

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

CHIEKO WEBB,)	
Employee,)	
Claimant,)	FINAL DECISION AND ORDER
)	
v.)	AWCB Case No. 198103241
)	
DFS NORTH AMERICA, LTD.,)	AWCB Decision No. 14-0114
Employer,)	
)	Filed with AWCB Anchorage, Alaska
and)	On August 13, 2014
)	
FIREMAN'S FUND INSURANCE CO.,)	
Insurer,)	
Defendants.)	
)	

Chieko Webb's request to set aside a compromise and release agreement (C & R) was heard in Anchorage, Alaska, on August 6, 2014, a date selected on June 19, 2014. Non-attorney representative Charles Webb, Mrs. Webb's son, appeared telephonically and represented Chieko Webb ("Employee"). Attorney Michael Budzinski appeared and represented DFS North America, Ltd. and Fireman's Fund Insurance Co. (collectively "Employer"). No witnesses were called. As a preliminary matter, Employee requested the hearing be continued to allow more time to consult and retain counsel. Employer objected to the continuance request, contending Employee was previously granted a continuance in order to obtain counsel and has had sufficient time within which to do so. The continuance request was denied. This decision examines and memorializes the oral order denying the continuance request, and addresses Employee's underlying request to set aside the parties' February 24, 1986 C & R. The record closed at the hearing's conclusion on August 6, 2014.

ISSUES

Employee sought additional time to obtain counsel and requested the hearing be continued. Employer objected. The board orally denied Employee's continuance request.

1. *Was the board's order denying Employee's request to continue the hearing correct?*

Employee contends the parties' February 24, 1986 C & R should be set aside because she is now permanently and totally disabled. Employer contends there is no evidence of fraud, misrepresentation, duress or coercion perpetrated by Employer, and in the absence of such evidence, no grounds exist to set aside the C & R.

2. *Should the parties' February 24, 1986 Compromise & Release Agreement be set aside?*

Employee contends she should be permitted to pursue her claim. Employer contends that should the C & R withstand Employee's efforts to set it aside, her July 7, 2013 claim for benefits should be dismissed.

3. *Should Employee's June 7, 2013 claim for benefits be dismissed?*

FINDINGS OF FACT

The following relevant findings of fact and factual conclusions are either undisputed or established by a preponderance of evidence:

- 1) On October 7, 1981, at age 50, Employee was injured during the course and scope of her employment as a sales clerk in a duty free shop at Anchorage International Airport. Employee was attempting to sit in a chair which collapsed beneath her, causing her to fall to the floor and injuring her low back. (Compromise and Release Agreement, AWCBC Case No. 198103241, February 24, 1986).
- 2) In February, 1986, the parties entered into a C & R whereby Employer consented to Employee settling a third-party liability action in exchange for her waiver of all rights under the Alaska Workers' Compensation Act (Act). (*Id.*).
- 3) Employee was represented in both the third party liability and workers' compensation actions by the Anchorage law firm of Boyko, Davis & Dennis. (*Id.*).
- 4) The parties' C & R contained the following provisions:

SETTLEMENT

The employee entered into a settlement agreement with the aforementioned third-parties. Under the terms of that settlement, the employee¹ is to receive \$350,000 in cash. This sum is paid in exchange for a release of said third-parties from any and all liability resulting from the aforementioned injuries. Said settlement would not be permissible without the consent of the employer and its workers' compensation carrier in accordance with the terms of AS 23.30.015(h). By strict interpretation of AS 23.30.015(g) the employee would be required to repay to the employer and its workers' compensation carrier out of said settlement funds the sum of \$89,499.63, less the pro-rata share of attorney's fees and costs incurred in said third-party action. This amount is equal to the amounts that the employer and its workers' compensation carrier have paid to or on behalf of the employee in accordance with the Act.

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In order to resolve any issues which might arise in the future with respect to the amount of the lien, offsets for the pro-rata share of attorney fees and costs incurred in the third-party action and credit rights of the employer and its compensation carrier, and to resolve possible future disputes regarding the nature and extent of the disability, entitlement to medical or rehabilitation benefits or the appropriate computation of compensation rate, the employer and its workers' compensation carrier hereby approve the third-party settlement referred to above and waive their rights to receive \$37,514.97 of the present compensation lien. In other words, the employer and its workers' compensation carrier are contributing a pro-rata share of the compensation lien for attorney fees and costs. In addition the employer and its workers' compensation carrier waive their right to a credit against all third-party settlement monies which the employee is receiving in excess of the employer's lien.

In consideration for the foregoing, the employee hereby waives any and all rights regarding computation of compensation rates and regarding the receipt of: (a) compensation benefits, regardless of whether the same be for temporary total, temporary partial, permanent partial, permanent total, (b) medical benefits, (c) vocational rehabilitation compensation . . . and (d) reimbursement for attorney fees and costs incurred in the third-party action or in connection with her workers' compensation claim. The parties stipulate and agree that such waiver is justified because the amounts to be received by the employee under the terms of said third-party settlement exceed any disability or medical benefits which the employee might conceivably be entitled to in the future under the terms of the . . . Act . . . Irrespective of this Compromise and Release, it is recognized and agreed that the employer's lien and credit rights under AS 23.30.015(g) will have the effect of precluding the employee from receiving any compensation or medical benefits in the future.

...

¹ Employee interlineated here "and her husband are, is" and added her initials "C.W."

RELEASE

It is the intent of this agreement to compromise all benefits which might be due to the employee pursuant to the terms of the Alaska Workers' Compensation Act. *To this end and for such purpose, the parties agree that upon approval of this Compromise and Release by the Alaska Workers' Compensation Board, this Compromise and Release shall be enforceable and shall forever discharge the liability of the employer and its workers' compensation carrier to the employee and her heirs, beneficiaries, executors and assigns, for all benefits which could be due or might be due in the future, pursuant to the terms and provisions of the Alaska Workers' Compensation Act.*

It is agreed that the employee's injuries and disability, including any injuries and disabilities which arose prior to the injury referred to herein, are or may be continuing and progressive in nature and that the nature and extent of said injuries and resulting disability may not be fully known at this time.

By execution of this Compromise and Release, *the employee acknowledges her intent to release the employer and its workers' compensation insurance carrier from any and all liability arising out of or in any way connected with the work-related accident referred to above and any known or as yet undiscovered disabilities, injuries or other damages associated with said accident. This Compromise and Release shall be effective in discharging the employer and its workers' compensation carrier of all liability of whatsoever nature for all such past, present and future benefits under the Alaska Workers' Compensation Act.* (Italics added) (C & R at 2-4).

...

- 5) Employee and her attorney signed the agreement on February 5, 1986, as did the attorney for the employer and carrier. (C & R at 4).
- 6) In her own handwriting, and with her initials, Employee made changes on three of the C & R's five pages. (C & R at 1, 2, 3).
- 7) Employee then made the following sworn statement, her attestation notarized by her attorney:

I, CHIEKO WEBB, being first duly sworn, depose and say:

I am the employee named in the foregoing Compromise and Release. I have read the same, know the contents thereof, and the facts set forth therein are true and correct as I verily believe. I have signed the Compromise and Release freely and voluntarily for the uses and purposes therein mentioned. (C & R at 5).

- 8) On February 24, 1986, the parties' C & R was approved by a two member panel of the board, a quorum under AS 23.30.005(f). (C & R at 5).

- 9) On June 7, 2013, Employee, *in propria persona*, filed a workers' compensation claim alleging she was permanently and totally disabled. Her claim seeks permanent total disability benefits (PTD), medical and transportation costs, and attorney fees and costs. (Claim).
- 10) On June 29, 2013, Employee's son, Charles Webb, filed a Notice of Appearance as Employee's non-attorney representative. (Notice of Appearance, June 29, 2013).
- 11) At a January 2, 2014 prehearing conference, the parties agreed to bifurcate Employee's underlying claim for benefits from Employer's affirmative defense that the parties' 1986 C & R precludes Employee's claim. Employee was provided with the board-maintained list of attorneys who represent injured workers before the board. She was informed that should she wish to retain an attorney and the attorney agrees to take her case, the Act and regulations provide for payment of her attorney if she prevails, and if she does not prevail, she may not be charged more than \$300.00. (Prehearing conference summary, January 2, 2014).
- 12) At a February 28, 2014 prehearing conference, an oral hearing to determine whether grounds exist to set aside the 1986 C & R was scheduled for April 16, 2014. Employee was provided with a copy of the board publication titled "How to Present Your Case – be prepared for a hearing." (Prehearing conference summary, February 28, 2014).
- 13) At the start of the hearing on April 16, 2014, Employee requested the hearing be continued to allow her additional time to obtain counsel to ensure her adequate representation. Mr. Webb stated he has friends in the Anchorage legal community he intended to contact if the continuance request was granted. Mr. Webb and Employee live in Spokane Valley, Washington. (Webb). Employer did not oppose the continuance request. (Budzinski).
- 14) Employee's continuance request was granted, and a prehearing conference was scheduled for the purpose of setting a new hearing date. *Webb v. DFS North America, Ltd.*, AWCB Decision No. 14-0056 (April 18, 2014).
- 15) At a June 19, 2014 prehearing conference, the parties agreed to an August 6, 2014 hearing on the C & R set aside issue. (Prehearing Conference Summary, June 19, 2014).
- 16) On July 23, 2014, Mr. Webb's brother called the Division of Workers' Compensation's Fairbanks office, and requested a copy of Employee's file. The Division's "File Copy Request Form," with an envelope bearing the Anchorage office address, was mailed to Employee's address the same day. (Webb; AWCB electronic database, July 23, 2014).

- 17) On August 4, 2014, two days before the scheduled hearing, Employee's file copy request form (FCR), signed by Employee on July 31, 2014, was received. It was entered into the agency's electronic record at 4:17 p.m. on August 6, 2014. On the line where the FCR asks "Firm Name (if Applicable)," intended for completion when a law firm employee is obtaining records on behalf of a represented client, Employee wrote "Elliott Dennis (Attney (sic) at Law)." The mailing address to send the records was Employee's address in Washington. (Receipt stamp, File Copy Request; observation).
- 18) On August 6, 2014, the copy request was filled, and a compact disc containing the 233 pages comprising Employee's agency file was mailed to Employee. (Invoice 33134, August 6, 2014).
- 19) Since Employee's continuance request was granted in April, 2014, Mr. Webb called Elliot Dennis, the attorney who represented Employee in 1981, was "trying to get him to work on this case," and asked him for recommendations for an attorney. (Webb).
- 20) Other than calling Mr. Dennis, although previously stating he had friends in the Anchorage legal community he was intending to call after the April continuance, Mr. Webb did not contact any other attorneys. (Webb).
- 21) Mr. Webb asked his brother to call the Division on July 23, 2014 to obtain a copy of his mother's agency file. (Webb).
- 22) Mr. Webb did not describe any other efforts made to obtain counsel since his first continuance request was granted in April, 2014. (Observation).
- 23) No attorney has entered an appearance on Employee's behalf. (Observation).
- 24) Employer opposed Employee's second continuance request. (Budzinski).
- 25) Employee's continuance request was orally denied and the matter proceeded to hearing on the issue of setting aside the C & R. (Record).
- 26) Mr. Webb argued Employee's injury is ongoing, she remains under a doctor's care, she is 84 years old and walks with a cane or "walking chair." (Webb).
- 27) Mr. Webb contended the C & R suggested Employee's injury was only temporary, but she has not been able to return to work since the injury. He argued the insurance company should offer Employee more money. (Webb).
- 28) Mr. Webb conceded he did not believe his mother entered into the agreement as the result of any fraudulent misrepresentation. (Webb).

- 29) Employee presented no witness testimony or evidence. (Record; observation).
- 30) There is no evidence Employee was induced into signing the agreement through fraud, misrepresentation, duress or coercion. (Record; observation).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

- 1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
- 2) worker's compensation cases shall be decided on their merits except where otherwise provided by statute;
- 3) this chapter may not be construed by the courts in favor of a party;
- 4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

AS 23.30.012. Agreements in regard to claims. (a) At any time after death, or after 30 days subsequent to the date of injury, the employer and the employee . . . have the right to reach an agreement in regard to a claim for injury . . . under this chapter . . . but a memorandum of the agreement in a form prescribed by the board shall be filed with the board. Otherwise, the agreement is void for any purpose. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. The board may approve lump-sum settlements when it appears to be in the best interest of the employee.

A workers' compensation C & R is a contract, and subject to interpretation as any other contract. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093-1094 (Alaska 2008). Clear and convincing evidence is necessary in order to set aside a C & R. *Olsen Logging Co. v. Lawson*, 856 P.2d 1155 (Alaska 1993).

The Alaska Workers' Compensation Act (Act) does not permit workers' compensation settlement agreements to be set aside due to a unilateral or mutual mistake of fact. *Id.* at 1158-59. That an employee did not know the extent of his or her disability at the time the agreement was signed is a mistake of fact, and does not justify setting aside a C & R. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1007-1008 (Alaska 2009).

A workers' compensation C & R may be set aside if based on fraud or misrepresentation. A party seeking to void the contract for fraud or misrepresentation must show, by clear and convincing evidence: (1) a misrepresentation was made; (2) which was fraudulent or material; (3) which induced the party to enter the contract; and (4) upon which the party was justified in relying. *Seybert* at 1093-1094.

A C & R may also be set aside for duress or coercion. A party seeking to void the agreement for duress or coercion must show, by clear and convincing evidence: 1) one party involuntarily accepted the terms of another; 2) circumstances permitted no other alternative; and 3) such circumstances were the result of coercive acts of the other party. *Helstrom v. North Slope Borough*, 797 P2d 1192, 1197 (Alaska 1990).

Clear and convincing evidence is "evidence that is greater than a preponderance, but less than proof beyond a reasonable doubt." It is "that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Buster v. Gale*, 866 P.2d 837, 844 (Alaska 1994) (quoting *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249, 253 (1984)).

8 AAC 45.074. Continuances and cancellations. . . .

. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and the taking of the deposition of the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance for good cause as set out in (1)(A) - (I) of this subsection.

...

ANALYSIS

1. Was the board's order denying Employee's request to continue the hearing correct?

Hearing continuances are not favored and will not be routinely granted. Hearings may only be continued for good cause as strictly defined by law. 8 AAC 45.074. Employee began these proceedings in June, 2013. At a January 2, 2014 prehearing conference she was provided with a list of attorneys who represent claimants in proceedings before the board. At a February 28, 2014 prehearing conference, a hearing on the C & R set aside was scheduled for April 16, 2014. At that time, Employee requested and was granted a continuance in order to obtain counsel. The request was unopposed. To ensure Employee was provided an opportunity for her evidence and arguments to be heard, the continuance request was granted under 8 AAC 45.074(b)(1)(N).

However, by Mr. Webb's own admission, since the April 16, 2014 continuance, he made no efforts to contact any attorneys other than Mr. Dennis. The file suggests his contact with Mr. Dennis was close in time to his brother's telephone request for a copy of the agency file, just two weeks before the scheduled hearing date. Mr. Dennis has not entered an appearance for Employee. Employee's completed FCR was not received until August 4, 2014, two days before the hearing. Employee's actions do not demonstrate the due diligence necessary to justify a second continuance for the purpose of obtaining counsel. Nor was Employee's apparent neglect in her efforts to obtain counsel excusable to perhaps justify a continuance under 8 AAC 45.074(b)(1)(L). There being no other basis under law to grant Employee's continuance request, the oral decision to deny the continuance was correct.

2. Should the parties' February 24, 1986 Compromise & Release Agreement be set aside?

A workers' compensation C & R is a contract subject to interpretation as any other contract. *Seybert*. To set aside a C & R, a party must demonstrate fraud, misrepresentation, coercion or duress perpetrated during the settlement process. *Id.* That an employee did not know the extent of his or her disability at the time the agreement was signed is a mistake of fact, and does not justify setting aside a C & R. *Smith*.

A party seeking to void a C & R for fraud or misrepresentation must show by clear and convincing evidence: (1) a misrepresentation occurred; (2) which was fraudulent or material; (3) which induced the party to enter the contract; and (4) upon which the party was justified in relying. Employee does not allege, nor has she presented any evidence that a fraudulent or material misrepresentation was made to her, upon which she relied, and which induced her to sign the agreement. Accordingly, the C & R may not be set aside for fraud or misrepresentation.

A party seeking to set aside a C & R for coercion or duress must show by clear and convincing evidence: 1) the party involuntarily accepted the terms of another; 2) circumstances permitted no other alternative; and 3) such circumstances were the result of coercive acts by the other party. Employee does not allege, nor has she presented any evidence that she was coerced, or subject to duress at the time she signed the agreement.

On the contrary, Employee was represented by competent counsel in both the third party and workers' compensation actions. In signing the agreement, Employee swore she signed it "freely and voluntarily," after reading it and knowing its contents. She made changes on three of the four pages of the agreement, and initialed those changes, evidencing having read the document carefully and in its entirety. Under the clear and unambiguous terms of the agreement, in exchange for Employer's waiver of its lien rights under AS 23.30.015, and its consent to Employee receiving \$350,000 from a third party tortfeasor, Employee waived any and all future benefits to which she may have been entitled under the Act, specifically including a waiver of permanent total disability and medical benefits, the benefits her current claim seeks. Employee acknowledged her injuries were or may become continuing and progressive in nature. She nevertheless signed she was knowingly and willingly waiving all of her rights under the Act, and forever discharging Employer and its workers' compensation carrier of any and all future liability for any benefits under the Act.

There being no grounds upon which to set aside the parties' February 24, 1986 C & R, the request to set it aside will be denied.

3. Should Employee's June 7, 2013 claim for benefits be dismissed?

The parties' February 24, 1986 C & R is a fully enforceable contract under which Employee knowingly and voluntarily waived all past and future benefits under the Act in return for a third

party liability settlement of \$350,000. Having waived any and all further benefits, Employee has no further legal basis upon which to bring a claim against Employer or its workers' compensation carrier. Accordingly, Employee's July 7, 2013 claim for benefits will be dismissed.

CONCLUSIONS OF LAW

1. The board's order denying Employee's request to continue the hearing was correct.
2. The parties' February 24, 1986 Compromise & Release Agreement will not be set aside.
3. Employee's June 7, 2013 claim for benefits will be dismissed.

ORDER

1. Employee's request to continue the hearing is denied.
2. Employee's request to set aside the February 24, 1986 C & R Agreement is denied.
3. Employer's request to dismiss Employee's June 7, 2013 claim is granted.
4. Employee's June 7, 2013 claim for benefits is herewith dismissed.

CHIEKO WEBB v. DFS NORTH AMERICA, LTD.

Dated in Anchorage, Alaska on August 13, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Linda M. Cerro, Designated Chair

Rick Traini, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of CHIEKO WEBB, employee / claimant; v. DUTY FREE ALASKA, employer; FIREMAN'S FUND INSURANCE CO., insurer / defendants; Case No. 198103241; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on August 13, 2014.

Pamela Murray, Office Assistant