ALASKA WORKERS' COMPENSATION BOARD

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

DONALD TROMETTER,	)	
	)	
Employee,	)	INTERLOCUTORY
Claimant,	)	DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201704167
	)	
STATE OF ALASKA,	)	AWCB Decision No. 25-0005
	)	
Self-Insured Employer,	)	Filed with AWCB Fairbanks, Alaska
Defendant.	)	on January 29, 2025
	)	

Donald Trometter's July 22, 2024 claim for ongoing reemployment stipend benefits, and the State of Alaska's August 2, 2024 petition to dismiss Employee's July 22, 2024 claim, were heard on the written record in Fairbanks, Alaska on October 31, 2024; a date selected on September 4, 2024. Attorney John Franich represented Donald Trometter (Employee). Attorney Daniel Moxley represented the State of Alaska (Employer). The record closed at the conclusion of deliberations on November 21, 2024. Previous decisions in this case include, *Donald Paul Trometter v. State of Alaska,* AWCB Dec. No. 20-0112 (December 11, 2020) (*Trometter I*) and *Donald Paul Trometter v. State of Alaska,* AWCB Dec. No. 21-0074 (August 11, 2021) (*Trometter II*).

ISSUES

Employee contends that a June 18, 2024 settlement stipulation resolved only his November 30, 2023 gap-stipend claim and did not compromise his right to receive ongoing gap-stipend benefits.

Employer asserts the settlement stipulation constituted an unequivocal waiver of "all past, present, and future gap-stipend benefits" and that Employee's July 22, 2024 post-settlement claim for ongoing stipend should be dismissed.

Did Employee waive ongoing gap-stipend benefits with the parties' June 18, 2024 settlement stipulation?

FINDINGS OF FACT

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

1) On September 1, 2016, Employee sustained a left shoulder injury from years of repetitively tightening and loosening steam pipes in the course of his regular employment. (Report of Occupational Injury or Illness, March 10, 2017).

2) On April 13, 2017, Employee underwent left shoulder arthroscopy with rotator cuff repair, supralabral debridement, biceps tenotomy, open distal clavicle excision, subpectoral biceps tenodesis, subacromial decompression and acromioplasty. (Operative Report, April 13, 2017).

3) Employer accepted the injury as compensable and paid benefits. (Secondary Report of Injury (SROI), May 11, 2017).

4) On July 11, 2017, Employer notified the Workers' Compensation Division's (Division) that Employee had been unable to work for 90 consecutive days because of his injury. (Employer's notice, July 11, 2027).

5) On July 13, 2017, rehabilitation specialist Tommie Hutto (Hutto) was assigned to complete an reemployment benefits eligibility evaluation. (Charles letter, July 13, 2017).

6) On September 5, 2017, Hutto determined Employee was not eligible for reemployment benefits based on Employee's treating provider's prediction that Employee would have the physical capacity to return to previously held occupations. (Eligibility Evaluation, September 5, 2017).

7) On October 6, 2017, based on Hutto's September 5, 2017 eligibility evaluation, the Reemployment Benefits Administrator's (RBA) designee notified Employee he was not eligible for reemployment benefits. (Helgeson letter, October 6, 2017).

8) On April 24, 2018, Martina Adam-Mariutto, PT, performed a Functional Capacity Evaluation (FCE) and concluded Employee was not capable of performing the physical demands of the job

Maintenance Mechanic. Employee did not demonstrate the ability to safely lift overhead, carry, push, and pull at the level required by the job. (Adam-Mariutto report, April 24, 2018).

9) On May 17, 2018, at the request of Employer's adjuster, PT Adam-Mariutto issued an FCE Addendum for the job description Maintenance Repairer. The addendum concluded Employee was able to perform all but one of the physical demands of this job. The addendum additionally concluded, if accommodations were made to limit frequent floor-to-waist and shoulder-to-overhead lifting, Employee would be able to perform all the other essential duties of a Maintenance Repairer. (Adam-Mariutto Addendum, May 17, 2018).

10) On June 4, 2018, Employer controverted temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, permanent partial impairment (PPI) benefits beyond two percent and further medical treatment, including physical therapy and surgery. (Controversion Notice, June 4, 2018).

11) On June 4, 2019, attorney John Franich entered an appearance and filed a claim on Employee's behalf seeking to modify the RBA designee's October 6, 2017 determination that Employee was not eligible for reemployment benefits. (Entry of Appearance, June 4, 2019; Claim for Workers' Compensation Benefits, June 4, 2019). Employee also filed a petition requesting a review of the RBA designee's determination, contending she based her October 6, 2017 determination on an erroneous prediction because a subsequent FCE showed he did not have the physical capacity to return to the job at the time of injury. (Petition, June 4, 2019).

12) On June 24, 2019, Employer answered Employee's June 4, 2019 petition, arguing against modification or re-evaluation by the RBA "since no change in condition has caused the eligibility requirements of AS 23.30. 041 to be met." Employer challenged Employee's petition as untimely; claiming AS 23.30.130 required the Board act within one-year of the last TTD/PPI payment, and since the Board had not acted, it now lacked authority to review Employee's claim. (Answer, June 24, 2019).

13) On June 25, 2019, Employer answered Employee's June 4, 2019 claim, incorporating by reference it's earlier answer to Employee's petition. It denied Employee's entitlement to modify the RBA's October 6, 2017 eligibility determination and denied attorney fees and costs. (Answer, June 25, 2019).

14) On June 28, 2019, Employer controverted Employee's June 4, 2019 claim, reiterating the substantive provisions of its previous June 4, 2018 controversion, and additionally denying

Employee's entitlement to modify the RBA designee's October 6, 2017 eligibility determination. (Controversion Notice, June 28, 2019).

15) On April 21, 2020, Employee requested a hearing on its petition to modify the RBA designee's eligibility determination. (Affidavit of Readiness for Hearing, April 21, 2019). Employer opposed Employee's hearing request. (Affidavit of Opposition, May 1, 2019).

16) On December 11, 2020, *Trometter I* denied Employee's petition for review as untimely, remanded the matter to the RBA "for possible modification based on a change in circumstances," and awarded attorney fees and costs. (*Id*.).

17) On January 6, 2021, the RBA designee notified the parties she lacked sufficient information to change the October 6, 2017 eligibility determination. The designee advised she was re-engaging rehabilitation specialist Hutto to "perform additional work so a determination of whether the determination finding the employee ineligible for reemployment benefits should be modified." (Helgeson letter, January 6, 2021). On that date, the designee also wrote Hutto requesting that he contact Employee's provider "to obtain current predictions on the . . . job descriptions you selected for [Employee's] job of injury." The designee also requested Hutto file his report once he had "the information needed to make a recommendation . . . based on [Employee's provider's] predictions only." (Helgeson letter, January 6, 2021).

18) On January 21, 2021, Employer wrote the RBA designee, objecting "to referral of Employee's petition for further creation of evidence by Mr. Hutto and [Employee's provider]" and asserting, "creation of new medical evidence . . . for a determination on modification . . . is improper and not authorized by the Act or the Board's Decision." (Tashjian letter, January 21, 2021).

19) On January 28, 2021 the RBA designee responded, stating for reasons explained in her letter, "I decline to withdraw my request directing Mr. Hutto to contact [Employee's provider] for current predications on the . . . job descriptions." (Helgeson letter, January 28, 2021).

20) On February 5, 2021, Employer petitioned the Board for an order limiting the RBA's modification analysis, contending "The RBA designee is seeking to create additional evidence, which is unauthorized under the Act and legal precedent." (Petition, February 5, 2021). Employee opposed the petition. (Opposition, February 8, 2021).

21) On March 5, 2021, Hutto issued his Eligibility Evaluation, this time recommending Employee eligible for reemployment benefits. (Eligibility Evaluation, March 5, 2021).

22) On March 10, 2021, Employer wrote the RBA designee objecting to what it perceived as deficiencies in Hutto's report and requesting the designee delay making an eligibility determination. (Tashjian letter, March 10, 2021).

23) On March 22, 2021, the RBA designee notified the parties she was delaying "making a final determination so the Board can hear the parties' arguments on the employer's petition." (Helgeson letter, March 22, 2021).

24) On June 21, 2021, Employee filed another claim for workers' compensation benefits, this time asserting he had incurred unpaid medical expenses since Employer's June 4, 2018 controversion. Employee requested attorney fees and costs, medical costs, penalties, interest, and AS 23.30.041(k) (gap stipend) benefits from at least the date the board remanded the matter to the RBA on December 11, 2020, and arguably as early as Employer's June 28, 2019 controversion. (Claim for Workers' Compensation Benefits, June 21, 2021).

25) On July 12, 2021, Employer answered Employee's June 21, 2021 claim, asserting its June 28, 2019 controversion had not been rescinded or overturned and Employee's entitlement to benefits remained in dispute pending a July 15, 2021 hearing on Employer's February 5, 2021 petition to limit modification. (Answer, July 12, 2021).

26) On August 21, 2021, *Trometter II* found the Board lacked authority to issue an advisory opinion limiting the RBA's actions on remand. (*Id*.).

27) On August 25, 2021, Employer requested reconsideration of *Trometter II*. (Request for Reconsideration, August 25, 2021). Employee opposed reconsideration. (Opposition, August 26, 2021).

28) On October 27, 2021, the RBA designee notified Employee he was eligible for reemployment benefits based on Hutto's March 5, 2021 eligibility report and requested he elect either a reemployment benefits or a job dislocation benefit. (Helgeson letter, October 27, 2021).

29) On November 8, 2021, Employer sought review of the RBA's October 27, 2021 eligibility determination. It asserted the "RBA failed to consider the Employee's ability to perform jobs the Employee held or received training for in the 10 years prior to his injury" and had "expanded the scope of modification to conduct a new investigation." (Petition for Review, November 8, 2021).

30) On November 19, 2021, Employee submitted an Election of Benefits Form, notifying the RBA he elected to receive reemployment benefits and wanted rehabilitation specialist Tommie Hutto to assist with the plan preparation process. (Election Form, November 19, 2021).

31) During a November 22, 2021 prehearing conference, the parties set a February 24, 2022 hearing date for Employer's November 8, 2021 petition for review of the RBA's eligibility determination. (Prehearing Conference Summary, November 22, 2021). The hearing was subsequently continued by stipulation and ultimately canceled after Employer withdrew its petition on August 31, 2022. (Stipulation, January 19, 2021; Notice of Withdrawal, August 31, 2022).

32) On December 14, 2021, Employer objected to Employee's selection of rehabilitation specialist Hutto. (Tashjian letter, December 14, 2021).

33) On January 20, 2022, the parties stipulated to continue the February 24, 2022 hearing to enable Employer to appoint new counsel. The stipulation, approved by the Board's designee, provided that "All current deadlines are vacated, and all-time limits are stayed pending the scheduling of a new hearing date." The stipulation also provided that instead of filing an affidavit of readiness the parties could instead request a prehearing to schedule new dates. (Stipulation, January 20, 2022).

34) On September 9, 2022, an RBA technician notified rehabilitation specialist Daniel LaBrosse (LaBrosse) that Employee had been determined eligible for reemployment benefits and, since Employer objected to Employee's selected specialist, he had been selected to develop and write a reemployment plan. (Charles letter, September 9, 2022).

35) On December 23, 2022, LaBrosse issued a proposed Reemployment Plan which he transmitted to the RBA by email on December 29, 2022. The plan listed "Small Business Manager" as the vocational objective. (Reemployment Plan, Dec. 23, 2022).

36) On February 2, 2023, the RBA technician wrote LaBrosse stating, "The status of the plan is in question because it has not been approved and signed by employee and/or employer/insurer." The technician requested LaBrosse contact the parties to determine whether they agreed or opposed the plan and, if they agreed that he obtain their signatures so the plan could go forward as written. (Charles letter, February 2, 2023).

37) On February 13, 2023, Employee's counsel wrote the RBA technician stating, "In response to your February 2, 2023 letter to . . . LaBrosse, I have advised Mr. Trometter not to sign the plan

proposed by Mr. LaBrosse dated December 23, 2022 . . . ." Employee's counsel listed several perceived deficiencies with the plan. (Franich letter, February 13, 2023).

38) On February 21, 2023, Employer wrote the RBA technician, stating it did not object to LaBrosse's reemployment plan or to LaBrosse doing further analysis as requested by Employee's counsel. It did, however, ask that LaBrosse be directed "to promptly provide this further review and analysis or to provide an alternative reemployment plan." (Moxley letter, February 21, 2023).

39) On October 17, 2023, Employer wrote the RBA technician requesting "an informal conference to discuss the reemployment process in this case." (Moxley letter, October 17, 2023). On that same day, Employer petitioned the Board to "compel the Rehabilitation Benefits Administrator to take action in this matter consistent with AS 23.30.041 and 8 AAC 45.550." Employer asserted the RBA's failure to act, despite communication from the parties, was causing significant delay and harm. It requested the Board "direct the RBA to promptly restart the reemployment process and to take such action as necessary and as required by AS 23.30.041 and 8 AAC 45.550 to ensure a workable and agreeable reemployment plan is quickly developed, signed and implemented." (Petition to Compel, October 17, 2023).

40) On October 18, 2023, Employee opposed Employer's petition to compel, asserting only "the RBA, not the Board . . . has authority to supervise and direct reemployment specialists" and that "only [the] RBA can address the directives to the Reemployment Specialist contained in [the] . . . February 2, 2023 letter to Mr. LaBrosse." (Employee's Opposition, October 18, 2023). Employee also requested a written records hearing on his June 21, 2021 claim. (Affidavit of Readiness for Hearing (ARH), October 18, 2023).

41) On October 21, 2023, LaBrosse emailed the RBA a Progress Report, dated October 19, 2023. It stated that since submitting the first version of the proposed employment plan he had received feedback from Employee's counsel and the RBA and "[t]hese factors and corrections have been applied to the current reemployment plan which is once again being submitted to all parties for consideration." The report also stated that although Employer's adjuster had signed the December 23, 2022 plan as originally presented, "[t]he claimant has not signed this proposed plan yet based on advice of his attorney." (Progress Report, October 19, 2023).

42) On October 26, 2023, Employee field another ARH, this time requesting a written records hearing on Employer's October 17, 2023 petition to compel and Employee's October 17, 2023

opposition. (ARH, October 26, 2023). Employer opposed the ARH, contending it needed additional time for discovery and a potential IME or SIME. (Opposition to ARH, October 30, 2023).

43) On November 8, 2023, the RBA technician wrote the parties and LaBrosse to schedule a November 27, 2023 informal conference "for the purpose of discussing rehabilitation plan issues of concern to the parties." (Charles letter, November 8, 2023).

44) During the November 27, 2023 informal conference, the parties agreed that LaBrosse "would be asked to perform further work on the plan," "consider all information available to him," and "submit a plan that meets the statutory and regulatory requirements to the parties for consideration no later than December 29, 2023." (Informal Rehabilitation Conference Summary, November 27, 2023). Although LaBrosse had been invited to attend and participate in the informal conference he did not. (LaBrosse email, November 27, 2023).

45) During a November 30, 2023 prehearing conference, the parties notified the designee that Employer's October 17, 2023 petition to compel was to be held in abeyance until further notice. (Prehearing Conference Summary, November 30, 2023).

46) On November 30, 2023, Employee filed another claim seeking attorney fees and costs, interest, and AS 23.30.041 gap-stipend benefits. Employee asserted:

> [H]e has been actively pursuing reemployment benefits since June 4, 2019 when he filed his Petition seeking modification and is owed reemployment benefits during that gap period of 876 days (125.4 weeks), during which Employer was resisting reemployment, plus interest on those benefits from the date that they were due until the date that they are paid.

(Claim for Workers' Compensation Benefits, November 30, 2023).

47) On December 20, 2023, Employer answered Employee's November 30, 2023 claim, denying it owed any gap stipend beyond what had already been paid. Employer asserted Employee had not started actively pursuing reemployment benefits until he engaged in litigation steps and then "abandoned his pursuit as of the date the Board issued its Order on January 20, 2022, approving the parties' agreed delay of a hearing." It also asserted "Employee was not actively and vigorously pursuing reemployment benefits at any time before April 21, 2020, or at any time after January 20, 2022." Employer claimed an offset for all stipend benefits, approximately 100 weeks, it paid after January 20, 2022 and asserted if Employee insisted on

taking this matter to hearing, it would "ask the Board to authorize it to withhold 40%-50% of any future .041(k) benefits payments until it entirely recovers its overpayment of gap stipend." (Answer, December 20, 2023).

48) On December 29, 2023, LaBrosse issued a second reemployment plan. Instead of the "Small Business Manager" vocational objective selected for the October 22, 2023 reemployment plan, the second plan listed "Accounting Technician" as the vocational objective. (Reemployment Plan, December 29, 2023).

49) On January 23, 2024, Employer wrote the RBA designee requesting LaBrosse rework the December 29, 2023 reemployment plan. Employer asserted, "There are a couple of problems with the Plan as written, most notably . . . it is almost stale dated . . . and it is not clear whether it would be possible for the parties to meet the requirements of the Plan as written." It requested the RBA direct Labrosse "to rework the reemployment plan to: (1) include a realistic timeline for starting coursework; and (2) resolve contingencies such as treating physician's approval." (Moxley letter, January 16, 2024).

50) On February 5, 2024, the RBA designee wrote LaBrosse stating, "The proposed class sequencing shows Mr. Trometter will attend two courses per semester [whereas] AS 23.30.041 requires the employee to participate in activities relating to employability on a full-time basis." The designee requested LaBrosse explain why the part-time schedule was selected, set a new plan start date, and obtain physician approval for the vocational objective. The designee directed LaBrosse to "perform the work . . . and submit a completed plan that meets the requirements of AS 23.30.041(h) and (i) no later than March 4, 2024." (Charles letter, February 5, 2024).

51) On February 5, 2024, Employee filed an ARH on his November 30, 2023 claim. (ARH, February 5, 2024). Employer objected, contending the ARH was "confusing and self-contradictory." (Opposition to ARH, February 16, 2024).

52) On February 15, 2024, LaBrosse submitted an updated Reemployment Plan. The "Accounting Technician" vocational objective remained consistent with the December 29, 2023 reemployment plan. (Reemployment Plan, February 15, 2024).

53) On March 11, 2024, Employer emailed the RBA designee, forwarding a letter previously sent to Employee's counsel on February 23, 2024 that included a copy of LaBrosse's February 15, 2024 updated Reemployment Plan, signed by LaBrosse and Employer's Adjuster, and requesting Employee's signature. (Moxley email, March 11, 2024).

54) During a March 20, 2024 prehearing conference, the parties agreed on August 22, 2024 as the hearing date on Employee's June 21, 2021 and November 30, 2023 claims. (Prehearing Conference Summary, March 20, 2024).

55) On April 4, 2024, Employer wrote the RBA designee, requesting the RBA promptly approve the February 15, 2024 reemployment plan previously signed by LaBrosse and Employer's adjuster and submitted to the RBA on March 11, 2024 for approval. (Moxley letter, April 4, 2024).

56) On April 4, 2024, Employee wrote the RBA designee, disagreeing that LaBrosse's February 15, 2023 reemployment plan met or exceeded Employee's remunerative wage goal, and contending LaBrosse had not analyzed entry level wages for the "Accounting Technician" vocational objective. (Franich letter, April 4, 2024).

57) On April 25, 2024, the RBA denied the February 15, 2024 reemployment plan proposed by LaBrosse and signed by Employer's adjuster, stating "I do not believe that the requirements of AS 23.30.041(h) and (i) have been met." The designee determined LaBrosse "did not address emotional condition/family support or medical stability in the proposed plan" and "the labor market research provided . . . does not provide enough information to determine if the proposed training plan ensures Mr. Trometter will have the skills to be competitive in the labor market." The designee also found "the plan for Mr. Trometter to attend classes at a part-time rate . . . does not meet the requirement of remunerative employability in the shortest time possible." The designee directed LaBrosse to "continue to work with the parties to identify a viable plan the parties can agree to or that can be approved in plan review." (Niwa letter, April 25, 2024).

58) On May 31, 2024, Employee withdrew "that portion of his 6/21/21 claim that sought unpaid medical expenses." (Notice of Withdrawal of Claim, May 31, 2024).

59) On June 7, 2024, LaBrosse submitted a plan progress report, stating "since submission of the second proposed reemployment plan [he] has received feedback and input from the claimant, the claimant's attorney . . . and the RBA." LaBrosse reported, "The claimant has not signed this proposed plan and now states that he is working with his attorney to negotiate a Compromise and Release Settlement agreement." LaBrosse also reported Employee is undergoing medical treatment to address chronic pain conditions and "is working on getting another SIME set for the end of July." (Progress Report, June 7, 2024).

60) On June 18, 2024, the parties, through counsel, filed a Settlement Stipulation, the substantive provisions provide:

Settlement Stipulation

1. The Employee alleges that he began actively pursuing reemployment benefits on June 4, 2019, and continued actively pursuing reemployment benefits through the present date. The Employee therefore alleges that he is entitled to gap stipend for the period from June 4, 2019, through the date the Employer started paying the gap stipend: October 27, 2021. The Employee alleges that he is entitled to penalty, interest, and attorney's fees and costs related to this gap stipend. The Employee also alleges that he is entitled to full, ongoing gap stipend until he starts working a reemployment plan.

2. Contrary to what the Employee alleges, the Employer asserts that the Employee was not actively pursuing reemployment benefits at least until April 21, 2020, and that he subsequently abandoned his pursuit of reemployment benefits, such that the Employee is not entitled to gap stipend for much of the period for which the Employee asserts gap stipend is due. The Employer additionally asserts that the Employer is entitled to an offset of future stipend payments until the amount the Employer has already paid in gap stipend during the period from April 21, 2020, through January 20, 2022, is recovered.

3. The Employee additionally claims that other compensation and/or benefits have been, are, or may in the future be due in this case.

4. To resolve the dispute between the parties regarding the Employee's allegations as summarized in paragraph "1," a hearing was scheduled for August 22, 2024, on the Employee's June 21, 2021, *Claim for Workers' Compensation Benefits* and The Employee's November 30, 2023, *Claim for Workers' Compensation Benefits*.

5. To settle the dispute between the parties as to Employee's allegations as summarized in paragraph "1," the parties have agreed, and hereby stipulate, as follows:

    a. The Employer will pay $80,000 to the Employee, via check . . . within fourteen days of full execution of this *Settlement Stipulation*.

    b. The Employer will pay $15,000 to the Employee's attorney . . . within fourteen days of full execution of this *Settlement Stipulation*.

    c. The Employee waives all past, present, and future claims regarding all gap stipend and associated penalty, interest, and attorney's fees and costs.

> d. Employee's existing claims addressing gap stipend and associated penalty, interest, and attorney's fees and costs should be dismissed with prejudice.
>
> e. By this *Stipulation*, the Employer does not waive any of its rights under the Alaska Workers Compensation Act or other applicable law, and this *Stipulation* is not an admission of liability and may not be used in any forum or proceeding as such.
>
> f. By this *Stipulation*, the Employe does not waive his claims to any compensation or benefits, including claims regarding future medical benefits, not explicitly resolved by this *Stipulation*. Additionally, the Employee is represented by an attorney licensed to practice law in Alaska. Therefore, the Board's approval of this *Stipulation* is not necessary for it to become effective, and the parties agree that this *Stipulation* will be in effect as soon as it is fully executed.
>
> g. The parties respectfully request that the hearing currently scheduled for August 22, 2024, be canceled, and that the parties' counsel be notified of such cancelation.
> . . . .

(Settlement Stipulation, June 18, 2024). Counsel for both parties signed the Settlement Stipulation on June 18, 2024. (Observation). Employee's counsel transmitted the agreement to the Division via email stating: "Attached is a fully executed Settlement Stipulation that does not require Board approval." (Franich email, June 18, 2024).

61) On June 19, 2024, based on the parties' June 18, 2024 settlement, the August 22, 2024 hearing was vacated. (Notice Vacating Hearing, June 19, 2024).

62) On June 25, 2024, consistent with the terms of the settlement, Employer issued two checks: one for $80,000 payable to Employee (Check #18979) and the other for $15,000 payable to Employee's counsel (Check #18962). (Employer's Documentary Evidence, October 11, 2024). Employee and Employee's counsel negotiated the checks sometime between June 28, 2024 and July 1, 2024. (*Id*.). On that same date, Employer's adjuster filed a controversion notice stating:

> On June 18, 2024, the parties signed an agreement settling AS 23.30.041gap stipend. Therefore, the Employer denies further AS 23.20.041(k) gap stipend payments. Also, as of the date of this denial, the Employee has not entered a reemployment plan, so is currently ineligible for AS 23.30.041 plan-related stipend. AS 23.30.041 only requires the Employer to pay plan-related stipend while the Employee is participating in a reemployment plan, so the Employer also

> denies that any 041(k)-plan related stipend is due until the Employee starts a reemployment plan. (Controversion Notice, June 25, 2024).

At the time the adjuster filed the controversion, Employee had not filed a post settlement claim for gap-stipend benefits. (Observation).

63) On July 22, 2024, Employee filed a claim requesting attorney fees and costs, penalties, interest, ongoing .041(k) benefits, and an unfair or frivolous controversion finding. Employee asserted:

> [Employer's] 6/25/24 controversion has no factual or legal basis and is therefore unfair or frivolous. EE is in the plan development phase of reemployment. Payment of ongoing .041(k) benefits does not require plan approval, or that EE begin training under an approved plan.

(Claim for Workers' Compensation Benefits, July 22, 2024). Employee filed the July 22, 2024 claim several weeks after he had negotiated the settlement checks which Employer issued on June 25, 2024 and after Employer filed its controversion notice. (Observations).

64) On July 24, 2024, LaBrosse submitted a third Reemployment Plan. In contrast to the two previous plans, this third plan listed "Superintendent, Construction" as the vocational objective. (Reemployment Plan, July 24, 2024).

65) On August 1, 2024, the RBA technician wrote LaBrosse stating, "The status of the plan is in question because it has not been approved and signed by Employee and/or Employer/insurer." The designee directed LaBrosse to contact the parties to confirm whether they agreed or disagreed with the proposed plan. (Charles letter, August 1, 2024). That same day, Employer wrote the RBA objecting to LaBrosse's July 24, 2024 Reemployment Plan, contending the plan's total cost exceeded the $13,300 limits of AS 23.30.041(l) and 8 AAC 45.550(a)(8)(c). It requested the plan be rejected and LaBrosse be required to "develop a plan that is workable, consistent with AS 23.30.041 and 8 AAC 45.550 and not stale-dated." It also stated, "This is at least the third failure . . . at developing a workable plan that is agreeable to both parties . . . . Employer would not object to appointment of a different reemployment specialist." (Moxley letter, August 1, 2024). Employee also wrote the RBA objecting to Employer's suggestion of "removing Mr. LaBrosse and reassigning a different reemployment specialist." (Franich letter, August 1, 2024).

66) On August 2, 2024, Employer petitioned to dismiss Employee's July 22, 2024 claim, asserting:

> [The] June 18, 2024 Settlement Stipulation settled the EE's past, present and future claims regarding gap stipend and associated penalty, interest and attorney fees and costs. In that settlement, the Employee waived his claims to those workers' compensation benefits. Therefore, his July 22, 2024, Claim for Workers' Compensation, which is a claim for the compensation benefits settled by the parties' June 18, 2024 stipulation, is frivolous and should be dismissed."

(Petition, August 2, 2024). Employer also answered Employee's July 22, 2024 benefits claim. Quoting the settlement stipulation, Employer asserted that in exchange for the settlement payment, "Employee waive[d] all past, present, and future claims regarding all gap stipend and associated penalty, interest, and attorney's fees and costs". It argued the settlement is enforceable and "Employee has no right to any further pre-plan ("gap") stipend, and no right to associated penalty, interest, or attorney's fees and costs, according to the clear, stated terms of the parties' settlement agreement . . . ." Employer denied Employee's entitlement to fees, costs and penalties and asserted that since its controversion was based on the parties' settlement, the controversion is neither unfair nor frivolous. (Answer, August 2, 2024). That same day, Employee opposed Employer's petition, stating "The only benefits resolved by the parties' 6/18/24 Settlement Stipulation related to the period of time before the RBA found Employee eligible for reemployment benefits and the Employer began paying them" (approximately June 4, 2019 until October 27, 2021). (Opposition, August 2, 2024). He also requested two hearings, one on his July 22, 2024 claim and the other on Employer's August 22, 2024 petition. (ARH, August 2, 2024).

67) On August 5, 2024, Employer opposed Employee's ARH filings and requested a prehearing conference to set a mutually agreeable hearing date. (Opposition, August 5, 2024).

68) On August 7, 2024, Employer controverted all further payments to rehabilitation specialist LaBrosse "for work related to the July 24 2024 reemployment plan." It asserted LaBrosse's work "was not in accordance with the regulation and statute and he is not due any payment for work in which he knowingly created a plan that was inconsistent with the regulations and statute" (Controversion Notice, August 7, 2024).

69) On August 12, 2024, the RBA responded to Employer's August 1, 2024 letter regarding LaBrosse's July 24, 2024 reemployment plan. She informed Employer it had two options:

"under AS 23.30.041(j) you may submit a plan for approval to the administrator if either party fails to agree" or "request an informal conference . . . with all parties present to discuss issues with the submitted plan." (Niwa letter, August 12, 2024).

70) At a September 4, 2024 prehearing conference scheduled for the purpose of identifying issues and setting a hearing date on Employee's July 22, 2024 claim and Employer's August 2, 2024 petition to dismiss, Employee's counsel characterized the two filings as "two sides of the same coin." Both filings involved the same substantive issue - the impact of the June 18, 2024 settlement stipulation on Employee's entitlement to further gap stipend benefits. With the parties' consent, the designee set a written records hearing for October 31, 2024, with hearing briefs due October 23, 2024. (Prehearing Conference Summary, September 4, 2024). Because of inclement weather, the parties subsequently stipulated to extend the briefing deadline to October 25, 2024. (Moxley email, October 23, 2024).

71) On October 11, 2024, Employer filed documentary evidence in advance of the October 31, 2024 written records hearing. The evidence included copies of the two settlement checks and an affidavit of Amber Treston, the Workers' Compensation Claims Administrator for the Alaska Department of Administration, Division of Risk Management. (Employer's Documentary Evidence, October 11, 2024). In her affidavit Ms. Treston averred Employer had approved the June 18, 2024 settlement stipulation and had issued payment as required under the terms of the agreement, which Employer's records indicate were accepted. Ms. Treston also averred:

> In exchange for these payments, I expected the claim(s) in this case, regarding gap stipend and associated penalty, interest, and attorney's fees and costs, to be dropped, and I expected that Mr. Trometter and Mr. Franich would not file any more claims regarding gap stipend and associated penalty, interest, and attorney's fees and costs.

(Employer's Documentary Evidence, October 11, 2024; Affidavit of Amber Treston, October 8, 2024).

72) On October 25, 2024, Employee submitted his Hearing Brief along with affidavits requesting $5,824 in attorney fees and costs. He asserted the June 18, 2024 Settlement Stipulation compromised only the gap stipend associated with his November 30, 2023 benefit claim (the period from approximately April 30, 2018 until October 27, 2021), and that he "specifically did not waive his claims to any compensation or benefits not resolved by the

stipulation." Employee contended he is owed ongoing gap stipend from the settlement stipulation date (June 18, 2024), plus penalties, interest, and attorney fees/costs. Employee also asserted Employer's controversion is unfair or frivolous because "Employer's argument that .041(k) benefits do not resume until Employee enters training under an approved plan has no basis in law or fact . . . ." (Employee's Hearing Brief, October 25, 2024).

73) On October 25, 2024, Employer denied Employee is entitled to any ongoing gap stipend or related benefits and denies that its controversion is unfair or frivolous. Quoting from the settlement stipulation it contends Employee specifically waived "all past present and future claims regarding all gap stipend and all associated penalty, interest and attorney fees." Employer requested a finding that "the parties' settlement of 'all gap stipend' was indeed a settlement of all gap stipend, not just past gap stipend" and that its controversion, which was based on the settlement, is neither unfair nor frivolous. (Employer's Hearing Brief, October 25, 2024).

74) On October 31, 2024, a written record hearing was held. (Agency Record).

75) To date, approximately 27 months after the RBA first appointed LaBrosse to develop an acceptable, approvable reemployment plan, and despite three failed attempts, there is still no approved reemployment plan in place. (Observations).

PRINCIPLES OF LAW

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

> **AS 23.30.001. Legislative intent**. It is the intent of the legislature that
>
> (1) this chapter be interpreted . . . to ensure . . . predictable delivery of . . . benefits to injured workers at a reasonable cost to the employers . . . .
>
> **AS 23.30.012. Agreements in regard to claims.** (a) At any time . . . after 30 days subsequent to the date of the injury, the employer and the employee . . . have the right to reach an agreement in regard to a claim . . . under this chapter, but a memorandum of the agreement . . . shall be filed with the division. 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 . . . .

AS 23.30.012 permits resolving workers' compensation claim disputes by filing a settlement agreement with the division. When all parties are represented by Alaska attorneys, Board approval of a settlement is not required. *Seal v. Welty*, 477 P.3d 613, 619 (Alaska 2020). A settlement agreement filed with the division is enforceable as a compensation order and discharges the Employer's liability. *Id*. Once the parties enter into a settlement agreement, the agreement cannot be modified or set aside because of unilateral or mutual mistake. *Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1159 (Alaska 1993). As emphasized by the Court in *Notti v. Hoffman,* 513 P.3d 245, 252 (Alaska 2022), settlement agreements are binding contracts and case law has repeatedly affirmed a strong public policy favoring settlements. *Id*. (citations omitted).

A workers' compensation settlement agreement is a contract subject to interpretation the same as any other contract. *Williams v. Abood*, 53 P.3d 134, 139 (Alaska 2002). Common law contract formation principles and rules of interpretation apply to worker compensation settlement agreements unless overridden by statute. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079 (Alaska 2008). The goal of contract interpretation "is to give effect to the reasonable expectations of the parties." *Cooper Leasing, LLC v. Woronzof Condominium Association,* 584 P.3d 636, 646 (Alaska 2024). As the Court stated in *Craig Taylor Equipment Corp. v. Pettibone Corp*., 659 P.2d 594 (Alaska 1983):

> Contracts are to be interpreted so as to give effect to the reasonable expectations of the parties, that is, to give effect to the meaning of the words which the party using them should reasonably have apprehended that they would be understood by the other party.

Id. at 597.

In determining the parties' reasonable expectations, the Court looks to the language of a disputed provision, the language of other provisions of the contract, relevant extrinsic evidence, and case law interpreting similar provisions. *Abood*; *Woronzof.* "Extrinsic evidence is always admissible on the question of the meaning of the contract itself." *Estate of Smith v. Spinelli*, 216 P.3d 524, 530 (Alaska 2009). The type of extrinsic evidence that may be considered includes the language and conduct of parties, objects sought to be accomplished, surrounding circumstances at the time the contract was negotiated, as well as the parties conduct after the contract was entered into. *Andrew B. v. Abbie B.,* 494 P.3d 522, 535 (Alaska 2021).

"An ambiguity exists only where the disputed terms are reasonably subject to differing interpretations after viewing the contract as a whole and the extrinsic evidence surrounding the disputed terms." *Wessells v. State, Dept. of Highways,* 562 P.2d 1042, 1046 (Alaska 1977). The Court in *Modern Construction, Inc. v. Barce, Inc*., 556 P.2d 528, 529-30 (Alaska 1976) held:

> The mere fact that two parties disagree as to the interpretation of a contract term does not necessarily imply that an ambiguity exists in the contract. Rather, an ambiguity exists only when the contract, taken as a whole, is reasonably subject to differing interpretations . . . . In outlining the canons of construction used by the courts in contract interpretation, Professor Williston stated:
>
> > The court will, if possible, give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable. (S. Williston and W. Jaeger, Williston on Contracts, Section 619 at 731 (3d ed. 1961).

"The focus is on what a reasonable person would have understood the . . . language to have meant." *Notti,* 248 (citation omitted); *Pettibone.* Broad language in settlement agreements implies that all claims are settled; the parties must specifically state claims that are not settled. *Abood*.

In Alaska the doctrine of waiver is defined as the "intentional relinquishment of a known right." *Milne v. Anderson*, 576 P.2d 109, 112 (Alaska 1978). The Court also held:

> [W]aiver is a flexible word, with no definite, and rigid meaning in the law. . . . While the term has various meanings dependent upon the context, it is, nevertheless, capable of taking on a very definite meaning from the context in which it appears, and each case must be decided on the facts peculiar to it. *Id.*

The Court further held that waiver may be express or implied:

> An implied waiver arises where the course of conduct pursued evidence an intention to waive a right or is inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party. . . . To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver. *Id*.

Citing earlier cases, the Court in *Notti*, cautioned against giving significant weight to a litigant's assertion of subjective understanding about the meaning of contract language that is in stark contrast to the objective meaning of language. *Id*. at 249. "Self-serving assertions do not create issues of fact in the face of very clear contract language." *Id*.

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . . .
>
> (b) The administrator shall
>
> (1) Enforce regulations adopted by the board to implement this section . . . .
>
> (c) . . . . If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. . . .
>
> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. . . .

> (k) . . . . If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process . . . .
>
> (n) After the employee has elected to participate in reemployment benefits, if the employer believes the employee has not cooperated, the employer may terminate reemployment benefits on the date of noncooperation. . . .

Reemployment benefits are intended to return an injured employee to remunerative employment when they are not able to return to their former job for which they have the relevant training or experience. *Vandenberg v. State, Dept. of Health & Social Services*, 371 P.3d 602 (Alaska 2016); *See also Rockney v. Boslough Construction. Co*., 115 P.3d 1240, 1242 (Alaska 2005) (describing the purpose of a reemployment plan). Reemployment benefits are also intended to ensure an injured employee has an income during the time that vocational rehabilitation keeps them out of the job market. *Rydwell v. Anchorage School District*, 864 P.2d 526 (Alaska 1993).

If an injured worker is unable to return to their prior employment for 90 consecutive days, the RBA is required to evaluate whether the worker is eligible for reemployment benefits. *Martino v. Alaska Asphalt Services LLC*, AWCAC Dec. No. 304 (June 22, 2023); *Unisea, Inc. v. Morales de Lopez*, 435 P.3d 961, 964-75 (Alaska 2019). The 90-day mandate establishes a "bright line" automatically entitling an injured employee to an eligibility evaluation. *Martino*. Once an eligibility evaluation is ordered, the consequences to the employer include an obligation to pay stipend benefits to the injured worker under applicable circumstances. *Id.*

An injured employee who is actively pursuing reemployment benefits is entitled to receive the benefits throughout the reemployment process, including during the eligibility evaluation process, plan formulation process, and plan implementation process. *Martino*; *Carter v. B&B Construction, Inc*., 199 P.3d 1150, 1159-60 (Alaska 2008); *Vandenberg*. As the Court stated in *Carter*:

> [A]n employee may be eligible for subsection .041(k) benefits before approval or acceptance of a reemployment plan so long as he has begun the reemployment process. . . . Subsection .041(k) stipend benefits are to be provided during the

> reemployment process, not just during the course of a reemployment plan. . . . [E]mployees become eligible for reemployment benefits when they begin participating in the reemployment process.

The "fallback" income source, also referred to as "gap stipend," provided in AS 23.30.041(k) reflects a legislative intent that "there should not be a gap between the expiration of TTD or PPI benefits and the commencement of reemployment benefits for employees who are vigorously pursuing reemployment benefits." *Carter* at 1159-60; *Vandenberg*; *Martino*.

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

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury. . . . On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days. . . .
>
> (c) The insurer or adjuster shall notify the division in a format prescribed by the director that the payment of compensation has begun or has been increased, decreased, suspended, terminated, resumed, or changed in type. . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted

> compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate . . . in effect on the date the compensation is due. . . .

Benefits under AS 23.30.041(k) are "compensation." *Widmer v. Municipality of Anchorage*, AWCAC Dec. No 165 (August 3, 2012). "The Alaska Workers' Compensation Act sets up a system in which payments are made without need of Board intervention unless a dispute arises." *Harris v. M-K Rivers*, 325 P.3d 510, 518 (Alaska 2014). To avoid a penalty, a controversion notice must be filed "in good faith," meaning the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992).

> **8 AAC 45.507. Notice of employee rights to reemployment benefits**. . . .
>
> (b) If the employee has been totally unable to return to the employee's employment at the time of injury for 90 consecutive days, as a result of the injury, the employer shall notify the administrator, in writing, on the 91st day. The notification must be completed on a form prescribed by the administrator.

> **8 AAC 45.522. Ordering an eligibility evaluation without a request.** (a) For injuries occurring on or after November 7, 2005, if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation, unless the employer controverts on grounds identified under AS 23.30.022, 23.30.100, 23.30.105, and 23.30.250, or 8 AAC 45.510(b). If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference and hold a hearing in accordance with 8 AAC 45.510(b). . .

ANALYSIS

Much like the title of the Beatles hit song, "The Long and Winding Road," so too has been Employee's rehabilitation and reemployment process; a journey that started on July 13, 2017 when the RBA first ordered an eligibility evaluation. To date, more than three years after the RBA ultimately determined Employee eligible for rehabilitation benefits, and nearly 27 months

after the RBA appointed rehabilitation specialist LaBrosse to develop a reemployment plan, there is still no approved plan. The parties have levied blame on one another, the RBA, and on LaBrosse for the delay in achieving an approved plan. Whether blame is justified is uncertain and undetermined. What is certain, however, is that the time thus far involved in developing a reemployment plan for Employee does not accord with the fundamental objective of AS 23.30.041 in finding remunerative employability in the shortest time possible.

With the backdrop of a long-standing, contentious dispute regarding gap-stipend benefits, and the absence of an approved reemployment plan, the parties executed a settlement stipulation on June 18, 2024. Neither party disputes the settlement's enforceability and neither seeks to unwind or avoid the settlement. Further, there is no evidence either party was pressured to sign the settlement, had no other alternative but to sign the settlement, or involuntarily agreed to the settlement terms. What the parties dispute, however, is the meaning of language used in the settlement, and the settlement's overall impact on Employee's entitlement to receive ongoing gap-stipend benefits.

The October 31 2024 written records hearing focused on Employee's July 22, 2024 benefit claim for ongoing gap stipend and Employer's August 2, 2024 petition to dismiss. However, as Employee's counsel perceptively noted during the September 4, 2024 prehearing conference, the two filings are effectively "two sides of the same coin" - both impacted and controlled by the same substantive issue: the scope of the parties' settlement stipulation on Employee's entitlement to receive ongoing gap stipend benefits. If as Employer contends, the settlement waived Employee's entitlement to all gap stipend, "past, present and future," Employee's July 22, 2024 post-settlement claim for ongoing gap-stipend benefits fails. Conversely, if as Employee contends, the settlement compromised only his November 30, 2023 gap-stipend benefit claim (for the period from approximately April 30, 2018 to October 27, 2021), and not his entitlement to ongoing stipend benefits, Employer's petition to dismiss is without merit, thus entitling Employee to receive the benefits requested.

Regarding Employee's entitlement to reemployment benefits, AS 23.30.041 makes clear that if an injured employee is unable to return to their prior employment for 90 consecutive days, the

RBA is mandated to evaluate whether the employee is eligible for reemployment benefits. *Martino*; *Morales de Lopez*. AS 23.30.041(c) is designed to be self-executing and reflects the legislative intent that the Act be interpreted to ensure quick, efficient, fair and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1).

An eligibility evaluation ordered by the RBA carries consequences to the employer, including paying "stipend" benefits to the injured employee under applicable circumstances. An employee actively pursuing reemployment benefits is entitled to receive benefits during the reemployment process – including during the eligibility evaluation process, plan formation process, and plan implementation process. *Martino*; *Vandenberg*; *Carter.* The entitlement to receive what is commonly referred to as "gap stipend" or "fallback" income, as provided in AS 23.30.041(k), reflects the legislative intent that "there should not be a gap between the expiration of TTD or PPI benefits and the commencement of reemployment benefits for employees actively and vigorously pursuing reemployment benefits." *Carter*.

In the present case, Employee's entitlement to gap stipend (more specifically how much and for what time frame) has been a contentious issue between the parties for several years. Prior to the June 18, 2024 settlement stipulation Employee filed two claims for stipend benefits. Employee's first claim, filed June 21, 2021, sought .041(k) benefits starting June 28, 2019, when Employer controverted Employee's efforts to modify the RBA's eligibility denial. Employee's second claim, filed November 30, 2023, subsumed his earlier claim and requested reemployment benefits during the "gap period of 876 days (125.4 weeks)," starting from June 4, 2019.

Employer, has consistently disputed aspects of Employee's gap stipend and .041(k) benefit claims, denying it owed any gap stipend beyond what it has already paid, and asserting that Employee had not actively pursed reemployment benefits at any time before April 21, 2020 or after January 20, 2022. Employer has also asserted an offset against future stipend benefits until such time as it recovered what it contends it overpaid in stipend benefits.

It is against this backdrop that the parties executed the June 18, 2024 Settlement Stipulation.

Did Employee waive ongoing gap-stipend benefits with the parties' June 18, 2024 settlement stipulation?

The essence of Employer's argument is that the June 18, 2024 settlement stipulation constitutes an unequivocally waiver of "all past, present, and future claims regarding all gap stipend and associated penalty, interest, and attorney's fees and costs." It contends the intent and purpose of the words "all gap stipend," in the context of the phrase "all past, present, and future claims regarding all gap stipend" comprehensibly resolved "all gap-stipend claims" – not simply past gap-stipend claims.

In contrast Employee contends the settlement compromised only his November 30, 2023 gap-stipend claim – "reemployment benefits from April 30, 2018 until October 27, 2021, when employer began paying reemployment benefits." He also asserts, (1) "the Settlement Stipulation referenced only "gap" stipend. It did not waive Employee's right to receive ongoing .041(k) stipend"; and (2) "Employee specifically did not waive his claims to any compensation or benefits not explicitly resolved by the stipulation." Regarding these last two arguments, Employee essentially argues there is a substantive difference between the use of the term "gap stipend" and ".041(k) stipend" in the context of the settlement, and that a strict, literal construction should apply when interpreting the settlement.

AS 23.30.012 allows parties to resolve workers' compensation claim disputes by filing a settlement agreement which, if the parties are represented by Alaska counsel, does not require Board approval to be enforceable. *Seal*. Once filed with the division the settlement is enforceable as a compensation order and cannot be modified or set aside because of unilateral or mutual mistake. *Id; Olsen Logging Co.* Settlement agreements are binding contracts favored by public policy. *Notti.*

A workers' compensation settlement agreement such as signed by the parties is a contract subject to interpretation the same as any other contract. *Abood.* Common law contract formation principles and rules of interpretation apply unless overridden by statute. *Seybert.* The goal of contract interpretation is to give effect to the reasonable expectations of the parties; to

give effect to the meaning of the words which the party using them should reasonably expect would be understood by the other party. *Pettibone*.

To determine the parties' reasonable expectations as they relate to the settlement stipulation, and in so doing the impact of the settlement on Employees right to on-going gap stipend benefits, it is appropriate to look to the language of a disputed provision, the language of other contract provisions, relevant extrinsic evidence, and case law interpreting similar provisions. *Williams*; *Woronzof*. Additionally, extrinsic evidence is always admissible on the question of the meaning of the contract. *Spinelli*. The type of extrinsic evidence that may be considered includes the language and conduct of parties, objects sought to be accomplished, surrounding circumstances at the time the contract was negotiated, as well as the parties conduct after the contract was entered into. *Andrew B*.

A sectional analysis of the settlement stipulation is beneficial to understanding the interrelationship of the various substantive provisions as they relate to the interpretation of the settlement as a whole and the parties' reasonable expectations.

Paragraph 1 of the settlement stipulation sets forth Employee's allegations. There are four specific allegations, each prefaced by the word "alleges": (1) "Employee alleges he began actively pursuing reemployment benefits on June 4, 2019, and continued actively pursuing reemployment benefits through the present date"; (2) Employee alleges "he is entitled to gap stipend for the period . . . June 4, 2019 through . . . October 27, 2021;" (3) Employee alleges "he is entitled to penalty, interest, and attorney's fees and costs related to this gap stipend"; and (4) "Employee also alleges that he is entitled to full, ongoing gap stipend until he starts working a reemployment plan." The temporal scope and grammatical tense associated with each allegation provides context and is relevant to understanding the object and scope of Employee's waiver in paragraphs 5 and 5(c). Allegation 1 encompasses both a past and present tense – Employee's allegation "he began pursuing reemployment benefits on June 4, 2019 and continued actively pursuing reemployment benefits through the present date" - the June 18, 2024 settlement date. Allegations 2 and 3 are oriented in the past – Employee's assertion that he is entitled to gap stipend for the past period from "June 4, 2019 through October 27, 2021." Allegation 4 is

entirely future focused – Employee alleges "he is entitled to full ongoing gap stipend until he starts working a reemployment plan." At its core, allegation 4 is future oriented; an entitlement to "ongoing gap stipend" for an indeterminant time into the future "until he starts working a reemployment plan."

Paragraph 2 of the settlement stipulation reflects Employer's counter arguments to Employee's allegations in paragraph 1. In summary, Employer denies all of Employee's allegations; it denies that Employee has been actively pursuing reemployment benefits during certain time frames, denies Employee is entitled to any gap stipend beyond those already paid, and asserts an offset against future stipend benefits until it recovers the amount it alleges were overpaid. Employer's contentions are consistent with those asserted in its response to Employee's November 30, 2023 benefits claim. *Rogers & Babler*.

Paragraph 5 is the seminal paragraph, the gravamen of the parties' dispute. It reads:

> 5. To settle the dispute between the parties **as to the allegations summarized in paragraph "1"** (emphasis added) the parties have agreed, and hereby stipulate, as follows:
>
> a. The Employer will pay $80,000 to the Employee, via check . . . within fourteen days of full execution of this *Settlement Stipulation.*
>
> b. The Employer will pay $15,000 to the Employee's attorney . . . within fourteen days full execution of this *Settlement Stipulation*.
>
> c. The Employee **waives all past, present, and future claims regarding all gap stipend and associated penalty, interest, and attorney fees and costs.** (Emphasis added).
>
> d. **Employee's existing claims addressing gap stipend** and associated penalty, interest, and attorney's fees and costs **should be dismissed with prejudice**. (Emphasis added).
>
> . . . .
>
> (f) By this *Stipulation*, the **Employee does not waive his claims to any compensation or benefits,** including claims regarding future medical benefits, **not explicitly resolved by this *Stipulation***. (Emphasis added). Additionally, the Employee is represented by an attorney licensed to practice law in Alaska. Therefore, the Board's approval of this *Stipulation* is not necessary for it to

> become effective, and the parties agree that this *Stipulation* will be in effect as soon as it is fully executed.

As previously noted, the allegations in paragraph 1, which paragraph 5 includes by reference, and which Employee specifically waives in Paragraph 5(c), includes the allegation of past due gap stipend for the period June 4, 2019 to October 27, 2021, and present gap stipend to the date of the settlement. Paragraph 1 additionally includes the allegation of future gap-stipend benefits; specifically, "full, on-going gap stipend until he starts working a reemployment plan." Understanding, based on paragraph 2, and relevant extrinsic evidence previously referenced in the form of the parties' various pleadings, that gap-stipend benefits (past, present and future) were disputed prior to and at the time the settlement stipulation was executed, gives significance and meaning to the specific word choice used in paragraphs 5 and 5(c).

The waiver language in paragraph 5(c) is comprehensively broad and its intent and impact unambiguous. The phrase "waives all past, present, and future claims regarding all gap stipend" leaves no temporal gaps; it demonstrates the intent to comprehensively waive all gap claims within the timeframes "past, present and future." There can be no other reasonable interpretation. The deliberate inclusion of the phrase "all past, present and future claims regarding all gap stipend" reflects the parties' conscious intent to avoid further disputes regarding gap-stipend benefits, encompasses every conceivable temporal category, and aligns with the plain language of the agreement. *Pettibone.* As the court emphasized in *Abood*, broad language in settlement agreements implies that all claims are settled; the parties must specifically state claims that are not settled.

As urged in *Pettibone* and *Woronzof*, interpreting the settlement stipulation in a manner that gives effect to all parts, and in a manner which gives reasonable meaning to all settlement provisions, the essence of the settlement stipulation is that the parties agreed: To settle the dispute as to Employee's allegations summarized in paragraph 1, Employer agrees to pay $95,000 and Employee agrees to dismiss his existing gap-stipend claims and waives all past and present gap stipend and associated penalty, interest and attorney's fees and costs, and all ongoing gap stipend until he starts working a reemployment plan. Except as explicitly resolved by this

Stipulation, Employee does not waive his claims to any other compensation or benefits, including claims regarding future medical benefits.

The import and impact of the broad, comprehensive waiver in paragraph 5(c), particularly in the context in which it was executed, is that Employee waived all past and present gap stipend benefits and waived all ongoing gap stipend benefits until he starts working a reemployment plan. Such a construction and interpretation gives effect to the meaning of the words that the parties using them should reasonably have expected they would be understood. *Milne*; *Barce*; *Pettibone*.

If, as Employee contends, the settlement was intended only to resolve his November 30, 2023 gap stipend benefit claim (the period June 4, 2019 to October 27, 2021), the parties should have used narrower limiting temporal language. Why allege, as in paragraph 1, an entitlement "to full, ongoing gap stipend," and why include, as in paragraph 5(c), language waiving present and future gap-stipend claims? To construe the settlement stipulation as Employee urges, that it compromised only his November 30, 2023 stipend claim, strains credulity, contravenes the plain meaning of the words used, and is consistent with the interpretation a reasonable person would assume in the context in which the settlement was executed. *Quimiging*; *Barce*. Employee's subjective understanding regarding the meaning and scope of the waiver language is in stark contrast to the objective meaning of the words used and their context and as such is not credible. *Smith*. The waiver language could not be clearer; it constitutes an unambiguous waiver of all past and present gap stipend claims and all ongoing gap-stipend claims until he works a reemployment plan. *Wessells*; *Milne.*

Employee's efforts to distinguish between "gap stipend" and ".041(k) stipend" benefits, to narrow the scope of the waiver in paragraph 5(c) is without merit. In the context of the settlement, the terms "gap stipend" and ".041(k) stipend" are interchangeable, having the same substantive meaning. Employe has himself used the terms interchangeably in his various filings, such as his June 21, 2021 and November 30, 2023 claims, and his August 2, 2024 opposition to Employer's petition to dismiss. In the context in which it is used, the phrase "Employee waives

all past, present, and future claims regarding all gap stipend," constitutes an explicit, unequivocal intent to resolve all "gap stipend" and ".041(k) stipend."

Employee additionally argues it is unreasonable to assume he would accept $80,000 as compromising his entitlement to ongoing .041(k) benefits when the value of his November 30, 2023 gap-stipend claim exceeds $130,000. Employee's argument, however, ignores that Employer has consistently disputed his entitlement to any gap stipend beyond what has already been paid, denies that Employee actively pursued reemployment benefits before April 21, 2020 and after January 20, 2022, and asserts an offset against future stipend payments until it recoups what it contends it overpaid. Whether Employee might have succeeded on his November 30, 2023 claim is uncertain, and it is this uncertainty, coupled with the uncertainty of when or if a reemployment plan will be finally approved, which undoubtedly contributed to the parties' motivation to settle. *Rogers & Babler*.

In addition to the settlement stipulation, and the extrinsic evidence in the form of the parties' various filings set forth in this decision's factual findings, the parties' post-settlement conduct is also relevant in ascertaining the parties' intentions and expectations. *Wessells*; *Andrew B*. On June 25, 2024, consistent with the settlement, Employer tendered two checks totaling $95,000. Contemporaneous with its payment, Employer's adjuster filed a controversion notice referencing the settlement stipulation and denying further gap stipend payments. The Controversion Notice stated:

> On June 18, 2024, the parties signed an agreement settling AS 23.30.041 gap stipend. Therefore, the Employer denies further AS 23.30.041(k) gap stipend payments. Also, as of the date of this denial, the Employee has not entered a reemployment plan, so is currently ineligible for AS 23.30.041 plan-related stipend. AS 23.30.041 only requires the Employer to pay plan-related stipend while the Employee is participating in a reemployment plan, so the Employer also denies that any [.]041(k)-plan related stipend is due until the Employee starts a reemployment plan. (Controversion Notice, June 25, 2024).

Although there was no apparent reason for Employer to have filed the controversion when it did since Employee had not filed a post-settlement claim, the controversion is nonetheless relevant post-settlement extrinsic evidence in ascertaining the Employer's expectation and intent

regarding the scope of Employee's waiver. *Andrew B*. The controversion's first two sentences reflect Employer's expectation and understanding that the agreement settled "further AS 23.30.041(k) gap stipend payments." The third sentence reflects Employers understanding and expectation that since Employee has not entered a reemployment plan, he "is currently ineligible for AS 23.30.041 plan-related stipend benefits." This third sentence when read in context with paragraph 1 of the settlement stipulation reflects an expectation between the parties that there is a distinction between gap-stipend and .041(k) stipend benefits. Paragraph 1 of the settlement stipulation includes Employees allegation that he is entitled to "full, ongoing gap stipend until he starts working a reemployment plan." The implication being that once Employee starts working a reemployment plan, he becomes eligible for a different type of benefit - plan-related stipend benefits. Similarly, the third sentence of Employer's controversion reflects Employer's understanding and expectation, that Employee is not eligible to receive "AS 23.30.041 plan-related stipend benefits" until he enters a reemployment plan. Read in harmony, the two provisions reflect the parties' intent and expectation that when and if Employee starts working a reemployment plan, he will be eligible to receive plan-related stipend benefits. In the interim, the effect of the settlement stipulation is that Employee waived "all past, present, and future claims regarding all gap-stipend" - including his claim to on-going gap-stipend benefits. The last sentence of the controversion, although incorrectly stating the legal standard when an employee is entitled to receive reemployment benefits, is nonetheless contextually consistent with the parties' settlement agreement as previously discussed.

Notwithstanding Employer's controversion and the expressed expectation in which the settlement proceeds were tendered, instead of reaching out to Employer to advise and clarify that Employee had a different intention regarding the waiver provision, Employee said nothing, electing instead to accept and negotiate the settlement checks. If as Employee now asserts, he intended the settlement to compromise only his November 30, 2023 claim, he had an obligation under the circumstances to notify Employer before negotiating the settlement checks. Instead, approximately three weeks after Employer filed its controversion and paid the settlement proceeds, and after negotiating the settlement proceeds, Employee filed a claim on July 22, 2024, seeking additional gap stipend and requesting a finding that Employer's controversion was unfair or frivolous. Employee's failure to reach out to Employer under the circumstances amounts to

an estoppel and an implicit waiver. *Milne*. Employee's conduct is inconsistent with the purpose, intent and language of the settlement. *Notti*.

After considering the settlement stipulation, the purposes it sought to achieve, the circumstances surrounding its execution, extrinsic evidence, and case law, the only logical conclusion is that Employee waived all past and present gap-stipend benefits and waived all ongoing gap-stipend benefits until he starts working a reemployment plan. When and if a reemployment plan is finally developed and approved, Employee is entitled to reemployments plan related benefits provided he is "working the reemployment plan" and otherwise complies with the requirements of AS 23.30.041.

CONCLUSION OF LAW

Employee waived ongoing gap-stipend benefits with the parties' June 18, 2024 settlement stipulation.

ORDERS

1) Employer's Petition to Dismiss Employee's July 22, 2024 workers' compensation benefits claim is granted.
2) Employee's July 22, 2024 workers' compensation claim is denied. Employee waived past and present gap stipend through the date of the settlement stipulation and waived ongoing gap-stipend benefits until such time as a reemployment plan is approved and Employee starts working the plan. Once a reemployment plan is approved, Employee is eligible for AS 23.30.041(k) benefits provided, he starts working the plan and otherwise complies with the requirements of AS 23.30.041.

Dated in Fairbanks, Alaska on January 29, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/

John Corbett, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of DONALD TROMETTER, employee / claimant v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201704167; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on January 29, 2025.

/s/
Whitney Murphy, Office Assist II