Alaska Workers' Compensation Appeals Commission

Dr. Edward Barrington,
Appellant,

vs.

Alaska Communications Systems Group, Inc., Liberty Mutual Insurance Co., and Noelle E. Williams,
Appellees.

Final Decision
February 12, 2007 Decision No. 033

AWCAC Appeal No. 06-015
AWCB Decision No. 06-0080
AWCB Case No. 200306612

Appeal from the final decision of the Alaska Workers' Compensation Board, Decision No. 06-0080 issued April 14, 2006, and on reconsideration Decision No. 06-0116, issued May 11, 2006, by the south-central panel at Anchorage, Darryl Jacquot, Chairman, and Stephen T. Hagedorn, Member for Industry.

Appearances: William J. Soule, Law Office of William J. Soule, for appellant Edward Barrington, D.C.; Jeffrey D. Holloway, Holmes Weddle & Barcott, P.C., for appellees Alaska Communications Systems Group, Inc., and Liberty Mutual Ins. Co.; Robert Rehbock, Rehbock & Rehbock, for appellee Noelle E. Williams.[1]

Commissioners: Philip Ulmer, Jim Robison, and Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

Noelle Williams settled her workers' compensation claim against her employer, Alaska Communications Systems Group, Inc., in an agreement approved by the Alaska Workers' Compensation Board. The settlement resolved "all disputes among the parties with respect to medical and related transportation costs, compensation rate, compensation for disability . . . penalties, interest, reemployment benefits, and AS 23.30.041(k) benefits." After the settlement was approved, Edward Barrington,

[1] Counsel for Noelle Williams, also known as Noelle Marshall, did not participate in this appeal.

D.C., filed a claim against the employer for medical costs associated with an impairment examination and neurological testing. The board denied the claim because the employer's liability was "contractually waived" in the settlement agreement. Dr. Barrington appealed, asserting he was denied due process of law because payment for his services was waived in a board-approved settlement agreement to which he was not a party. We conclude that Alaska's workers' compensation laws establish employer liability for injury to the employee, and that the injured employee has the right to discharge the employer's liability for the injury without first joining as parties all persons who may have an interest in the outcome in the employee's claim. Because Dr. Barrington's common law right to a collection action against the employee was not waived, or barred by the workers' compensation act, he was not denied due process. For the reasons set out below, we affirm the board's decision.

Factual background.

Noelle Williams, a collections representative for Alaska Communications Systems Group (ACSG), reported an occupational injury to her left arm, elbow, and hand on May 1, 2003.[2] ACSG controverted payment of medical benefits (chiropractic care) on December 4, 2003.[3] On February 17, 2004, the employer controverted all further "active treatment."[4] Williams filed a claim for permanent partial impairment compensation and medical benefits on May 4, 2004.[5] ACSG filed an answer[6] and formal controversion notice.[7] Among other assertions, ACSG denied that Williams had any permanent impairment attributable to a work injury based on an employer medical

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[2] R. 0001.

[3] R. 0003.

[4] R. 0007.

[5] R. 0019-20.

[6] R. 0021-22. 8 AAC 45.050(c) requires an answer be filed within 20 days of service of a claim. An amended answer was filed August 25, 2004. R. 0024.

[7] R. 0009.

examiner report that Williams had no permanent impairment.[8] After stipulating to a board ordered second independent medical examination under AS 23.30.095(k),[9] the parties proceeded toward hearing.[10] In order to establish she had a permanent partial impairment, Williams obtained a referral from her physician for an impairment examination.[11] Dr. Barrington examined her November 18, 2004.[12] He rated her impairment as a result of the shoulder injury at 17 percent of the whole person.[13] Dr. Barrington also performed limited nerve conduction studies on November 23, 2004.[14]

The board-appointed medical examiner's report was not favorable to Williams.[15] At a pre-hearing conference on March 17, 2005, Williams and ACSG agreed to a hearing date in August 2005, and also agreed to discuss settlement.[16] Shortly afterward, Williams settled her claim for compensation with ACSG.[17] The agreement provided that in return for a full release of liability for all past and future benefits under the workers'

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[8] R. 0009; William S. T. Mayhall, M.D., February 6, 2004, R. 0454.

[9] R. 0791 (using the abbreviation "SIME").

[10] An affidavit of readiness for hearing was filed January 14, 2005. R. 0085.

[11] R. 0681.

[12] R. 0682.

[13] R. 0684.

[14] R. 0685.

[15] R. 0758-765. The report by Alan Roth, M.D., was dated December 28, 2004. Dr. Roth reported Williams had no objective evidence of carpal tunnel syndrome, ulnar nerve entrapment, impingement syndrome (shoulder condition marked by compression of blood vessels in swollen muscle tissue and resulting fraying of weakened muscles), rotator cuff injury, or cervical radiculopathy, R. 0764. He reported Williams was medically stable, could return to work, required no further chiropractic treatment, and had no measurable permanent impairment. R. 0765-766.

[16] R. 0797.

[17] R. 0115-123. Williams signed the agreement on April 11, 2005.

compensation act, ACSG would pay Williams $7,500.[18] The agreement also provided that Williams would indemnify ACSG against any claim for medical benefits against ACSG by medical providers.[19] The board approved the agreement on May 6, 2005.[20]

Board proceedings on Barrington's claim.

On July 5, 2005, Dr. Barrington filed a workers' compensation claim for $950 in medical benefits, alleging "this patient was legally referred to our office and due to a controversion our PPI [permanent partial impairment] exam was denied and not paid."[21] An answer was filed July 7, 2005[22] with a copy of the formal controversion of the claim (mistakenly dated February 17, 2004) on the grounds that the claim was settled by agreement.[23] At a pre-hearing conference September 7, 2005, Williams's counsel stated the debt to Dr. Barrington had been discharged in Williams's bankruptcy, which she filed after the settlement was approved; Dr. Barrington stated that his claim was against the employer, ACSG.[24] A hearing was scheduled for March 22, 2006 "on the issue of Dr. Barrington's medical costs in the amount of $1,980."[25]

At the board hearing, Dr. Barrington stated he performed a "test and examination of the patient" and that he was not requesting payment for treatment.[26]

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[18] R. 0119.

[19] The agreement states: "The employee agrees to indemnify and hold harmless the employer against any claim or demand by a medical care provider for treatment related to her alleged May 1, 2003, injury that has not already been paid for by the employer." R. 0119.

[20] R. 0123.

[21] R. 0174-75. Dr. Barrington filed an amended claim on November 7, 2005 increasing the amount of claimed medical benefits to $1,980. R. 0192-93.

[22] R. 0178.

[23] R. 0182.

[24] R. 0825.

[25] Pre-hearing conference summary dated December 23, 2005. R. 0835-36.

[26] Tr. 5.

He knew Williams was "controverted for treatment," but it was his understanding that "testing was not controverted, just treatment."[27] When Williams settled her claim, he said, "I had not really had an opportunity at that time to – to go through the process to see about getting payment for my services."[28] He also testified:

> I had talked to the patient's attorney, Mr. Rehbock, who had indicated to me that my claim was going to be included with Ms. Marshall's claim, and that, I think, [was] the reason I hesitated a month or two in – in trying to open my own claim for – for payment on this. As far as the bankruptcy is – is concerned, I was aware that she had filed bankruptcy but in my – in my experience, usually my bills are not paid on a bankruptcy hearing so I – I admit I did not pursue that avenue.[29]

The only evidence Dr. Barrington introduced at the hearing was his testimony. He presented no evidence on the relationship between the injury to Williams and the employment by ACSG.

ACSG argued its liability for Dr. Barrington's services was discharged in the settlement approved by the board on May 6, 2005.[30] Although Williams and her husband filed for bankruptcy protection on May 26, 2005, Dr. Barrington had other avenues to procure payment of his services, including his remedies in federal bankruptcy court.[31] He failed to pursue them, so the debt owed for his services was extinguished September 9, 2005, by the federal bankruptcy court.[32] It would be

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[27] Tr. 5-6. Dr. Barrington may have been suggesting that because chiropractic *treatment* was controverted, but not chiropractic impairment *examination and testing*, his services had not been controverted and therefore, he was entitled to payment.

[28] Tr. 6.

[29] Tr. 12.

[30] Tr. 9.

[31] Tr. 9.

[32] Tr. 10.

contrary to federal bankruptcy law for the board to issue an order reestablishing that debt.[33] Finally, ACSG argued that the settlement was sufficient for Williams to satisfy Dr. Barrington's debt, so it was Williams's responsibility to pay for his services.[34]

The board's original decision.

In its summary of the evidence, the board reviewed the "essential facts," incorporating those recited in the settlement agreement approved by the board.[35] The board noted that the employer had controverted "any additional medical treatment" and "asserted compensability and notice defenses."[36] The board described the settlement agreement and noted that the proceeds of the settlement had been listed in the bankruptcy filing as an asset and the chiropractic medical care as an unsecured creditor or liability.[37] Finally, the board briefly described Dr. Barrington's claims.[38]

The board reasoned that its ability to adjudicate disputes was limited to "explicit adjudicatory authority" granted by statute.[39] Equitable powers were granted "only as necessarily incident" to exercise of statutory authority.[40] The board then stated:

> We find Dr. Barrington is requesting the employer/insurer to pay for services that it and the employee contractually waived in the May 6, 2005 C&R. Dr. Barrington was not a party to the action until he filed his July 2005 claim. We find Dr. Barrington's recourse is within the civil courts against Ms. Williams. Unfortunately for Dr. Barrington, it appears liabilities may have been discharged in bankruptcy. We conclude that Dr.

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33 Tr. 10.

34 Tr. 11.

35 *Noelle E. Williams v. Alaska Commc'ns Systems Group, Inc.,* AWCB Dec. No. 06-0080, 2 (April 14, 2006); R. 0876.

36 *Id.*

37 AWCB Dec. No. 06-0080 at 3; R. 0877.

38 *Id.*

39 AWCB Dec. No. 06-080 at 4; R.0878.

40 *Id.*

> Barrington's claim, in this forum, must be denied and dismissed.[41]

The board's decision on reconsideration.

Dr. Barrington filed a timely petition for reconsideration of the board's order.[42] He argued that under *Sherrod v. Municipality of Anchorage,*[43] he should have been joined as a real party in interest before the settlement because he had a right to relief based on his provision of services that were not controverted prior to his providing the services.[44] Williams responded to the petition by stating that the settlement could not be held to discharge the employer's liability to Dr. Barrington.[45] ACSG opposed the petition, arguing that Dr. Barrington misconceived *Sherrod*. 8 AAC 45.040 provides a process for an original party to join a "real party in interest;" but neither the regulation nor *Sherrod* requires the board to seek out all potentially interested parties or automatically join all potentially interested parties.[46] The employee sought medical benefits in her claim that included Dr. Barrington's expenses and, had the employee won, the board may have ordered the employer to pay Dr. Barrington's bill.[47] ACSG also argued that Williams position is "entirely disingenuous" as she negotiated an agreement knowingly waiving all medical benefits and allocating her settlement monies toward the payment of her past medical bills.[48] Allowing Dr. Barrington's claim to go forward would take away the finality of settlements required by AS 23.30.012.[49]

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41 *Id.*

42 R. 0881-87.

43 803 P.2d 874 (Alaska 1990).

44 R. 0886.

45 R. 0891.

46 R. 0896-97.

47 R. 0898-99.

48 R. 0900.

49 R. 0900.

The board described its original decision as follows:

> We found that Dr. Barrington did not become a party until after he filed his claim, and by then, the employee had agreed to hold the employer harmless against any claims for past medicals pursuant to the terms of the C&R she entered into on May 6, 2005. We advised Dr. Barrington that his legal remedy is a civil one, and would have to be taken individually against the employee in civil court. We denied and dismissed Dr. Barrington's claim in our April 14, 2006 decision and order.[50]

After reviewing its authority to reconsider or modify its decisions, the board declined to reconsider its original decision. The board went on to state:

> We find the totality of the record supports our conclusion in Williams I, that the employee specifically contemplated that she had existing medical bills and contractually agreed to indemnify the employer/insurer of its obligations for any outstanding treatment or evaluation. The employee even listed her outstanding medical bills as a liability in her bankruptcy filing. Dr. Barrington now states that he knew the care or treatment he provided was controverted yet took no affirmative action to protect his interest by filing his claim in a timely fashion. We take notice that Dr. Barrington is not a stranger to our forum. We affirm our prior decision that Dr. Barrington's remedies are against the employee individually, which is a civil court matter, and not properly before us.[51]

Dr. Barrington appeals, arguing that his procedural due process rights under the Alaska Constitution are violated by the board's failure to allow him an opportunity to prove his claim, that the statute and case law give him the right to file an independent claim which is not barred by Williams's settlement agreement, and the board erred in finding his claim was not timely.[52]

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[50] *Noelle E. Williams v. Alaska Commc'ns Systems Group, Inc.,* AWCB Dec. No. 06-0116, 3 (May 11, 2006); R. 0904.

[51] AWCB Dec. No. 06-0118 at 7; R. 0908.

[52] The basis of this argument is the board's statement that Dr. Barrington "knew the care or evaluations he provided were controverted yet took no affirmative action to protect his interest by filing his claim in a timely fashion." AWCB Dec. No. 06-0116 at 7.

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.[53] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[54] The commission exercises its independent judgment on questions of law and procedure.[55] If we must exercise our independent judgment to interpret the law, where it has not been addressed by the Alaska Supreme Court, we draw upon the specialized knowledge and experience of this commission in workers' compensation,[56] and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[57]

A. The employer's liability for workers' compensation is to the employee for injury to the employee; to the employee's beneficiaries for the employee's death.

We begin our analysis of this case with the founding principle of workers' compensation law. Workers' compensation represents a social bargain between workers and their employers, in which workers cede the right to sue employers for damages at law in the event of injury or death in the course of employment in return for certain payment of statutory compensation and provision of medical care; employers cede the right to defend an action on the basis that an employer was not at fault in bringing about the injury in return for limiting employer liability to paying statutory compensation and medical care. Society supports the bargain by paying the increased

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[53] AS 23.30.128(b).

[54] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[55] AS 23.30.128(b).

[56] *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).

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

cost of goods and services reflecting the cost of insurance for the liability to pay statutory compensation and medical care.

It is important to recall that this principle was not reflected in early forms of workers' compensation. In the 1910 New York workers' compensation law found unconstitutional in *Ives v. South Buffalo Railway Co.,*[58] a worker's right to bring an action for damages at law was not foreclosed unless he elected to receive compensation benefits.[59] Thus, an employer was compelled by law to secure compensation, but the employee was not compelled to accept it, and could choose to maintain an action for damages after the injury.[60] Following the *Ives* decision, states adopted statutes that provided limited election by both parties.[61] Wisconsin, in another early workers' compensation law upheld as constitutional, provided that an employee could elect out of the workers' compensation system, but only after giving notice to the employer before the injury that was the basis of his lawsuit.[62] The Iowa legislature adopted a workers' compensation law that conclusively presumed an agreement "on the part of one to provide, secure, and pay, and on the part of the other to accept compensation" absence proper notice of rejection, and stripped the employer who

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[58] 201 N.Y. 271, 94 N.E. 431 (1911).

[59] L. 1910, ch. 674 § 218.

[60] Montana also found a coal miners' compensation law unconstitutional on similar grounds. *Cunningham v. Northwestern Improvement Co.,* 119 P. 554 (Mont. 1911).

[61] This was not the only reaction. California, (Cal. Const. of 1879, art. 20, § 21, added Oct. 10, 1911), Ohio, (Ohio Const. art. 2, § 35, adopted Sept. 3, 1912), Vermont, (Vermont Const. ch. 2, § 70, adopted as amendment 35, Apr. 8, 1913), New York, (N.Y. Const. art. I, § 19, adopted Nov. 2, 1913), and Wyoming (Wyo. Const. art 10, § 4, adopted Nov. 3, 1914) amended their state constitutions to permit workers' compensation laws to be enacted.

[62] L. 1911, c. 50, § 2394-8(2). The decision upholding the constitutionality of the Wisconsin Workmen's Compensation Law of 1911 is *Bourgnis v. Falk Co.,* 147 Wis. 327, 133 N.W. 209 (1911).

chose not to adopt the workers' compensation bargain of certain defenses at law.[63] Washington, by adopting a compulsory state fund for payment of compensation benefits in hazardous industries, rested the constitutionality of its workers' compensation law on a different basis, summarily distinguishing itself from New York.[64] However, by 1914, New York had adopted a compulsory workers' compensation law that provided the *quid pro quo* recognized today as an essential feature of workers' compensation.[65]

In its first review of its constitutionality, the New York Court of Appeals observed that the 1914 act was essentially and fundamentally different from that declared unconstitutional in *Ives:*

> This act protects both employer and employee, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties and delays of litigation in all cases and from the certainty of defeat if unable to establish a case of actionable negligence. Both acts are said to have been based on the proposition that the risk of accidental injuries should be borne by the business and that loss should not fall on the injured employee and his dependents, who are unable to bear it or to protect themselves against it. That [*Ives*] act made no attempt to distribute the burden, but subjected the employer to a suit for damages. This act does in fact as well as in theory distribute the burden equitably over the industries affected. It allows compensation . . . it insures the prompt receipt by the injured employee or his dependents of a certain sum undiminished by the expenses of litigation. The two acts are, therefore, so plainly

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[63] *Hunter v. Colfax Consol. Co.,* 175 Iowa 245, 154 N.W. 1037, 1068-1069 (1915). This opinion discusses as well workers' compensation laws, and decisions finding them constitutional, in Massachusetts, Ohio, and Illinois.

[64] *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156, 212, 117 P.2d 1101, 1120 (1911) ("The act the court there had in review is dissimilar in many respects to the act before us, and is perhaps less easily defended on economic grounds.").

[65] N.Y. L. 1914, ch. 41.

> dissimilar that the decision in the Ives case is not controlling in this.[66]

In return for paying for compulsory insurance, the employers' payment of "the required premiums exempts them from further liability."[67] In short, workers' compensation is based on an agreement between employers on one side, and the employees (for themselves and their dependents) on the other, and the *quid pro quo* of the agreement turns on the employee ceding an action for damages at the common law on account of accidental injury or death in return for compensation.[68]

AS 23.30.055 embodies Alaska's version of this bargain:

> The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and fellow employee *to the employee*, the employee's legal representative, husband or wife, parents, dependents, next of kin, *and anyone otherwise entitled to recover damages from the employer* or fellow employee at law . . . on account of the injury or death. (*Emphasis added.)*

The liability of an employer is prescribed in AS 23.30.045 as "An employer is liable for and shall secure the payment *to the employees* of the compensation payable under . . . 23.30.095, 23.30.145, and 23.30.180 – 23.30.215." The liability of the employer is to the injured employee. In short, we view this bargain as the foundation

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[66] *Jensen v. Southern Pac. Co.*, 215 N.Y. 514, 524 (1915), reversed on other grounds by *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524 (1917). The same New York statute found was constitutional in *New York Central RR Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L.Ed. 667 (1917) ("Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death, to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.").

[67] 215 N.Y. at 525.

[68] *See, Suave v. Winfree,* 907 P.2d 7, 11 (Alaska 1995), *quoting* 2 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 72.22, at 14-152 (1994) ("The reason for the employer's immunity is the *quid pro quo* by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common-law verdicts.")

of workers' compensation benefits. It is this foundational bargain that is part of every contract of an employee's hire.[69] It is enforceable on employers by employees (and, in event of death, their statutory beneficiaries) because the employees ceded their common law right to sue in tort and by employers against employees because only employers ceded their right to defend against an action by the employee or his beneficiaries at the common law.[70]

B. *The employee may waive the employer's liability to the employee on account of his or her injury in a settlement agreement.*

AS 23.30.012 provides "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." An agreement "discharges the liability of the employer" under AS 23.30. The employee's power to enter into a settlement is circumscribed, reflecting the legislature's judgment that in certain cases, the board may require a showing that the agreement is in the best interests of the employee.[71]

The phrase "the employee, or the beneficiary or beneficiaries, as the case may be," describes who may discharge the liability of the employer: either "the employee, or the . . . beneficiaries, *as the case may be."* If the case is that there is no employee to discharge the liability, as when the employee has died or is presumed dead, the

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[69] AS 23.30.020. "This chapter constitutes part of every contract of hire . . . every contract of hire shall be construed as an agreement on the part of the employer to pay and the employee to accept compensation . . . in this chapter for all personal injuries sustained." See also, *M-K Rivers v. Schleifman*, 599 P.2d 132 (Alaska 1979).

[70] Employees did not give up their right to bring other actions against employers, as, for example, in *Reust v. Alaska Petroleum Contractors, Inc.,* 127 P.3d 807, 819-820 (Alaska 2005), *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 431 n. 3 (Alaska 2004); *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 917 (Alaska 1999); *Sauve v. Winfree*, 907 P.2d 7, 12 (Alaska 1995).

[71] *Kaiser v. Royal Ins. Co. of Am*. 89 P.3d 740 (Alaska 2004); *see also*, § 10 ch 10 FSSLA 2005 (amending AS 23.30.012 to require board approval of settlements when the employee is not represented by an Alaskan attorney, is a minor or incompetent, or when medical benefits are waived).

beneficiary of the employee (the recipient of death benefits) may do so. If the employee is alive, the employee (or his guardian) may discharge the liability of the employer. The word "or" is disjunctive; either one *or* the other is able to discharge liability – not both.[72]

This construction parallels the fundamental bargain of workers' compensation. Liability of the employer for compensation flows from the waiver of personal injury liability by the employee. Only the employee could enter into a settlement of the employee's common law action for negligence against the employer, only the employee may settle a workers' compensation claim that exists in lieu of the common law liability. A mere creditor of the employee has no right to waive – or enforce – the employer's liability for compensation without the employee's participation, just as he or she could not have the same parallel action at common law against the employer.[73]

The relationship between a physician and an employee is one of contract. Although the contract is granted special protection against interference,[74] it is not one which gives the physician an assignment of or lien on the employee's benefits under the workers' compensation law. Our statute includes no medical lien provision[75] and an employee's assignment of his or her compensation or benefits is invalid as a matter of law.[76] It is the employee who is entitled to medical benefits; the means by which the

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[72] We note that a similar disjunctive is used in AS 23.30.030(3): "As between the insurer and the employee, *or the employee's beneficiaries,* notice to or knowledge of the occurrence of the injury on the part of the insured employer is notice or knowledge on the part of the insurer . . . ." (emphasis added).

[73] See, 09.55.580(c)(1) describing the rights of "beneficiaries" of the deceased in an action for wrongful death. As used in the context of the workers' compensation act, we interpret "beneficiary" to mean a person entitled to death benefits under AS 23.30.215 as a result of their relationship to the deceased employee.

[74] AS 23.30.095(i); *Kaiser v. Royal Ins. Co. of America*, 89 P.3d 740, 742 n. 3 (Alaska 2004).

[75] See note 79 below.

employer furnishes the medical treatment is by paying the *employee's* bills for medical treatment[77] so that the employee need not do so.[78]

C. Dr. Barrington is not a beneficiary of the employee to whom the employer is directly liable for compensation or benefits on account of the employee's injury or death.

Dr. Barrington argues that he is a "beneficiary" under AS 23.30.012 because the employer is obligated to pay the bills he submits under AS 23.30.097(d). We do not agree with this interpretation of the term "beneficiary." The obligation to pay the employee's bills is the means by which the employer's obligation to furnish medical treatment to employee is satisfied. It does not create a right in the payee to be a beneficiary of a workers' compensation claimant. In the case of medical providers, the statute provides that payment is required to the provider *if* the employer is liable to the employee. Such obligation to pay is (1) a convenience to the employee who is not required to pay and wait for reimbursement and (2) a means of enforcing AS 23.30.097(f). The *benefit* is the medical treatment, and the medical treatment belongs to the employee. The employee has the right to enforce or discharge his or her entitlement to it.[79]

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[76] AS 23.30.160(a). *Compare Wichman v. Benner,* 948 P.2d 484, 487 (Alaska 1997); *Croxton v. Crowley Maritime Corp.*, 758 P.2d 97, 98 (Alaska 1988); *Deal v. Kearney*, 758 P.2d 1353, 1356 (Alaska 1988); *Morris v. Morris*, 908 P.2d 425 (Alaska 1995) (federal workers' compensation benefits assignable in contract).

[77] AS 23.30.097(d).

[78] AS 23.30.097(f).

[79] Hospitals and physicians have a statutory lien on any recovery by a patient who suffers traumatic injury, excepting workers' compensation injuries:

> AS 34.35.450 Hospital's, physician's, and nurse's lien. (a) An operator of a hospital in the state, a licensed special nurse in a hospital in the state, or a physician who furnishes service to a person who has a traumatic injury has a lien upon any sum awarded to the injured person or the personal representative of the injured person by judgment or obtained by a settlement or compromise to the extent of the amount due the hospital, nurse, or physician for the reasonable value of the service furnished

Unlike employees, medical providers are not compelled to accept the workers' compensation bargain with employers.[80] Dr. Barrington is not compelled to provide services to employees, employers, or the board, although, if he does, his services may be reasonably regulated by the board.[81] There is no *quid pro quo* between the employer and Dr. Barrington, nor any surrender of common law rights by medical providers against the employer or the employee.[82] Therefore, he is not the

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> before the date of judgment, settlement, or compromise, together with costs and reasonable attorney fees that the court allows, incurred in the enforcement of the lien. AS 34.35.450 -- 34.35.480 do not apply to a claim, right of action, or money accruing under AS 23.30 (Workers' Compensation Act).
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> (b) When the person receiving hospitalization has a contract providing for indemnity or compensation for the sum incurred for hospitalization, the hospital has a lien upon the amount payable under the contract. The party obligated to make reimbursement under the contract may pay the sum due under it directly to the hospital, and this payment is a full release of the party making the payment under the contract in the amount of the payment.

Thus, Alaska law protects the employee's recovery from settlement of workers' compensation claims from liens by physicians or hospitals. *See also,* AS 23.30.160(b), "Benefits payable under this chapter are exempt from levy to enforce the collection of a debt as provided in AS 09.38 (exemptions)." The decision to protect workers' compensation settlements from medical liens is a policy judgment of the legislature. It balances the obligation of the employer or its insurer to pay the employee's medical treatment bills within 30 days on uncontroverted claims (assuring medical providers quicker payment in *most* cases than medical providers would receive if forced to wait for payment of a lien on a judgment or settlement in *all* workers' compensation cases) against the right of the employee to control the terms of settlement of the employees' claim.

[80] Dr. Barrington points to no statutory duty he owes to treat workers' compensation claimants as a class of injured patients.

[81] *Chiropractors for Justice v. State*, 895 P.2d 962, 969 (Alaska 1995) (Regulation does not interfere in the physician-patient relationship; it "merely prescribes the procedures under which a physician may seek payment under the Act.")

[82] The Alaska Workers' Compensation Act distinguishes between medical providers and attorneys who represent employees in workers' compensation claims. Medical providers may not collect payment from an employee directly while the

"beneficiary" to whom the employer owes the liability that was exchanged for yielding a common law action for damages. In this case the employee discharged the employer's liability in her settlement.

D. Due process did not require the employee to join Dr. Barrington as a real party in interest in her claim for compensation before it was dismissed by board decision or settlement.

Dr. Barrington had a financial interest in the outcome of the employee's claim, in that he anticipated that his services to the employee would be paid if the employee's claim was successful. But, mere financial interest as a creditor does not give the medical provider the legal right to pursue the employee's claim for medical benefits against the employer once the employee settled her claim and released the employer from liability.

Dr. Barrington claims he was a party in interest before he filed his claim. We disagree. A party in interest is the person in whose interest the claim is brought; it is not any person who has an interest in the outcome of the case. The employee was the party in interest; she pursued her claim in her own name. She had the legal right to dispose of her claim against the employer by releasing the employer from all liability.

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treatment is not controverted (or a controverted claim has not been decided by the board), AS 23.30.097(f); but they have not been deprived of their common law or contractual rights to payment of their services. On the other hand, attorneys are subject to criminal penalty if they receive a fee for services except as approved by the board. AS 23.30.260. An attorney's payment of fees by the employer depends on the board's decision in the case and the board's assessment of the degree of his or her success. Medical providers are not subject to the same assessment. If the claim is not controverted, but the employee's attorney has performed "bona fide legal services" the board *may* direct that the employee's attorney may be paid out of the compensation awarded. AS 23.30.145(a). This provision for payment by the employee "out of the compensation awarded" is rarely exercised. Therefore, the attorney who is not successful, or whose bona fide services are performed in an uncontroverted claim, risks not being able to collect payment from the person to whom he or she provided services. In contrast, a medical provider retains his or her common law and contractual rights at law against the patient to whom he provided services.

The Alaska Rules of Civil Procedure require an action be prosecuted in the name of the "real party in interest" because it is the defendant's right to require disclosure of the person who has the legal interest sufficient to dispose of the claim to appear and be named.[83] In workers' compensation matters, the claimant or defendant likewise may require the real party in interest, whose interest is based on a contract with and for the benefit of the employee, to appear and join the claimant in prosecuting the claim, or risk that his or her recovery will be insufficient.

Dr. Barrington has confused the concept of "party in interest" with the concept of joinder of interested parties. 8 AAC 45.040 provides the board's rule on joinder of parties: the injured worker must be joined, if the claim is brought by any person other than the employee (because the injured worker is always a real party in interest); any person who may have a *right to relief* in respect to, or arising out of the same transaction or series of transactions should be joined as a party; and any person against whom a right to relief may exist should be joined as a party.

Dr. Barrington essentially claims that he is a person with a "right to relief" under 8 AAC 45.040(c) because he claims a right to be paid under AS 23.30.097(d). Therefore, he should have been joined in the claim *before* it was settled by the

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[83] Alaska Rule of Civil Pro. Rule 17 provides in part:

> (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

employee; because he was not, his right to relief survives settlement of the employee's claim. He argues he should be allowed to make a new claim for payment, even if the employee waived employer liability.

Sherrod v. Municipality of Anchorage[84] stands for the proposition that a claimant may compel his health insurer to submit to the board's jurisdiction as an interested party if his contract with the health insurer requires reimbursement from a workers' compensation claim. Sherrod's right to compel Aetna to be joined as a party rested on his specific reimbursement contract with Aetna *and* his employer's liability to his health care providers under AS 23.30.030(4).[85] *Sherrod* does not stand for the proposition that a claimant is *required as a matter of due process* to join his or her medical providers as parties in his or her claim based solely on the employer's obligation to make payment "to the persons entitled" to payment under AS 23.30.030(4).[86]

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[84] 803 P.2d 874 (Alaska 1990).

[85] 803 P.2d at 875.

[86] AS 23.30.040 sets out required provisions of a workers' compensation insurance policy. Subsection (4) states:

> The insurer will promptly pay to the person entitled to them the benefits conferred by this chapter, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and all installments of compensation or death benefits awarded or agreed upon under this chapter. The obligation of the insurer is not affected by a default of the insured employer after the injury, or by default in giving a notice required by this policy. *The policy is a direct promise by the insurer to the person entitled* to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation or death benefits, *and is enforceable in the name of that person.* The insurer shall provide claims facilities through its own staffed adjusting facilities located within the state, or by independent, licensed, resident adjusters with power to effect settlement within the state. (Emphasis added.)

AS 23.30.097(d) requires an employer to pay "the employee's bills." The employer's liability to furnish medical care is owed to the employee. The bills must be paid to the persons entitled under AS 23.30.030(4) only because the employer must furnish medical treatment to the injured employee.[87] AS 23.30.097(d) directs the employer to pay the employee's bills for medical treatment, but it does not give every person who bills the employer an independent right to relief in the sense of a right to a claim in which the employee is not the real party in interest. AS 23.30.030(4) requires the insurer to pay "to the person entitled to them *the benefits conferred by this chapter* . . . and is enforceable in the name of that person." The benefits of the act are conferred on the employee and his beneficiaries. Thus, although AS 23.30.030(4) permits a medical provider to file a claim in his own name, the real party in interest is the employee, not the provider.

AS 23.30.030(4) and 8 AAC 45.040(c) do not compel the employee to join every creditor who may have provided services or treatment of the workers' compensation injury. The physician stands in the same position as the manufacturer of eyeglasses, the physical therapist, the operator of a clinic, and the ambulance service: a provider of medical services to the employee. A medical provider's interest in the workers' compensation claim is merely economic;[88] a partial embodiment of the interest the employee has in being awarded medical benefits. Because the employee's claim was not for "medical benefits except those provided by Dr. Barrington," Dr. Barrington's economic interest was represented in the employee's claim.

If we were to adopt Dr. Barrington's view, hearings on claims would be crowded with additional parties and final hearings would be delayed as new parties were added.

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[87] *See* 8 AAC 45.082(a): "The employer's obligation to furnish medical treatment under AS 23.30.095 extends only to medical and dental services furnished by providers unless otherwise ordered by the board after a hearing or consented to by the employer." The employer's obligation is to furnish medical treatment to the injured employee; the right to relief for non-performance belongs to the person who is owed the obligation.

[88] *See, Chiropractors for Justice,* 895 P.2d at 969.

Most claims would not achieve settlement because future creditors could not be joined, so that there would be no finality in any settlement. More importantly, the employee would, by having to join all his creditors, lose control of the right to settle his or her claim and dispose of the employer's liability. This would erode the employee's right to "reach an agreement in regard to a claim for injury or death under this chapter."[89]

Dr. Barrington has a "right to relief" against the employer under the act, but that right flows through the employer's liability to the employee; unless he is able to demonstrate employer liability to the employee, the employer need make no payment to him. Thus, if Dr. Barrington files a claim in his own name, he must join the employee under 8 AAC 45.040(a) and he must be prepared to prove the employee is entitled to benefits under 8 AAC 45.040(b).

In this case, Dr. Barrington's claim was denied because the employee, the real party in interest, had waived all right to payment of compensation or benefits by the employer in return for a certain sum. The employer's liability to the employee was extinguished in the settlement with the employee. Dr. Barrington was not denied due process by the board's decision anymore than if he had brought a claim against the wrong employer – his "right to relief" is dependent upon the existence of employer liability to the employee. A claimant is not denied procedural due process if the board refuses to decide the merits of a claim barred by prior settlement or, for example, the statute of limitations.

Dr. Barrington relies on the example of *University of Massachusetts Memorial Medical Center, Inc., v. Christodoulou,*[90] to argue that due process compels that his claim survives the employee's settlement with the employer where he was not a party to the settlement. We believe Dr. Barrington misreads that case. Mario Christodoulou was injured in a car crash in Massachusetts, driving his New Jersey employer's car in disputed circumstances. He was flown to the University of Massachusetts hospital for treatment, where he later died. Christodoulou's father filed a claim on behalf of his

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89 AS 23.30.012.

90 180 N.J. 334, 851 A.2d 636 (N.J. 2004).

estate, as well as for death benefits for himself and his wife. The employer denied the accident occurred in the course of employment and ultimately a settlement was reached with the father, mother, and estate. The hospital was not given notice of the settlement, but the terms of the settlement included that the insurer would hold Christodoulou's father harmless for any medical bill arising out of the injury. When the hospital sought payment of its bill from the insurer, the insurer said that it agreed to hold Christodoulou's father, not his estate, harmless, and that because the father was not responsible for his son's bills, it would not pay the hospital's bill. The hospital then brought a common law collection action against the estate.

The supreme court of New Jersey held that although workers' compensation liability was limited by the settlement, the hospital's common law collection action was not precluded by the settlement because the hospital was not a party to the workers' compensation settlement.[91] The hospital was not *required* to pursue a workers' compensation claim, so it did not lose its contractual rights to payment in the settlement.[92] The court commented regarding the effect of this result:

> Because the employee's contractual obligation to pay for medical services rendered will not be extinguished by a settlement, the employee will have an incentive to arrange for payment of the bills in the settlement or to present them in a compensation proceeding to obtain payment from his employer. To the extent that a common law collection action allows a medical provider to proceed only against the employee, a medical provider will have an incentive to intervene in a pending workers' compensation action to proceed against the potential deep pockets of the employer and insurer.
>
> One of the goals of the Workers' Compensation Act is to secure for the parties an effective, fair, and inexpensive procedure. [citations omitted] That objective would be thwarted by a requirement that medical providers obtain legal representation to file claim petitions or intervene in all pending workers' compensation cases out of fear that the injured worker will settle without providing for payment of their bills . . . On the

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91 180 N.J. 334, 349, 851 A.2d 636, 644.

92 180 N.J. 350, 851 A.2d at 645.

> other hand, an injured employee will know his employment status and the details concerning a work-related injury. To compel unnecessarily the intervention of medical providers in every workers' compensation case would be a spectacularly wasteful expenditure of resources and effort.[93]

Like the hospital, Dr. Barrington is not *required* to file a workers' compensation claim in order to obtain payment; he is allowed to do so if he wishes. We agree that the compulsory joinder of medical providers in workers' compensation claims, as Dr. Barrington argues must occur to protect his due process rights,[94] would be a "spectacularly wasteful expenditure of resources" and undermine the efficient resolution of workers' compensation claims. Dr. Barrington's due process rights are protected by the survival of his common law action for collection of a debt if his claim is extinguished in a settlement to which he is not a party.

Conclusion.

For these reasons, we AFFIRM the board's decision.

Date: *12 February 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

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[93] 180 N.J. at 351-352, 851 A.2d at 646.

[94] Appellant argues that he should receive notice of the settlement before it is approved by the board. Employers who pay workers' compensation are entitled to receive prior notice of an employee's settlement with a third party because employers have a statutory right to reimbursement of compulsory compensation payments from settlement proceeds. AS 23.30.015. However, the act does not compel medical providers to treat employees and gives medical providers no lien against compensation settlements.

APPEAL PROCEDURES

This is a final decision. The commission has affirmed (upheld) the board's decision dismissing the workers' compensation claim. It becomes effective when filed in the office of the commission unless proceedings to appeal it are instituted. Look at the Certification below to find the date this decision was filed in the commission. Effective November 7, 2005 proceedings to appeal 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. 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 is mailed to the parties, whichever is earlier. 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

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 delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision in the matter of *Dr. Edward Barrington v. Alaska Communications Systems Group, Inc., Liberty Mutual Insurance Co., and Noelle E. Williams*; AWCAC Appeal No. 06- 015; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this _*12th*_ day of February, 2007.

Signed
C. J. Paramore, Appeals Commission Clerk

I certify that a copy of this Final Decision in AWCAC Appeal No.06-015 was mailed on _*2/12/07*_ to Soule, Rehbock, & Holloway at their addresses of record and faxed to Soule, Rehbock, Holloway, AWCB Appeals Clerk & Director WCD.

Signed
L. A. Beard, Deputy Appeals Commission Clerk