

Case: *M-K Rivers and ACE Indemnity Insurance Company vs. Willard L. Harris*, Alaska Workers' Comp. App. Comm'n Dec. No. 147 (March 4, 2011)

Facts: Willard L. Harris (Harris), while employed as a teamster by appellant, M-K Rivers, was injured in a rollover accident off the Richardson Highway in 1976 that left him paraplegic. Over the years, M-K Rivers and Harris resolved disputes in a series of partial compromise and release (C&R) agreements. In 1996, one such agreement settled all housing/home/dwelling/accommodations related expenses. The C&R provided that it was intended to settle "all claims and disputes between the parties related to . . . all past, present or future housing/dwelling expenses, including modifications (interior or exterior), purchases, rentals, evaluations, or housing space related expenses of any kind. . . ." In the "Dispute" section of the C&R, Harris's position on his house was that he needed

modifications to make it a safe environment, including ramp and sidewalk repair, emergency fire/earthquake escape system, additional storage for medical supplies and equipment, modification of bathroom and kitchen for personal access on his own, and a ceiling mounted grab bar, modifications in the bedroom including a significant addition, and modifications of doorways and hallways. In the alternative he asserts that he is entitled to a new, larger residence for easy accessibility in a wheelchair.

In 1998, another settlement agreement included a recital that Harris's diabetes was compensable and stipulated that M-K Rivers would pay for past and continuing medical treatment for his diabetes. That same agreement also stated, in terms of the non-medical fitness facility attendance, the employer and insurer "ha[ve] stipulated and agreed that such care is appropriate, reasonable and necessary. . . ." In 2009, the board heard and decided specific disputes that arose between the parties, some of which M-K Rivers asserted were barred by the terms of the earlier settlement agreements. After the board's decision, M-K Rivers appealed.

Applicable law: AS 23.30.155(e) provides in relevant part, "If any installment of compensation payable without an award is not paid within seven days after it becomes due, . . . there shall be added to the unpaid installment an amount equal to 25 percent of the installment."

AS 23.30.097(d) states: "An employer shall pay an employee's bills for medical treatment . . . within 30 days after the date that the employer receives the provider's bill[.]

AS 23.30.155(f), which provides in pertinent part: "If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment."

AS 23.30.155(p) states in part: "An employer shall pay interest on compensation that is not paid when due."

In Sumner v. Eagle Nest Hotel, 894 P.2d 628, 632 (Alaska 1995), the Alaska Supreme Court (supreme court) rejected the argument that bad faith warrants imposing a penalty regardless of the promptness of payment.

In *Summers v. Korobkin Construction*, 814 P.2d 1369 (Alaska 1991), the supreme court concluded that the employee was entitled to a hearing on the compensability of his claim even though the employer had paid outstanding medical bills. The court reasoned that if Summers prevailed at hearing on the issue of the compensability, "Korobkin will still be able to controvert Summers' claim at a future hearing, if the grounds for the controversion arise after the initial hearing."

A C&R is interpreted in the same manner as any other contract. *Williams v. Abood*, 53 P.3d 134, 139 (Alaska 2002). To the extent they are not overridden by statute, common law principles of contract formation and rescission apply to C&Rs. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093 (Alaska 2008). The supreme court has held that the intent of contracting parties is a factual issue. *Schmidt v. Lashley*, 627 P.2d 201, 203 n.4 (Alaska 1981). The intent of the parties when forming a C&R is reviewed under the substantial evidence standard. *Williams*, 53 P.3d at 139.

Issues: (1) Did the board err in concluding that the employer owed penalties for its controversion of a Clinitron bed and controversion of treatment for Harris's diabetes, hypertension, and sleep apnea because the controversions were made in bad faith? (2) Did the board err in concluding that the employer could not controvert any of Harris's future claims for his diabetes treatment and attendance at a non-medical fitness facility without first petitioning for relief from a 1998 stipulation? (3) Did the board err in finding occupational therapy, an orthotic device, and a resistance exercise device to be compensable? (4) Did the board err in finding compensable an air conditioning system and the electrical costs given the terms of a partial C&R that settled "all housing/home/dwelling/accommodations related expenses of any kind"? (5) Did the board err in awarding attorney fees?

Holding/analysis: (1) On both controversions, the commission concluded that no penalties were owed because there were no late compensation payments. On the Clinitron bed, Harris dropped his request for that type of bed so no compensation was owed, much less late. On the medical treatment for Harris's diabetes, hypertension and sleep apnea, M-K Rivers acknowledged that its controversion was a mistake but it never acted on the controversion, timely paying all the bills related to treatment of the those conditions. The commission did not analyze whether the controversions were frivolous, unfair, or in bad faith; the issue was moot.

(2) The commission concluded that M-K Rivers could controvert diabetes treatment and attendance at a non-medical fitness facility on grounds that arose after the July 2, 2009, hearing date, in accordance with *Summers*. The commission concluded that M-K Rivers acknowledged in the stipulation only that Harris's diabetes was work-related and his attendance at a non-medical fitness facility was reasonable and necessary treatment but implicitly reserved all other defenses under the Workers' Compensation Act (Act).

(3) The commission concluded that the board did not err in finding occupational therapy, an orthotic device, and a resistance exercise device to be compensable. The board correctly applied the presumption of compensability to each, concluding that Harris had attached the presumption and M-K Rivers had not rebutted it, or if it did rebut it, Harris proved his claim by a preponderance of the evidence. The commission concluded that substantial evidence supported this conclusion: Dr. Andrew Ross testified at the board hearing that Harris needed occupational therapy and, to help with his sleep apnea, an orthotic device. Dr. Parvez Fatteh, in his deposition, recommended resistance exercises and equipment in one form or another for Harris. "While the evidence relied on by the board for compensability might have been more compelling, in the absence of persuasive rebuttal evidence, we affirm the board's ruling that occupational therapy, an orthotic device, and a resistance exercise device, are compensable." Dec. No. 147 at 18.

M-K Rivers disputed the board's holdings because ruling prospectively violated its due process rights. The commission did not decide the constitutional question (it lacks jurisdiction). Nevertheless, the commission concluded that prospectively deciding the compensability of occupational therapy, an orthotic device, and a resistance exercise device was permitted under *Summers* because it gave the claimant some certainty that pursuing a particular course of medical treatment would be compensable under the Act and M-K Rivers was still free to controvert claims based on circumstances that arose after the board's hearing.

(4) The board did not err in finding the air conditioning system and related operating costs compensable. The terms of the 1996 C&R did not bar the claim because air conditioning was a medical, rather than a housing, expense since Harris's spinal cord injury rendered it difficult for him to regulate his body temperature. "Ordinarily, home air conditioning and related expenses are housing expenses. However, as a result of his paraplegia and related medical conditions, Harris's circumstances are extraordinary. In his case, air conditioning is a compensable medical expense." *Id.* at 22-23.

(5) On attorney fees, the commission stated in whole:

There are two issues with respect to the board's order relative to attorney fees: 1) whether Harris was entitled to reimbursement of fees he paid a California attorney who assisted him; and 2) whether Harris's Alaska counsel, Mr. Choate, was entitled to an award of full fees. As for the first, AS 23.30.260(a)(1) prohibits receipt of a fee for representation or advice with respect to a claim unless it is approved by the board. Although we are reluctant to make a ruling that causes Harris to bear the brunt of the California attorney's inappropriate acceptance of an unapproved fee, we conclude that the board erred, and reverse its attorney fees ruling in this respect. The board should have denied Harris's request for reimbursement of attorney fees. As for the second, we remand to the board its award of fees to Mr. Choate for review in light of this decision. *Id.* at 23.

Note: The Alaska Supreme Court reversed this decision in part and affirmed in part. The court concluded that “medical benefits become due for purposes of controversion and penalties when the employer has notice they have been prescribed by a doctor,” rather than when a bill is presented for payment. *Harris v. M-K Rivers*, ___ P.3d ___ (Alaska, March 14, 2014).