ALASKA WORKERS' COMPENSATION BOARD

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

RICK FIFIELD, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 200606580
WEAVER BROTHERS, INC., Employer,	)	AWCB Decision No. 17-0002
and	)	Filed with AWCB Anchorage, Alaska on January 6, 2017
ALASKA NATIONAL INSURANCE, Insurer, Defendants.	)	

Rick Fifield's (Employee) October 13, 2016 petition to set aside the parties' November 15, 2006 compromise and release agreement (C&R) was heard on January 5, 2017 in Anchorage, Alaska. The hearing date was selected on November 22, 2016. Attorney Michael Budzinski appeared and represented Employer. Rick Fifield appeared, testified, and represented himself. There were no other witnesses. The record closed at the conclusion of the hearing on January 5, 2017.

ISSUE

Employee contends the November 15, 2006 C&R should be set aside because he did not understand the agreement at the time of signing and also misrepresentation by Employer. Employee contends his own attorney misled him about the C&R, and that he should not have relied on his attorney's advice. 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 November 15, 2006 C&R should be denied.

Should the November 15, 2006 C&R be set aside?

FINDINGS OF FACT

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

1) On March 16, 2006, Employee was reportedly injured while working as a truck driver for Employer when he turned his head and felt dizziness and lightheadedness. (Report of Injury, June 14, 2006).

2) On November 15, 2006, the parties filed an executed C&R, which was effective upon filing. In exchange for waiver of indemnity benefits and penalties and interest, Employee was to receive $60,780.00 "plus PPI to be determined at a later date." Employee's attorney was to receive $17,590.00 in attorney's fees and costs. Filed concurrently with the C&R was a job dislocation benefit election form, signed by the Employee on November 15, 2006. The election form states Employee releases vocational rehabilitation benefits in exchange for $13,500.00. The November 15, 2006 C&R states:

> [Employee] was diagnosed with right vertebral artery dissection due to head turning. . . . The employee was referred to Dr. David Newell at Swedish Medical Center in Seattle for a neurological consultation. Dr. Newell evaluated the employee on 7/14/06 and diagnosed "head turn syncope. . . ." Dr. Newell successfully performed a left C1 partial laminectomy and decompression of the vertebral foramen. This alleviated the symptoms of head turn syncope.
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> The employee followed up with Dr. Newell on 9/26/06. Dr. Newell noted that post-operatively Mr. Fifield had no further symptoms on turning his head and that a Doppler ultrasound exam done on 9/26/06 showed that circulation was not obstructed on extreme head turning. . . .
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> The employee understands and acknowledges that his condition may progress, worsen, be greater in degree, or different in kind or character than that which is known at present, and that there may be latent or undiscovered injuries associated with said incident. Nonetheless, the employee acknowledges his intent to release the employer and carrier from any and all liability for the benefits waived through this agreement. . . .

Employee signed the C&R before a notary public. The agreement is also signed by Employee's attorney and Employer's attorney. (C&R, November 15, 2006).

3) On October 13, 2016, Employee filed a petition to set aside the November 15, 2006 C&R and brief in support. (Petition, October 13, 2016).

4) Employee testified: Subsequent to the November 15, 2006 C&R, and related to the work injury for Employer, he developed Bowhunter's syndrome, a rare disorder affecting blood circulation through the vertebral artery to the brain. This very serious and potentially fatal condition severely impacts his life, limits his movement, and affects his sleep. Although Employer is paying for his medical care, including treatment in Seattle, Employee believes he cannot return to work because of complications from the work injury, which include strokes and fainting spells, for which he uses a special neck brace and medications. Employee feels Employer took advantage of him prior to the signing of the November 15, 2006 C&R, and in hindsight, he would have never signed such an agreement. Employee believes Employer knew more about Bowhunter's syndrome than it let on during negotiations of the C&R, although he could not offer specific details or an example of misrepresentation or deception. Employee contends due to the nature of Bowhunter's syndrome, which affects brain function, his judgment and understanding of the C&R were clouded. His only income is $240 per month in public aid, and he is currently homeless. Employee attempted to contact his attorney in an effort to set aside the C&R and reopen his case, but eventually learned the attorney retired. Employee believes he was mistaken in relying on his attorney's advice in signing the C&R. When questioned, Employee could not remember the exact location or venue where the C&R was signed, but stated he did recall the signing was in a conference room in a downtown office. Employee confirmed his signature on the November 15, 2006 C&R was genuine. Because of his serious medical complications, Employee believes he will never be able to return to work and would like to reopen the possibility of obtaining indemnity, permanent disability, or time loss benefits in this case. (Employee).

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. . . .

> **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.

(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 November 15, 2006 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 November 15, 2006 C&R, Employee signed it waiving all future benefits with the exception of 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 at the time of filing, on November 15, 2006. AS 23.30.012; 8 AAC 45.0160. There is no evidence Employee 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, or was unaware he would not be compensated for future time loss, he made a mistake of fact. *Id.* A C&R may not be set aside because a party made a mistake in his determination of a material fact. *Id.* Employee read the proposed agreement and was assisted by his attorney, who also

signed the C&R. Employee signed the agreement stating he read and understood it, and was signing it freely and voluntarily. Because Employee offered no reliable 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 October 13, 2016 petition to set aside the parties' November 15, 2006 C&R will be denied.

CONCLUSION OF LAW

The November 15, 2006 C&R will not be set aside.

ORDER

Employee's October 13, 2016 petition to set aside the parties' November 15, 2006 C&R is denied.

Dated in Anchorage, Alaska on January 6, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Rick Traini, Member

/s/
Robert C. Weel, 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 RICK FIFIELD, employee / claimant; v. WEAVER BROTHERS, INC., employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 200606580; 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 January 6, 2017.

/s/
Pamela Hardy, Office Assistant