# ALASKA WORKERS' COMPENSATION BOARD

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

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| JEFFREY ZIMMERMAN,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>COLASKA, INC.,<br><br>Employer,<br>and<br><br>LIBERTY INSURANCE CORPORATION,<br><br>Insurer,<br>Defendants. | ) | INTERLOCUTORY DECISION AND ORDER<br><br>AWCB Case No. 201513910<br><br>AWCB Decision No. 23-0061<br><br>Filed with AWCB Fairbanks, Alaska on November 2, 2023 |

Colaska, Inc.'s (Employer) October 16, 2020 petition was heard on the written record on November 2, 2023, in Fairbanks, Alaska, a date selected on July 20, 2023. A July 20, 2023 hearing request gave rise to this hearing. Attorney Robert Beconovich represents Jeffrey Zimmerman (Employee). Attorney Rebecca Holdiman-Miller represents Colaska, Inc., and its insurer (Employer). The record closed at the hearing's conclusion on November 2, 2023.

## ISSUE

Employer contends that the parties had an approved settlement on April 8, 2020, which included Employee and his attorney cooperating in developing medical evidence to obtain a Medicare Set-Aside Agreement (MSA). It contends neither Employee nor his attorney did anything to assist even though Employer ultimately obtained Centers for Medicare and Medicaid Services (CMS)

approval for an MSA without Employee's assistance. Additionally, Employer seeks an order "approving" the MSA so "the parties can close future medical benefits."

Employee contends Employer's petition seeks to "forcibly close medical treatment" and shift his burden of continued medical care to the public sector. He contends Employer "abandoned" the petition by not proceeding with it for over three years. Alternately, he contends the MSA has several flaws making it not in his best interest to settle ongoing medical care. He seeks an order denying Employer's petition.

**Does the panel have legal authority to grant Employer's requested relief?**

## FINDINGS OF FACT

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

1) On March 26, 2020, the parties filed a fully executed Partial Compromise and Release Agreement (Partial C&R). The Partial C&R states in relevant part:

> **PARTIAL COMPROMISE AND RELEASE AGREEMENT**
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> This partial settlement agreement was reached at mediation on January 31, 2020, with the assistance of Board Hearing Officer Janel Wright as mediator.
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> The purpose of this agreement is to resolve any and all non-medical disputes concerning injuries and symptoms sustained by employee during his employment with the employer, in accordance with AS 23.30.012. To settle all non-medical claims and obligations under the Alaska Workers' Compensation Act [Act] . . . the parties agree as follows:
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> . . . .
>
> **RELEVANT POST-INJURY MEDICAL AND PROCEDURAL HISTORY**
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> . . . .
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> After the SIME [second independent medical evaluation], the Board then scheduled a hearing for August 23, 2018, on employee's June 6, 2017, WCC [Workers' Compensation Claim] for TTD [temporary total disability], PPI [permanent partial impairment], medical and transportation costs, penalty, interest, and attorney fees and costs.
>
> . . . .

On June 4, 2018, the Board conducted a prehearing at which it confirmed that the hearing on employee's June 6, 2017, claimant remains scheduled for August 23, 2018.

On June 19, 2018, employer filed a petition to continue the August 23, 2018, hearing. Employee opposed the petition on July 6, 2018.

On June 25, 2018, employee filed a claim for PTD [permanent total disability], transportation costs, medical costs, penalty for late paid compensation, interest, and attorney fees and costs.

. . . .

On August 10, 2018, the Board conducted a prehearing at which it denied employer's June 19, 2018, petition to continue the August 23, 2018, hearing and scheduled employer's petition to continue as a preliminary issue to be heard at the August 23, 2018, hearing. The Board also set a hearing on employee's June 25, 2018, PTD claim for January 17, 2019. The Board listed the issues for the August 23 hearing as employer's petition to continue dated 6/19/18, employee's 6/6/17 WCC seeking TTD, PPI, medicals, transportation, penalty, interest and attorney fees and costs. The Board listed the issues for the 1/17/19 hearing as employee's PTD claim dated 6/25/18.

. . . .

On August 21, 2018, the parties filed a stipulation, approved by the Board on August 23, 2018, that continued the August 23, 2018, hearing. . . . The parties agreed that all other benefits requested by employee remain disputed and the employer retains its right to all defenses. The parties stipulated to mediate the remaining issues, with mediation to take place in December 2018, prior to the next hearing date.

. . . .

In December 2018, the parties attempted mediation, which was unsuccessful.

On January 10, 2019, the Board conducted a prehearing at which it granted employer's December 29, 2018, petition for a continuance of the January 17, 2019, hearing.

. . . .

On February 20, 2019, the Board conducted a prehearing at which it scheduled a hearing for June 20, 2019 on employee's 9/21/16, 6/8/17, 8/19/18, and 6/25/18 claims.

. . . .

On May 28, 2019, employer filed a petition to continue the June 20, 2019, hearing.

On June 17, 2019, the parties stipulated to continue the June 20, 2019, hearing; . . .

. . . .

On January 31, 2020, the parties reached this partial compromise and release agreement at mediation, with the assistance of Hearing Officer Janel Wright.

. . . .

COMPROMISE AND RELEASE

To resolve disputes among the parties with respect to certain medical and related transportation benefits noted below, all out-of-pocket costs, all TTD, TPD [temporary partial disability], PPI, PTD, reemployment benefits, and AS 23.30.041(g) job dislocation benefits, the parties agree as follows:

- Employee will waive all past and future out-of-pocket medical and medical transportation claims, and will waive future indemnity, including TTD, TPD, PPI, reemployment and PTD benefits for $101,000.00 payable to Employee in a lump sum, without offset for the seven additional weeks of past TTD payments that will be paid when the C&R is signed by the employee and filed. This settlement reflects payment of reemployment benefits in the amount of $73,000.00 and $28,000.00 in temporary total disability benefits paid at the SSD [Social Security Disability] offset rate with COLA [cost-of-living adjustment]. Employee will execute this Agreement in front of a notary within three days. The lump sum under this Agreement will be paid when the Agreement is filed even though Board approval is necessary for the limited out-of-pocket medical waiver.
- Medical benefits will remain open, subject to the employer's defenses, unless and until settled by professionally administered Medicare Set-Aside. Employer's controversions remain in place. Employer will pay the costs of professional administration. The MSA will require review and approval by employer, employee, the Center for Medicare services, and the Board. Employee will cooperate in the development of the MSA.
- Upon approval by the Board of the MSA, employee will waive his right to future medical expenses and the employer will indemnify employee, against claims by any medical provider, Medicaid, or Medicare for medical expenses incurred from the date of injury through the date that the MSA is approved by the Board.
- Employee and attorney will assist in obtaining written opinions from Drs. Dryer and Davidson in either a chart note or on a physician's letterhead, to be used to obtain MSA. And if employee must attend appointments to obtain these opinions, adjuster will pay medical provider fees under the Act. Employer will arrange medical transportation, housing, and per diem for employee to attend any appointments outside of his home town.

. . . .

Employee's claims for medical benefits (other than those waived above) and Employer's controversions remain in place with this agreement. The employer

reserves the right, in accordance with the Act, to contest any treatment through any existing or future defense. The employer further agrees to hold employee harmless and indemnify the employee should a medical lien be pursued relative to prior medical treatment.

. . . Notwithstanding, the parties agree that Employee's entitlement, if any, to past incurred out of pocket medical costs through the date of this agreement, including prescription and transportation costs, is waived by the terms of this Agreement.

The parties agree that Medicaid and Medicare's interests must be taken into account before past and future medical provider benefits are closed. The parties have considered the interests of Medicaid and Medicare and do not intend to shift responsibility for Employee's injuries to Medicaid or Medicare.

Employee is currently a Medicare recipient. Settlement of Medicare's lien for medical benefits paid by Medicare and a Medicare Set-Aside by the Centers for Medicare and Medicaid services (CMS) are required under federal law. Employee's claim for medical benefits other than those out-of-pocket costs waived under this Agreement remains in place. Employer's controversions remain in place with this Agreement.

Medical Benefits

Compensability of past and future medical benefits are not affected by this Partial Compromise and Release, other than the out-of-pocket medical costs and transportation benefits that are specifically closed by the terms of this agreement. Medical provider benefits remain open for the employee to pursue and the employer retains the right to rely on its existing or any future defenses under this Agreement.

The employee agrees that the employer has the right to offer to close additional future provider medical benefits with a Medicare Set-Aside to include professional administration for the employee and approval by CMS. The employee agrees to cooperate in the MSA process and agrees to obtain updated medical opinions from Drs. Davidson and Dryer for CMS consideration.

. . . .

Agreement as Board Order

While this Agreement does not waive Employee's right to past and future medical benefits to be paid directly to a medical provider, past and future out-of-pocket medical costs and transportation costs are waived under this Agreement. Thus, Board approval is necessary. Upon approval of the Settlement Agreement under AS 23.30.012(b) and upon payment as specified under this Agreement, this Settlement Agreement shall be enforceable and shall forever discharge the liability of the employer to the employee and to his heirs, beneficiaries, executors and assigns, for all compensation and other benefits payable directly to the employee

> arising out of or in any way connected with the injuries, illnesses, symptoms, or conditions referred to in the introduction which might now be due or might become due in the future under the Alaska Workers' Compensation Act, excepting only: past and future medical provider benefits as outlined above.
>
> By signing this Partial Compromise and Release Agreement, the employee acknowledges his intent to release the employer from any and all liability for benefits payable directly to the employee or under the Alaska Workers' Compensation Act for all claims, unless expressly excluded in this agreement, arising out of or in any way connected with the injuries, illnesses, symptoms, or conditions referred to in the Introduction.
>
> . . . To this and, the parties mutually waive any right they may have to set aside this Settlement Agreement, based upon any mistake of law or upon any changed condition or circumstance. Further, the parties agree that the payments made and the claims released under this Agreement shall be final and binding, regardless of any change in the law or change in the interpretation of the law governing the parties rights and responsibilities under the Alaska Workers' Compensation Act.
> . . . .
>
> ENTIRE AGREEMENT
>
> This Partial Compromise and Release contains the entire agreement among the parties and constitutes the full and complete settlement of all claims, whether actual or potential, described above. This Partial Compromise and Release is not contingent on any undisclosed agreement and an undisclosed Agreement is not contingent upon this agreed Partial Compromise and Release per 8 AAC 45.160. The parties have not made an undisclosed agreement that modifies this agreed settlement. . . .

Employee, his former attorney John Franich, and Holdiman-Miller signed the agreement on March 26, 2020. A Board panel approved the Partial C&R on April 8, 2020. (Partial Compromise and Release Agreement, approved April 8, 2020).

2) On June 22, 2020, the parties filed a stipulation to cancel a July 23, 2020 attorney fee hearing and to pay Franich's attorney fees. The stipulation states in relevant part:

> **STIPULATION TO CANCEL 7/23/20 HEARING and for INTERIM ATTORNEY FEES**
>
> The parties stipulate that the board should cancel the hearing scheduled for July 23, 2020 and further stipulate and agree as follows:
>
> 1. The parties attended mediation with Janel Wright that resulted in a resolution of and [sic] all non-medical claims. The agreement also resolved all past and future

> out-of-pocket medical and medical transportation expenses. The agreement was reduced to writing in a Partial Compromise and Release Agreement (C&R).
> . . . .
>
> 4. On May 11, 2020, the Board conducted a prehearing conference the sole issue for hearing is Employee's attorney's fees and costs regarding the Partial C&R.
>
> 5. On June 18, 2020, with the assistance of Janel Wright, the parties resolve the attorney fee issue that is currently scheduled for hearing on July 23. Pursuant to their agreement, and consistent with the April 8, 2020 oral of approval, the parties ask the board to vacate the July 23, 2020 hearing date and submit this stipulation for approval under AS 23.30.145.
> . . . .
>
> 7. The parties agree that employee may be due additional attorney fees and costs that are related to medical benefits that were not resolved by the C&R approved April 8, 2020. Medical benefits remain open and disputed pursuant to employee's claims and employer's defenses and controversion notices.
> . . . .
>
> 10. Per the C&R, Employee will cooperate in the development of the MSA. The payment of fees under this stipulation does not cover the work performed relative to the MSA. As stated in the Agreement, Employee and his attorney will assist in obtaining written opinions from Drs. Dreyer and Davidson in either a chart note or on a physician's letterhead, to be used to obtain MSA. Employee has an appointment with Dr. Davidson on June 25, 2020, at which time he will ask Dr. Davidson to express an opinion about Employee's specific future medical care related to the work injury.

Employee, Franich and Holdiman-Miller signed the stipulation. On June 23, 2020, a Board hearing officer approved it and awarded $20,000 in attorney fees and costs to Franich, resolving the issue set for hearing. (Stipulation To Cancel 7/23/20 Hearing and for Interim Attorney Fees; Statement and Order of the Board, June 23, 2020).

3) On October 16, 2020, Employer filed a "Petition to Enforce Settlement." In Attachment A to the petition, Employer stated:

> Employer petitions for an order compelling enforcement of the settlement terms agreed upon at the January 31, 2020, mediation, memorialized in the Compromise and Release Agreement (C&R) approved by the Board on April 8, 2020, and further agreed upon in the terms of the Stipulation to Cancel Hearing and for Interim Attorney Fees approved by the Board in [sic] June 23, 2020. In both the C&R and Stipulation, the employee agreed to cooperate in the development of medical evidence to obtain an MSA. Per the terms of the Stipulation, the "employee and

> his attorney will assist in obtaining written opinions from Drs. Dryers and Davidson in either a chart note or on a physician's letterhead, to be used to obtain MSA. Employee has an appointment with Dr. Davidson on June 25, 2020, at which time he will ask Dr. Davison [sic] to express an opinion about employee's specific future medical care related to the work injury." To date, the employee has made no attempts to obtain the agreed upon medical evidence. See Interrogatory Responses attached. As such, the employer requests an order enforcing the terms of the C&R and subsequent Stipulation (Petition, October 16, 2020). . . .

4) On November 10, 2020, Employer requested a hearing on the written record with briefs on its October 16, 2020 petition. (Affidavit of Readiness for Hearing (ARH), October 10, 2020).

5) On December 14, 2020, the parties met before a Board designee for a prehearing conference.

> Discussion was held re: obtaining the medical opinions needed to pursue a medical set-aside (MSA). Employee is considered high risk during the current pandemic. Employer wants to move forward with telemedicine appointments as applicable for Drs. Dryer and Davidson.
>
> The parties agreed that Employer will contact Drs. Dryer and Davidson to arrange appointments. Employee indicated an attending nurse and joint letter regarding purpose of employment would not be needed. Employer may need to obtain an additional release for the limited purpose of scheduling the appointments.

The designee noted a June 23, 2020 approved stipulation regarding attorney fees, and cancellation of a previously scheduled hearing. (Prehearing Conference Summary, December 14, 2020).

6) There were no additional prehearing conferences in this case until July 20, 2023. (Agency file).

7) On December 15, 2022, CMS approved an MSA in Employee's case for $29,639. (CMS letter, December 15, 2022).

8) On January 3, 2023, Holdiman-Miller emailed Beconovich a draft "medical C&R" since CMS had recently approved a set-aside agreement. This draft "Compromise and Release Agreement" (C&R) stated, among other things, that in the Partial C&R, Employee "further agreed to future medical closure with a CMS approved MSA." The unexecuted C&R states in relevant part:

> The parties have considered the interest of Medicare and do not intend to shift responsibility for the employee's medical conditions to Medicare. The employee is a Medicare recipient and, therefore, a Medicare Set-Aside (MSA) is required by the Centers for Medicare and Medicaid Services (CMS) under federal law. To resolve all disputes among the parties with respect to all medical benefits to include, but not limited to, medical services, transportation and prescription drug costs, the parties agree the employer is protecting Medicare's interest with an MSA approved

> by CMS in the amount of $29,639.00 to be paid via lump-sum and self-administered by the employee. . . .

In exchange for the above, Employee, should he sign the agreement, would agree to "close medical benefits." The C&R also requires Employee to agree that the MSA calculation of future medical care and funding was reasonable based on his current medical conditions. (C&R).

9) On July 20, 2023, the parties attended a prehearing conference and the Board designee set a written record hearing on Employer's October 16, 2020 Petition to Enforce Settlement for November 2, 2023. Employee's attorney fees were not set as an issue for hearing. (Prehearing Conference Summary, July 20, 2023).

10) On September 12, 2023, the parties attended a prehearing conference. Neither party had anything to address, and Employee's attorney fees were not added as an issue for hearing. (Prehearing Conference Summary, September 12, 2023).

11) In its October 27, 2023 hearing brief, Employer couched its petition as one to "enforce" the Partial C&R and "close" the MSA. It stated Employee and his counsel had not fulfilled their duties under the Partial C&R because they failed to cooperate in developing medical evidence to obtain the MSA. However, Employer agreed it obtained a CMS-approved MSA anyway "without the employee's assistance." It expanded the relief sought in its petition and asked the Board to "approve the MSA, so that the parties can close future medical benefits." Employer admitted "medical benefits remained open" in the Partial C&R and contended they remain open "until settled by a professionally administered" MSA. It mentioned that at a May 11, 2020 prehearing conference, Employee's counsel said Employee was not currently able to travel to medical appointments because of his medical condition. Employer also noted the Board-approved stipulation wherein Employee again agreed to cooperate in developing the MSA, and contended he did nothing for five months to assist Employer, citing an October 6, 2020 interrogatory response in which it contended Employee admitted as much. Based on this failure, Employer said it filed its October 16, 2020 petition to enforce the Partial C&R. Employer agreed CMS approved the MSA on December 15, 2022. (Employer's Hearing Brief, October 27, 2023).

12) Employer relies on Alaska Supreme Court caselaw regarding contracts vis-à-vis workers' compensation settlements, as well as Board regulations regarding stipulations. Addressing what appears to be the crux of Employer's current position, it contended:

> Here, the "Compromise and Release" section of the C&R specifically states that medical benefits will be closed by a professionally administered CMS approved MSA. Exhibit 1 at 13. . . .
>
> The clear expectations of the parties was to obtain an approved MSA to close medical benefits. Both parties entered into this C&R with the unequivocal intention of obtaining a professionally administered, CMS-approved MSA. Regardless of the employee/opposing counsel's failure to cooperate or obtain the required medical opinions, the employer has obtained CMS approval of the MSA. Therefore, the employer requests that the Board issue an order that the employer has the right to fund the CMS approved MSA to close medical benefits per the parties' C&R and stipulation. Once approved, the employer will submit another C&R to close medical benefits, a draft of which was submitted as hearing evidence. Exhibit 7. (Employer's Hearing Brief, October 27, 2023).

13) Employer cited *Mullins* and contended it states the Board has a strong policy favoring settlements. It concluded the parties' "reasonable expectations have been met" and requested the "Board order enforcement of the C&R and stipulation so that the parties can close medical benefits with funding of the CMS approved MSA." (Employer's Hearing Brief, October 27, 2023).

14) In his October 26, 2023 hearing brief, Employee contended the issue addressed in this hearing was "specific, narrow, and easily resolvable by reliance on statute and regulation." He contended Employer's petition "seeks to forcibly close medical treatment and shift the burden of [his] continued care to the public sector." Employee contended Employer's "extraordinary delay" in obtaining the MSA three years post-settlement "warrants a determination that this issue has been abandoned, and the petition should be denied on its merits." Alternately, he relied on existing statutes and regulations. Employee contended Alaska law is clear "that a medical agreement closing future medical treatment is appropriate only if it is in best interest of the employee." He further contended any C&R that "discharges the liability of the employer" must meet all requirements in AS 23.30.012 and 8 AAC 45.160 or "it is void for all purposes." Employee relied on *Lindekugel* for support. (Employee's Hearing Brief, October 26, 2023).

15) Employee contended Employer bears the burden to establish by a preponderance of the evidence "that the proposed MSA" is in Employee's "best interest." He contended Employer made no such showing in its pleadings or otherwise. Employee "declined and continues to refuse to sign" an MSA that provides "no recognition of work-related injuries" and in his view, provides "on an annual basis, nominal values extended to cover his purported [non]-existent work injuries." He gave five reasons why he objects to the MSA and to signing the C&R, summarized below:

> (1) The sums proposed are inadequate to meet ongoing, and future treatment needs annualized or otherwise.
> (2) Employee is still on an oxygen concentrator, which limits any physical activity.
> (3) He objects to conceding that his pulmonary collapse is not work-related; for him to do so would be "inaccurate and fraudulent."
> (4) Employee will not endorse any mischaracterization of his work injury as "simple resolved strains" of his cervical and thoracic spine.
> (5) The CMS documentation requires employee to agree with certain statements he believes are "inaccurate and fraudulent." (Employee's Hearing Brief, October 26, 2023).

16) There is no C&R executed by all parties in the agency file presently for Board panel review and approval. (Agency file).

17) A Board panel does not approve an MSA. (Experience, observations).

18) In some cases, an MSA is attached to a C&R to identify it as a separate agreement and to advise the reviewing Board panel as to its terms and to assist the panel in determining whether to approve the C&R. Board panels do not approve even fully executed C&Rs when the employee changes his or her mind and no longer supports settlement. (Experience, observations).

## PRINCIPLES OF LAW

The Board may base its decision not only on direct testimony, medical findings and other tangible evidence, but also on the Board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987).

> **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.
>
> (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.

A C&R acts like a Board award, except it is more difficult to set aside. A C&R is a contract so common law contract principles apply to them "to the extent the standards are not overridden by statute." An approved C&R cannot be modified or set aside because of unilateral or mutual mistake. The Board has jurisdiction to approve a C&R but does not have jurisdiction to approve related agreements not falling under the Act. If an associated document or agreement is attached to a C&R, the Board has jurisdiction to review and approve the C&R, and may rely upon the attached documents or agreements to determine if the C&R is in the injured worker's best interest. *Rosales v. Icicle Seafoods Inc*., 316 P.3d 580, 584 (Alaska 2013).

In *Lindekugel v. Fluor Alaska, Inc*., 934 P.2d 1307 (Alaska 1997), the Board in a three-party case accepted an on-the-record oral stipulation between two parties' lawyers to settle the injured worker's remaining rights to future medical benefits against one employer by dismissing his claim. When the injured worker learned what happened to that claim, he hired a new lawyer and filed a new claim against that employer for medical care. The employer defended on grounds that a Board hearing officer at a hearing had approved the oral stipulation and dismissed that employer. The employee contended because this hearing stipulation was an agreement in regard to a claim, and was not written in a form prescribed by the Board, and because the Board did not find it to be in his best interest, it was "void for any purpose." *Lindekugel* relied on AS 23.30.012(b) and 8 AAC 45.160 and agreed with the employee's position, reversing the Board. The Court stated:

> The first and most important is the legislative language. The phrase "void for any purpose" is a clear indication that the legislature intended that no legal consequences should flow from an agreement covered by subsection .210(b) which does not meet its requirements.
>
> Second, the purpose of the "void for any purpose" language in subsection .210(b) is to prevent poorly conceived agreements from discharging an employer's liability.

> Underlying this purpose are reasons which are both personal to the injured worker and social in character. The personal reasons are premised on the thought that the injured worker should not give up his or her rights except with knowledge and deliberation concerning the consequences. Included in the social reasons is the thought that if the injured worker improvidently surrenders his or her rights society may ultimately bear the burden of the worker's decision through public welfare or private charity. To allow a non-complying settlement agreement to be validated by an order subverts these purposes. (*Id*. at 1311).

*Mullins v. Oates*, 179 P.3d 930, 937 (Alaska 2008), was a property dispute between a land seller (Oates) and a purchaser (Mullins). The seller claimed the purchaser had defaulted on a real estate sales contract by failing to make payments and provide required insurance on a building. The seller's lawyer sent the buyer a letter, with a 10-day time limit to act. When the buyer did not timely respond, the seller instituted court proceedings declaring the buyer's rights, title and interest in the property foreclosed, and title vested in the seller free and clear. The trial court granted a default judgment against the buyer, who later moved the trial court to set aside the judgment and provide further relief. A court master mediated the case, and the parties came to a purported settlement. The trial court intended to dismiss the case, but the buyer claimed she did not understand the settlement terms and had been coerced into accepting it. She asked the trial court to vacate the settlement and reset the case for trial. Eventually, after much litigation the trial court found the buyer had freely and knowingly entered into a settlement agreement, and enforced it. When the buyer did not live up to the agreement's terms, the trial court ultimately entered a final judgment terminating the buyer's rights and interests in the property. In this context, the Supreme Court stated, "there is a strong public policy in favor of the settlement of disputes."

> **8 AAC 45.065. Prehearings**. . . .
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> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

> **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. . . .
>
> (c) Every agreed settlement must conform strictly to the requirements of AS 23.30.012. . . .
> . . . .
>
> (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
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> (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. . . .
> . . . .
>
> (e) An agreed settlement in which the employee waives medical benefits . . . 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. . . .

"A claim [is] moot if it has lost its character as a present, live controversy. We have further held that [a] case is moot if the party bringing the action would not be entitled to any relief even if it prevails." *Ulmer v. Alaska Restaurant & Beverage Assoc.*, 33 P.3d 773, 776 (Alaska 2001).

## ANALYSIS

**Does the panel have legal authority to grant Employer's requested relief?**

Contrary to what is often the case, neither party here is attempting to set-aside the approved Partial C&R. Moreover, there are no relevant factual disputes. This is a legal question concerning this panel's jurisdiction and authority under the Act to provide the relief Employer seeks.

Employer contends the parties in the Partial C&R settled all indemnity and some medical benefits, and essentially *pre-agreed* to settle future medical benefits once it obtained a CMS-approved MSA and provided a subsequent C&R, which if signed and approved would waive Employee's medical care. AS 23.30.012; 8 AAC 45.160(f). Employee contends the petition to enforce settlement was "abandoned" because it took three years for Employer to obtain a CMS-approved MSA. Alternately, he contends there is no C&R to enforce because "the MSA" is not in his best interests. To summarize the parties' positions as best as they can be determined, Employer contends it is trying to *enforce* a settlement; Employee contends Employer is trying to *force* one.

*A) Employer did not abandon its petition.*

Employee provided no statute, regulation or case law supporting his "abandonment" theory. Employer filed a petition on October 16, 2020, and on November 10, 2020, filed an ARH requesting a hearing. The agency file shows no further action was taken on that petition until Employer resurrected it at the July 20, 2023 prehearing conference. That is a lengthy period for a petition to languish. Nevertheless, nothing in the law prevents Employer from pursuing its aging petition. Employee's abandonment contention is therefore without merit.

*B) There is nothing for this panel to enforce or approve.*

When Employer filed its October 16, 2020 petition, the situation was different than it is now. This decision assumes solely for sake of Employer's pending petition, that by October 16, 2020, neither Employee nor his attorney had done anything to assist Employer in obtaining medical evidence to attain a CMS-approved MSA. Thus, at the time it was filed, Employer's October 16, 2020 "Petition to Enforce Settlement," sought to compel Employee and his attorney to assist in the MSA process. However, three years later Employer admitted in its brief that it "obtained CMS approval of the MSA without the employee's assistance." Assuming these facts, it is too late to compel Employee and his attorney to take action to obtain an MSA that has already been attained; were this decision to grant this request, Employer would get no relief. Thus, Employer's original reason for filing its petition is no longer valid. The petition gives no other requested relief for the assumed breach in Employee's and his attorney's duty to cooperate in obtaining medical information under the Partial C&R. Therefore, Employer's original request for an order compelling Employee and his attorney to cooperate in obtaining an MSA will be denied as moot. *Ulmer*.

Employer's petition now seeks an order "approving" the MSA "so that the parties can close future medical benefits." It relies on language from the Partial C&R, page 13, which states: "Upon approval by the Board of the MSA, Employee will waive his right to future medical expenses. . . ." Employer contends the parties agreed during mediation that they would eventually close medical benefits upon achieving a CMS-approved MSA. But the statute controls. *Lindekugel*.

Employer cited no statute, regulation or case law supporting its position, which appears to seek an order requiring Employee and this panel to "approve the MSA," and requiring Employee to sign the draft C&R waiving medical benefits. *Mullins* upon which Employer relies is not a workers' compensation case; it is a real estate contract case. Those cases are subject to common law contract rules, and are not subject to the Act's requirements. Workers' compensation C&Rs, by contrast, though they apply contract principles in their interpretation, are bound and controlled by statute. In other words, contract principles in them are "overridden by statute." AS 23.30.012; *Rosales*.

There is no statute, regulation or case law providing authority for this decision to approve an MSA. An MSA is attached to a C&R to disclose it as a separate agreement and to advise the reviewing panel as to its terms. *Rogers & Babler*. An MSA, like other documents, may be used to determine if a C&R is in an injured worker's best interest. *Rosales*. As Employer states, CMS approves an MSA, not Division hearing panels. Nevertheless, Employer also wants this decision to order that Employer "has the right to fund the CMS-approved MSA to close medical benefits per the parties' C&R and stipulation," and once that order issues, Employer will submit another C&R "to close medical benefits." It cites no law for that request either.

The Partial C&R's plain language states repeatedly and unequivocally that it does not waive Employee's future medical benefits. In it, Employee agreed that "employer has the right to offer to close additional future provider medical benefits with a Medicare set-aside to include professional administration for the employee and approval by CMS." Employer's contention must be that Employee, in a Partial C&R that unequivocally did not waive his right to future medical benefits, *pre-waived* them in the future once Employer obtained a CMS-approved MSA. In other words, he "agreed to agree" to waive them in the future. Inherent in this implied position is that Employee has no choice in the future but to agree with the MSA and sign the required C&R to

resolve the remaining medical care issue regardless of whether he agrees with the MSA, and even if he believes the C&R is not in his best interest. AS 23.30.012.

Internally inconsistent terms in the Partial C&R creates problems with Employer's position. First, Employee agreed in the Partial C&R that Employer had a right to "offer" to close additional medical benefits. Implicit in Employer's right to offer was Employee's right to refuse. Second, as Employer acknowledges with its draft C&R, parties have a right to reach agreement in regard to a claim, "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." AS 23.30.012(a). Since the Partial C&R by its explicit terms did not waive future medical benefits, Employer cannot rely on the approved Partial C&R as a panel's "pre-approval" of a future C&R not yet written. To adopt Employer's contention would violate AS 23.30.012, 8 AAC 45.160(a), (b), (c), (d) and (e) and *Lindekugel*, all of which require a panel to review and approve a written C&R that extinguishes Employee's right to future medical care, to ensure it is in his best interest. Third, the language leaving medical benefits "open" subject to Employer's defenses "unless and until settled," implies uncertainty there will ever be a settlement. Moreover, contrary to Employer's contention claims are not settled by an MSA; they are settled by a panel approving a C&R. AS 23.30.012.

Even assuming this panel had authority to approve an MSA, settling Employee's future medical benefits still requires a separate C&R. AS 23.30.012; *Rosales*; *Lindekugel*. That C&R would have to be "signed by all parties to the action and their attorneys." 8 AAC 45.160(b). Right now, there is no C&R signed by all parties for a panel to review or approve. Employer's position on the Partial C&R would render AS 23.30.012 and 8 AAC 45.160 superfluous because Employee and his attorney would have no choice but to sign the C&R and a panel would have no choice but to approve it, even if the panel found it was not in Employee's best interests.

The law on a party waiving future medical care is clear: There must be a C&R signed by all parties and their attorneys if Employee is waiving future medical benefits. AS 23.30.012(b); *Lindekugel*. There is no such document, and it appears there will not be one given Employee's objections to the MSA and proposed C&R. Therefore, this decision has no reason to reach the question of Employee's best interests. Because there is no C&R to review, and because the panel has no

authority to provide the relief Employer seeks, its petition will be denied. If the parties provide the Division with a fully executed C&R, it will be reviewed in accordance with the Act and applicable regulations. Since Employee's attorney fees were not an issue set for hearing, they will not be addressed at this time. 8 AAC 45.065(c).

## CONCLUSION OF LAW

The panel does not have legal authority to grant Employer's requested relief.

## ORDER

Employer's October 16, 2020 petition is denied in accordance with this decision.

Dated in Fairbanks, Alaska on November 2, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Jonathon Dartt, Member

/s/
John Corbett, Member

## PETITION FOR REVIEW

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

## RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in 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 Interlocutory Decision and Order in the matter of Jeffrey Zimmerman, employee / claimant v. Colaska, Inc., employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201513910; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified US Mail on November 2, 2023.

/s/
Whitney Murphy, Office Assistant