ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

KIP WALRATH, Employee, Claimant, v. GENERAL ELECTRIC, Employer, and ELECTRIC INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201015745 AWCB Decision No. 17-0123 Filed with AWCB Anchorage, Alaska on October 25, 2017

Kip Walrath's (Employee) March 20, 2017 petition to set aside the parties' January 25, 2012 compromise and release agreement (C&R) was heard on October 24, 2017 in Anchorage, Alaska. The hearing date was selected on June 29, 2017. Attorney Adam Sadoski appeared and represented General Electric (Employer). Kip Walrath appeared, testified, and represented himself. There were no other witnesses. The record closed at the conclusion of the hearing on October 24, 2017.

ISSUE

Employee contends the January 25, 2012 C&R should be set aside because he did not understand the agreement at the time of signing. Employee contends the mechanism of his work injury was incorrectly described by his physician and the employer's medical examiner (EME), leading Employee to misunderstand the nature of his condition and prognosis. Employee additionally

contends the C&R should be set aside because his medical condition has substantially worsened subsequent to the C&R, and he is unable to return to work.

Employer contends none of the legal tests for setting aside a C&R under the Act are met. Employer contends Employee's petition to set aside the January 25, 2012 C&R should be denied.

Should the January 25, 2012 C&R be set aside?

FINDINGS OF FACT

The following facts are established by a preponderance of the evidence:

1) On November 2, 2010, Employee reportedly injured his back while working on a film set and carrying heavy buckets. (Report of Occupational Injury or Illness, November 15, 2010).

2) On December 28, 2011, the parties filed a C&R which required Board approval before becoming final. Under the agreement, Employee was to receive $7,500 in exchange for full waiver of all benefits under the Act, including medical benefits. The agreement states:

> It is agreed that Employee's condition and disability that arose prior to the occurrence referred to herein, are or may be continuing and progressive in nature, and that the nature and extent of such condition and resulting disability may not be fully known at this time.
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> By execution of this compromise and release the Employee acknowledges his intent to release the employer from any and all past and future indemnity, medical and reemployment liability, arising out of or in any way connected with any conditions sustained with the employer, and any known or as yet undiscovered disabilities, injuries, or damages associated with any injury with the employer, and specifically waives all liability for past, present and future related indemnity, medical and reemployment benefits as described above. (C&R, December 28, 2011).

3) On January 10, 2012, the Board sent the parties a letter directing the parties to schedule a hearing to determine whether the C&R should be approved. (Letter, January 10, 2012).

4) On January 25, 2012, a hearing was held to determine whether the December 28, 2011 C&R should be approved. After Employer's attorney gave a brief factual background of the case, the hearing record is as follows:

> DESIGNATED CHAIR: So understanding now that the law would allow you to have an attorney, that you could consult with an attorney regarding your case, do

you wish to proceed with the hearing today, or would you like to postpone the hearing for, say, 30 days?

EMPLOYEE: No, I think moving forward and being done with this process would be great. . .

CHAIR: Okay. Then I have some questions just to confirm that you understand the finality of the agreement if the Board approved it. I may have already asked you these before, but I just want to make sure we get it on the record that you really do understand that it would be virtually impossible to come back and obtain more benefits -- other than that $7,500 --

EMPLOYEE: Uh huh.

CHAIR: -- even if your condition gets worse than it is today. Do you understand that?

EMPLOYEE: I do.

CHAIR: Okay. And do you understand it would be virtually impossible to set aside the agreement, essentially have the agreement undone, for any reason?

EMPLOYEE: I do. I understand that.

CHAIR: Okay. And you understand you're settling all benefits for $7,500?

EMPLOYEE: Yes.

CHAIR: And that you're giving up the right for the Board to decide your claim at a hearing? You could go to a hearing, but you're giving up that right to have the Board decide.

EMPLOYEE: Yes.

CHAIR: Okay. And I want to make sure you understand you could consult with an attorney, nothing precludes you from consulting with an attorney, and that you are giving up that right as well if the Board approved it today?

EMPLOYEE: Yes. I would like to have this process over.

CHAIR: Okay. And I think that you have already kind of said why it's in your best interest, but is there anything else you'd like the Board to know about why approval is in your best interest?

> EMPLOYEE: This process has really overtaken my life, and I believe I can change and -- change how I do things and -- and just move forward in this process. . .

The panel went off the record for several minutes to deliberate in private on whether the C&R should be approved. When the hearing resumed, the hearing record is as follows:

> CHAIR: The Board has deliberated, and we will approve the agreement, but I want to first put some findings on the record. You know, it's clear that the employee, Mr. Walrath, does understand the significance of this agreement. Although it's concerning that $7,500 may not be enough to cover his future medical care, even the medical records in this case, including the opinions from his treating physicians, and his own statement about why approval would be in his best interests, we would -- decided to go ahead and approve the compromise and release agreement. We find it's unlikely that he would obtain a greater benefit at hearing than what he's provided in the settlement. We find that he fully understands that he -- it would be virtually impossible to return to the Board and ask for additional benefits should his condition worsen in the future. . . (Record; Employer's Hearing Exhibit 7).

5) On March 20, 2017, Employee filed a petition to set aside the January 25, 2012 C&R. (Petition, March 20, 2017).

6) On October 2, 2017, Employee filed a brief in support of his March 20, 2017 petition. The brief is titled "Mechanism of Injury" and discusses how Employee was injured on November 2, 2010, how the injury has worsened, and how his daily life is impacted by severe continuing pain and disability. (Brief, October 2, 2017).

7) Employee testified he did not understand the nature and extent of his injury at the time the January 25, 2012 C&R was approved. Employee currently has severe pain in his back and recently had a pain pump implanted, which gives him some relief. Employee has difficulty walking and must use a cane. Employee contends he is currently totally disabled and unable to return to work. Until the federal Affordable Care Act became law, Employee could not afford most of the medical care he needed, and traveled to Thailand to obtain treatment. Employee's main contention in support of setting aside the January 25, 2012 C&R is the mechanism of injury was mischaracterized, leading Employee and his doctors to not understand the nature and extent of his back injury at the time. Employee contends he has permanent spinal injury, including discs ruptured at multiple levels. The ongoing nature of Employee's back injury has caused him to be unable to perform many ordinary tasks of living, and eventually contributed to Employee and his

wife splitting. Employee stated Employer's insurance adjusters pressured him to settle his case. If the January 25, 2012 C&R is set aside, Employee would like to pursue medical care and also possibly vocational retraining benefits under the Act. (Employee).

8) When questioned, Employee could not point to any acts of fraud or misrepresentation by Employer or its adjuster, or an example of coercion or duress which led him to sign the January 25, 2012 C&R. (Record; Observations).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > (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 this chapter
> > . . . .
> >
> > (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.

A decision may be based not only on direct testimony and other tangible evidence, but also on "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). A factual finding reasonable persons could make is, "as are all subjective determinations, the most difficult to support." However, there is no reason to suppose Board members who make findings are either irrational or arbitrary. That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." *Id.* at 534. "Substantial evidence" to support findings of Workers' Compensation Board is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1007 (Alaska 2009).

> **AS 23.30.012. Agreements in regard to claims.** (a) At any time after death, or after 30 days subsequent to the date of the injury, 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 under this chapter, but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose. Except as provided in (b) of this section, an agreement filed with the division discharges the liability of the employer for the compensation, notwithstanding the provisions of

> AS 23.30.130, 23.30.160, and 23.30.245, and is enforceable as a compensation order.
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> (b) The agreement shall be reviewed by a panel of the board if the claimant or beneficiary is not represented by an attorney licensed to practice in this state, the beneficiary is a minor or incompetent, or the claimant is waiving future medical benefits. 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. A lump-sum settlement may be approved when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

Standards of contract formation from the common law apply to formation and rescission of workers' compensation settlement contracts to the extent these standards are not overridden by statute. The standard of proof for setting aside a C&R in cases under the Alaska Workers' Compensation Act is clear and convincing evidence. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079 (Alaska 2008). While the Board can set aside a settlement agreement based on fraud, the Act does not permit avoidance of a settlement contract based on mistakes of fact. *Id.* at 1094. To avoid a contract based on a misrepresentation, the party seeking to avoid the contract must show 1) a misrepresentation, 2) which was fraudulent or material, 3) which induced the party to enter the contract, 4) upon which the party was justified in relying. *Id.* at 1095. In evaluating a claimant's assertion that a C&R should be set aside because of misrepresentation, the Board is required to consider whether there was an intentional misrepresentation or a material representation on the part of the employer. *Id.* at 1094.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
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> **8 AAC 45.160. Agreed settlements.** (a) The board will review a settlement agreement that provides for the payment of compensation due or to become due and that undertakes to release the employer from any or all future liability. A

settlement agreement will be approved by the board only if a preponderance of evidence demonstrates that approval would be for the best interest of the employee or the employee's beneficiaries. The board will, in its discretion, require the employee to attend, and the employer to pay for, an examination of the employee by the board's independent medical examiner. If the board requires an independent medical examination, the board will not act on the agreed settlement until the independent medical examiner's report is received by the board.

(b) All settlement agreements must be submitted in writing to the board, must be signed by all parties to the action and their attorneys or representatives, if any, and must be accompanied by form 07-6117.

(c) Every agreed settlement must conform strictly to the requirements of AS 23.30.012 and, in addition, must

(1) be accompanied by all medical reports in the parties' possession, except that, if a medical summary has been filed, only those medical reports not listed on the summary must accompany the agreed-upon settlement;

(2) include a written statement showing the employee's age and occupation on the date of injury, whether and when the employee has returned to work, and the nature of employment;

(3) report full information concerning the employee's wages or earning capacity;

(4) state in detail the parties' respective claims;

(5) state the attorney's fee arrangement between the employee or his beneficiaries and the attorney, including the total amount of fees to be paid;

(6) itemize in detail all compensation previously paid on the claim with specific dates, types, amounts, rates, and periods covered by all past payments;

(7) include a written statement from all parties and their representative that

(A) the agreed settlement contains the entire agreement among the parties;

(B) The parties have not made an undisclosed agreement that modifies the agreed settlement;

(C) the agreed settlement is not contingent on any undisclosed agreement; and

(D) an undisclosed agreement is not contingent on the agreed settlement; and

(8) contain other information the board may from time to time require.

(d) The board will, within 30 days after receipt of a written agreed settlement, review the written agreed settlement, the documents submitted by the parties, and the board's case file to determine

(1) if it appears by a preponderance of the evidence that the agreed settlement is in accordance with AS 23.30.012; and

(2) if the board finds the agreed settlement

(A) is in the employee's best interest, the board will approve, file, and issue a copy of the approved agreement in accordance with AS 23.30.110(e); or

(B) lacks adequate supporting information to determine whether the agreed settlement appears to be in the employee's best interest or if the board finds that the agreed settlement is not in the employee's best interest, the board will deny approval of the agreed settlement, will notify the parties in writing of the denial, and will, in the board's discretion, inform the parties

(i) of the additional information that must be provided for the board to reconsider the agreed settlement; or

(ii) that either party may ask for a hearing to present additional evidence or argument for the board to reconsider the agreed settlement; to ask for a hearing under this paragraph, a party may write to the board or telephone the division; an affidavit of readiness for hearing is not required; the procedures in 8 AAC 45.070 and 8 AAC 45.074 do not apply to a hearing under this subparagraph unless a party requests a hearing by filing an affidavit of readiness for hearing. If a hearing is held under this section, the board will, in its discretion, notify the parties orally at the hearing of its decision or in writing within 30 days after the hearing; if after a hearing the board finds the preponderance of evidence supports the conclusion that the agreed settlement appears to be in the employee's best interest, the board will approve and file the agreed settlement in accordance with AS 23.30.110(e); the evidence is insufficient to determine whether the agreed settlement appears to be in the employee's best interest, the board will deny approval of the agreed settlement and request additional information from the parties; or the agreed settlement does not appear to be in the employee's best interest, the board will deny approval of the agreed settlement; the board will not prepare a written decision and order containing findings of fact and conclusions of law unless, within 30 days after the board's notification, a party files with the board a written request

> for findings of fact and conclusions of law together with the opposing party's written agreement to the request.
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> (e) An agreed settlement in which the employee waives medical benefits, temporary or permanent benefits before the employee's condition is medically stable and the degree of impairment is rated, or benefits during rehabilitation training after the employee has been found eligible for benefits under AS 23.30.041(g) is presumed not in the employee's best interest, and will not be approved absent a showing by a preponderance of the evidence that the waiver is in the employee's best interest. In addition, a lump-sum settlement of board-ordered permanent total disability benefits is presumed not in the employee's best interest, and will not be approved absent a showing by a preponderance of evidence that the lump-sum settlement is in the employee's best interests. . . .

ANALYSIS

Should the January 25, 2012 C&R be set aside?

A workers' compensation C&R is a contract subject to interpretation as any other contract. *Seybert*. Standards of common law contract formation apply to formation and rescission of workers' compensation settlement agreements to the extent these standards are not overridden by statute. *Id*. A C&R may be set aside for fraud, misrepresentation, coercion, or duress. *Id.* A C&R may not be set aside due to a unilateral mistake of fact. *Id.* 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. *Id.* A party seeking to void a C&R for coercion or duress must show by clear and convincing evidence: 1) a 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. *Id.*

According to the unambiguous terms of the January 25, 2012 C&R, Employee signed the agreement waiving all future benefits under the Act, including medical benefits, knowing his injury may be continuing and progressive in nature, and understanding the extent of his injuries and disability may not have been fully known at the time of signature. The C&R became binding on the parties when approved, on January 25, 2012. AS 23.30.012; 8 AAC 45.0160. Employee did not present evidence he was pressured by Employer to sign the agreement, had no alternative

but to sign the agreement, or agreed to the C&R's terms involuntarily. *Id.*; AS 23.30.001; AS 23.30.135; *Smith*; *Seybert*; *Rogers & Babler*.

If Employee was not aware of the full extent of his future disabilities when he signed the C&R, he made a mistake of fact. *Id.* A C&R may not be set aside because a party made a mistake in their determination of a material fact. *Id.* Employee signed the agreement stating he read and understood it, and was signing it freely and voluntarily. At the January 25, 2012 hearing, the chair explained once the agreement is approved, it is "virtually impossible" to re-open, and Employee stated he understood. The panel made an oral finding of fact that Employee understood the C&R would be virtually impossible to set aside once it is approved. Because Employee offered no evidence he was unduly influenced, or that his judgment was so impaired as to lack mental capacity to enter into a contract, no basis exists in fact or law to set aside the C&R in this case. *Id.* Employee's March 20, 2017 petition to set aside the parties' January 25, 2012 C&R will be denied.

CONCLUSION OF LAW

The January 25, 2012 C&R will not be set aside.

ORDER

Employee's March 20, 2017 petition to set aside the parties' January 25, 2012 is denied.

Dated in Anchorage, Alaska on October 25, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Stacy Allen, Member

/s/
Dave Kester, 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 KIP WALRATH, employee / claimant; v. GENERAL ELECTRIC, employer; ELECTRIC INSURANCE COMPANY, insurer / defendants; Case No. 201015745; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on October 25, 2017.

/s/

Elizabeth Pleitez Office Assistant