

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

GREG BROWN SR.,)
)
Employee,)
Claimant,)
) FINAL DECISION AND ORDER
v.)
) AWCB Case No. 201218260
JUNEAU LODGES, INC.,)
) AWCB Decision No. 15-0106
Employer,)
and) Filed with AWCB Juneau, Alaska
) on August 26, 2015
ALASKA NATIONAL INSURANCE,)
)
Insurer,)
Defendants.)
)

Greg Brown Sr.'s (Employee) March 17, 2015 petition for reimbursement of an out-of-pocket prescription cost and request to set-side a January 2, 2014 compromise and release agreement (C&R) was heard on July 28, 2015 and July 29, 2015, in Juneau, Alaska. This hearing date was selected on May 26, 2015. Employee appeared, represented himself, and testified. Attorney Joseph Cooper appeared and represented Juneau Lodges, Inc. and Alaska National Insurance (Employer). The record closed at the hearing's conclusion on July 29, 2015.

ISSUES

Employee contends the parties' C&R approved January 2, 2014 should be set-aside. Employee alleges he signed the C&R under duress and was not represented when he signed the agreement.

Employer contends there is no basis for setting aside the parties' C&R. Employer contends Employee voluntarily signed the C&R, received substantial benefits and was represented by competent workers' compensation attorney Joseph Kalamarides when he signed the agreement.

1) Should the parties' January 2, 2014 C&R be set aside?

Employee contends he paid \$230 for an OxyContin prescription on August 25, 2014. Employee contends he is entitled to reimbursement for this prescription.

Employer contends Employee never presented an August 25, 2014 OxyContin prescription for payment or a receipt showing Employee paid for it. Nevertheless, Employer stipulated it would pay Employee \$230 for the specific OxyContin prescription if, within 90 days of the hearing, Employee provides a document showing he was prescribed \$230 in OxyContin on August 25, 2014.

2) Should the parties' July 29, 2015 stipulation for reimbursement of Employee's out-of-pocket prescription cost be approved?

FINDINGS OF FACT

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

- 1) Employee has a significant history of back injuries, including to his low back. He has received extensive low back medical treatment, including multiple low back surgeries. (*See, e.g.,* AWCB Case Nos. 198408584, 198410070, 199109426, 199314021, 200424427, 200608164, 200718881, 201119211, 201218260; Chart Note, Kim Wright, M.D., February 4, 2014; Operative Report, Dr. Wright, February 6, 2014).
- 2) On December 9, 2012, Employee reinjured his low back while working for Employer as a steward on the M/V Matanuska, when he slipped on a wet floor. (Report of Occupational Injury or Illness, December 11, 2012).
- 3) At a May 23, 2013 prehearing conference, Employee stated he was in the process of securing an attorney to represent him. (Prehearing Conference Summary, May 23, 2013).
- 4) On June 26, 2013, experienced workers' compensation attorney Joseph Kalamarides entered an appearance on Employee's behalf. (Entry of Appearance, June 26, 2013).
- 5) On December 30, 2013, the parties filed a C&R, which included the following provisions:

The employer and carrier agree to pay the employee the sum of \$40,000.00 [FORTY THOUSAND DOLLARS] without any offset or deduction. The employer and carrier waive their right to recoup the overpayment of TTD they had previously declared. In addition, the employer and carrier will pay employee the sum of \$200.00 [TWO HUNDRED DOLLARS] to reimburse for out of pocket expenses. They will also pay all outstanding pre-C&R approval bills from Dr. Bursell's office, pursuant to the Alaska fee schedule. In addition, they will provide limited future medical benefits as set forth below...

....

The employee waives his entitlement to any and all past, present, and future compensation benefits that might be due under the Alaska Workers' Compensation Act, including compensation for temporary total disability, temporary partial disability, permanent partial impairment, and permanent total disability, as well as penalties and interest thereon, arising from his employment with the employer. This waiver is effective upon Board approval of this C&R.

The employee further waives any claim for a compensation rate adjustment that could be asserted under any provision of the [Act]. This waiver is effective upon Board approval of this C&R.

....

The employee waives his entitlement to reemployment benefits of any kind. . . . This waiver is effective upon Board approval of this C&R.

....

For the period of one year only from the date of Board approval of this C&R, the employee reserves his entitlement, if any, to future medical and related benefits under the Alaska Workers' Compensation Act for his low back. . . . The Carrier specifically agrees to authorize (pursuant to the Alaska Fee Schedule), the surgery proposed by Dr. Wright, and any follow-up care: 1) so long as the surgery and follow-up care take place within one year of the date of Board approval of this C&R; and 2) so long as the surgery is performed at Alaska Regional Hospital. The carrier will authorize reasonable airfare for surgery and any required follow-up outside of Juneau, AK.

After one year passes from Board approval of this C&R, the employee waives his entitlement to any and all future medical and related benefits, along with interest and penalties thereon, arising from his employment with employer.

....

The employer and carrier shall pay attorney's fees and costs in the amount of \$6,500.00 [SIX THOUSAND FIVE HUNDRED DOLLARS] directly to the employee's attorney in settlement of all claims for attorney's fees and costs. . . .

The parties' C&R also included the following acknowledgement by Employee:

I am the employee named in this Compromise and Release Agreement. . . . I have read the agreement and understand that this is a release of certain workers' compensation benefits. I represent that I am fully competent and capable of understanding the benefits I am releasing and the binding effect of this agreement. . . . I have not entered into this agreement through any coercion or duress created by the employer or carrier or their agents in this matter. I am signing this agreement freely and voluntarily because I agree that settlement is in my best interest.

Employee, Employee's attorney and Employer's attorney all signed the C&R. (C&R at 7).

6) On January 2, 2014, the board reviewed and approved the parties' C&R, stating, "The Board finds by a preponderance of the evidence that this settlement is in the employee's best interest." (C&R, January 2, 2014).

7) In signing the C&R, Employee swore he had read the agreement, understood its contents, and was signing freely and voluntarily. (*Id.*).

8) On February 6, 2014, Kim Wright, M.D., performed lumbar spine surgery on Employee. (Operative Report, Dr. Wright, February 6, 2014).

9) On September 18, 2014, Employee filed a claim for temporary total disability (TTD) and permanent total disability (PTD) benefits, medical and related transportation costs, reemployment benefits, a compensation rate adjustment, and unfair and frivolous controversion. This claim was filed by Employee personally and not through his attorney. (Workers' Compensation Claim, September 18, 2014).

10) On September 24, 2014, Employer answered Employee's claims for benefits, stating reasonable and necessary medical and related transportation benefits relating to Employee's low back as set forth in the parties' January 2014 C&R were accepted until January 1, 2015. Employer denied all other benefits because they were waived by the C&R. (Answer, September 24, 2014).

11) At a November 5, 2014 prehearing conference, Employee and his attorney appeared telephonically. Employee, through his attorney, orally withdrew all his claims except for medical and related transportation costs, "as non-medical benefits were waived by the parties' 01/02/14 C&R." (Prehearing Conference Summary, November 5, 2014).

12) On March 17, 2015, Employee filed a petition requesting PTD benefits. The petition was filed by Employee personally and not through his attorney. (Petition, March 17, 2015).

13) On March 31, 2015, attorney Joseph Kalamarides withdrew as Employee's attorney. (Notice of Withdrawal as Attorney, March 31, 2015).

14) At an April 14, 2015 prehearing conference, Employee inquired into setting aside the January 2014 C&R. The board designee explained the process to request action in a proceeding and provided Employee a petition form. (Prehearing Conference Summary, April 14, 2015).

15) On April 20, 2015, Employee filed a claim for PTD benefits, unfair or frivolous controversion and attorney's fees and costs. (Workers' Compensation Claim, April 20, 2015).

16) On May 4, 2015, Employer filed a hearing request on Employee's September 2014 and April 2015 claims and March 2015 petition. (Affidavit of Readiness for Hearing, May 4, 2015).

17) At a May 26, 2015 prehearing conference, the parties agreed to a July 28, 2015 hearing on out-of-pocket prescription reimbursement and C&R set aside issues. (Prehearing Conference Summary, May 26, 2015).

18) At a June 30, 2015 prehearing conference, the parties narrowed the July 28, 2015 hearing issues to whether the C&R should be set aside and whether Employer must reimburse Employee for his August 25, 2014, \$230 OxyContin prescription from Carrs on Northern Lights Blvd., prescribed by Jane Sonnenburg. (Prehearing Conference Summary, June 30, 2015).

19) On July 29, 2015, Employee testified he signed the C&R under duress, stating he was living and sleeping on the streets at the time. Employee said his attorney told him it was the best result Employee would likely get and Employee would likely receive less if the case went to hearing. Employee also stated his attorney told him he was not his attorney and contended he was therefore unrepresented when he signed the C&R. (Employee).

20) Also on July 29, 2015, the parties entered into a stipulation for the disputed prescription cost. Employee testified he paid cash for this prescription on August 25, 2014. Employer agreed it would reimburse Employee \$230 if Employee provides Employer, within 90 days from the hearing, a document showing Employee was prescribed \$230 of OxyContin on August 25, 2014. Employer agreed to accept Employee's testimony he paid cash for the prescription and to waive any requirement Employee produce a receipt. (Parties' Hearing Stipulation).

21) Employee is not credible. (Experience, judgment and inferences drawn from all the above).

22) Employee probably would not have obtained any greater benefit at a hearing on his claim's merits than what is provided in the January 2014 C&R. (*Id.*).

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at . . . reasonable cost to . . . employers . . . subject to . . . this chapter; . . .

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "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).

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, 1093-94 (Alaska 2008). Clear and convincing evidence is necessary to set aside a C&R. *Olsen Logging Co. v. Lawson*, 856 P.2d 1155 (Alaska 1993). 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 P.2d 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)).

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness’s testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The board’s credibility findings and weight accorded evidence are “binding for any review of the Board’s factual findings.” *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

8 AAC 45.050. Pleadings.

. . . .

(f) Stipulations.

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

ANALYSIS

1) Should the parties’ January 2, 2014 C&R be set aside?

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. *Seybert*. At hearing, Employee stated his attorney told him he was not his attorney and

Employee contended he was, therefore, unrepresented when he signed the C&R. This testimony is not credible. AS 23.30.122; *Smith*. The record shows Kalamarides represented Employee in this case until Kalamarides' March 31, 2015 withdrawal. There is no credible evidence, let alone clear and convincing evidence, that Kalamarides falsely represented to Employee that he was not his attorney in this case at all relevant times. *Buster*. Kalamarides was Employee's attorney when Employee signed the C&R, represented Employee zealously and competently, and obtained an excellent result for Employee in the parties' C&R. Accordingly, the C&R may not be set aside for fraud or misrepresentation. *Seybert; Lawson; Buster*.

Employee testified he was living and sleeping on the streets at the time he signed the C&R, implying this created duress. Employee also stated he relied on his lawyer's opinion the C&R was the best result he would likely get and he would likely receive less if the case went to hearing. 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*. Although Employee was in very difficult circumstances when he signed the C&R, the circumstances did not result from coercive acts by Employee's attorney or Employer. Additionally, Employee had an alternative to signing the C&R. He could have brought his claims to hearing and obtained a decision and order either denying his claims or awarding benefits. Employee traded this uncertainty for guaranteed benefits. Under the clear and unambiguous C&R, Employer paid Employee \$40,000 plus \$200.00 in reimbursement costs, and provided one year of future low back medical and related benefits, including Dr. Wright's surgery. In exchange, Employee waived any and all future benefits to which he may have been entitled under the Act. Employee signed the C&R swearing he was doing so freely and voluntarily. *Seybert*.

As to Employee's contention he relied on his lawyer's opinion the C&R was the best result Employee would likely get and he would likely receive less if the case went to hearing, he reasonably accepted sound legal advice given by an experienced and competent workers' compensation attorney. A panel approved the parties' C&R after it determined the agreement was in Employee's best interest. Given Employee's history of low back injuries and medical

treatment including past low back surgeries, it is probable Employee would not have obtained any greater benefit had he gone to hearing than what is provided in the January 2014 C&R.

There being no grounds upon which to set aside the parties' January 2, 2014 C&R, the request to set it aside will be denied.

2) Should the parties' July 29, 2015 stipulation for reimbursement of Employee's out-of-pocket prescription cost be approved?

At hearing, the parties entered into a stipulation for the disputed prescription cost. Employer agreed it would reimburse Employee \$230 if Employee provides Employer, within 90 days from the hearing, a document showing Employee was prescribed \$230 in OxyContin on August 25, 2014. Employer waived any requirement Employee produce a receipt showing the cash payment. The parties' stipulation regarding the out-of-pocket prescription cost reimbursement is approved and will be so ordered. 8 AAC 45.050(f)(3).

CONCLUSIONS OF LAW

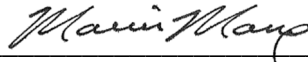
- 1) The parties' January 2, 2014 C&R will not be set aside.
- 2) The parties' July 29, 2015 stipulation for reimbursement of Employee's out-of-pocket prescription cost will be approved.

ORDER

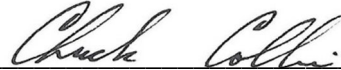
- 1) Employee's request to set-side the parties' January 2, 2014 C&R is denied.
- 2) The parties' July 29, 2015 stipulation for reimbursement of Employee's out-of-pocket prescription cost is approved and is so ordered.

Dated in Juneau, Alaska on August 26, 2015.

ALASKA WORKERS' COMPENSATION BOARD



Marie Marx, Designated Chair



Charles Collins, Member



Bradley Austin, 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 Greg Brown Sr, employee / claimant v. Juneau Lodges, Inc., employer; Alaska National Insurance, insurer / defendants; Case No. 201218260; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 26, 2015.

Sue Reishus-O'Brien, Workers' Compensation Officer