Alaska Workers' Compensation Appeals Commission

Dan Reeder,
Appellant,

vs.

Municipality of Anchorage,
Appellee.

Final Decision
Decision No. 116 September 28, 2009

AWCAC Appeal No. 09-003
AWCB Dec. No. 08-0259
Case Nos. 200421190, 200316604, 200316605, 199613691

Appeal from Alaska Workers' Compensation Board Decision No. 08-0259, issued at Anchorage, Alaska, on December 31, 2008, by southcentral panel members Darryl Jacquot, Chair, Don Gray, Member for Industry, and Tony Hanson, Member for Labor.

Appearances: Charles W. Coe, Esq., for appellant Dan Reeder. Shelby L. Nuenke-Davison, Davison & Davison, Inc., for appellee Municipality of Anchorage.

Commission proceedings: Appeal filed January 30, 2009. Briefing completed June 15, 2009. Oral argument presented July 23, 2009.

Commissioners: David Richards, Philip Ulmer, Kristin Knudsen.

By: Kristin Knudsen.

Appellant asks the commission to reverse the board's decision that it had no jurisdiction to order his employer to cease withholding overpaid injury leave from his paycheck. The injury leave overpayment was discovered following an audit after appellant settled his workers' compensation claims. Appellant asserts that the workers' compensation settlement agreement was a complete settlement of all claims, including claims for repayment of injury leave benefits he became entitled to because of his status as a workers' compensation recipient. The board had jurisdiction to so interpret the agreement and thus, he argues, to enforce the agreement against his employer.

Appellee asserts the Memorandum of Agreement entered into with the appellant's union established the method of calculation of injury leave during workers'

compensation disability. An audit was conducted and some employees benefitted by the collectively bargained method, and others, including appellant, were found to have been overpaid by their employer. Appellee argues that the board has no jurisdiction to enforce, or stay enforcement of, the Memorandum of Agreement or terms of the appellant's employment. The workers' compensation settlement agreement did not enlarge the appellant's rights in the collective bargaining agreement; the settlement agreement is limited to the workers' compensation claims and it has been fully discharged. Therefore, appellee argues, the board lacks jurisdiction to order it to cease collecting overpaid injury leave.

The parties' contentions require the commission to decide if the board could require an employer to cease withholding an overpayment of collectively bargained benefits because they are coordinated with, or triggered by, workers' compensation payments. The commission concludes that the settlement agreement does not give the board such authority and affirms the board's decision. The settlement agreement concerns only claims that could arise under the Workers' Compensation Act; appellant failed to demonstrate that the Municipality waived a claim for repayment of collectively bargained benefits in the settlement agreement. However, the commission holds that the board had jurisdiction to direct appellee to provide an accounting of the compensation payments made to him, so that he may determine if the withheld amount is correct.

1. Factual background and board proceedings.

Dan Reeder is a police officer employed by the Municipality of Anchorage and a member of a labor union, the Anchorage Police Department Employees Association (APDEA). Reeder injured his back in 1996 when his patrol car was struck by an uninsured motorist. The Municipality paid compensation during periods of temporary disability in 1996 and 1997, as well as medical benefits and permanent partial impairment. Reeder filed a claim against his own uninsured motorist insurance (UIM) carrier and the Municipality asserted rights to any recovery from the UIM policy under AS 23.30.015. Reeder disputed the Municipality's right to the recovery, but, once the UIM carrier paid the claim, in 1998 he tendered the $15,328.00 to the Municipality.

During his absence from work, the Municipality also placed Reeder on "injury leave," a benefit negotiated by APDEA. While on injury leave, he received supplemental pay. The Municipality paid Reeder during injury leave to supplement his workers' compensation payments up to a negotiated percentage of base wages. Thus, he received a workers' compensation payment from the adjuster and a supplemental injury leave payment from the Municipality.

In 2003 and 2004, Reeder suffered a series of injuries at his work. Again, he was on injury leave during periods he also received workers' compensation. In December 2004, APDEA notified Reeder that the Municipality and APDEA had reached a Memorandum of Agreement regarding calculation of the injury leave amount.[1] The

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[1] R. 0161. The Memorandum of Agreement provided

> The parties to this agreement are the Anchorage Police Department [Employees] Association (APDEA) and the Municipality of Anchorage (MOA). Implementation of contract language for Article XX, Section 3 of the parties' collective bargaining agreement has proven difficult to administer in an appropriate manner due to the use of both net pay and gross pay concepts. To assist in the resolution of this issue, Article XX, Section 3, will be interpreted as follows:
>
> While a regular employee is on Injury Leave, health and life insurance coverage shall be continued until terminated pursuant to paragraph 1 or 2 of this section, or until any one of the conditions in paragraph 4 of this section are met. The Municipality shall supplement workers' compensation payments to the extent that the injured employee receives no more than ninety percent (90%) of current base pay, with longevity and education.
>
> When an employee is injured on the job, the first three (3) days following the date of injury shall be administrative leave, provided the conditions of this Article are met.
>
> The MOA Central Payroll Office will audit all APDEA employees receiving Injury Leave benefits as of January 1, 2004 regardless of their date of injury. The MOA will not seek any repayment of overpayments made to employees on Injury Leave prior to January 1, 2004. The MOA Central Payroll Office will coordinate

message alerted him that the Municipality's payroll supervisor, Toni Prokish, would notify him of deductions from his payroll "reference . . . 2004 Workers Comp benefits."[2]

In 2006, Reeder filed a workers' compensation claim for additional permanent partial impairment compensation and other benefits.[3] A dispute arose between the parties regarding Reeder's claim for repayment of the UIM recovery.[4] Reeder asserted the Municipality had no right to the $15,328 under AS 23.30.015 and should repay it with interest; the Municipality asserted a number of defenses, including collateral estoppel, waiver, laches, and the statute of limitations.[5]

The parties entered into a settlement agreement, or "partial compromise and release agreement" in August 2007.[6] The agreement recited, "It is the intent of this agreement to compromise all past non-medical benefits and claims for reimbursement which might be due the employee pursuant to the terms of the Alaska Workers' Compensation Act arising out of the work-related injuries referred to herein."[7] The agreement recites the disputes between the parties: return of the UIM recovery, penalties for late payment of medical benefits, an outstanding bill to a physician, and increased permanent partial impairment compensation.[8] The heart of the agreement is found in this paragraph:

> In order to resolve all past, present or future disputes between the parties with respect to any claim for past nonmedical benefits which might otherwise be due under the Alaska Workers' Compensation Act, including but not limited to claims repayment of any monies due to the MOA in a timely and reasonable manner with the affected employees.

R. 0627. The agreement was signed by the APDEA President on Dec. 19, 2004. *Id.*

2 R. 0161.

3 R. 0006-07.

4 R. 0617-18.

5 R. 0150-51.

6 R. 0146-58.

7 R. 0153.

8 R. 0150-52.

> for a past compensation rate adjustment or past compensation for disability, regardless of whether the same be temporary total, temporary partial, permanent partial impairment, permanent total, penalties, interest, costs, vocational reemployment benefits or third-party recovery, upon approval of this agreement by the Alaska Workers Compensation Board, the employer will pay the employee the sum of $41,750.00 (FORTY ONE THOUSAND SEVEN HUNDRED FIFTY AND NO/100 DOLLARS). In addition, the employer will pay Dr. Kiester's outstanding medical bills.[9]

In the release portion of the settlement, the parties stated

> [t]he parties agree that this settlement is the compromise of their disputed claims referred to above, and hereby agree and acknowledge that any of their claims against each other known or unknown for the injuries described herein or past non-medical losses, expenses or claims of any nature whatsoever, are forever abandoned and any right to assert such claims for any past non-medical benefits based on the injuries this described herein, are hereby forever waived and barred. It is expressly agreed that no claims for past the non-medical benefits arising out of the injuries described herein are excepted or reserved from the terms of this release.[10]

The agreement was approved by the board on August 24, 2007.[11] The parties agree that appellee timely paid the full amount required by the settlement.

In January 2008, Toni Prockish completed an audit of Reeder's pay. She established that he had been overpaid $8,437.95.[12] She met with Reeder to inform him

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[9] R. 0152.

[10] R. 0154.

[11] R. 0158.

[12] R. 0122-23. It appears from this document that some of overpayment ($3,074.42) was based on the change in supplemental pay owed (90% of net salary instead of 100% of net salary) under the Memorandum of Agreement. Some was based on the difference between the supplemental payments, and what should have been paid after the offset for workers' compensation paid for the same period of injury leave ($5,363.53). In oral argument, appellant did not concede that the alteration in calculation agreed to by his union applied to him, although it was reached before he signed the settlement agreement.

of the overpayment and decide how the amount should be withheld.[13] Reeder took the position that the Municipality was barred from seeking reimbursement of overpaid injury leave by the settlement agreement approved August 24, 2007.[14] The Municipality took the position that reimbursement of supplemental pay "would have no relationship to the Workers' Compensation Claim or the Compromise and Release."[15] On June 13, 2008, Reeder filed a petition "seeking the employer to uphold the Partial Compromise and Release approved by the Board."[16]

Reeder's petition was heard on October 7, 2008.[17] Reeder argued that the compromise and release agreement affects what his pay is and what the overpayment would be because it impacts his ability to argue that his compensation was miscalculated.[18] He argued the existence of an overpayment was an undisclosed situation, that should have been resolved by, or discovered by, the Municipality, but which Reeder thought was resolved in the settlement.[19] Reeder argued the Municipality waived any claim to reimbursement in the settlement.[20] Reeder argued that the board had the power to [interpret and] enforce the agreement, and thus to order, "if there is anything that's workers' comp. related, they should not have the right to go back and collect it."[21] Reeder argued, "Everything that is controlled by comp. should be kept by comp., and . . . certain issues . . . are still under our control."[22] Because there is a relationship to the workers' compensation dispute, he argued, the board has the

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13 R. 0121.

14 R. 0124.

15 R. 0125.

16 R. 0061-63.

17 *Dan Reeder v. Municipality of Anchorage,* Alaska Workers' Comp. Bd. Dec. No. 08-0259, 1 (Dec. 31, 2008) (D. Jacquot, Chair).

18 Hrg. Tr. 121:1-19.

19 Hrg. Tr. 122:9-15.

20 Hrg. Tr. 123:1-4.

21 Hrg. Tr. 123:10-11.

22 Hrg. Tr. 123:25 – 124:3.

authority to deem the overpayment one of compensation governed by AS 23.30.155(j).[23]

The Municipality argued that Reeder never presented an issue regarding the amount of workers' compensation he was paid while on injury leave; therefore, his waiver of a right to challenge a compensation rate did not give the board jurisdiction to order the Municipality to cease its effort to recoup overpaid supplemental pay.[24] The board, the Municipality argued, had no jurisdiction to hear any action except a workers' compensation claim.[25] The Municipality asserted that the board had no jurisdiction to hear a claim for union benefits, no jurisdiction to approve a waiver of union benefits, and therefore, no jurisdiction to stop the withholding of overpaid union benefits.[26] The Municipality also argued that the agreement, on its face, mentioned nothing about a liability of the Municipality to pay injury leave, or Reeder to pay back overpaid injury leave, and in the absence of a clear, explicit waiver or rights, the agreement is not enforceable as a waiver in any case.[27]

The record was left open to allow the parties to submit documents and a deposition.[28] The board's decision was issued on December 31, 2008. After reviewing the evidence and arguments presented, the board began its discussion with a citation to *Gunter v. Kathy-O Estates*,[29] and the Supreme Court's holding that the board's "authority is limited to the powers and duties prescribed by [the Alaska Workers' Compensation Act]."[30] The board quoted the Supreme Court's statement in *Gunter*:

> Because the board is empowered to provide compensation under the act and because the act does not provide a means of

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23 Hrg. Tr. 124:20 – 125:4.

24 Hrg. Tr. 126:1-7.

25 Hrg. Tr. 126:11-12.

26 Hrg. Tr. 127:4-15.

27 Hrg. Tr. 127:16 – 128:4.

28 *Dan Reeder,* Bd. Dec. No. 08-0297 at 1.

29 87 P.3d 65 (Alaska 2004).

30 *Id*. at 12, quoting *Gunter*, 87 P.3d at 69.

> compensating employees for the remote consequences of their injuries, such as those for which Gunter seeks reimbursement, the board was correct in deciding that it did not have authority to grant Gunter's requested relief.[31]

The board also quoted from its decision in *John E. Orbeck v. University of Alaska, Fairbanks,*[32] on the subject of the limits of its adjudicatory responsibility:

> In his treatise on workers' compensation law, the late Professor Arthur Larson noted the majority rule is that workers' compensation benefits will be offset or barred for the receipt of benefits or payment from other sources only when a jurisdiction's organic workers' compensation act has a specific statutory provision . . . . Alaska follows the majority rule, as cited by Professor Larson. The authority and jurisdiction of the Alaska Workers' Compensation Board derives from the Alaska Workers' Compensation Act at AS 23.30.005, et seq., and the Alaska Administrative Procedure Act AS 44.62.540, and we can only adjudicate a dispute if our administrative agency has been given explicit adjudicatory authority by statute.[33]

The board found the settlement agreement did not address the supplemental payments. The board said:

> we find the employee's claim is not a claim for compensation under the Act, but a claim for benefits related to his contract of employment, as in *Orbeck*. As noted in *Orbeck* at footnote 5, that employer retained its ability to pursue its overpayment remedy contractually; a civil matter. In the present matter, we find we would have no authority to enforce or order the employer to provide the additional, supplementary injury leave benefit that Municipal employees enjoy pursuant to their negotiated union contracts. As we could not force or order an employer to provide any supplemental employment benefits, we find we likewise have no authority regarding its recoupment of the supplementary benefits it has provided pursuant to the union contract. In the present matter, we find that the employee has civil remedies, and union grievance procedures available to him.

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[31] 87 P.3d at 70.

[32] Alaska Workers' Comp. Bd. Dec. No. 04-0123 (May 24, 2004).

[33] *Dan Reeder*, Bd. Dec. No. 08-0259 at 13 (quoting *John E. Orbeck*, Bd. Dec. No. 04-0123 at 12).

> We conclude we have no jurisdiction in regards to the employee's supplemental employment benefits.[34]

The board denied and dismissed Reeder's petition.[35] This appeal followed.

2. Standard of review.

The commission exercises its independent judgment concerning questions of law and procedure within the scope of the Alaska Workers' Compensation Act,[36] but it will not disturb the board's findings of fact if there is substantial evidence to support them in light of the whole record.[37]

3. Discussion.

The parties' arguments were made in terms of subject matter jurisdiction. Subject matter jurisdiction is "the legal authority of a court to hear and decide a particular kind of case;"[38] in this appeal, it means the legal authority of the board to adjudicate the disputed withholding between appellant and appellee. Appellant argues that because the board has jurisdiction to approve settlements, it has jurisdiction to interpret and enforce them.[39] He asks that the settlement agreement be enforced by recognizing that the employer's right to reimbursement of overpaid injury leave was waived and ordering it to cease withholding it from his pay. The premise underlying appellant's argument is that the settlement agreement includes a waiver of appellee's claims against appellant for reimbursement of overpaid injury leave. Appellant does not argue that the board has jurisdiction over collectively bargained terms of employment in

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[34] *Dan Reeder,* Bd. Dec. No. 08-0259 at 14.

[35] *Id.*

[36] AS 23.30.128(b).

[37] *Id.*

[38] *Alaska Public Interest Group v. State*, 167 P.3d 27, 47 (Alaska 2007) (citing *Nw. Med. Imaging, Inc. v. State, Dep't of Revenue*, 151 P.3d 434, 438 (Alaska 2006)).

[39] Appellee also made its argument in terms of jurisdiction, arguing that injury leave is a collectively bargained right not arising out of the Workers' Compensation Act, so the board has no jurisdiction to adjudicate the subject of injury leave; and, because the board could not adjudicate an injury leave claim, it could not approve or enforce an agreement to waive such a claim. Appellee's Br. 17-20.

the absence of such a settlement agreement.[40] Therefore, the commission's analysis focuses on the settlement agreement between the parties.

a. The board may approve settlement agreements "in regard to a claim" under AS 23.30 that comply with 8 AAC 45.160.

The parties' power to enter, and the board's power to approve, workers' compensation settlement agreements is found at AS 23.30.012, which provided at the time of the parties' agreement:

> Agreements in regard to claims. (a) At any time after death, or after 30 days subsequent to the date of injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter, but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose. Except as provided in (b) of this section, an agreement filed with the division discharges the liability of the employer for the compensation, notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245, and is enforceable as a compensation order.
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> (b) The agreement shall be reviewed by a panel of the board if the claimant or beneficiary is not represented by an attorney licensed to practice in the state, the beneficiary is a minor or incompetent, or the claimant is waiving future medical benefits. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30 130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter, and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to

[40] AS 23.30.050 provides that the liability established by Alaska Workers' Compensation Act is the exclusive liability of the employer to the employee for damages at law "on account of injury or death." But, the exclusive liability clause does not bar employer liability for all employment conduct that may be tangentially connected to a work-place injury. *See, e.g., Reust v. Alaska Petroleum Contrs., Inc.*, 127 P.3d 807 (Alaska 2005); *VECO, Inc., v. Rosebrock*, 907 P.2d 906 (Alaska 1999); *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993).

> determine whether or not to approve the agreement. A lump-sum settlement may be approved when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

The board cited the version of this statute in effect at the time of the employee's injury. It provided:

> Agreements in regard to claims. At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter in accordance with the applicable schedule in this chapter, but a memorandum of the agreement in a form prescribed by the board shall be filed with the board. Otherwise, the agreement is void for any purpose. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. The board may approve lump-sum settlements when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

Both versions of the statute provide that the parties have a "right to reach an agreement in regard to a claim for injury . . . under this chapter," and that the board may approve a settlement agreement if it "conforms to the provisions of this chapter," and if the settlement is for a "claim for injury under this chapter." In short, the parties' right to settle claims under AS 23.30.012 is limited to claims that arise under the Workers' Compensation Act. The board's authority to approve a settlement agreement under AS 23.30.012, and thereby confer upon it the status of a board order or award, may be invoked only if the agreement settles claims that may be raised under the Workers' Compensation Act.

Appellant argues that the settlement agreement also includes other claims, like the claim for injury leave reimbursement, that are closely intertwined with the parties' claims under the Act. However, the board's regulations require that a settlement

agreement subjected to board approval be the "entire agreement between the parties."[41] The board forbids the parties to make "undisclosed agreements" that modify the agreed settlement, make other agreements contingent on the agreed settlement, or make the agreed settlement contingent upon other agreements.[42] The reason for this regulation is plain; because the board's approval converts the settlement to a board order, the board must be fully informed of the orders it makes. If appellant were correct, the effect of the board-approved settlement agreement would be to make enforcement of the Memorandum of Agreement contingent upon board approval, contrary to 8 AAC 45.160(c)(7)(C). At the very least, appellant must have disclosed the Memorandum of Agreement under 8 AAC 45.160(c)(7)(C) because, if appellant's position is correct, it modified the settlement agreement by including a claim not arising under the Workers' Compensation Act. The failure to do so is a failure to comply with the board's regulations for approved settlement agreements.

The parties' settlement agreement contains no statement that described another agreement that modified the settlement's terms, that was contingent upon the

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[41] The board's regulations at 8 AAC 45.160(c)(7) requires settlement agreements to include a written statement from all parties that

> (A) the agreed settlement contains the entire agreement between the parties;
> (B) [t]he parties have not made an undisclosed agreement that modifies the agreed settlement;
> (C) the agreed settlement is not contingent on any undisclosed agreement; and
> (D) an undisclosed agreement is not contingent on the agreed settlement: . . . .

[42] *Id*. The regulation prescribes the requirements for an approved settlement (8 AAC 45.106(c) says, "(c) Every agreed settlement must conform strictly to the requirements of AS 23.30.012 and, in addition, must . . . .") without stating the effect of failure to meet the regulation requirements. In *Smith v. CSK Auto, Inc.,* 204 P.3d 1001 (Alaska 2009) the Supreme Court did not void a settlement agreement solely because the board failed to follow this regulation's requirements regarding the approval process, but it did hold that, in the circumstances, the board abused its discretion by refusing to set the agreement aside. Thus, a material failure to adhere to board regulation may, in combination with other circumstances, render a settlement voidable.

settlement agreement, or that made the settlement agreement contingent upon some other agreement. Nothing in the agreement described the collectively bargained Memorandum of Agreement reached December 14, 2004, or the collective bargaining agreements to pay injury leave, and there is no evidence their existence was disclosed to the board with the settlement agreement. Therefore, under the board's regulations, the settlement agreement approved by the board could only discharge liability for claims described in the agreement terms or claims for compensation under the Workers' Compensation Act.

b. The settlement agreement waives only claims for non-medical benefits that could be brought under the Alaska Workers' Compensation Act.

The interpretation of a settlement agreement is a matter of law to which the commission applies its independent judgment. A settlement agreement is a contract and is subject to interpretation as other contracts.[43]

Appellant argues that the settlement language includes claims that are closely connected to his workers' compensation claim or dependent on the workers' compensation claim. He argues that the Municipality waived and abandoned any right to assert any of their claims against him, "known or unknown for the injuries described herein *or past non-medical losses*, expenses or *claims of any nature whatsoever*."[44] The Municipality's claim (for recovery of his overpayment of supplemental pay) arises out of the workers' compensation injury, therefore, he argues, it is "past non-medical . . . expenses or claims of any nature" barred by the agreement. He argues the board, which approved the agreement, has the power to so interpret the agreement, and thus, to order the Municipality to cease withholding wages as a means of enforcing the agreement.[45]

The agreement was designed to settle claims that might arise out of the Alaska Workers' Compensation Act. It begins, "For the purpose of Partial Compromise and

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[43] *Williams v. Abood*, 53 P.3d 134, 139 (Alaska 2002).

[44] R. 0154 (emphasis added).

[45] Appellant's Br. 15-16.

Release, under the Alaska Workers' Compensation Act, . . . the parties . . . submit to the Alaska Workers' compensation Board the following agreed statements of fact and, based thereon, settle all claims and disputes between the parties."[46] The settlement agreement states the "intent of this agreement is to compromise all past non-medical benefits and claims for reimbursement *which might be due employee pursuant to the terms of the Alaska Workers' Compensation Act*."[47] The settlement provides that the "disputes between the parties with respect to any claim for past non-medical benefits *which might otherwise be due under the Alaska Workers' Compensation Act"* are resolved by the agreement and the employer's payment of $41,750.[48] The agreement states the employee accepts the money in full settlement of "all past compensation and non-medical benefits . . . to which employee might be *presently due pursuant to the terms and provisions of the Alaska Workers' Compensation Act.*"[49] Injury leave was not a benefit to which appellant was due under the Alaska Workers' Compensation Act; appellee had no claim for reimbursement of injury leave overpayments under the terms and provisions of the Alaska Workers' Compensation Act. The only sentence that describes "claims of any nature whatsoever" without specific limitation to workers' compensation claims is the phrase appellant relies upon, but even that sentence begins with a reference to "their disputed claims referred to above."[50]

In *Cameron v. Beard*, the Supreme Court refused to apply a similarly worded release to the employee's claims against the employer for constructive discharge.[51] The Supreme Court distinguished *Martech Constr. Co. v. Ogden Envtl. Servs. Inc.,*[52] on the grounds that in *Martech* it had interpreted the scope of a general release broadly

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46 R. 0146.

47 R. 0153 (emphasis added).

48 R. 0152 (emphasis added).

49 R. 0153 (emphasis added).

50 R. 0154.

51 *Cameron v. Beard*, 864 P.2d 538, 546 (Alaska 1993).

52 852 P.2d 1146 (Alaska 1993).

because the broad language was "repeatedly used throughout the release," so that all claims arising out of the disputed transaction, not explicitly reserved, were included in the settlement.[53] Here, appellant asks that release language in a workers' compensation settlement be construed as a release of his employer's employment benefit claims against him. Following the Supreme Court's reasoning in *Cameron,* the commission concludes that the single sentence in the settlement on which appellant relies does not expand the settlement agreement to claims outside the scope of the Workers' Compensation Act.

The Supreme Court noted in *Cameron* that "the party relying on the release must show that the release 'was given with an understanding of the nature of the instrument.'"[54] "Only then," the Supreme Court said, "does the burden shift to the releasor to show by clear and convincing evidence that the release should be set aside."[55] Thus, because Reeder was relying on the release by the Municipality of claims against him, he had to demonstrate that the Municipality understood that it was releasing a claim for overpayment of injury leave against him when the agreement was signed. While Reeder demonstrated that some employees of the Municipality knew about a potential claim for reimbursement against him before the agreement was negotiated, he failed to demonstrate that the parties who negotiated the release were aware of the potential claim, or that any employee knew that Reeder specifically had been overpaid under the new method of injury leave calculation. If the parties negotiating the release were not aware of the claim, the release could not have been worded with an understanding of the claim's nature.

Appellant also argues that he "thought he was signing a full final release of all *disputed* compensation *issues*,"[56] including the overpayment of injury leave triggered by compensation payments. From this premise, he appears to argue that his expectation

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[53] *Cameron*, 864 P.2d at 546 n.10.

[54] *Cameron*, 864 P.2d at 546 n.11 (citing *Witt v. Watkins*, 579 P.2d 1065, 1069 (Alaska 1978); *Schmidt v. Lashley*, 627 P.2d 201, 204 (Alaska 1981)).

[55] *Cameron*, 546 n.11 (citing *Witt*, 579 P.2d at 1070).

[56] Appellant's Br. 10 (emphasis added).

is a *reasonable* expectation; therefore, the board ought to have interpreted the settlement agreement to give effect to his reasonable expectations. The Supreme Court has held that, "The primary goal of contract interpretation is to give effect to the parties' reasonable expectations."[57]

The board took evidence on the parties' knowledge of the Municipality's possible claims under the collectively bargained Memorandum of Agreement when they signed the settlement agreement. The board noted that the employee's attorney had no recollection of discussing payroll claims during the negotiations of the settlement agreement.[58] The attorney who negotiated the contract for the Municipality testified she knew nothing of the audit or overpayment claims by the Municipality.[59] In testimony to the board, Reeder denied that when he signed the settlement agreement, he knew "anything about the claim of the Municipality that the union benefit portion that [he] had been paid for injury leave benefits and been overpaid."[60] He testified that when he entered the agreement, there were three disputed benefits in the claim awaiting a hearing before the board: a penalty for late payment of medical bills, additional permanent partial impairment benefits, and reimbursement from the Municipality to appellant of the uninsured motorist insurance recovery he had received.[61] Because appellant had no knowledge of a potential claim at the time the release was signed, and the injury leave calculation method was not a disputed issue, he cannot have had a "reasonable expectation" that the Municipality was giving up that potential claim against him based on a disputed issue when the release was given.

The commission concludes that the settlement agreement did not include a waiver of the employer's right to seek reimbursement of overpaid injury leave under the

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[57] *Aviation Assocs. v. TEMSCO Helicopters, Inc.*, 881 P.2d 1127, 1130 n.4 (Alaska 1994).

[58] *Dan Reeder*, Bd. Dec. No. 08-0297 at 4.

[59] Hrg. Tr. 103:18-24; 85:5-7. The board's discussion of the testimony is at *Dan Reeder*, Bd. Dec. No. 08-0297 at 4.

[60] Hrg. Tr. 44:18-22.

[61] Hrg. Tr. 34:1-7.

Memorandum of Agreement. Therefore, the board did not commit legal error by refusing to enforce such a waiver against the Municipality.

c. The board had jurisdiction to direct appellee to provide payment records to appellant.

Appellant argues that the board had authority to enforce the agreement because the employer's right to reimbursement of injury leave is based on the payment of workers' compensation disability benefits when he was receiving injury leave without offset for his compensation disability benefits. Because the board has authority to determine that compensation was correctly paid, he argues, it has authority to adjudicate the consequences of payment.

Appellant agreed in the settlement agreement that he received compensation of a specific amount during certain periods, and waived any claim for recalculation of his compensation rate or additional disability compensation. But, the claimant is not seeking a recalculation or additional compensation: he is alleging that the Municipality is seeking to "collect an overpayment of Workers' Compensation by calling it an overpayment of injury leave."[62] His agreement that he received specific compensation amounts for certain periods, and has been paid "all compensation benefits . . . due as of the date of execution"[63] of the settlement agreement is not an agreement that the payments arrived in regular amounts during the periods listed.

The board has the authority to require an employer or its insurer to report payments to the board under AS 23.30.155(c)[64] and (m).[65] These provisions are made

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62 Employee's Reply Br. 3.

63 R. 0148.

64 AS 23.30.155(c) provides

> The insurer or adjuster shall notify the board and the employee on a form prescribed by the board that the payment of compensation has begun or has been increased, decreased, suspended, terminated, resumed, or changed in type. An initial report shall be filed with the board and sent to the employee within 28 days after the date of issuing the first payment of compensation. If at any time 21 days or more pass and no compensation payment is issued, a report notifying the board

and the employee of the termination or suspension of compensation shall be filed with the board and sent to the employee within 28 days after the date the last compensation payment was issued. A report shall also be filed with the board and sent to the employee within 28 days after the date of issuing a payment increasing, decreasing, resuming, or changing the type of compensation paid. If the board and the employee are not notified within the 28 days prescribed by this subsection for reporting, the insurer or adjuster shall pay a civil penalty of $100 for the first day plus $10 for each day thereafter that the notice was not given. Total penalties under this subsection may not exceed $1,000 for a failure to file a required report. Penalties assessed under this subsection are eligible for reduction under (m) of this section. A penalty assessed under this subsection after penalties have been reduced under (m) of this section shall be increased by 25 percent and shall bear interest at the rate established under AS 45.45.010.

65 AS 23.30.155(m) provides

On or before March 1 of each year the insurer or adjuster shall file a verified annual report on a form prescribed by the board stating the total amount of all compensation by type, the number of claims received and the percentage controverted, medical, and related benefits, vocational rehabilitation expenses, legal fees, including a separate total of fees paid to attorneys and fees paid for the other costs of litigation, and penalties paid on all claims during the preceding calendar year. If the annual report is timely and complete when received by the board and provides accurate information about each category of payments, the commissioner shall review the timeliness of the insurer's or adjuster's reports filed during the preceding year under (c) of this section. If during the preceding year the insurer or adjuster filed at least 99 percent of the reports on time, the penalties assessed under (c) of this section shall be waived. If during the preceding year the insurer or adjuster filed at least 97 percent of the reports on time, 75 percent of the penalties assessed under (c) of this section shall be waived. If during the preceding year the insurer or adjuster filed 95 percent of the reports on time, 50 percent of the penalties assessed under (c) of this section shall be waived. If during the preceding year the insurer's or adjuster's reports have not been filed on time at least 95 percent of the time, none of the penalties assessed under (c) of this section shall be waived. The penalties that are not waived are

applicable to self-insured employers by AS 23.30.155(n). There was no evidence offered to the board that the records of payment, maintained by the employer for reporting purposes, have been destroyed.

The employee's right to a copy of the report of the payments he received, and to discover records to verify the report is correct, does not derive from the settlement agreement, but from the employer's obligation under AS 23.30.155(c). It is not a claim for compensation that was waived in the settlement agreement because it is not a "benefit" that was "due" as of the date of the settlement agreement. Until the employee sought the information, the right to the record of the payments made to him was not "due."

If the employee had requested payment records from the employer so that he could verify which payments were workers' compensation disability compensation, and which payments were injury leave, the commission concludes the settlement agreement would not bar the board from requiring the employer to divulge the information under AS 23.30.155(c) and 8 AAC 45.054(b), notwithstanding the waiver of a claim for recalculation of his compensation rates or additional compensation. The appellee's workers' compensation manager testified that the records are "in the computer," so that a list of "all the benefits paid," including "the exact check that was issued and – by dates for the periods and amount that was paid."[66] There is some evidence that the records could be printed so appellant could determine if the Municipality's calculation of overpaid injury leave is correct, or, as he claims on appeal, a back-door attempt to recover overpayment of workers' compensation disability payments after the settlement agreement was reached. Appellant asked the board to "declare what control you have

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> due and payable when the insurer or adjuster receives notification from the commissioner regarding the timeliness of the reports. If the annual report is not filed by March 1 of each year, the insurer or adjuster shall pay a civil penalty of $100 for the first day the annual report is late, and $10 for each additional day the report is late. If the annual report is incomplete when filed, the insurer or adjuster shall pay a civil penalty of $1,000.

[66] Hrg. Tr. 113:19-18, 114:23 — 115:16.

over [the dispute]."[67] While the board correctly determined it lacked legal authority to order the Municipality to cease the withholding of overpayments that appellant sought, the board erred to the extent the board failed to declare that it had authority to require appellee to provide a record of workers' compensation payments to appellant, so that he could pursue his remedies in other forums. However, because there is no record that appellant ever requested the board to order such discovery from the employer, the error is harmless.

4. Conclusion.

The commission concludes the settlement agreement could not, and did not, include a waiver of the appellee's right to seek reimbursement of overpaid injury leave under the Memorandum of Agreement. Therefore, the settlement agreement did not give the board legal authority to order appellee to comply with the agreement by taking, or ceasing, action to which appellee is otherwise entitled under law. The board's order that it lacked jurisdiction to decide issues regarding the appellant's supplemental collectively bargained employment benefits (injury leave) is AFFIRMED.

Date: *September 28, 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision in this appeal from Alaska Workers' Compensation Board Decision No. 08-0259 denying Dan Reeder's petition to enforce a settlement agreement by ordering the Municipality of Anchorage to cease withholding reimbursement of overpaid leave benefits. The commission affirmed (approved) Board Decision No. 08-0259. The

[67] Hrg. Tr. 131:1-9.

effect of this decision is to leave Board Decision No. 08-0259 undisturbed. The commission has not retained jurisdiction. **This is a final administrative decision.**

Proceedings to appeal a final commission decision must be instituted in the Alaska Supreme Court within 30 days of the distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission. To see the date of distribution, look in the "Certificate of Distribution" box on the last page.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision is distributed. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal (or petition for review or hearing) to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after distribution or mailing of this decision.

CERTIFICATION

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of the text of the Final Decision in the matter of *Dan Reeder v. Municipality of Anchorage,* AWCAC Appeal No. 09-003, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 28, 2009.

Date: *October 6, 2009*

Signed

Barbara Ward, Appeals Commission Clerk