Alaska Workers' Compensation Appeals Commission

Northstar Earthmovers and American Interstate Insurance,
Appellants,

vs.

Marty J. Sanders, Anchorage Neurological Assoc., and John P. Shannon, D.C.,
Appellees.

Final Decision
Decision No. 046 June 7, 2007

AWCAC Appeal No. 06-024
AWCB Decision No. 06-0206
AWCB Case No. 200215665

Final Decision on appeal from Alaska Workers' Compensation Board Decision No. 06-0206 issued on July 26, 2006, by the southcentral panel at Anchorage, Rebecca Pauli, Designated Chair, Stephen T. Hagedorn, Member for Industry, and John Abshire, Member for Labor.

Appearances: Robin Gabbert, Russell, Wagg, Gabbert & Budzinski, for appellants, Northstar Earthmovers and American Interstate Insurance. Marty J. Sanders, Anchorage Neurological Assoc. and John P. Shannon, D.C., appellees, did not participate in the appeal.[1]

Commissioners: John Giuchici, Philip Ulmer, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

This is an appeal of a board order finding the employer's controversion of certain medical benefits after a compromise and release was executed to be in bad faith and invalid, directing the staff of the division to send a copy of the board's decision to the Division of Insurance for investigation of the appellant insurer, and assessing penalties for failing to issue a valid, timely controversion. The board's decision relied on application of equitable estoppel to bar the employer from exercising a legal right to

[1] Sanders was represented in proceedings before the board, but his attorney withdrew upon appointment to public office shortly after the appeal was filed. All appellees, including Sanders, entered notices of non-participation.

controvert based on a medical report. We conclude the board's application of equitable estoppel was improper and was not supported by findings based on substantial evidence in light of the whole record. We therefore reverse the board's decision. In other respects, the board's decision is not challenged and we affirm.

Factual background.

Marty Sanders injured his lower back while working as a mechanic and welder for Northstar Earthmovers.[2] Northstar paid compensation and medical benefits to Sanders without an award.[3] Sanders's attending physician was a chiropractor, Dr. Larson, who treated his lower back injury through August 2005. Dr. Larson referred him to "Back in Action" for a physical capacities evaluation (PCE) in March 2003. Sanders, who had suffered a neck injury in 1994, later reported to Dr. Larson, that he had injured his neck doing a "pull down" during the PCE. He was diagnosed with degenerative abnormalities; degenerative disc protrusion, osteophytic formations, canal stenosis, and a significant posterior bone spur at the C4-5 vertebrae. After conservative care, Dr. Larson referred him to a neurosurgeon, Dr. Kralick, who fused Sanders's C5-6 and C6-7 vertebrae, inserted a bone graft, and fixed the fusion with plates and screws.

Northstar requested an employer medical examination for the cervical condition in October 2004. The evaluation by Dr. Stanford resulted in a report that the cervical condition was not caused by the PCE or his low back treatment (physical therapy) and an addendum addressing imaging studies.[4] Based on these reports, on November 4, 2004, Northstar controverted payment of all benefits for the cervical spine condition.[5]

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2 R. 0001.

3 R. 0002.

4 R. 0919-926, 1386-87.

5 R. 0008. The explanation section of the controversion form reads:

> Per the 9/16/04 and 10/20/04 reports of Dr. Stanford, the employee injured his neck while doing 'pull downs' to strengthen his upper back. 'Pull downs' for the upper back was not part of employee's recommended treatment for his work related lower

Dr. Kralick's clinic, Anchorage Neurological Assoc., filed a claim for treatment costs related to the neck surgery.[6] Sanders filed a claim on November 29, 2004.[7] Northstar answered Sanders's claim and controverted it as well.[8] Northstar also controverted continuing chiropractic care as exceeding the frequency standards.[9] A second employer medical examination was performed in April 2005 by Dr. Reimer and Dr. Swanson to address Sanders's low back condition.[10] They reported Sanders was medically stable, required no further treatment, and incurred no permanent impairment due to a low back injury. They agreed a lumbar strain had been work-related, but that his multi-level pre-existing degeneration was pre-existing and chiropractic treatment had been excessive. They also reported that Sanders's multi-level cervical spondylosis, cervical condition before the injury in 2003, and subsequent 2004 surgery were not work-related. As a result of this report, Northstar issued a controversion on April 29, 2005, that denied, among other benefits, "chiropractic treatment after July 29, 2004."[11] Dr. Reimer also issued a second report after reviewing additional testimony and opined that Sanders's neck was not injured during treatment for his low back.[12]

> back injury. Treatment and disability related to the cervical spine injury are therefore not compensable. Per Dr. Stanford's 10/20/04 report, (copy attached), "the exercises he was doing are not part of a back rehabilitation program and, therefore, I feel that given that scenario, his cervical spine problem is unrelated to his low back problem."

[6] R. 0031-32. The claim listed the injury date as April 29, 2003, resulting in a controversion (R. 0010) and answer (R. 0045-46) stating that Sanders was not employed by Northstar on that date.

[7] R. 0035-36.

[8] R. 0011, 0040-41.

[9] R. 0015.

[10] R. 1258-70.

[11] R. 0019.

[12] R. 1291-92.

Northstar, Dr. Kralick, and Sanders had agreed to a second independent medical evaluation by a board-appointed examiner.[13] The appointed examiner, Dr. Greenwald, reported he examined Sanders on August 17, 2005.[14] The board characterized his report as "very thorough, accurate, complete, and consistent with the board record."[15] Before the report was distributed to the parties, the parties had negotiated a partial compromise and release agreement.[16] The agreement provided in part:

> In order to resolve all past, present, or future disputes between the parties as to the work related incidents described herein, excluding past medical benefits related to the cervical spine and past and future medical benefits related to the lumbar spine, the employer and its carrier will pay the employee the sum of $30,000. . . .
>
> The parties agree that the employee's entitlement, if any, to future medical/transportation benefits related to the low back under the Alaska Workers' Compensation Act is not waived by the terms of this agreement, and that the right of the employer to contest liability for future medical benefits is also not waived by the terms of this agreement.
>
> The parties agree that the employee's entitlement to future medical/transportation benefits related to his cervical condition under the Alaska Workers' Compensation Act is waived by the terms of this agreement. . . . Controversions properly filed and served and not otherwise withdrawn prior to Board approval of this Compromise and Release remain in effect and the provisions of AS 23.30.110(c) continue to apply thereto.[17]

Sanders signed the agreement on August 15, 2005. In an affidavit attached to the agreement, he stated:

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[13] R. 1478. Dr. Shannon, a chiropractor who rated Sanders's impairment, filed a claim for payment of his fee on June 15, 2005. This claim was answered (R. 0106-7) but no controversion addressing it specifically appears in the record.

[14] R. 1294-1302.

[15] AWCB Dec. No. 06-06-0206 at 3.

[16] R. 0112-20.

[17] R. 0116. (Emphasis in original.)

> To the best of my knowledge, the facts have been accurately stated in this Compromise and Release. No representations or promises have been made to me by the employer, carrier, or their agents in this matter which have not been set forth in this document, and I have not entered into this agreement through any coercion or duress created by the employer, carrier, or their agents.[18]

August 1, 2005, Dr. Larson wrote to Dr. Kralick for review of Sanders's low back condition *at Sanders's request.*[19] Dr. Kralick's office received the referral August 5, 2005, and a note indicates that an MRI would be required before an appointment.[20] Instead of following Dr. Kralick's directions, Sanders went to his family practitioner, Dr. Sloan, on October 21, 2005, telling her "previously he was offered injections for his back . . . wants to consider that option now."[21] Dr. Sloan ordered a new MRI and referred him to physical therapy.[22] Sanders did not attend the physical therapy. In November 2005, Dr. Kralick's office contacted Dr. Larson, and requested the MRI before seeing Sanders. Dr. Larson asked Sanders to send Dr. Kralick a copy of the 2005 MRI.

On December 16, 2005, Northstar, responding to Dr. Sloan's bills, issued a controversion of further medical benefits for the lower back based on Dr. Reimer's and Dr. Swanson's April 25, 2005, report.[23] It is this controversion that is at the center of this appeal.

Sanders immediately filed a claim for benefits, alleging that the controversion showed the settlement had been entered into in bad faith, thus implicitly arguing that

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[18] R. 0119.

[1919] R. 1331. No chart or treatment note for this day is included in the record. Dr. Larson's next treatment is in October 2005. R. 1332.

[20] R. 1341.

[21] R. 1316.

[22] R. 1316.

[23] R. 0023.

the settlement should be set aside.[24] Notably, he did not check the box labeled "unfair or frivolous controvert (denial)."[25] A pre-hearing conference was held to identify the issues for hearing resulting in a list that included a defense that the controversion was not issued in bad faith because both parties retained their rights regarding medical benefits in the compromise and release.[26] A hearing was held on May 3, 2006, to decide the claims of Dr. Kralick, Dr. Larson, and Sanders.

Sanders argued to the board that the settlement agreement itself was invalid as entered into in bad faith. Sanders's argument rests on the assumption that the settlement included an agreement to pay future medical benefits for treatment of the employee's lower back.[27] Although a medical opinion that the care was not covered was known to the parties, by entering into the agreement, Northstar impliedly disavowed the opinion. Thus, when it relied on that opinion to controvert benefits after the agreement was secured, Northstar demonstrated that it never intended to pay medical benefits for treatment as required by the agreement. Sanders did not challenge the grounds for the controversion – he challenged the validity of the settlement agreement itself.

Northstar argued that the terms of the agreement clearly stated that the employer retained all rights to controvert future benefits and did not guarantee payment of any particular benefit. The agreement clearly excludes medical benefits for

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[24] R. 0342-3. The board decision states that Sanders "contends that the employer's December 16, 2005 controversion of the MRI for his low back is not in good faith." AWCB Dec. No. 06-0206 at 14. Actually, Sanders clearly contended that Northstar did not enter into the settlement agreement in good faith, an entirely different matter than whether the controversion was "frivolous or unfair." *See*, Hr'g Br. in Support of Employee Claim for Medical Benefits, 5; R. 0438.

[25] R. 0343.

[26] R. 1503.

[27] "The carrier acted in bad faith when they signed a C&R *agreeing to pay* for benefits which they denied based on information they possessed before they signed the agreement." Hr'g Br. in Support of Employee Claim for Medical Benefits, 8; R.0441.

the lower back from the settlement, so it cannot be read as an agreement to pay benefits. Northstar argued that the law does not impose a requirement to controvert a medical benefit until a demand for benefits is received, and the law does not prohibit an employer from relying on evidence obtained before a partial settlement that does not address the controverted benefits. Therefore, the agreement was not entered into in bad faith, and the controversion was not invalid.

The board did not decide whether or not the settlement agreement was entered into in good faith. Instead, the board determined that the December 16, 2005, controversion was "not in good faith and is invalid."[28] The board's conclusion that the December 16, 2005 controversion is "not in good faith and is invalid" rests on its determination that the "the employer . . . knowingly led the employee to believe that while the employer retained the right to challenge future medical bills that it would do so by exercising its rights under the Act, e.g.: exercising its right to an EME."[29] The employer, through the conduct of its insurer's adjuster, Erickson, the board found, "indicated a purpose to abandon or waive any legal right to rely solely upon the records in the employers' possession prior to the approval of the C&R."[30] It was reasonable, the board said, "for the employee to believe the employer would, at a minimum obtain additional medical evidence prior, to controverting the employee's retained medical benefits." The board went on to find that based on the adjuster's testimony, the observations of witnesses, and counsel's arguments, "the employee would not have agreed to the terms of the C&R if he understood the employer was going to rely solely upon a medical record in its possession prior to the approval date of the C&R."[31] Instead, the agreement meant "the employer was retaining the right to seek EME, to

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[28] *Marty J. Sanders v. Northstar Sand & Gravel,* AWCB Dec. No. 06-0206, 16 (July 26, 2006). The employer name change on appeal was not explained.

[29] AWCB Dec. No. 06-0206 at 15.

[30] *Id.*

[31] *Id.* at 16.

exercise its rights under the Act."[32] The board concluded that there was no valid controversion of the employee's low back treatment because a third controversion was not issued after the April 11, 2006, employer medical examination.[33] Therefore a penalty for untimely controversion was assessed. This appeal followed.

Discussion.

This appeal presents questions of interpretation of the settlement agreement entered into by the parties, whether its terms contained a promise to pay future benefits or acceptance of liability for them, whether the written terms of that agreement were varied by acts or statements of the employer's adjuster, and whether the employer waived statutory rights reserved under the contract.

We begin our examination of the board's reasoning with a review of the written terms of the agreement and whether they support the assumptions Sanders claimed. We examine next whether the board properly applied equitable estoppel to bar the employer from exercising a right to controvert medical benefits. We review the evidence of record to determine if there is substantial evidence to support the board's findings that Erickson's conduct and statements evinced a purpose to abandon or waive any legal right to rely solely upon medical records in the employer's possession before September 1, 2005, as a basis to controvert future medical benefits.

1. Our standard of review.

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[34] Because the commission makes its decision based on the record before the board, the briefs, and oral argument,[35] no new evidence may be presented to the commission. The board's determination of the credibility of a witness appearing before the board is binding on

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[32] AWCB Dec. No. 06-0206 at 16.

[33] *Id.*

[34] AS 23.30.128(b).

[35] AS 23.30.128(a).

the commission.[36] The commission is required to exercise its independent judgment on questions of law and procedure.[37] If members of this commission must exercise their independent judgment to interpret the workers' compensation act, where it has not been addressed by the Alaska State Legislature or the Alaska Supreme Court, we draw upon the specialized knowledge and experience of this commission in workers' compensation,[38] and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[39]

2. The settlement terms do not include an agreement to pay future medical benefits for the lower back; medical benefits for the lower back are clearly excluded from the settlement.

The Alaska Supreme Court has said that a compromise and release settlement of workers' compensation benefits is to be interpreted in the same manner as any other contract.[40] While broad language in settlement agreements implies that all claims are settled, if the parties specifically state that a claim is not settled, it remains contested.[41]

The settlement agreement states clearly that "to resolve all past, present, or future disputes between the parties as to the work related incidents described herein, *excluding* past medical benefits related to the cervical spine and past and future medical benefits related to the lumbar spine, the employer and its carrier will pay the employee" the settlement sum. In short, the language of the settlement document

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[36] AS 23.30.128(b).

[37] AS 23.30.128(b).

[38] *See Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

[39] *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[40] *Williams v. Abood,* 53 P.3d 134, 144 (Alaska 2002), *citing Cameron v. Beard,* 864 P.2d 538, 545 (Alaska 1993) (citing *Schmidt v. Lashley,* 627 P.2d 2001, 2004 n. 7 (Alaska 1981).

[41] *Williams v. Abood,* 53 P.2d at 144.

plainly *excluded* any settlement of any dispute related to future medical benefits related to the lumbar spine.

In the next paragraph, the settlement document says

> The parties agree that the employee's entitlement, if any, to future medical/transportation benefits related to the low back under the Alaska Workers' Compensation Act is not waived by the terms of this agreement, and that the right of the employer to contest liability for future medical benefits is also not waived by the terms of this agreement.

The phrase "employee's entitlement, *if any*" does not constitute a statement that the employee *is* entitled to any future benefit. The phrase means that *if* the employee is entitled to a benefit in the future, he does not waive it. The second half of the phrase clearly states that the employer does not waive the right to contest liability for future medical benefits. It does not limit or condition the employer's right to contest liability. This language reserves each party's rights as they existed at the time the settlement agreement was signed.[42] It does not, as Sanders implicitly argued, constitute a waiver of the employer's statutory rights, nor does it create any new rights for Sanders's benefit, as the board found (i.e., the right to require the employer to obtain a new employer medical examination before controverting medical benefits).

Because the parties excluded the entire subject of medical benefits for Sanders's lumbar spine from the settlement, no settlement of those benefits occurred. A document that explicitly states it does not resolve any dispute relating to certain medical benefits cannot constitute an acknowledgement of liability for such benefits. The settlement approved by the board made no change in the parties' rights and legal relationship to each other respecting medical benefits for the lower back; it reserved each party's rights as they existed at the time of the settlement.[43]

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[42] *Compare, Gorman v. City of Haines,* 675 P.2d 646, 648 (Alaska 1984).

[43] At the time of the settlement, Northstar had controverted Sanders's right to continuing chiropractic care for his lower back. No bills for other care had been received. Although two weeks earlier he had asked Dr. Larson to refer him to Dr. Kralick, there is no evidence Sanders informed the adjuster that he was seeking alternate forms of medical care for his lower back when he signed the agreement.

> *3. The agreement is complete in itself and its written terms are clear. There is no evidence to support finding a variation from the terms of the agreement that limits the employer's exercise of its statutory rights.*

The settlement also states that the "Compromise and Release contains the entire agreement among the parties and constitutes the full and complete settlement of all claims, whether actual or potential, described above."[44] Sanders's affidavit states that "No representations or promises have been made to me by the employer, carrier, or their agents in this matter which have not been set forth in this document." By its terms, as well as Sanders's sworn statement, no other "side agreement" was made between the parties – the entire agreement is contained in the settlement document.

There was no evidence offered by Sanders that he did *not* agree the settlement document he signed on August 15, 2005, was the complete and accurate integration of the settlement contract with Northstar. A close and careful review of Sanders's testimony at hearing reveals no testimony that the settlement terms were inaccurate, or that it was not the complete expression of the agreement between the parties.[45] Thus, the *only* testimony directly addressing existence of an agreement or promise to pay medical benefits for the lower back contrary to the settlement terms is Sanders's affidavit that no such agreement or promise was made to him.

Once it is established that a written contract is integrated, it is well-established that parol evidence (testimony or antecedent statements) is not admissible to vary its terms.[46] Sanders did not offer such evidence. Instead, the board's decision assumed the existence of such a variation, when no evidence existed to support it.

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[44] R. 0118.

[45] *Kupka v. Morey*, 541 P.2d 740, 747 n. 8 (Alaska 1975) (defining an integrated contract). As we discuss later in this decision, Sanders's testimony on the settlement was a single "Yeah" in response to a question from his attorney.

[46] *Id.* at 747 n. 9, quoting 3 Corbin, Contracts s 573 at 357 (1960):

> When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or

Sanders's attorney repeatedly questioned Erickson on his agreement to the settlement despite the existence of an EME report suggesting the employer was not liable for further treatment of the lower back. His questions were based on an unspoken assumption that Northstar had agreed to cover treatment of Sanders's lower back:

> Q: And you're aware that there was a C&R that left open medicals on the low back.
>
> A: According to the statute, yes, they were. It wasn't carte blanche leaving it open for anytime, anywhere, and any purposes, and you're right.
>
> Q: But you're aware of that provision I just read to you.
>
> A: I – I'm aware – I understand it, yes. That means we can still deny care if we want to.
>
> Q: But you had no basis to deny it other than an April 2005 medical report.
>
> A: Yes.
>
> Q: And that was all you cited in that controversion.
>
> A: Right.
>
> Q: Why would you approve of a C&R being open to low back care if you had an April report telling you it shouldn't be covered?
>
> A: Because I figured you as representative of him as well as her and the Board would find it was a reasonable settlement; so we agreed upon it.
>
> Q: Leaving open the low back as a reasonable term.
>
> A: Yeah. As part of the conditions, yes.
>
> Q: Knowing that you didn't believe there should be any coverage for the low back.

> otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

A: I didn't say that at that time. I thought it was all paid for, everything was current and paid for when we signed the C&R on 9/1.[47]

* * *

Q: And why would you approve of a C&R leaving open future benefits if you had a –

A: Because we

Q: -- report –

A: -- we always leave it open. You can't get a C&R approved without leaving medicals open.[48]

* * *

Q: You approved of a C&R with open low back for the future.

A: Yes.

Q: And you controverted that low back benefit when it was asked for.

A: Only controverting care that's not work-related, yes.

Q: And you say that is not work related because of a report you had from Dr. Reimer in April of 2005.

A: That is correct.

Q: And if you believe that Dr. Reimer was telling you Mr. Sanders's low back was not work related in April of 2005, why did you approve of a settlement leaving open low back care?

A: Because the bill was not received until after the C&R was approved. .. . how can I look in the future to say what I can and cannot approve.[49]

* * *

Q: Before you approved the C&R you were aware of a medical report from Dr. Reimer dated April 2005; is that correct?

A: If you're – regarding the IME, yes, I was.

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[47] Hr'g Tr. 97:21 - 98:22.

[48] Hr'g Tr. 99:2 - 7

[49] Hr'g Tr. 100:13 – 101:1

> Q: And in that IME report you believe that that report said that Mr. Sanders was not in further need of low back care; is that correct?
>
> A: That is correct.
>
> Q: And yet you approved of a C&R leaving open low back care.
>
> A: Yes.
>
> Q: And when the low back bill was actually submitted you used the April report to deny it.
>
> A: Yes.
>
> Q: And you had approved of a settlement leaving open low back care knowing full well that you never would cover low back care based on the IME.
>
> A: No.[50]

By repeatedly suggesting that it was unreasonable or unbelievable that an adjuster would agree to exclude medical benefits from a settlement, to leave a dispute open and unresolved, when he had evidence in the employer's favor, Sanders's counsel suggested that Erickson's later reliance on the April 2005 report to challenge coverage of a medical bill was unfair, a demonstration of bad faith because it was contrary to the settlement's provision of "open medicals" or a side agreement to provide medical care for the lower back.[51]

Throughout his questioning and argument, Sanders's counsel used the word "open" to suggest that the settlement gave Sanders "open access" to medical care for his lower back – that is, that Northstar had acknowledged coverage of the benefit – not, as the settlement terms state, that future medical care for the lower back was "open to dispute" because it was *excluded* from the settlement. By substituting the words "unresolved" or "excluded" for the word "open" in the questions put to Erickson,

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[50] Hr'g. Tr. 102:10-25.

[51] If there had been such an agreement to provide medical care for Sanders's lower back, or to limit the employer's legal rights to controvert medical care, then it was not reduced to writing and submitted to the board for approval. Moreover, the existence of such an agreement is directly contrary to Sanders's affidavit of August 15, 2005.

it becomes clear that Erickson testified that he believed the settlement left the issue of entitlement to low back care for another day, that the issue was open and unresolved, and that he believed that the matter of low back care was not likely to arise in the future because all care had been paid.[52]

Sanders's counsel did not actually introduce parol evidence to vary the terms of the contract, which would be inadmissible over objection. Instead, he flourished before the board an assumption that the settlement's exclusion of benefits, which he characterized as "open medicals," meant the employer agreed to "accepted medicals," or "open access" to medical care.[53] However, if testimonial evidence cannot be accepted to support a variance in the clear terms of an integrated contract, then even less acceptable are unsupported suggestions in counsel's argument. We find no evidence to support the board's finding that Northstar agreed that it would exercise the statutory right to challenge future medical bills, only after exercising its right to another employer medical examination.

After carefully reading the hearing transcript and the record, we find no evidence supporting the board's finding that Erickson knowingly led the employee to believe that while the employer retained the right to challenge future medical bills, it would do so "by exercising a right to an EME" instead of relying on reports in the file. It is clear that Erickson understood that the settlement agreement left the entire issue of medical benefits for the low back care unresolved; thus he was entitled to act on that issue as though no settlement existed. Nothing in Erickson's testimony establishes that he communicated to anyone, or that he agreed, that he would not controvert future

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[52] It may be inferred from Erickson's testimony that Sanders did not inform Erickson prior to signing the agreement that Sanders had asked Dr. Larson for a referral to Dr. Kralick for further treatment of his lower back two weeks earlier. Erickson's testimony was that he believed treatment for the low back was "all paid for; everything was current and paid for" (Hr'g. Tr. 98:20-21) when he signed the settlement.

[53] We note that his unsupported assumption was challenged, both by Erickson's testimony that the settlement terms mean "we can still deny care if we want to," Hr'g Tr. 98:3-4, and by counsel for Northstar. Hr'g Tr. 49:20 – 51:1.

medical benefits unless he obtained new medical evidence in the form of an EME to support the controversion.

The board also found that Sanders would not have entered into the agreement if he understood that the employer was going to rely solely on a medical record in its possession prior to September 1, 2005, to controvert benefits. We find absolutely no evidence to support this finding in Sanders's testimony. The closest his hearing testimony came to the subject was a response to a leading question from his own counsel: "Now, after you signed the settlement you had in the settlement a provision addressing open medicals for your low back, do you recall that?" Sanders responded, "Yeah." In other words, yes, he recalled that there was a provision addressing open medicals for his low back. He did not testify to his *understanding* of that provision. He did not ask his attorney what he meant by "open medicals." And, he did not testify he would not have entered into the agreement unless he understood the employer would have to obtain new evidence to support denial of future claims.

As we said earlier, the *only* evidence concerning the existence of agreements or promises outside the settlement agreement itself is Sanders sworn statement that there were none. We find there is no evidence in the record, on which a reasonable mind would base a conclusion, that Sanders (1) believed his medical benefits for his low back would not be controverted after the agreement was signed unless the employer got another medical examination; or (2) would not have signed the agreement unless the employer induced that belief in him. We conclude we must reject the board's findings as unsupported by substantial evidence in light of the whole record.

> *4. To apply the doctrine of equitable estoppel to bar the employer from enforcement of the settlement terms, the board must find that Northstar clearly and unequivocally communicated to the employee an intent to waive Northstar's legal rights under the settlement.*

We have concluded that the settlement agreement excluded medical benefits for Sanders's lower back from its terms and that the parties remained in the same legal position they held before September 1, 2005. The settlement itself did not contain an agreement to pay for such benefits. We have determined that there is no evidence to

support a finding that Northstar agreed, at the time of the settlement, to waive its legal right to controvert medical benefits for Sanders's lower back. Nonetheless, the board found the employer "through its conduct conveyed that it was not going to rely upon existing medical records as the sole support for a controversion of claimed benefits for the low back."[54] The board cited no particular instance of such conduct, only that the employer's actions, "as testified to by Mr. Erickson, knowingly led the employee to believe that while the employer retained the right to challenge future medical bills that it would do so by exercising its rights under the Act, e.g.: exercising its right to an EME."

The board briefly stated the elements of implied waiver before finding that Northstar, through Erickson's conduct, waived its legal right to rely on medical records in its possession before September 1, 2005. Neglect to insist on a right, the board said, "only results in an estoppel, or an implied waiver, when the neglect is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question."[55] Equitable application of implied waiver must be supported by findings of fact of *specific instances of direct, unequivocal conduct* that demonstrate a clear intent to abandon a known right.[56] While the board recited the correct test for application of implied waiver through conduct, we cannot find the evidence of "direct, unequivocal conduct" by Erickson demonstrating that he intended to waive Northstar's statutory rights.[57]

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[54] AWCB Dec. No. 06-0206 at 15.

[55] AWCB Dec. No. 06-0206 at 14-15, *citing Wausau Ins. Companies v. Van Biene*, 847 P.2d 584, 589 (Alaska 1993) ("As one key element of estoppel is communication of a position, it follows that neglect to insist upon a right only results in an estoppel, or an implied waiver, when the neglect is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question.")

[56] 847 P.2d at 588.

[57] The board implies, without explicitly stating, that Northstar's rights were abandoned in the settlement, so the evidence must establish that Erickson, instead of

a. There is no evidence of record that Erickson communicated any intent to Sanders to waive Northstar's legal rights.

The Board's decision cites no specific instances of communication by Erickson with Sanders or Sanders's representative except the controversion in issue. We find nothing in the record in the nature of correspondence from Erickson stating that Northstar would get a new employer medical examination before controverting benefits. We carefully reviewed the transcript of the hearing, particularly Erickson's testimony from pages 97 to 103. Sanders's counsel questioned Erickson regarding his intentions, his beliefs, and his general policy, but he did not ask him if he communicated with Sanders between September 1, 2005 (when the settlement was approved by the board) and the December 16, 2005 (when the controversion was issued). The board panel also questioned Erickson,[58] and did not ask him anything about communicating with Sanders or Sanders's attorney. There is no evidence in the form of writings or testimony regarding oral communication of a desire to abandon or waive *any* legal right Northstar had regarding Sanders's lower back.

Therefore, any application of implied waiver must rest on Erickson's conduct. The only affirmative conduct elicited in the course of the hearing is that Erickson approved a settlement with Sanders, excluding the issue of medical care for Sanders's lower back, even though he had medical evidence in his favor that would support a controversion of such medical benefits. The question is whether this is sufficiently direct and unequivocal conduct that would communicate a clear intent to abandon a known right. We hold as a matter of law that it is not.

The language of the settlement did not alter the parties' legal relationship regarding medical care for Sanders's lower back; it reserved all parties' rights as of the date of the settlement. Under the agreement, Northstar did not limit its rights and Sanders did not waive his. Because the settlement terms state that Northstar does *not*

Northstar's attorney, was authorized by Northstar to abandon Northstar's rights in the course of negotiation of the settlement. None was offered.

[58] Hr'g Tr. 109:7 – 111:19.

waive its statutory rights, agreeing to it cannot be unequivocal conduct demonstrating intent to abandon the very right Northstar expressly reserved in the agreement. Therefore, the board's application of implied waiver must be based on a determination that some other Erickson conduct was "direct and unequivocal" and communicated a "clear intent" to abandon Northstar's rights or to condition their exercise on obtaining new evidence despite the clear language of the settlement.

The only other specific instance of conduct toward Sanders described in the evidence and cited by Sanders is that Erickson did not controvert Sanders's entitlement to medical benefits (as opposed to chiropractic benefits, which were controverted) immediately after receiving the April 19, 2005, report of Dr. Reiter and Dr. Swanson, but waited to do so until after a bill for medical treatment was received. That the report provided a legal basis to controvert entitlement to further medical care is not disputed by Sanders, and indeed, his claim of bad faith rests on the assumption that a controversion based on the report would have been valid if filed.[59] The flaw in the board's reasoning is that Erickson was not *required* to file a controversion until a bill was submitted or compensation was payable, and, in addition, he had no reason to expect further treatment was anticipated. Sanders was not seeking treatment for his lower back, his injury had received an impairment rating, which was paid. Failure to controvert benefits when no benefits are due, even if the employer has a valid basis to controvert, does not subject the employer to penalty. The Reiter-Swanson report had been given to Sanders, so there was no concealment of evidence by Erickson; Sanders was made aware that the employer had a basis to controvert further medical care for his lower back; and, there was no communication from Erickson or Northstar that would constitute acceptance of liability for the lower back care. If no settlement had been reached, there would be no question but that Northstar would have been entitled to rely on the April 19, 2005, Reiter-Swanson report to controvert care provided in October

[59] Refraining from filing an *invalid* controversion could not have been relied on as an abandonment of an employer's legal right because there is no legal right to file an invalid controversion.

2005.[60] We cannot agree that this is the kind of "direct unequivocal" conduct demonstrating a clear intent to abandon Northstar's legal right to controvert a benefit once a medical bill was received or compensation was owed. There is nothing *unequivocal* about not filing a controversion in such circumstances. A reasonable person, having the Swanson-Reiter report in hand, would not expect that absence of a controversion over six months – when payment is not due -- would lead to the directly to the conclusion that the employer clearly intended not to controvert payment of medical bills until a new employer medical examination was obtained.

There is no evidence in the board's record to support a finding that Erickson communicated "a purpose to abandon or waive any legal right to rely solely upon the records in the employers' possession prior to the approval" of the settlement. We conclude the board's finding lacks substantial evidence to support it in light of the whole record.

b. There is no evidence to support the board's finding that Sanders actually relied on a communication from Erickson.

Sanders did not testify to *any* reliance, to his detriment or otherwise, on any statement by George Erickson. More importantly, the board's record does not contain a statement of Sanders's beliefs regarding his specific acts of reliance. The board's findings are essentially speculation: "it was reasonable for the employee to believe," not "the employee believed, and we find his belief was reasonable." When the board is asked to invoke its equitable powers to bar an employer from exercising a legal right and, as in this case, to find that the employer subjected itself to penalty by exercising a legal right, the board's invocation of its equitable powers should not rest on speculation, but on evidence.

Sanders did not testify at hearing to what he thought the agreement *meant* at the time of the settlement was signed. His single "Yeah" in response to his attorney's

[60] The five to six months of silence in this case is much less than the three years of silence in *Van Biene* that the Court held insufficient to constitute an implied waiver of the employer's statutory rights. 847 P.2d at 589.

question simply states he was aware of a provision in the agreement regarding "open medicals." Sanders also did not testify to specific communications from Erickson. He did not describe any act in reliance. Erickson cannot testify to what was in Sander's mind at the time of settlement. Counsel's arguments, however eloquent, are not evidence. This leads only the board's "observation of the witnesses" as a basis for its finding, but mere observation of a witness's demeanor, without testimony, is insufficient to base a finding that a party's specific intent is contrary to the written agreement or his sworn statement. We conclude there was no evidence in light of the record as a whole to support the board's finding of fact.

Finally, the board concludes Sanders relied on "the representations of the employer to his detriment." The board fails to describe the harm the employee suffered by securing the settlement, which is the event the board says Erickson obtained through his conduct. We find no evidence Sanders suffered a loss by agreeing to the settlement. He was paid $30,000. He did not give up any right to claim medical benefits for his low back injury. Sanders's only complaint was that he was required to file a claim to obtain medical benefits. He would have been required to do so if the settlement were not reached. Therefore, he was in no worse position with regard to medical benefits for his lower back than he was before the settlement. The board also failed to identify the specific representations made by the employer. There is no evidence in the record that Erickson communicated with Sanders regarding the settlement. No other evidence of communications containing Northstar's representations, on which Sanders relied, was presented to the board. Therefore, it is not possible for Sanders to have relied on a representation communicated by Erickson, and there is no evidence of other representations in the record. We conclude that the board's finding is not supported by substantial evidence in light of the whole record.

5. *Because there is no evidence to support the board's findings of fact, we conclude the board improperly applied implied waiver to invalidate the controversion.*

The board's award of penalties rests on its determination that the employer's controversion was invalid as resting on evidence the employer agreed it would not use.

The board found the controversion was filed in bad faith, not because the controversion lacked intrinsic worth, but because the employer had given up the right to use the evidence on which it was based. Because we have found that the employer did not give up the right to use the evidence, we conclude the board improperly applied the doctrine of implied waiver.

The Supreme Court has made it clear that controversions must be based on reliable medical opinion or testimony. Dr. Reiter's and Dr. Swanson's April 19, 2005, report is just such reliable medical opinion. It addresses the key issue of Sanders's need for further medical care. Since the settlement did not alter the parties' position, and there is no evidence the employer communicated a waiver to Sanders of the right to controvert, there is no evidence on which to base a conclusion that the controversion was invalid when issued.

Conclusion.

We REVERSE the board's decision that the employer controverted the employee's medical benefits for his lower back in bad faith. We VACATE the board's order that the employer be referred to the Division of Insurance. We REVERSE the board's decision that the controversion of December 16, 2005, was invalid. We VACATE the board's order to pay a 25% penalty under AS 23.30.155(e) on the medical expenses for the employee's lower back found compensable by the board. We were not asked to address other portions of the board's order; they are not affected by this appeal.

Date: *7 June 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
John Giuchici, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final administrative agency decision. The appeals commission reversed the workers' compensation board decision awarding penalties and referring a bad faith controversion to the Division of Insurance. This decision becomes effective when it is filed in the office of the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are instituted. To find the date of filing, look at the Certification by the commission clerk on the last page.

Effective November 7, 2005, proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the filing of this decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal 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 was mailed to the parties, whichever is earlier. See AS 23.30.128(f).

If you wish to appeal 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

You 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 delivery or mailing of this decision. The commission will accept fax filing of a motion for reconsideration.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of the Final Decision No. 045 in the matter of *Northstar Earthmovers and American Interstate Insurance v. Marty J. Sanders*; Appeal No. 06-024; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *7th* day of *June*, 200*7*.

Signed
R. M. Bauman, Appeals Commission Clerk

I certify that on *6/7/07* a copy of the above Final Decision in AWCAC Appeal No. 06-024 was mailed to Gabbert, Anc Neuro Assoc, Shannon, & Sanders and a copy was faxed to Gabbert, AWCB Appeals Clerk and Director WCD.

Signed
L. A. Beard, Deputy Clerk