ALASKA WORKERS' COMPENSATION BOARD

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

MARK YOST, Employee, Respondent, v. DELTA AIR LINES, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurer, Petitioners.	INTERLOCUTORY DECISION AND ORDER ON RECONSIDERATION AND MODIFICATION AWCB Case No. 202216211 AWCB Decision No. 25-0032 Filed with AWCB Anchorage, Alaska on May 7, 2025

Delta Air Lines, Inc.'s and Indemnity Insurance Company of North America's (Employer) April 21, 2025 petition for reconsideration and modification was heard on the written record in Anchorage, Alaska on April 30, 2025, a date selected on April 23, 2025. The April 21, 2025 petition gave rise to this hearing. Bryan Haugstad represents Mark Yost (Employee). Attorney Martha Tansik represents Employer. The record closed on April 30, 2025.

ISSUE

Employer contends *Yost v. Delta Air Lines, Inc.*, AWCB Dec. No. 25-0023 (April 4, 2025) (*Yost I*) should be reconsidered and modified as Employee is medically stable, able to return to work, and has an 11 percent permanent partial impairment (PPI) rating. It contends if it is unable to withhold PPI benefits at 100 percent under AS 23.30.155(j), it will never be able to recover an overpayment.

The time for Employee's response to Employer's April 21, 2025 petition has not yet expired. It is presumed Employee opposes reconsideration and modification.

Should Employer's petition for reconsideration and modification be denied?

FINDINGS OF FACT

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

1) On October 22, 2022, Employee was throwing bags to load a cart and experienced back pain. (First Report of Injury, October 31, 2022).

2) On May 22, 2023, Employer reported Employee's weekly temporary total disability (TTD) benefit rate as $931.23 and began paying TTD benefits on October 23, 2022. (Subsequent Report of Injury, May 22, 2023).

3) On July 25, 2023, Employee was found ineligible for reemployment benefits as his treating physician, Samuel Adams, MD, predicted he will have permanent physical capacities to perform the physical demands of his job at the time of injury, as described in the job description for Baggage Handler DOT# 910.687-010. (Letter, July 25, 2023).

4) On July 22, 2024, the Social Security Administration informed Employee that he became disabled on October 24, 2022, and the first month he became entitled to Social Security Disability Insurance (SSDI) benefits was April 2023. He received $30,935 around July 23, 2024, for money due April 2023 through June 2024. Employee's next payment for July 2024 would be $2,097. The initial benefit amount was $2,032. He was entitled to a cost-of-living adjustment in December 2023, which resulted in a $2,097 benefit. (Notice of Award, Social Security Administration (SSA) Retirement, Survivors and Disability Insurance, July 22, 2024).

5) On July 30, 2024, Employee faxed a copy of the Notice of Award to Sherrie Arbuckle, the claims adjuster. (Fax Cover Sheet, July 30, 2024).

6) On January 28, 2025, Employer requested a $340.59 per week Social Security offset under AS 23.30.225(b). It contended Employee was overpaid at least $32,356.05 starting April 1, 2023 (April 1, 2023 to January 28, 2025 = 95 weeks x $340.59 = $32,356.05). Employer calculated Employee's weekly SSDI benefit as $483.92 based upon the $2,097 monthly benefit ($2,097 x 12 months = $25,164 / 52 weeks per year = $483.92); when combined with Employee's weekly TTD benefit rate of $931.23, the total is $1,415.15, which exceeds the maximum allowable total of

$1,074.56 by $340.59; and the maximum allowable total is 80 percent of Employee's average weekly wage at the time of injury, which was $1,343.20 ($1,343.20 x 80 percent = $1,074.56). Employer requested the standard 20 percent offset and an additional "offset against any future PPI should such occur." It contended the additional recoupment from PPI benefits, if Employee is entitled, is fair and just based on the significant overpayment and the difficulty and improbability Employer will be able to recoup the full amount if the additional offset is not permitted. Employer contended the offset prevents any additional weekly reduction of TTD benefits beyond the statutory limit. Employer requested the overpayment be calculated by the panel because it continues to grow until the offset is granted. (Petition and Memorandum in Support of Petition for Social Security Benefit Offset, January 28, 2025).

7) On February 18, 2025, Employer requested a hearing on its petition. (Affidavit of Readiness for Hearing (ARH), February 18, 2025).

8) On March 5, 2025, Employer filed Employee's 2020 W-2, which showed his gross yearly earnings were $68,837.69 and his 2021 W-2, which showed his gross yearly earnings were $54,836.11. (Employer's Hearing Evidence, March 5, 2025).

9) On March 6, 2025, Employee reported that while his symptoms have resolved, "his strength is not back to where he would like it" and he is "working hard with therapy as an exercise regimen." Employee was hopeful he would continue to make "a full improvement. Samuel Waller, MD, noted Employee was now status post lumbar decompression and fusion, and clinically, he made dramatic improvements. He was hopeful Employee would continue to make good improvements and encouraged Employee to continue with his exercise regimen. Dr. Waller recommended following up in three months with repeat x-rays, and if there were any new symptoms, "we will see him sooner." (Waller record, March 6, 2025). He checked "No" on a "Physician's Report" on whether Employee was released to work, and under "Estimate Length of Disability," he wrote "2" months. (Weller Physician's Report, March 6, 2025).

10) On March 18, 2025, Employer contended Employee's TTD benefit compensation rate was $931.23 based upon his gross yearly earnings in 2020, which were $68,837.69 and his gross weekly earnings were $1,376.75 ($68,837.69 / 50 weeks = $1,376.75). It contended the overpayment from April 1, 2023, has grown to $35,421.36 as of the March 25, 2025 hearing and it will continue to grow while it waits for its petition to be granted. Employer contended a recoupment against a future PPI rating, should one be awarded, in addition to the 20 percent

recoupment it is statutorily entitled to without an order. (April 1, 2023 to March 25, 2025 = 104 weeks; $340.59 x 104 weeks = $35,421.36). It contended it would take 300 weeks, or six years, to fully recoup its alleged overpayment at the statutory rate of $118.13 per week (weekly TTD benefit $931.23 - Social Security offset $340.59 = $590.64 weekly TTD benefit after Social Security offset; $590.64 x 0.2 = $118.13 at a 20 percent reduction). Employer suspected reducing Employee's weekly TTD benefit by more than the standard 20 percent recoupment would cause Employee financial hardship. It does not know whether Employee still has the lump-sum from Social Security, and it does not know how long Employee will remain temporarily and totally disabled. (Employer's Hearing Brief, March 18, 2025).

11) At hearing on March 25, 2025, Employer reiterated the arguments contained in its petition and hearing brief. It also contended Employee has had the benefit of the overpayment, including interest. Employer contended the SSDI initial entitlement of $2,032, beginning on April 1, 2023, should be used to calculate the Social Security offset through November 30, 2023, and the increased entitlement beginning on December 1, 2023 at $2,097 should be used to calculate the Social Security offset on and after December 1, 2023. (Record).

12) At hearing on March 25, 2025, Employee testified he is experiencing financial stress due to the monthly Medicare premiums being deducted from his SSDI benefits and due to a $200 monthly payment to repay a short-term disability insurance benefit which he had received after the work injury. He and his wife are struggling to figure out their budget and what they can afford. Employee does not want to receive any benefit he is not entitled to and he does not object to Employer recouping an overpayment. (Record).

13) On April 4, 2025, *Yost I* granted Employer's petition for a Social Security offset and overpayment recoupment, determined Employer overpaid Employee $31,326.07, and permitted Employer to take a $298.75 Social Security offset retroactively to April 1, 2023, and continuing from Employee's weekly TTD benefits and a Social Security offset against future PPI benefits, if awarded, at the 20 percent statutory recoupment rate. It found it was unknown whether Employer will be able to recoup the entire overpayment with only the statutory overpayment on TTD benefits as it would take almost five additional years of TTD benefits payments to recoup the overpayment at the 20 percent statutory rate and it was unknown how long Employee will be temporarily and totally disabled. *Yost I* found Employee's hearing testimony credible that he is experiencing financial stress and held withholding more than 20 percent of PPI benefits to which Employee may

be entitled would exacerbate his financial stress. It also found Employee provided the SSA letter to the adjuster eight days after it was dated and he credibly testified he only wants the benefits he is entitled to under the Act. (*Yost I*).

14) On April 4, 2025, Jason Thompson, MD, examined Employe for a "follow-up" employer's medical evaluation (EME) and reviewed medical records, beginning with a previous EME report performed by Dr. Thompson on December 21, 2024, and records from January 15, 2025 through March 27, 2025. Employee stated he does not feel ready to return to work, though he expressed the desire to do so. Employee rated his pain as four on a scale of 1-10 and indicated on a pain diagram that he has aching and stabbing abdominal pain, left thigh pain, and low back and upper buttock pain and intermittent left leg numbness and weakness, which gives way often. Employee stated his pain is relieved by lying down and Epsom salt bath with hot water, and is aggravated by lifting, standing, sitting, and walking. Dr. Thompson stated the work injury is the substantial cause of Employee's need for medical treatment and disability and Employee reached medical stability on April 4, 2025. He released Employee to work without restrictions related to the work injury and provided an 11 percent PPI rating. Dr. Thompson said no further formal medical treatment is required as Employee is well equipped to perform physical therapy exercises on his own at home in a self-directed program. (Thompson EME report, April 4, 2025).

15) On April 11, 2025, Dr. Waller checked "No" when asked, "Do you PREDICT that Mark Yost will have the permanent physical capacities to perform the physical demands of the Baggage Handler DOT Code: 910.687-010 after surgery and completion of his medical treatment and therapy?" (Waller response, April 11, 2025).

16) On April 21, 2025, Employer filed a petition:

> EMPLOYER REQUESTS AN EMERGENCY RECONSIDERATION / MODIFICATION OF DECISION AND ORDER 25-0023 AS EMPLOYEE IS NOW MEDICALLY STABLE AND ABLE TO RETURN TO WORK WITH AN 11% PPI. IF NOT PERMITTED TO WITHHOLD AT 100% EMPLOYER WILL NEVER BE ABLE TO RECOVER THE OVERPAYMENT--CONTRARY TO THE EXPRESS INTENT OF THE ACT. (Petition, April 21, 2025).

17) On April 21, 2025, Employer denied TTD benefits, PPI benefits over 11 percent and physical therapy, relying on Dr. Thompson's EME report. (Controversion Notice, April 21, 2025).

18) On April 21, 2025, Employer filed a medical summary with Dr. Thompson's report. (Medical Summary, April 21, 2025). This is the only medical summary in the file. (Agency record).

19) On April 29, 2025, Bryan Haugstad entered his appearance on behalf of Employee. (Entry of Appearance, April 29, 2025).

20) On April 29, 2025, Employee opposed Employer's April 21, 2025 petition contending he has not reached medical stability, he cannot return to his prior employment, and he is entitled to a PPI rating at medical stability from his own treating physician. He contended allowing an employer to take 100 percent recoupment offset is unfair and unpredictable to the injured worker and contrary to legislative intent in AS 23.30.001. Employee contended his treating physician updated his opinions on his ability to return to his jobs in his 10-year work history and recently opined there is continued need for treatment. He contended there is "ample opportunity" for Employer to recoup its overpayment from ongoing benefits as he is not medically stable and is seeking modification of the prior rehabilitation determination. Employee provided records from Dr. Waller dated March 6, 2025, and his April 11, 2025 response. (Affidavit of Opposition to Employer's April 21, 2025 Petition Seeking Emergency Reconsideration/Modification, April 29, 2025).

21) On April 29, 2025, Employee sought TTD and PPI benefits, medical and transportation costs, interest, a finding of an unfair or frivolous controversion, attorney fees and costs, and modification of the reemployment benefits determination, including stipend benefits. (Claim for Workers' Compensation Benefits, April 29, 2025).

22) On April 29, 2025, Employee requested modification of the RBA ineligibility determination. (Petition, April 29, 2025).

23) On April 29, 2025, Employee filed a medical summary with Dr. Waller's March 6, 2025 medical records and his April 11, 2025 response. (Medical Summary, April 29, 2025).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> > (1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

The Board may base its decision on not only direct testimony, medical findings, and other tangible evidence, but also on the Board's "experience, judgment, observations, unique or peculiar facts of

the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.005. Alaska Workers' Compensation Board.** . . .
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> (h) Process and procedure under this chapter shall be as summary and simple as possible. . . .
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> **AS 23.30.095. Medical treatments, services, and examinations**. (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
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> **AS 23.30.155. Payment of compensation.**
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> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board. . . .

AS 23.30.155(j) permits withholding up to 20 percent of future compensation installments and can be invoked at an employer's discretion. *Davenport v. K&L Distributors, Inc.*, AWCB Dec. No. 92-0180 (July 22, 1992). It does not, however, provide any criteria or factors that should be considered in determining whether a higher withholding rate is appropriate. Thus, decisions have entertained various considerations when deciding appropriate withholding amounts. For examples, *Barnett v. Lee's Custom Designs*, AWCB Dec. No. 99-0146 (July 8, 1999) considered the financial hardship the employee would suffer as result of a higher withholding rate; *Decker v. Price/Northland J.V.*, AWCB Dec. No. 930304 (November 24, 1993) considered the length of time employee was expected to be disabled and whether the overpayment could be recouped within that time at 20 percent; and *Bathony v. State*, AWCB Dec. No. 98-0101 (April 22, 1998) considered

the fact the overpayment arose or was exacerbated by the employee's resistance to providing correct information to the employer.

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.. . . .

For a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005).

> **AS 23.30.135. Procedure before the board.** (a) . . . The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

The Alaska Workers' Compensation Appeals Commission recently held in *Trident Seafoods v. Saad*, AWCAC Decision No. 213 (July 16, 2015), that the Board's characterization of a decision as "final" is not conclusive for purposes of an appeal, rather than for a petition for review. *Id*. at 2. *Saad* said a board decision is final for appeal purposes when it "is final as to the appellant's rights and leaves no further dispute on a pending claim or petition for the Board to resolve." *Id*. The Alaska Supreme Court in *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1971) addressed discretionary review in administrative proceedings and held a superior court decision, which reversed an administrative agency's decision and remanded for further proceedings, was a "non-final order." *Thibodeau* said though such an order was not a "final judgment" for "appeal" purposes this did not preclude the court from reviewing a party's contentions. *Id*. at 629-30.

> **AS 23.30.155. Payment of compensation.** . . . .
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> (h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is

> controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.
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> **AS 44.62.540. Reconsideration**. (a) The agency may order a reconsideration of all or part of the case. . . . To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. . . .

AS 44.62.540 limits the Board's authority to reconsider and correct alleged legal errors under this section to 30 days. "Reconsideration" requests are used to address alleged legal errors, not factual errors. *Lindekugel*. A petition for reconsideration has a 15-day time limit for the request, and power to reconsider "expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied." *Id*. at 743 n. 36.

> **8 AAC 45.082. Medical treatment.** . . . .
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> (b) A physician may be changed as follows:
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> (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service
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> (A) at a hospital or an emergency care facility;
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> (B) from a physician
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> (i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;
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> (ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or

(iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician;

. . . .

(4) regardless of an employee's date of injury, the following is not a change of an attending physician:

(A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitution of physicians and not a change of attending physicians;

(B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians;

(C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician;

(D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.

(c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.

8 AAC 45.150. Rehearings and modification of board orders. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.

(b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The

> petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.
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> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
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> (1) the facts upon which the original award was based;
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> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
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> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
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> (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.
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> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

"[R]elevant evidence means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Granus v. Fell*, AWCB Dec. No. 99-0016 (January 20, 1999) (emphasis in original) (citing Alaska Evid. R. 401).

ANALYSIS

Should Employer's petition for reconsideration and modification be denied?

Employer contends *Yost I* legally erred when it permitted Employer to recoup only 20 percent of Employee's future PPI benefits, if awarded. It submitted Dr. Thompson's April 4, 2025 EME report, which found Employee medically stable on April 4, 2025, released Employee to work without restrictions related to the work injury, and provided an 11 percent PPI rating. Employer controverted TTD benefits and PPI benefits over 11 percent. It contends it will never be able to

recover the $31,326.07 overpayment, which contravenes "the express intent of the Act." The panel's power to reconsider *Yost I* expired 30 days after it was issued and served. Thirty-three days have passed since *Yost I* was issued and served (April 4, 2025 to May 7, 2025 = 33 days). Consequently, the panel has no power to reconsider *Yost I*. Employer's petition for reconsideration based upon a legal error will be denied.

Alternatively, if the panel had the power to reconsider *Yost I*, Employer failed to prove *Yost I* legally erred. Employer presented no evidence for *Yost I* as to Employee's medical stability date, PPI rating, or ability to return to work. *Yost I* found Employee was experiencing financial stress, and withholding more than 20 percent of PPI benefits to which Employee may be entitled would exacerbate his financial stress; the length of time Employee was expected to be disabled was unknown; and whether the overpayment could be recouped. It concluded it was unknown whether Employer will be able to recoup the entire overpayment as it would take almost five additional years of TTD benefits payments to recoup the overpayment at the 20 percent statutory rate. *Yost I* did not legally err because it considered whether Employee would experience a financial hardship should a higher recoupment be permitted, the length of time Employee was expected to be disabled, and whether overpayment could be recouped. AS 23.30.155(j); AS 44.62.540; *Barnett*; *Decker*; *Bathony*. Employer's petition for reconsideration based upon a legal error will be denied.

Employer contends *Yost I* factually erred by not finding it would never be able to recoup the entire overpayment and requested modification. A request for modification may be based upon a change of conditions or a mistake of fact. 8 AAC 45.150(c), (d). Employer's petition failed to address which basis for a request for modification it sought; both will be addressed.

Employer presented no evidence for *Yost I* as to Employee's medical stability date, PPI rating, or ability to return to work. Now, Employer filed new evidence with its petition -- Dr. Thompson's EME report, which said Employee was medically stable as of April 4, 2025, released Employee to work without restrictions related to the work injury, and provided an 11 percent PPI rating. Employer was also required to provide all relevant medical reports with a petition based upon a change of Employee's physical condition; *i.e.*, that he became medically stable and able to return to work with a ratable PPI after the *Yost I* hearing. 8 AAC 45.150(c). Dr. Thompson's April 4,

2025 EME report shows he reviewed his prior December 21, 2024 EME report and medical records from January 17, 2025 through March 27, 2025, which are not in the record. Presumably, Dr. Thompson also reviewed medical records for his December 21, 2024 EME report, which are also not in the record. Employer only provided Dr. Thompson's April 4, 2025 EME report with its petition, and Dr. Thompson's April 4, 2025 EME report is the only medical record in the file. Evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probably than it would be without the evidence is relevant. *Granus*. The medical records reviewed by Dr. Thompson are relevant to Employee's medical stability, ability to work without restrictions, and his PPI rating. *Rogers & Babler*. Employer failed to provide all relevant medical reports with its petition. 8 AAC 45.150(c).

A request for modification based upon a change of fact requires Employer to provide an affidavit stating the reason why, with due diligence, the Dr. Thompson's April 4, 2025 EME report could not have been discovered and produced at the time of hearing for *Yost I*. 8 AAC 45.150(d)(2). It failed to fulfill the regulatory requirements for a mistake of fact. *Id*.

Alternatively, had Employer fulfilled the requirements for modification, it failed to prove *Yost I* factually erred by not finding it would never be able to recoup the entire overpayment. Employee opposed modification contending *Yost I* did not make a mistake of fact as he has not reached medical stability, he cannot return to his prior employment, and he is entitled to a PPI rating at medical stability from his own physician. He contended there is "ample opportunity" for Employer to recoup the overpayment from ongoing payments and it would contravene legislative intent to allow Employer to take a 100 recoupment. Employee also submitted new evidence from Dr. Waller on March 6 and April 11, 2025, restricting him from working, predicting he will not have the permanent physical capacities to perform the physical demands of his job at the time of injury after surgery and completion of his medical treatment and therapy, and recommending x-rays in three months and that Employee continue with his exercise regimen as therapy. He filed a claim seeking additional TTD and PPI benefits, which Employer controverted on April 21, 2025, and a petition for reemployment benefits. It is possible that Employee may prevail on his claim and petition and Employer could recoup the overpayment from ongoing payments, but it is also possible Employee may not prevail on his claim or petition. Thus, Employer has failed to prove it will never be able

to recoup its overpayment as it is still unknown whether Employer will be able to recoup the entire overpayment from ongoing payments. *Decker*. Only a future decision determining whether Employee is entitled to the disputed TTD and PPI benefits and reemployment benefits will resolve this unknown factor. Employer's petition for reconsideration and modification should be denied.

Employee's claim and petition remains pending so this decision does not resolve all issues in the case. *Saad*. Therefore, this decision is not a final decision subject to appeal; it is an interlocutory decision and order. AS 23.30.135(a); AS 23.30.155(h). However, any party may seek interim appellate review pursuant to the instructions set forth below. *Thibodeau*.

CONCLUSION OF LAW

Employer's petition for reconsideration and modification should be denied.

ORDER

Employer's April 21, 2025 petition is denied.

Dated in Anchorage, Alaska on May 7, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Brian Zematis, 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 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 on Reconsideration and Modification in the matter of Mark Yost, employee / respondent v. Delta Air Lines, Inc., employer; Indemnity Insurance Company of North America, insurer / petitioner; Case No. 202216211; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on May 7, 2025.

/s/
Rochelle Comer, Workers' Compensation Technician