

Alaska Workers' Compensation Appeals Commission

Pedro Erpelo,
Appellant,

vs.

Trident Seafoods and Liberty Insurance
Corporation,
Appellees.

Final Decision

Decision No. 247 April 4, 2018

AWCAC Appeal No. 17-009
AWCB Decision No. 17-0045
AWCB Case No. 201102068

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 17-0045, issued at Anchorage, Alaska, on April 21, 2017, by southcentral panel members William Soule, Chair, and Stacy Allen, Member for Labor.

Appearances: Pedro Erpelo, self-represented appellant; Jeffrey D. Holloway, Holmes Weddle & Barcott, PC, for appellees, Trident Seafoods and Liberty Insurance Corporation.

Commission proceedings: Motion for extension of time to file notice of appeal filed May 18, 2017; order granting extension of time to file notice of appeal issued June 2, 2017; notice of appeal filed July 17, 2017; briefing completed February 20, 2018; neither party requested oral argument.

Commissioners: Michael J. Notar, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Pedro Erpelo (Mr. Erpelo) sustained an injury while working for Trident Seafoods, insured by Liberty Insurance Corporation (Trident). The Alaska Workers' Compensation Board (Board) heard Mr. Erpelo's claim for a civil penalty against Trident on March 22, 2017, in Anchorage, Alaska.¹ The Board denied his claim on April 21, 2017, and

¹ *Erpelo v. Trident Seafoods and Liberty Insurance Corporation*, Alaska Workers' Comp. Bd. Dec. No. 17-0045 (Apr. 21, 2017) (*Erpelo II*). The Commission takes judicial notice of a prior decision not at issue here in Mr. Erpelo's claim: *Erpelo v. Trident Seafoods and Liberty Insurance Corporation*, Alaska Workers' Comp. Bd. Dec. No. 14-0106 (Aug. 4, 2014) (*Erpelo I*).

Mr. Erpelo filed his appeal with the Alaska Workers' Compensation Appeals Commission (Commission) after the Commission granted his motion for an extension of time to file his notice of appeal. Neither party requested oral argument and the Commission has decided this appeal based on the briefing submitted by the parties. The Commission now affirms the Board's decision and order.

*2. Factual background and proceedings.*²

On February 22, 2011, Mr. Erpelo signed a report of injury (ROI) which stated he injured his right wrist. The ROI described the injury as "[w]as waiting to unload broiler when his hand was crushed by the hopper." Mr. Erpelo said this report was incorrect and misleading. He further contended this report was "illegal" and Trident's actions should result in a civil penalty assessment. Mr. Erpelo stated the injury description should have read "[h]ad just signaled the lead butcher to lower/open the hopper when my hand was crushed by the closing/elevating hopper." Mr. Erpelo's concern with the original wording was that it made it sound like the injury was his fault, when he asserted it was not.³

At hearing, Trident and Mr. Erpelo stipulated that block 15 on the February 22, 2011, injury report was amended to state: "Had just signaled the lead butcher to lower/open the hopper when my hand was crushed by the closing/elevating hopper."⁴

Trident accepted the injury as compensable and began paying Mr. Erpelo benefits. Mr. Erpelo agreed he received disability and medical benefits, which Trident stopped paying only after Trident's employer medical evaluation (EME). Mr. Erpelo conceded at hearing the EME and subsequent controversion had nothing to do with his request for a civil penalty.⁵

Upon relocating to New Jersey in 2011, Mr. Erpelo began treating with George C. Alber, M.D., for his work injury. Mr. Erpelo testified he was dissatisfied with Dr. Alber's

² We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

³ *Erpelo II* at 2, No. 1.

⁴ *Id.*, No. 2.

⁵ *Id.* at 2-3, No. 3.

services and changed his treating physician to John A. Cristini, M.D., in 2012. Dr. Cristini referred Mr. Erpelo to specialist John M. Bednar, M.D. Eventually, Mr. Erpelo saw his primary care provider Peter Kuponiyi, M.D., for high blood pressure issues. Mr. Erpelo testified Dr. Kuponiyi observed his hand issues during the physical examination, talked to him about it, and referred him to specialist Joseph S. Harhay, M.D., for additional treatment. Mr. Erpelo did not see Dr. Kuponiyi for his work injury and Dr. Kuponiyi's referral to a hand specialist was incidental to his high blood pressure examination.⁶

The Board found that Dr. Alber was Mr. Erpelo's first attending physician, and he exercised his one "free" physician change when he changed to Dr. Cristini who made an appropriate referral to Dr. Bednar. Neither Dr. Cristini nor Dr. Bednar referred Mr. Erpelo to Dr. Harhay.⁷

Mr. Erpelo saw Dr. Bednar on several occasions. On February 4, 2013, Mr. Erpelo saw Dr. Bednar at Philadelphia Hand Center for his work injury, who charged him \$155.00.⁸ Mr. Erpelo next saw Dr. Bednar on March 4, 2013, and was again charged \$155.00.⁹ Mr. Erpelo saw Dr. Bednar on October 20, 2014, and was charged \$470.00.¹⁰ On November 10, 2014, Dr. Bednar again treated Mr. Erpelo and charged him \$155.00.¹¹

Mr. Erpelo saw Salvatore Russomano, M.D., at Mid-Atlantic Rehabilitation Associates on referral from Dr. Bednar. Dr. Russomano also provided services for Mr. Erpelo's work injury. Mr. Erpelo testified he paid Dr. Russomano's bill; however, Mr. Erpelo did not provide a bill for Dr. Russomano.¹²

Mr. Erpelo testified he paid all the above-referenced medical bills from his own pocket and wanted reimbursement from Trident. Except for these bills, there are no

⁶ *Erpelo II* at 3, No. 4.

⁷ *Id.*, No. 5.

⁸ *Id.*, No. 6.

⁹ *Id.*, No. 7.

¹⁰ *Id.*, No. 8.

¹¹ *Id.*, No. 9.

¹² *Id.*, No. 10.

work-related medical bills remaining unpaid. Mr. Erpelo admitted he did not provide Trident with a medical mileage transportation log because “he didn’t think of it.”¹³

On June 26, 2014, the Board’s designee gave Mr. Erpelo advice on how to obtain evidence to support his claim.¹⁴

On February 25, 2015, the parties set forth their arguments at a prehearing conference. Mr. Erpelo said his treating physician had referred him to another physician for an examination and treatment. Trident’s representative said it had received no additional medical records from any physician with recommendations for further treatment. The Board’s designee “explained the adjudications process” to him and said:

Designee further verified that once discovery is complete (*i.e.*, once [Mr. Erpelo] has produced/filed his documents supporting the need for further treatment) . . . either party may file an Affidavit of Readiness for Hearing (ARH) form to notify the [Board] that a Hearing is necessary.¹⁵

On January 12, 2017, the Board’s designee told Mr. Erpelo to file his evidence and witness list in a timely manner.¹⁶

Mr. Erpelo testified that on February 16, 2017, Joseph Harhay, M.D., told him he had recurrent carpal tunnel syndrome and needed surgery, which he scheduled for March 24, 2017. Mr. Erpelo wanted Trident to pay for the surgery and any future treatment he needs for his hand. When asked if he provided a medical record from a physician stating his need for recurrent carpal tunnel surgery arose from his work injury surgery, Mr. Erpelo said “no,” but he would obtain such a document from his physician at the next appointment. Mr. Erpelo said his doctor told him the work injury with Trident caused the need for surgery, but did not write it down in a report.¹⁷

Mr. Erpelo attached several medical records to his hearing brief on which he wanted to rely. These records recounted his work injury with Trident. None included a

¹³ *Erpelo II* at 3, No. 11.

¹⁴ *Id.*, No. 12.

¹⁵ *Id.* at 3-4, No. 13.

¹⁶ *Id.* at 4, No. 14.

¹⁷ *Id.*, No. 15.

physician's opinion stating Mr. Erpelo's need for recurrent carpal tunnel surgery arose out of or in the course of his work injury with Trident. None said the work injury was the substantial cause of the need for the additional medical treatment.¹⁸

On February 24, 2017, Trident filed and served Mr. Erpelo's reimbursement requests for his work-related medical expenses and a chart showing Trident's payments. These materials included an inclusive list of all medical bills Trident paid on Mr. Erpelo's behalf, including the provider's name, the service date, and the amounts. Trident paid Dr. Bednar's February 4, 2013, bill for \$310.00 and his March 4, 2014, bill for \$470.00, in February 2015. Trident contended it never received actual bills with appropriate billing codes from Mr. Erpelo for the October and November 2014 doctor visits for which Mr. Erpelo was seeking reimbursement. Trident did not receive these otherwise inadequate "bills" until three weeks prior to hearing, attached to Mr. Erpelo's brief. Trident contended this two and one-half year tardiness violated AS 23.30.097(h), which requires payment only if Trident receives the medical records within 180 days after the medical service date or after the date the provider knew about Mr. Erpelo's claim and its relationship to his employment. Trident contended Mr. Erpelo presented no evidence he paid these bills from his own pocket.

Mr. Erpelo's materials included a comprehensive, hand-written mileage log for medical transportation from 2011 through 2013. Trident's payment chart also showed on September 30, 2013, it paid Mr. Erpelo all medical mileage from 2011 through 2013, which he previously provided on a proper medical transportation log. Trident contended, consistent with Mr. Erpelo's admissions, it had not received any additional medical transportation logs. Recalling an earlier hearing in this case, Trident noted Mr. Erpelo delayed his initial effort to bring his medical benefits and transportation claim to hearing in 2014 because he said he needed additional time to prepare his evidence. Nevertheless, Mr. Erpelo admitted he failed to present additional evidence. Trident contended the

¹⁸ *Erpelo II* at 4, No. 16.

Board's designees at numerous prehearing conferences told Mr. Erpelo what he needed to obtain and how to provide supporting documentary evidence, but he failed to do so.¹⁹

Trident contended there was no written evidence supporting Mr. Erpelo's hearsay allegation that someone at the insurance company gave him permission to change from Dr. Alber to Dr. Cristini. Further, Trident contended Mr. Erpelo failed to provide written notice of his physician change as required by law. It further contended Mr. Erpelo then switched from Drs. Cristini and Bednar to Dr. Kuponiyi, who inappropriately referred him to Dr. Harhay. Thus, Trident contended it could not be liable for treatments or services provided by Dr. Harhay, because he was an excessive change-of-physician.²⁰

Trident further contended a prior Board decision found second independent medical examiner, David W. Gaw, M.D., credible. It contended three physicians, including Dr. Gaw, three years earlier, all agreed Mr. Erpelo needed no further medical care for his work injury. Trident noted recent medical reports Mr. Erpelo had just provided indicated he now needs medical treatment, but no records provided even causal opinions supporting his claim. Mr. Erpelo told Dr. Gaw the numbness and tingling in his wrist had resolved. Trident questioned why Mr. Erpelo now had symptoms in his right hand some three years following Dr. Gaw's examination. Trident contended these new symptoms required supporting medical evidence to establish a presumption in Mr. Erpelo's favor. Further, Trident previously demanded its right to cross-examine Dr. Bednar on his opinions, but Mr. Erpelo never provided him for questioning.²¹

Mr. Erpelo said he had a fair hearing and the interpreter was helpful.²²

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.²³

¹⁹ *Erpelo II* at 4-5, No. 17.

²⁰ *Id.* at 5, No. 18.

²¹ *Id.*, No. 19.

²² *Id.* at 6, No. 20.

²³ AS 23.30.128(b).

Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion.²⁴ "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."²⁵ The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.²⁶ The Board's findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.²⁷

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."²⁸

4. Discussion.

a. Did the Board correctly deny Mr. Erpelo a civil penalty against Trident?

Mr. Erpelo sought a penalty against Trident under AS 23.30.250(a), contending that wording on his ROI was improper and misleading. This statute provides:

A person who (1) knowingly makes a false or misleading statement, representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of workers' compensation insurance premiums; or (4) employs or contracts with a person or firm to coerce or encourage an individual to file a fraudulent compensation claim is civilly liable to a person adversely affected

²⁴ See, e.g., *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

²⁵ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

²⁶ AS 23.30.122.

²⁷ AS 23.30.128(b); AS 23.30.122.

²⁸ AS 23.30.128(b).

by the conduct, is guilty of theft by deception as defined in AS 11.46.180, and may be punished as provided by AS 11.46.120 – 11.46.150.

Mr. Erpelo stated the wording on the ROI made it appear the injury was his fault when it was not. At hearing, Trident agreed to change the wording and the parties agreed on amended language, to wit, "Had just signaled the lead butcher to lower/open the hopper when my hand was crushed by the closing/elevating hopper."

Mr. Erpelo testified at hearing that Trident accepted his ROI and paid time loss and medical benefits. He further agreed his benefits were controverted only after Trident conducted an EME and the language on the ROI did not precipitate the controversion.²⁹ He nonetheless contended that the wording on the ROI was misleading and, therefore, illegal.

By its language, AS 23.30.250(a) requires first a "knowing" misrepresentation related to a workers' compensation benefit. While Mr. Erpelo sincerely believed the language was incorrect, his belief is not evidence Trident "knowingly" or deliberately misrepresented the facts of his injury. Mr. Erpelo submitted no additional evidence that Trident knowingly misstated the facts of his injury on the ROI.

Secondly, the statute requires the person making the misrepresentation to "knowingly" do so for the purpose of affecting payment of benefits. Mr. Erpelo testified Trident accepted his claim and paid his benefits until its EME physician, George P. Nanos, M.D., on January 12, 2013, stated Mr. Erpelo was medically stable, with no need for further curative medical treatment, and had a ratable permanent partial impairment.³⁰ By his own testimony, Mr. Erpelo demonstrated that, even if the statement on the ROI was incorrect and knowingly made, the misstatement did not affect the payment of benefits to him or on his behalf.

The other two subsections of this statute do not apply to Mr. Erpelo. That is, subsection (3) requires a knowing misclassification of employees for purpose of workers'

²⁹ *Erpelo II* at 2-3, No. 3.

³⁰ *Erpelo I* at 3, No. 3.

compensation insurance premiums. Subsection (4) requires encouragement of a person to file a fraudulent workers' compensation claim.

The Alaska Supreme Court (Court) has addressed AS 23.30.250(b) with regard to claims by employers against employees. In *ARCTEC Services v. Cummings*, the Court construed the language "knowingly" in .250(b) and stated "we conclude that 'knowingly' in AS 23.30.250(b) must have the same meaning that it has in subsection (a), which in turn is the same meaning that it has in criminal law."³¹ The Court noted the standard is a subjective standard and cited to language in AS 11.81.900(a)(2) which provides "[a] person acts knowingly with respect to conduct . . . when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence"³² Mr. Erpelo presented no evidence to support a finding that Trident either subjectively or objectively used language on the ROI with any intent to deprive Mr. Erpelo of his entitlement to workers' compensation benefits. Pursuant to this standard, Trident did not "knowingly" misrepresent the nature of Mr. Erpelo's work accident.

Both the specific language in AS 23.30.250(a) and the substantial evidence in the record support the Board's conclusion that no civil penalty was due or owing to Mr. Erpelo. The language on the ROI, which Mr. Erpelo asserts was misleading or incorrect, did not deprive him of any benefits to which he was entitled. By his own testimony, he received benefits from Trident. Moreover, at hearing the language on the ROI was amended to read as Mr. Erpelo requested to reflect his understanding as to how the accident occurred. Since no benefits due to Mr. Erpelo were withheld as a result of the language on the ROI, the Board's finding that no penalty is due is affirmed.

³¹ *ARCTEC Services v. Cummings*, 295 P.3d 916, 923 (Alaska 2013).

³² *Cummings*, 295 P.3d 922-923.

b. Did the Board properly find Mr. Erpelo is not entitled to additional medical benefits?

The other issue on appeal to the Commission is whether the Board properly denied Mr. Erpelo additional medical benefits, in particular repayment for out of pocket payments to Dr. Bednar and payment for proposed carpal tunnel surgery.

As to the claim for repayment of out of pocket payments, Mr. Erpelo needed to provide evidence that he, and not Trident, paid Dr. Bednar's bills. The Board found his testimony that he paid for the visits on February 4, 2013, and March 4, 2014, to be credible, based on the attachment of medical billing invoices to his hearing brief before the Board. This evidence attaches the presumption of compensability in AS 23.30.120. Once the presumption is raised, Trident was obligated to rebut the evidence with substantial evidence. Trident submitted a medical payment spreadsheet documenting the medical bills it had paid. This evidence rebutted the presumption and the burden returned to Mr. Erpelo to show by a preponderance of the evidence Trident owed him reimbursement.

The Board found Mr. Erpelo to be credible that he paid these bills himself and found Trident to be credible that it has also paid these bills. The evidence thus showed that Dr. Bednar had been paid twice for the same visits. Thus, the proper recourse was for Mr. Erpelo to seek a refund from Dr. Bednar. Mr. Erpelo presented no evidence he had sought repayment from Dr. Bednar or that Dr. Bednar had made repayment to Trident for the double payments. The Board advised Mr. Erpelo to show Dr. Bednar Trident's spreadsheet and request return of the overpayment to him. The substantial evidence in the record supports the Board's finding that Trident is not responsible for repayment to Mr. Erpelo since the substantial evidence is that Trident already paid for these visits by paying Dr. Bednar directly.

Mr. Erpelo also sought reimbursement for payments to Dr. Bednar for a visit on November 10, 2014, and for a bill from Dr. Russomano. However, Mr. Erpelo did not present evidence of either the invoice or proof of his payment for either of these visits. As the Board found, without appropriate billing statements from these providers Mr. Erpelo has no evidence to support his contention and, thus, the presumption of

compensability is not attached. He also was unable to prove his claim for repayment of the cost of these visits by a preponderance of the evidence, since he had no evidence of the cost of these visits nor the fact that the doctors had not been paid for these visits.

Similarly, Mr. Erpelo sought reimbursement for his mileage for attending medical appointments. However, Mr. Erpelo testified that he had not thought about preparing a mileage log and, therefore, had not submitted a proper request to Trident. Without a medical travel log, Trident could not pay for the alleged mileage. There simply was no evidence upon which to base a payment for medical mileage. The evidence in the record supports the Board's denial of Mr. Erpelo's request for mileage reimbursement.

Mr. Erpelo also sought an order requiring Trident to pay for pending carpal tunnel surgery. First, Mr. Erpelo needed to raise the presumption this surgery was necessitated by his work injury with Trident. Mr. Erpelo had not even a modicum of evidence the work injury was the substantial cause for pending surgery. His testimony that his doctor, Dr. Harhay, told him the surgery was the result of the work injury is insufficient. First, as the Board noted, this testimony is hearsay for which no exemption for hearsay evidence was identified. Direct evidence, which Mr. Erpelo should have been able to obtain with ease, would be a doctor's written report stating the work injury was the substantial cause of the need for the surgery. Mr. Erpelo did not provide the Board with this evidence. Thus, he did not raise the presumption of compensability.

However, even if Mr. Erpelo had been able to present such a written report, there is a further problem. That is, Dr. Harhay is an unauthorized change in treating physicians. AS 23.30.095(a) allows an injured worker the right to make one change in treating physicians without the need for approval by the employer. Here, Mr. Erpelo originally treated with Dr. Alber and then he changed to Dr. Cristini, who referred Mr. Erpelo to Dr. Bednar. This change constituted his legally allowed change. When Mr. Erpelo saw his primary care provider, Dr. Kuponyi, for treatment of high blood pressure, Dr. Kuponyi referred him to Dr. Harhay to look at his wrist problems. While Mr. Erpelo had every right to treat with Dr. Kuponyi, Mr. Erpelo did not have a legal right to seek treatment for the work injury (the hand injury) with Dr. Harhay, even on referral from Dr. Kuponyi. Dr. Kuponyi was not in a position to make such a referral under AS 23.30.095. If

Mr. Erpelo wished to treat with Dr. Harhay, he needed a referral from either Dr. Cristini, who originally referred Mr. Erpelo to Dr. Bednar, or a referral from Dr. Bednar to Dr. Harhay. Such documentation of referrals provides a clean line in compliance with the mandate in AS 23.30.095.

The substantial evidence before the Board supports the Board's finding that, at this point, Trident is not liable for the carpal tunnel surgery. If Mr. Erpelo were to obtain proper documentation showing a link between the need for carpal tunnel surgery and his work injury, he would be entitled to file a new claim for benefits and seek a hearing on compensability. At this point, based on the evidence in the record, the Board's decision to deny the request for additional medical benefits is affirmed.

5. Conclusion.

The Commission AFFIRMS the Board's decision that Mr. Erpelo is not entitled to a civil penalty against Trident and its denial of his request for additional medical benefits.

Date: 4 April 2018 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Michael J. Notar, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

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

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 247 issued in the matter of *Pedro Erpelo vs. Trident Seafoods and Liberty Insurance Corporation*, AWCAC Appeal No. 17-009, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on April 4, 2018.

Date: April 5, 2018



Signed

K. Morrison, Appeals Commission Clerk