the total recovery.

Forest v. Safeway Stores, Inc., 830 P.2d 778 (Alaska 1992), was a benefits forfeiture case brought by an employer under §015 for the employee's failure to get written consent from the employer before settling a third-party medical malpractice case against his surgeon. It did not implicate what constitutes "all benefits furnished by the employer" or "all amounts paid as compensation."

McCarter v. Alaska Nat. Ins. Co., 883 P.2d 986, 989 (Alaska 1994), did not involve what constitutes "all benefits furnished by the employer" or "all amounts paid as compensation" under §015. Rather, it addressed contentions the injured worker was not fully compensated in a policy-limit third-party settlement and how this would affect the employer's lien, and related arguments.

Rice v. Denley, 944 P.2d 497 (Alaska 1997), said an insurer had a §015 lien that could be enforced as a constructive trust or an equitable lien. It did not address what is included in such a lien.

Wichman v. Benner, 948 P.2d 484 (Alaska 1997), did not address what constitutes "all benefits furnished by the employer" or "all amounts paid as compensation" under §015. *Wichman* dealt with whether a workers' compensation insurer could assign its §015 reimbursement rights.

Stone v. Fluid Air Components of Alaska, 990 P.2d 621, 625 (Alaska 1999), addressed attorney fees and costs under §015 and concluded the employer's *pro rata* share of attorney's fees and costs in a third-party settlement included all benefits, both past and future. At hearing, the employee in *Stone* presented an economic expert who estimated the employer's future compensation liability; the Court approved this method. *Stone* did not construe what constitutes "all benefits furnished by the employer" or "all amounts paid as compensation" under §015.
Berger v. Wien air Alaska, 990 P.2d 240, 242 (Alaska 2000), did not speak to what is included in a §015 lien. It addressed whether collateral sources like a spouse's health insurance or the VA that had paid the injured worker's medical benefits could reduce the employer's §015 credit. The Court held they could and did and stated:

> Thus, when an employer would be otherwise responsible under the workers' compensation statute for an employee's medical expenses, the employer's credit decreases. This is true regardless of how those bills were paid or discharged.

Alaska National Insurance Co. v. Jones, 993 P.2d 424 (Alaska 2000), was an appeal from a superior court order stating the workers' compensation insurer had no right to sue attorneys for the plaintiff, rather than the plaintiff himself, to recover its §015 lien, which the attorneys refused to release. *Jones* reversed the superior court and stated §015 required the plaintiff to "promptly pay to [ANIC] the total amounts paid by [ANIC as workers' compensation benefits] insofar as the recovery is sufficient after deducting all litigation costs and expenses." (Bracketed material in original). *Jones* did not discuss what are considered "benefits" in an insurer's §015 lien.

State of Alaska v. Kacyon, 31 P.3d 1276, 1283 (Alaska 2001), stated §015(e)(1)(C) encompasses "*all* amounts paid as compensation," (emphasis in original) but did not address what constitutes "compensation" in an employer's §015 lien.

Schiel v. Union Oil Co. of California, 219 P.3d 1025 (Alaska 2009), involved a statutory change extending exclusive liability principles to project owners, and did not implicate §015.

Atkins v. Inlet Transportation & Taxi Service, Inc., 426 P.3d 1124 (Alaska 2018), was a benefits forfeiture case brought by an employer under §015 for the employee's failure to get written consent from the employer before settling a third-party claim for policy limits. It did not implicate what constitutes "all benefits furnished by the employer" or "all amounts paid as compensation."

Professor Larson in his workers' compensation treatise states:

> The normal rule . . . is that a subrogated carrier is entitled to recover from the third party not merely its compensation outlay, but the full amount of the employee's . . . damages, including personal damages such as loss of consortium and companionship, but not including the penalties or expenses paid by the carrier. (10 Larson, *Workers' Compensation Law*, §117.01[1] p. 117-5 (2016)).

In *Ziegler v. Department of Labor & Industries*, 708 P.2d 1212 (Wash. App. 1986), Washington Labor and Industries, pursuant to a right granted it by statute, ordered an injured worker to undergo several independent medical examinations in his workers' compensation case. The worker later settled a third-party case and Labor and Industries demanded, as part of its statutory lien, costs and expenditures for the medical evaluations. The Superior Court ruled these were not "benefits paid as contemplated" by the subrogation statute, which stated in relevant part:

> (1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:
> . . . .
>
> (c) The department and/or self-insurer shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for *compensation and benefits paid* (emphasis in original). . . .

On appeal the dispositive issue was whether statutorily authorized medical examinations were reimbursable under the subrogation statute as "compensation and benefits paid." *Ziegler* found the reason for such examinations differed from the purpose of providing the injured worker with "proper and necessary" medical and surgical services. "It is a cost that ordinarily would not be incurred by a worker if it were not for the fact the department has a duty to properly administer the funds." (*Id*. at 1213). Labor and Industries argued that the injured worker received "some benefit" from the medical examinations but *Ziegler* emphasized that the examinations are intended to allow the state to properly administer its program and any benefit to the injured worker was "incidental." *Ziegler* concluded such medical examinations do not fit within the description of "medical care" under Washington law and held, "we find the costs of the ordered examinations were administrative expenses, not benefits." Consequently, they were not reimbursable from the injured worker's third-party case recovery. (*Id*. at 1214).

In *Cole v. Byrd*, 656 N.E.2d 1068 (Illinois 1995), the Illinois Supreme Court considered whether nurse case management services the compensation insurer provided to the injured worker were included in the employer's lien and reimbursable from the worker's third-party case recovery. A management company's registered professional nurse performed consultant services "to ensure that proper medical care was given to plaintiff." The nurse's testimony explained her typical activities: make recommendations to the carrier; ensure the patient gets the best medical care; provide management rather than medical treatment; keep the carrier's costs down; bill for her time consulting with the carrier and any attorneys involved in litigation; attend the injured worker's medical visits to provide moral support; visit the worker's home to see if accessibility modifications were necessary; and "try to recommend more efficient management." The nurse case manager provided no medical treatment to the plaintiff. (*Id*. at 1071-72). Following this testimony, the trial court found the nurse case manager's charges were a case-management expense and not medical treatment; the plaintiff could not recover them as damages arising from the claim and they were not included in the carrier's subrogated lien. (*Id*. at 1072).

Post-trial, the lower court reopened the trial record and heard testimony from the adjuster who hired the nurse case manager. While admitting she wanted to cut costs for the insurer, the adjuster said her primary motivation was to make sure the plaintiff "received the best care." The

adjuster testified that the nurse case manager would explain treatments to the plaintiff and provide moral support; the nurse also coordinated services among various providers but did not provide any treatment. The trial court again concluded the nurse case manager's bill was a case-management expense and not reimbursable from the plaintiff's recovery. (*Id*.).

On appeal, an intermediate court concluded the nurse case manager's bill represented "medical treatment." It held the nurse's services were "necessary for the physical, mental, and vocational rehabilitation" for the plaintiff. "The court also stated that the services were performed basically for plaintiff's benefit" and were recoverable in the lien. The intermediate appellate court reversed the trial court and the plaintiff appealed. (*Id*.). The statute in question in *Cole* stated in part:

> The employer shall provide and pay for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury. The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is unable to be self-sufficient the employer shall further pay for such maintenance or institutional care as shall be required. (820 ILCS 305/8(a) (West 1992)).

The Illinois Supreme Court in *Cole* said whether an expense constitutes a necessary medical or rehabilitative expense is ordinarily a "question of fact." It credited the trial court's findings that the nurse case manager was managing the file on the insurer's behalf rather than providing medical services to the plaintiff because it was undisputed that the nurse case manager did not provide any necessary medical or rehabilitation services to the plaintiff. It further noted no doctor recommended the nurse case management services and the plaintiff had little choice in choosing the service, controlling it, deciding whether to accept it or questioning its costs. *Cole* held Illinois law authorized reimbursement to carriers for necessary medical and rehabilitation services but not for "an insurer's expenses." *Cole* noted an insurer incurs numerous expenses in handling a workers' compensation case, including the need to retain legal counsel to advise the insurer, claims adjusters' salaries, private investigators' expenses and costs associated with independent medical evaluations. None of these are reimbursable from third-party recoveries. (*Id*. at 1073).

Notwithstanding its agreement that nurse case managers' services may provide some benefit to an injured worker, *Cole* held they are not reimbursable. *Cole* relied on Professor Larson's treatise to hold that an "insurer's expenses are simply not considered 'compensation' paid to plaintiff." The carrier contended the law's requirement that it provide medical and rehabilitative services had been interpreted broadly; for example, it must provide assisted home and nursing care and home remodeling expenses. *Cole* distinguished these services and noted the nurse case manager provided consultation services for the insurer; this "cannot be considered similar to a nursing service, home care service or remodeling expense which is sought by an employee or an employee's doctors and is needed to treat the long-term effects of an employee's physical injuries." *Cole* reversed the lower appellate court and reinstated the trial court's decision. (*Id*. at 1074).

Memphis Light Gas & Water Division v. Watson, 584 S.W.3d 863 (Tenn. App. 2019), similarly held that a workers' compensation insurer's discretionary nurse case management expenses were not recoverable from the injured worker's third-party tort recovery under Tennessee law.

Professor Larson's treatise further states:

> Reimbursement of the compensation payor according to the terms of the statute is mandatory, and cannot be modified by courts. (10 Larson's, *Workers' Compensation Law*, §117.01[2] (2016) p. 117-8).

> **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. . . .

> **AS 23.30.097. Fees for medical treatment and services**. (a) All fees and other charges for medical treatment or service are subject to regulation by the board consistent with this section. . . .

> **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 credibility finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.395. Definitions**. In this chapter,
> . . . .
>
> (12) "compensation" means the money allowance payable to employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter; . . .

> **8 AAC 45.083. Fees for medical treatment and services.** (a) A fee or other charge for medical treatment or service may not exceed the maximums in AS 23.30.097. The fee or other charge for medical treatment or service . . . (4) provided on or after January 1, 2019, but before January 1, 2020, may not exceed the maximum allowable reimbursement established in the Official Alaska Workers' Compensation Medical Fee Schedule, effective January l, 2019, and adopted by reference. (5) provided on or after January 1, 2020, may not exceed the maximum allowable reimbursement established in the Official Alaska Workers' Compensation Medical Fee Schedule, effective January 1, 2020, and adopted by reference. . . .

> **8 AAC 45.114. Legal memoranda.** Except when the board . . . determines that unusual and extenuating circumstances exist, legal memoranda must
> (1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established;

ANALYSIS

1) Was the oral order to not consider Employee's hearing brief correct?

The parties' hearing briefs were due for filing and service no later than January 21, 2021, both by regulation and by the parties' stipulation. 8 AAC 45.114(1). The December 8, 2020 prehearing conference summary recorded the parties' stipulation to file their hearing briefs by January 21, 2021, and cited §114 for easy reference. Employee filed and served his hearing brief five days late on January 26, 2021; his counsel did not offer any unusual or extenuating circumstances that prevented him from filing it timely. Accordingly, the oral order granting Employer's request to

not consider Employee's hearing brief was correct. However, the panel considered Employee's verbal opening statement and closing arguments.

2) Does Employer's third-party lien include all administrative costs, do such costs affect the §015(g) credit, and on what date is the lien determined?

The parties' raise three questions: (A) What is included in Employer's lien under AS 23.30.015; (B) Do any disallowed administrative costs affect the §015(g) credit; and (C) On what date is Employer's §015 lien determined?

(A) Employer's §015 lien does not include all "administrative" costs.

Employer contends its §015 lien includes what it calls "administrative costs" and essentially everything it paid on Employee's behalf, even though some funds did not go to him or to his medical providers. It seeks a broad interpretation of the word "cost" in §015(e)(1)(B), to include costs it paid for a third-party contractor to review Employee's medical bills and adjust them in accordance with the Alaska Medical Fee Schedule, and expenses paid to a nurse case manager. Employer contends Employee acted in "bad faith" by not accepting its interpretation of §015 and not promptly paying all requested reimbursements; it contends Employee cited no legal authority supporting his position. Employer contends no statute or case law prevents it from including PACBLU's and EMM's charges in its §015(g) lien.

Employee relies on §015(e)'s plain language, which limits the "amount" Employer "shall retain" to "the costs of all benefits actually furnished" by it under the Act, all amounts paid as "compensation," SIF payments and all WSSCA fees Employer must pay under AS 23.05.067 because it is a self-insured employer; he does not dispute the SIF or WSSCA payments or amounts.

Neither party provided case law addressing the initial issue: What is included in Employer's §015 lien? And more precisely, do fees paid to a third-party contractor to adjust medical bills to the Alaska Medical Fee Schedule, and payments to a nurse case manager consultant count toward Employer's lien? Employer's cases are not on point because none addresses this issue. *Cooper*; *Forest*; *McCarter*; *Rice*; *Wichman*; *Stone*; *Berger*; *Jones*; *Kacyon*; *Schiel*; *Atkins*. *Dicta*

from cases suggesting Employer is entitled to "all amounts paid out," "the total amounts paid," or "all amounts paid as compensation" do not address or resolve the pertinent question here and are not binding precedent. *Joseph*. Contrary to Employer's assertion, this appears to be a case of first impression.

Looking to the statute, notably §015's relevant provisions do not contain the word "includes" when explaining what Employer gets to retain. Had the statutes used "includes," under Alaska law this language would have allowed a broader "includes but is not limited to" interpretation, which would strengthen Employer's argument. AS 01.10.040(b). Rather, §015 expressly states and limits how third-party proceeds "shall" be distributed and on its face does not suggest the list may be expanded. General statutory construction rules suggests "where certain things are designated in a statute, all omissions should be understood as exclusions." *Croft*. Thus, Employer's argument that nothing in the statute suggests that EMM's and PACBLU's services should not be included in its §015 lien is diametrically opposed to standard statutory interpretation rules. Similarly, Employer's reliance on legislative intent does not support its position because the intent of §015 is to prevent Employee's double recovery, allow Employer to recover "workers' compensation benefits" it paid to Employee and require Employer to contribute to attorney fees and costs Employee incurred in his third-party case, which resulted in Employer's reimbursement. *Jones*.

When "due regard for the meaning" §015 "conveys to others" is given, including "reason, practicality and common sense," the average person reading §015(e)(1)(B) and (C) would initially consider "benefits" and "compensation" to refer to indemnity and medical benefits actually paid to compensate Employee for disability or impairment or provide medical care or treatment to him. *Shehata*. (1) The statute's language is plain on its face; (2) its scant legislative history only shows that specific expenses including "the cost of all benefits actually furnished by the employer" under the Act, "all amounts paid as compensation," and SIF and WSCAA payments are included in the lien; and (3) its legislative purpose is to prohibit Employee from "double recovery," while at the same time requiring Employer to share in litigation costs and expenses Employee incurred in obtaining recovery for Employer's lien. *Harris*; *Cooper*.

Closely examining §015(e)(1) further supports Employee's position. Either an injured worker or his employer may recover from a liable third-party under §015(d) and (g). Section 015(e) ordinarily applies only to an employer who, under an assignment from the employee, recovers money from a third-party tortfeasor. Section 015(g) explains what happens if an employee or his representative recovers damages from the third-party responsible for the work injury. Perhaps to avoid repetition, the legislature referred parties in the situation where Employee rather than Employer recovered from the third-party tortfeasor, to §015(e)(1)(B) and (C) to determine what is included in Employer's lien. In other words, at least part of the statute that ordinarily applies only to Employer's recovering from the third-party is made applicable in this case by reference where Employee pursued the recovery. Thus, this decision must construe both §015(e)(1)(A)-(C) and §015(g) together to determine Employer's lien. It is presumed that the legislature intended every word of a statute to have some purpose, force and effect and none are superfluous. *Nelson*.

Section 015(g) requires Employee or his representative to promptly pay to Employer "the total amounts paid by the employer under (e)(1)(A)-(C)," after deducting all litigation costs and expenses; it does not require Employee or his representative to promptly pay to Employer "the total amounts paid by the employer" as Employer contends. The Act does not define "benefits"; "compensation" is defined but comes with "obvious difficulties"; its meaning must be determined with regard to the purpose of the section in which it is found. *Castillo*; AS 23.30.395(12). Employee has a right to disagree with Employer's position on what payments are included "under §015(e)(1)(A)-(C)" and take that issue to a hearing and have it decided. AS 23.30.001(4). Doing so does not suggest Employee is acting in bad faith.

Employer claimed no "expenses incurred" with respect to Employee's third-party compromise; it is claiming no attorney fees or costs for participating in any way in Employee's third-party settlement. Therefore, (e)(1)(A) does not apply here. Reading the next two sub-sections, one could think "benefits" and "compensation" are synonymous. However, §015(e)(1)(B) and (C) distinguish between "benefits" in (B) and "compensation" in (C). These words must be presumed to have some meaning, purpose, force and effect; otherwise, there would be no need for two separate sub-sections. *Nelson*. Notably, §015(e)(1)(D) is not included in the analysis

when §015(e)(1) is applicable by reference from §015(g). However, §015(e)(1)(D) is useful in understanding what the legislature meant when it used "benefits" in sub-section (B) and "compensation" in sub-section (C). Section 015(e)(1)(D) refers to the present value of all amounts payable later as "compensation" computed from "a schedule," and the present value of the cost of all "benefits" furnished later "under AS 23.30.095," which is the medical benefit statute. Usually the same words used twice in the same statute have the same meaning. *Cummings*. Therefore, to construe §015(e)(1)(B) and (C) *in pari materia* and produce a harmonious whole within the Act, §015(e)(1)(B) refers to medical benefits "actually furnished by the employer" to Employee under the Act, while (C) refers to other benefits such as disability and PPI Employer paid Employee. *Shirley*. Nothing in these sections suggest including administrative costs in Employer's §015 lien.

The Act's overall legislative intent also supports Employee's position. The Act must be construed to ensure among other things "fair" delivery of indemnity and medical benefits to injured workers. AS 23.30.001(1). Employer's nurse case manager's efforts and PACBLU's Alaska medical fee schedule billing adjustments are administrative costs. Consequently, unlike Employee's lost time from work and medical expenses caused by his work accident, Employer's administrative expenses could never form the basis for a damage award in his third-party case. *Castillo*. Therefore, it would not be fair to allow Employer to receive reimbursement for its administrative costs from Employee's third-party recovery when he could not recover those same costs from the liable third-party; Employer would be unjustly enriched. Furthermore, if as Employer suggests, official notice could be taken that most carriers and adjusters utilize nurse case managers like EMM as consultants, and contractors like PACBLU to adjust medical bills to conform to the Alaska fee schedule, it is reasonable to infer that these costs are factored into an Employer's premiums or a self-insured employer's budget. *Rogers & Babler*. Nothing in §015 suggests its purpose is to make Employer whole. Its purpose is to prevent Employee from receiving a double recovery, provide reimbursement for money it paid to Employee for indemnity benefits and medical treatment it provided to him, and require Employer to share in the attorney fees and costs Employee incurred, which resulted in Employer's §015 reimbursement. *Cooper*.

Professor Larson's treatise states the normal rule that an employer is entitled to recover its compensation outlay but not "the penalties or expenses paid by the carrier." Larson, *Workers' Compensation Law*, §117.01[1]; *Castillo*. While Alaska precedent does not directly address this issue, cases from Washington, Illinois and Tennessee do. For example, though an employer has a statutory right to send an injured worker to an employer's medical evaluation, it cannot recover these costs from the injured worker's third-party recovery. *Ziegler* held such examinations do not fit within the description of "medical care" and were "administrative expenses, not benefits."

The parties in *Cole* made arguments almost identical to those the parties made in this case. The employer wanted to recover nurse case management services from the injured worker's third-party case recovery. The nurse case manager and the adjuster who hired her both testified and agreed on the nurse case manager's activities. These included making sure the injured worker received the best possible medical care; minimizing the carrier's costs; making recommendations to the insurance company; managing medical communication; consulting with the insurance company and attorneys; attending medical visits to provide moral support; performing home visits as necessary and generally trying to "recommend more efficient management." All parties in *Cole* agreed the nurse case manager provided no medical treatment to employee.

In the instant case, Employer provided no evidence concerning Tuccillo's activities; Employee said Ward told him he hired a nurse case manager because he was having difficulty getting information from Employee's medical providers. Tuccillo accompanied him to California for spinal surgery and went to other doctor visits; she had to contact Ward for his approval whenever physicians made treatment recommendations. Employee thought Tuccillo was working for Ward and not for him. Though he understood he could have objected to Tuccillo's participation, there is no evidence he exerted any control over her activities. Employee was credible. AS 23.30.122; *Smith*. Tuccillo was the adjuster's consultant. *Rogers & Babler*.

In *Cole*, the employer contended the injured worker received "some benefit" from the nurse case manager's services and therefore the cost of such services should be reimbursable under its lien. Ultimately, the Illinois Supreme Court disagreed, finding it was undisputed the nurse case manager provided no necessary medical or rehabilitation services to the injured worker, the worker's doctors did not recommend nurse case management services, the employee had little

choice in choosing this service, controlling it, deciding whether to accept it or questioning its costs. *Cole* held that Illinois medical treatment law, similar to AS 23.30.095(a), did not include "an insurer's expenses," and nurse case manager services were not reimbursable from third-party recoveries.

Tennessee came to the same conclusion and *Watson* held that a workers' compensation insurer's discretionary nurse case management expenses were not recoverable from the injured worker's third-party tort recovery. The instant panel could find no contrary case law. Courts cannot modify what a lien statute says is recoverable. Larson, *Workers' Compensation Law*, §117.01[2].

Although Employer wants to include nurse case management and a contractor's Alaska medical fee adjustment administrative costs as "medical care" so they fit under§015(e)(1)(B) or (C), it provided no evidence that either service is included in the Alaska Medical Fee Schedule. If these services were properly considered "medical care," they would be subject to adjustment under the fee schedule. AS 23.30.097(a), (d); 8 AAC 45.083(a). While nearly all of Employee's medical providers' charges were reduced, presumably in accordance with the fee schedule, none of EMM's or PACBLU's charges were reduced; all were paid in full as billed. Some PACBLU expenses are questionable and unexplained: Employee had surgery on November 5, 2019; his medical bills are itemized on Employer's spreadsheet and virtually all are reduced and reportedly paid. On the same day, PACBLU billed $5,000 three times and billed for other services totaling nearly $20,000.

In summary, §015(e) on its face, with its words construed as commonly used, limits what is included in Employer's lien. AS 01.10.040(a). That the legislature included SIF and WSCAA fees under AS 23.05.067(a)(1), (2), and (e) to the lien simply illustrates it could have added Employer's administrative costs such as nurse case management and bill reduction services, had it wanted to; it did not. No reasonable reading of §015(e) would include administrative costs like nurse case management services and an adjuster's expenses to pay a contractor to review and adjust Employee's medical bills. Therefore, EMM's and PACBLU's charges of $68,509.87

($16,517.98 + $51,991.89 = $68,509.87) are administrative costs and may not be included in Employer's lien pursuant to AS 23.30.015(e).

Employer raised the issue of attributing 100 percent of Employee's attorney fees and costs to Employer pursuant to *Stone*, given Employer's estimates that its lien and future compensation payments would quickly exceed the value of his third-party settlement. Employee's objection to Tansik's estimates is well taken; Employer provided no expert testimony to assist in determining Employee's probable, future entitlement to additional workers' compensation benefits. Though he may obtain additional surgery or other care, which may result in disability, Employee expressed hesitancy to undergo additional surgery. Therefore, it is not possible to accurately estimate Employee's future benefits or alter the attorney fee and cost proration pursuant to *Stone*.

(B) Reducing Employer's §015 lien increases the §015(g) credit.

Employee's main concern is reducing Employer's §015 lien. In accordance with this decision, he has succeeded as set forth above. One of Employer's main issues at hearing was obtaining an order stating the amount of the §015(g) credit against Employee's future workers' compensation benefits. As Employer noted at hearing, any reduction Employee successfully obtains from Employer's §015 lien correspondingly results in an increase in the §015(g) credit. Employer's brief suggests a $38,383.37 credit; using Employer's numbers, however, it appears the asserted credit should be $35,383.37; since this decision adopted Employee's reasoning on Employer's lien, the apparent typographical error in Employer's credit calculation is immaterial.

Based on calculations in Table II, below, though Employee successfully reduced Employer's §015 lien, he increased the §015(g) credit, which is $83,142.85 as of January 8, 2021. Employer cited *Berger*, which applied a collateral sources rule to §015(g) credits. *Berger* held that any payment source for Employee's future work-related medical care, like the VA, reduces the §015(g) credit. The §015(g) lien set forth below shall be reduced in accordance with *Berger*.

Table II

Third-party recovery:		**$346,388.14**
Attorney fees (33 1/3 x $346,388.14):	$115,451.17	
Costs:	$2,525.00	
Total attorney fees and costs:		$117,976.17

Ratio of fees & costs to gross recovery ($117,976.17 / $346,388.14 = .3406 = 34.06%):		34.06%
Net third-party recovery to Employee ($346,388.14 - $117,976.17 = $228,411.97):		$228,411.97
Employer's requested lien:		$288,814.87
Employer's lien after reductions ($288,814.87 - $68,509.87 = $220,305.00):		**$220,305.00**
Employer's *pro rata* share of fees & costs ($220,305.00 x 34.06% = $75,035.88):		$75,035.88
Amount recoverable by Employer ($220,305.00 - $75,035.88 = $145,269.12):		$145,269.12
Excess recovery retained by Employee after satisfaction of Employer's 1/8/21 lien ($228,411.97 - $145,269.12 = $83,142.85):		$83,142.85
The §015(g) credit:		$83,142.85

(C) Employer's §015 lien is determined based on evidence admissible at hearing.

Employee contends the proper date for determining Employer's §015 lien is the date he settled Employee's third-party case. He presented no legal authority for that proposition and the Act appears silent on the issue. An injured worker may continue to receive workers' compensation benefits after a third-party claim settled and before the lien issue is resolved. It is difficult to calculate a lien based on a "moving target" that increases as the injured worker receives additional benefits after a third-party settlement. Absent contrary statutory, regulatory or decisional law on this issue, and given the difficulty inherent with calculating anything when the amounts are constantly changing, Employer's §015 lien will be determined based on Employer's January 8, 2021 figures, in accordance with this decision.

3) May this decision equitably reduce Employee's third-party attorney fees?

Employer contends Employee's alleged bad faith in not reimbursing its disputed §015 lien promptly should result in an equitable remedy, and suggests an order reducing his attorney fees. Employee did not directly address this contention at hearing. Employer cited to several Alaska Supreme Court cases and several agency decisions to support this contention. It further contends it demonstrated Employer was prejudiced by Employee's alleged bad faith. Employee has a right to challenge Employer's interpretation of §015. AS 23.30.001(4). He succeeded; there is no bad faith in that. Consequently, Employer's reliance on case law discussing equitable remedies is irrelevant and those cases need not be addressed. There is no legal or factual basis

for this decision to reduce Employee's third-party attorney fees, and Employer's request will be denied.

4) Does this decision need to reach issues over the panel's subject matter jurisdiction to order Employee to reimburse Employer's lien?

The main issue in the party's litigation has been how to interpret §015 to decide what is included in Employer's lien. Employer contended its lien included all benefits and compensation it paid to Employee or on his behalf and administrative costs such as nurse case manager services and charges related to applying the Alaska Medical Fee Schedule to his medical bills. Employee contended administrative costs are not included in the §015 lien. Employer's July 13, 2020 email reflects an understanding that the parties had a dispute over this issue. Therefore, it is not completely correct to say Employee refused to ever reimburse Employer's lien; the parties simply had a dispute over what is included in the lien, which is now resolved in this decision and order. Consequently, unless and until Employee refuses to reimburse Employer's §015 lien in accordance with this decision, the panel need not reach the question of whether or not it has jurisdiction to order Employee to reimburse the lien because the underlying issue is not ripe. *Nelson*.

CONCLUSIONS OF LAW

1) The oral order to not consider Employee's hearing brief was correct.
2) Employer's third-party lien does not include administrative costs, such costs do affect Employer's credit, and the lien is determined as of the hearing date.
3) This decision does not need to reach issues about the panel's subject matter jurisdiction to order Employee to reimburse Employer's lien.

ORDER

1) Employer's §015 lien is $220,305**.**
2) Employer's *pro rata* share of Employee's attorney fees and costs is $75,035.88.
3) Employee retains $83,142.85 from his third-party settlement.
4) The §015(g) credit is $83,142.85, which shall be reduced in accordance with *Berger*.

Dated in Anchorage, Alaska on February 26, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Randy Beltz, Member

/s/
Nancy Shaw, 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 Municipality of Anchorage, employer / insurer / petitioner v. Jeffery D. Hurd, employee / respondent; Case No. 201910727; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on February 26, 2021.

/s/
Nenita Farmer, Office Assistant