ALASKA WORKERS' COMPENSATION BOARD

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

VINCENT SWOPES, Employee, Petitioner, v. DOYON UNIVERSAL SERVICES, LLC, Employer, and ALASKA NATIONAL INSURANCE, Insurer, Respondents.	)	FINAL DECISION AND ORDER AWCB Case No. 201501719 AWCB Decision No. 19-0081 Filed with AWCB Fairbanks, Alaska on August 2, 2019

By the parties' agreement, Employee's June 8, 2018 petition to set aside a previously approved compromise and release (C&R) agreement was heard on July 25, 2019, in Anchorage, Alaska, a date selected on April 19, 2019. A designee's order continuing a December 20, 2018 hearing and rescheduling it to this date gave rise to the hearing. Self-represented Vincent Swopes (Employee) appeared by telephone and testified. Attorney Michael Budzinski appeared and represented Doyon Universal Services, LLC and its insurer (Employer). Johanna Kalal testified by telephone on Employer's behalf. The record closed at the hearing's conclusion on July 25, 2019.

ISSUE

Employee contends Employer failed to disclose a Florida child support withholding order, which substantially impacted the amount he received in his settlement with Employer. He contends had

he known about the Florida withholding order, he would not have settled his workers' compensation claim. He seeks an order setting aside the settlement agreement.

Employer contends Employee knew he had child support obligations and his allegations against Employer amount to nothing more than a mistake of fact. It contends Employer made no intentional factual misrepresentations during mediation. Because a mistake of fact cannot be a ground to set aside an approved C&R, Employer seeks an order denying Employee's request.

Should the approved settlement agreement be set aside?

FINDINGS OF FACT

A preponderance of the evidences establishes the following facts and factual conclusions:

1) On January 29, 2015, Employee reported left neck and chest pain after reaching overhead and lifting trays while performing his work as a cook for Employer. (First Report of Injury, February 2, 2015; Compromise and Release Agreement, April 27, 2018).

2) On August 3, 2015, Employer denied Employee's right to all benefits based on an employer's medical evaluation by Michael Hall, M.D. (Controversion Notice, July 31, 2015).

3) In 2016 and 2017, Employee filed claims for various workers' compensation benefits. (Workers' Compensation Claim, March 4, 2016; Claim for Workers' Compensation Benefits, December 30, 2016; Claim for Workers' Compensation Benefits, February 21, 2017).

4) On December 19, 2016, Employer denied Employee's claims based on an employer's medical evaluation by Eugene Wong, M.D. (Controversion Notice, December 15, 2016).

5) On September 13, 2017, Employer told Employee it had received child support withholding orders from Arizona and Connecticut. The Arizona order apparently arose from a Missouri order. Employer's attorney sent these orders to Employee in connection with a settlement offer. Employer reduced Employee's bi-weekly disability benefits based upon these withholding orders. (Budzinski email, September 13, 2017; Employer's Hearing Brief, July 17, 2019).

6) Employer reduced Employee's disability rate by approximately $64 from March 1, 2015 through December 10, 2016, based on a "Court Ordered Lien." (ICERS database, Benefit Redistribution Segments, December 19, 2016).

7) On January 17, 2018, Employer's workers' compensation insurer received another child support enforcement order, this one from Florida. However, because it had controverted Employee's benefits in December 2016, Employer contends it did not reduce any benefits based on the Florida order. It contends the Florida order was placed in a different electronic folder than the Missouri and Connecticut orders and was inadvertently overlooked and not discussed at Employee's subsequent mediation. (Employer's Hearing Brief, July 17, 2019).

8) Employee testified he called the division offices and the division "appointed" a lawyer to represent him. (Employee).

9) The division does not appoint lawyers to represent parties in workers' compensation claims. The division maintains and offers a list including names and contact information for lawyers who have appeared before the board, representing injured workers. (Experience, observations).

10) On April 4, 2018, an attorney entered her appearance on Employee's behalf. (Entry of Appearance, April 4, 2018).

11) On April 27, 2018, the parties participated in a successful mediation with a division hearing officer, resolving Employee's claims. (ICERS database, Mediation Details, April 27, 2018).

12) On April 27, 2018, the parties also submitted a fully executed C&R. Employee initialed all but page seven of the 11 page document, stating he "Read and Understood" the writing on each page. The C&R provided him $95,000 in exchange for waiving all benefits. The C&R stated:

> The employee agrees and understands that the lump-sum settlement funds described above are subject to offset pursuant to orders served on the employer or carrier or their agents by the Alaska child support services division (CSSD) or equivalent agencies from other States, per AS 25.27.250.

On page 10, Employee stated under oath:

> 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. To the best of my knowledge, the facts have been accurately stated in this Compromise and Release Agreement. No representations or promises have been made to me by the employer or carrier or their agents in this matter, which have not been set forth in this document, and 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 interests.

Employee and all necessary persons signed the document on April 27, 2018, and submitted it to the board on the same date. (Compromise and Release Agreement, April 27, 2018).

13) On May 3, 2018, a board panel approved the C&R. (*Id*.).

14) The approved settlement resolved Employee's 2016 and 2017 claims and he no longer has a claim pending. (Experience, judgment and inferences drawn from the above).

15) The C&R does not specifically identify any child support withholding order by date, state or amount nor does it say how many withholding orders there were in this case. (*Id*.).

16) According to Employer, on May 8, 2018, during discussions between the parties' lawyers about child support withholding orders, which Kalal found confusing, Employer's adjuster discovered the Florida order. The parties' attorneys were uncertain if the Florida order duplicated the other orders. Consequently, Employee's lawyer contacted Florida, learned it had a separate order and successfully negotiated a reduced $15,117.71 amount, which Florida agreed to accept in satisfaction of its lien against this settlement only. Employer assumed Employee agreed to this negotiated reduction. (Employer's Hearing Brief, July 17, 2019).

17) Employee denies he gave his attorney authority to negotiate any lien reduction in the Florida case because he denies owing any child support in Florida because the child's mother had taken the child illegally out of state contrary to court orders. He said within three to four days after the April 27, 2018 mediation (*i.e.*, from April 30 to May 1), he knew the precise amount Employer was going to pay on the Missouri lien. Within three to four days after that date (*i.e*., from May 2 to May 5), Employee knew about the Florida lien. His best estimate is by May 10, 2018, he was aware Florida had a child support withholding order against his settlement. (Employee).

18) On May 15, 2018, Employer reduced Employee's C&R payment by $41,944.29 to satisfy a "Court Ordered Lien." It paid Florida $15,117.71 and Missouri $26,826.58, paying him the $53,055.71 balance. (ICERS database, Benefit Redistribution Segments, May 16, 2018; Employer's Hearing Brief, July 17, 2019).

19) Between May 8, 2018, when the adjuster discovered the Florida lien, and May 15, 2018, when the adjuster paid Employee his settlement balance, Employee did not file an objection to Employer paying the Florida lien and did not seek to set the C&R aside based on this discovery. (Employee; agency file; inferences drawn from all the above).

20) Employee's lawyer negotiated a resolution with Florida's child support enforcement agency to preserve the settlement after the board had approved the C&R, after the adjuster had discovered

the Florida lien. It is unlikely Employee's attorney negotiated the lien reduction without his knowledge and approval. (Experience, judgment, observations and inferences from the above).

21) On May 21, 2018, Employee's attorney withdrew. (Notice of Withdrawal of Attorney, May 21, 2018).

22) On June 8, 2018, Employee filed a petition; the relief he was seeking was unclear. It stated:

> Neglect of my legal matter: failure to communicate with me, dishonest, fraud, deceit or misrepresentation in a case. (Petition, June 8, 2018).

23) By August 28, 2018, the division and the parties understood Employee's petition sought to set aside his approved C&R. (Prehearing Conference Summary, August 28, 2018).

24) Over the next many months, the parties pursued discovery efforts concerning the Florida child support withholding order, and scheduled and then canceled hearings on Employee's petition. (Prehearing Conference Summary, December 17, 2018).

25) On July 22, 2019, the parties stipulated to have the hearing on Employee's petition held in Anchorage rather than in Fairbanks, because Employee lives out-of-state and planned to attend the hearing by telephone and so the defense lawyer and hearing officer would not have to fly to Fairbanks from Anchorage. (Prehearing Conference Summary, July 22, 2019).

26) Employee testified the "neglect," "failure to communicate" and "dishonesty" allegations in his petition were directed toward his former attorney. His "fraud" and "deceit or misrepresentation" claims were directed against both his former attorney and Employer's lawyer. Employee opined child support agencies are "a scam and illegal." He repeatedly expressed his displeasure with such agencies and his disagreement that he owed any child support in Florida. Employee obtained an attorney for the instant case who never mentioned the Florida order until after he settled his claim and the board had approved the C&R. He contends his attorney knew about the Florida withholding order as did Employer's lawyer and both intentionally withheld this information from him. Employee initially said he knew nothing about the Florida order but then said his attorney told him "something came up" regarding a Florida order about a week after the mediation when he returned to Missouri. His attorney told him she did not know about the Florida withholding order earlier because it was not in the file she reviewed. Employee does not believe her. He then stated he knew about the Florida child support withholding order around May 10, 2018. Later in his testimony, Employee said he knew about the Florida withholding order "within

a few days" after the mediation. At that point, Employee said he "had no choice," and could do nothing because he had already signed the C&R. He disputes Kalal's testimony that the child support withholding orders were confusing. Employee contends his former attorney and Employer's lawyer were working together "in cahoots" to defraud him. He primarily contends he would have postponed the case and not settled until he got the Florida child support issue resolved; had he known about the Florida order, he would not have agreed to give Florida any money because he denies owing it. Though Employee initially said he did not believe his lawyer when she told him she did not know about the Florida withholding order, he acknowledged perhaps Employer withheld the Florida order from her as well. He believes the fact Employer did not reduce his benefits for the Florida withholding order supports his position that there was fraud afoot. Nonetheless, in his closing argument, Employee said, in respect to the Florida child support withholding order, he was told "there was no way around it." His lawyer told him Florida was "going to take the money anyway." (Employee).

27) Employee's testimony at times was inconsistent and evasive. (Experience, judgment and inferences drawn from the above).

28) Kalal was the adjuster on Employee's case before and during settlement. She admitted the insurer received the Florida child support withholding order on January 17, 2018. However, Kalal did not know about the Florida order before the mediation and settlement because it had been placed in a separate electronic file in the insurer's electronic file and she simply did not see it. She candidly conceded, "I missed this one." In January 2018, the insurer was changing to an electronic filing system and documents were being scanned into it. Kalal thinks this may be why the document was placed in a separate folder apart from the other withholding orders. She is uncertain exactly why she did not see this Florida withholding order earlier. Kalal reduced Employee's disability benefits based on the Missouri withholding order during the time he was receiving those benefits. However, once Employer controverted his case, there was nothing from which to withhold any benefits and for this additional reason there was no need to consider any withholding orders. After the board approved the C&R, Kalal reviewed the electronic file to determine who, and how much, to pay. The Arizona, Missouri and Connecticut withholding orders did not all include a child's name. The amounts owed were close but different and Kalal was uncertain if some were duplicates. She was confused. While reviewing the file to clarify payment, Kalal saw the Florida withholding order folder for the first time. She was surprised. Kalal immediately

contacted her attorney and told him about the Florida order. She wondered if this one too might be a duplicate. Employer's lawyer immediately told Employee's attorney who contacted Florida child support and determined it had a separate $50,718.01 child support lien. Kalal believes she would have been obligated to reveal the Florida withholding order earlier had she been aware of it. Her failure to discover the Florida order was not purposeful but was a mistake or an oversight. Kalal confirmed Employer's attorney did not know about the Florida lien until after the settlement had been approved. (Kalal).

29) Kalal's testimony was credible. (Experience, judgment and inferences drawn from it).

30) Child support enforcement agencies normally serve child support withholding orders on insurance adjusters handling an injured person's work-related injury claim. (Experience).

PRINCIPLES OF LAW

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). That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." (*Id.* at 534).

> **AS 23.30.012. Agreements in regard to claims.** . . .
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> (b) . . . 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. . . .

Common law contract formation and rescission standards apply to workers' compensation settlement contracts to the extent statutes do not override them. The standard of proof for setting aside a C&R in Alaska is "clear and convincing evidence." *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079 (Alaska 2008). Contract rescission is an equitable, not a statutory, remedy. *McKeown v. Kinney Shoe Co.*, 820 P.2d 1068 (Alaska 1991). The board has inherent authority to set aside a settlement agreement because of fraud. *Williams v. Abood*, 53 P.3d 134 (Alaska 2002). Statements by an injured worker's representative cannot be the basis to find misrepresentation by the employer. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001 (Alaska 2009).

In *Seybert*, an injured worker sought to set aside or modify an approved C&R, based on duress, misrepresentation or fraud. At the board hearing, the worker testified that during settlement negotiations the adjuster and her attorney told him he did not need an attorney. He said he did not understand he would be giving up his weekly compensation checks when he signed the C&R. He further testified the adjuster told him he would not get medical care unless he signed the agreement. According to the worker, no one discussed releasing permanent total disability benefits even though he told the adjuster he did not think he could work. Denying the set-aside request, the board found the worker had failed to prove the adjuster engaged in fraud or misrepresentation in negotiating the C&R. It found his claim he did not understand the settlement terms was not credible and it found no credible, specific evidence showing misrepresentation or fraud by the employer to coerce him to sign the C&R. The board also found the employer's attorney and insurer owed no fiduciary duty to the claimant.

In *Seybert*, the adjuster had written the injured worker a letter affirmatively stating there were only three remaining benefits available to him. She discussed these benefits but did not tell him additional benefits such as permanent total disability could also be available, since Social Security had found him eligible for disability benefits, and that he would be waiving permanent total disability in a settlement agreement. The adjuster also failed to mention weekly stipend benefits as part of reemployment benefits, which he would also be waiving. On appeal, the worker contended this was a material misrepresentation. *Seybert* agreed the board could have found the adjuster's representations to the claimant were not in accord with the facts of his case as she knew them. Further, *Seybert* found the adjuster's letter suggesting the claimant had made an unlawful change in attending physician neglected to tell him that his move to another state accorded him a right to a new physician. Her letter implied the insurer's willingness to allow him to see a new physician depended upon whether he settled his claims. (*Id*. at 1095). The court remanded the case back to the board for it to consider the mixed legal and factual issues associated with the misrepresentation issue. *Seybert* also noted, "Under certain circumstances non-disclosure of a fact can be equivalent to an assertion, and according to the Restatement (Second) of Contracts §161(b), failure to act in good faith and in accordance with reasonable standards of fair dealing can be relevant in determining when non-disclosure of a fact is equivalent to an assertion." (*Id*. at 1096).

On appeal, *Seybert* held the Act created an adversarial system between the injured worker and his insurer. Because the parties' interests were in conflict, *Seybert* determined there was no basis for a fiduciary relationship. While a settlement agreement based on fraud can be set aside, the Act does not permit vacating a settlement contract based on mistakes of fact. (*Id.* at 1094).

Common law fraud claims require showing (1) a false representation of fact; (2) knowledge of the falsity of the representation; (3) intention to induce reliance; (4) justifiable reliance; and (5) damages. *Shehata v. Salvation Army*, 225 P.3d 1106 (Alaska 2010). In *Shehata*, the Alaska Supreme Court held that in common law, "silence can be a misrepresentation when a person has a duty to speak." If there is a statutory duty to disclose, silence can amount to "concealment of a material fact" for estoppel purposes. (*Id*. at 1117-18).

To avoid a contract based on 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, and (4) the party was justified in relying on it. (*Seybert* at 1094 (emphasis in original)). In evaluating a claimant's assertion that a C&R should be set aside because of misrepresentation, the board must consider whether there was an intentional, *i.e*., "fraudulent" misrepresentation or a material misrepresentation by the employer. (*Id.*).

Seybert also set forth elements for a duress claim. A party alleging duress must show that (1) he involuntarily accepted the terms of another; (2) the circumstances permitted no alternative; and (3) such circumstances were the result of coercive acts of the other party. (*Id.*).

> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary that
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> (1) the claim comes within the provisions of this chapter;

> **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 findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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).

> **AS 23.30.130. Modification of awards**. (a) Upon its own initiative, or upon the application of any party in interest on the ground of . . . a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits . . . review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

> **AS 25.27.250. Order to withhold and deliver**. (a) Without prior notice to the obligor, the agency may issue to any person . . . an order to withhold and deliver property under this section; the order may be issued. . . .
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> (b) All real or personal property belonging to the obligor is subject to an order to withhold and deliver, including, but not limited to, earnings that are due, owing, or belonging to the debtor. . . .
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> . . . .
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> (e) Any person . . . served with an order to withhold and deliver is required to make true answers to inquiries contained in the order under oath and in writing within 14 days after service of the order, and is further required to answer all inquiries subsequently put.
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> (f) If a person . . . upon whom service of an order to withhold and deliver has been made possesses property due, owing, or belonging to the obligor, that person . . . shall withhold the property immediately upon receipt of the order and shall deliver the property to the agency
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> > (1) if the property is earnings of an employee who is subject to a child support order being enforced by the agency, within seven business days after the amount would, but for this section, have been paid or credited to the employee. . . .
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> (j) A person . . . that fails to comply with an order to withhold and deliver served under this subsection is subject to penalties under AS 25.27.260. . . .

> **AS 25.27.260. Civil liability upon failure to comply with an order or lien.** (a) If a person . . . .

> (1) fails to make an answer to an order to withhold and deliver within the time prescribed in AS 25.27.250;
> (2) fails or refuses to deliver property in accordance with an order issued under AS 25.27.250;
> (3) pays over, releases, sells, transfers, or conveys real property subject to a lien recorded under AS 25.27.230 to or for the benefit of the obligor or any other person;
> (4) fails or refuses to surrender upon demand property attached; or
> (5) intentionally fails or refuses to honor an . . . income withholding order . . . the person . . . is liable to the agency in an amount equal to 100 percent of the amount constituting the basis of the lien, order to withhold and deliver, attachment, or withholding of wages or income, together with costs, interest, and reasonable attorney fees.

(b) A person . . . that intentionally fails or refuses to honor a properly served income withholding order . . . that is not being enforced by the agency is liable to the obligee in an amount equal to 100 percent of the amount ordered to be withheld together with costs, interest, and reasonable attorney fees.

AS 25.27.900. Definitions. In this chapter,
. . . .

> (7) "earnings" includes income from any form of periodic payment due to an individual, regardless of source; . . . and the interest on any of this income; in this paragraph, "periodic payment" includes . . . workers' compensation. . . .

3 AAC 26.100. Additional standards for prompt, fair, and equitable settlement of workers' compensation claims. Any person transacting a business of insurance who participates in the investigation, adjustment, negotiation, or settlement of a workers' compensation claim:

> (1) may not require a claimant to travel unreasonably for medical care, rehabilitation services, or any other purpose;
> (2) shall provide necessary claim forms, written instructions, and assistance that is reasonable so that any claimant not represented by an attorney is able to comply with the law and reasonable claims handling requirements;
> (3) shall promptly make all payments or denials of payments as required by statute or regulation.

According to *Black's Law Dictionary*, 10th Edition (2009) at 491, in legal parlance "deceit" means:

> **Deceit**, 1. The act of intentionally leading someone to believe something that is not true; an act designed to deceive or trick <the juror's deceit led the lawyer to believe that she was not biased>. 2. A false statement of fact made by a person knowingly or recklessly (*i.e.*, not caring whether it is true or false) with the intent that someone

> else will act on it. See *fraudulent misrepresentation* under MISREPRESENTATION. 3. A tort arising from a false representation made knowingly or recklessly with the intent that another person should detrimentally rely on it <the new homeowner sued both the seller and the realtor for deceit after discovering termites>. See FRAUD; MISREPRESENTATION.

ANALYSIS

Should the approved settlement agreement be set aside?

The C&R resolved his 2016 and 2017 claims and Employee does not have a claim pending. The statutory presumption of compensability does not apply to the C&R set-aside issue raised in his petition, because it is not a proceeding to enforce a "claim for compensation." AS 23.30.120(a)(1). Employee seeks to set aside his April 27, 2018 C&R on various grounds. These include, in his words: neglecting his case; failure to communicate with him; dishonesty; fraud; deceit and misrepresentation. Employee made it clear he asserts all six bases for rescinding the C&R against his own attorney. He avers only the last three, fraud, deceit and misrepresentation against Employer's attorney and by inference Employer and its adjuster.

(1) Grounds premised on Employee's lawyer.

To the extent Employee alleges his attorney withheld information, was negligent or otherwise mishandled his case, such allegations cannot form the basis for setting aside his C&R because his representative's alleged actions do not inure to Employer. The Alaska Workers' Compensation Act and case law does not accord him a remedy when he wants to vacate an approved C&R based on allegations his own representative misled him or did something wrong. *Smith*.

(2) Grounds premised on Employer and its agents.

As for his grounds against Employer, its insurer, adjuster or attorney, Employee must demonstrate by "clear and convincing evidence" that Employer or its agents committed fraud or misrepresented a material fact sufficient to vacate his approved C&R. *Seybert*. This higher burden of proof demonstrates the legislature's intent to make C&Rs difficult to set aside. AS 23.30.012(b); *Rogers & Babler*. "Deceit" is not recognized in Alaska law as a separate basis to set aside an approved C&R in a workers' compensation case. Employee's request to set aside the settlement agreement based on "deceit" will be as addressed as part of his "fraud" ground. *Black's Law Dictionary*. The

Alaska Supreme Court has applied common law contract principles to C&R rescission cases. An approved C&R may be set aside on grounds of fraud or material misrepresentation. *Seybert*. Employee's petition requests an equitable, not a statutory, remedy. *McKeown*.

(a) The C&R will not be set aside based on fraud.

To succeed on his fraud claim against Employer and its agents, Employee must show one or more of them made (1) a false representation of fact; with (2) knowledge of the falsity of the representation; with an (3) intention to induce reliance; and his (4) justifiable reliance; and (5) damages. *Shehata*. In common law, "silence can be a misrepresentation when a person has a duty to speak." If there is a statutory duty to disclose, silence can be "concealment of a material fact" for estoppel purposes. Conversely, if there is no duty, silence cannot be a misrepresentation. (*Id*.). If any element is missing from the applicable fraud test, Employee's petition on this ground fails.

(1) Employer and its agents made no false factual representation.

Employee contends Employer and its agents made a material misrepresentation by intentionally not telling him about the Florida withholding order during the mediation or before the C&R was approved. He offered arguments but no evidence to support this contention. Similarly, Employee offered no proof Employer or its agents affirmatively stated there were no other orders or specifically said there was no order from Florida. The C&R's plain language advised Employee his settlement would be reduced by child support withholding orders from any jurisdiction. He initialed that C&R page indicating he read and understood this provision. In contrast to making a material misrepresentation or intentionally withholding the Florida lien information, Kalal said she simply made a mistake and did not notice the Florida lien, which somehow found its way into a different folder in her electronic file. She only found it upon preparing to pay the appropriate child support enforcement agencies after the approved settlement. Kalal's testimony is credible. She would have revealed the withholding order earlier had she seen it. AS 23.30.122; *Smith*. At this point, Employee has proven only what Employer admitted freely -- that the adjuster made a mistake of fact and was unaware there was a Florida child support withholding order in an electronic file at the time the parties negotiated settlement and the C&R was approved. A factual mistake, on one or both parties' part, by law cannot form the basis for vacating an approved settlement agreement in a workers' compensation case. AS 23.30.012(b); AS 23.30.130; *Seybert*.

Employee insists Employer's adjuster and attorney knew Florida had a child support withholding order before the mediation and the C&R approval because Kalal admits it was in her file. He again offers arguments but no evidence. Employee failed to present clear and convincing evidence showing anyone other than Kalal could have known about the Florida withholding order without her sharing it with them. The fact the adjuster's file indisputably contained the order does not mean the adjuster assigned to the case saw it in a timely manner. If Kalal did not see the Florida order before the C&R was approved, no one else could have seen it because the child support agency would have served it on only the adjuster. *Rogers & Babler*. Kalal affirmatively and credibly stated her attorney did not know about the withholding order until after the C&R had been approved. There is no suggestion Employer ever knew about it. AS 23.30.122; *Smith*.

This case differs from *Seybert*, where an adjuster made affirmative statements to the claimant about his rights and benefits, knowing they were false. By contrast, without proof Employer or its agents knew they had the Florida withholding order and affirmatively denied having it before the mediation or before C&R approval, Employee cannot prove the elements of common law fraud. *Williams*. In other words, since Employer and its agents made no representation about the Florida withholding order at any relevant time, they could not have made a misrepresentation. Similarly, Employee cannot prove they intended to deceive him or induce his reliance on their misrepresentation, because they made no representation. Thus, he failed to show by clear and convincing evidence Employer, its attorney, insurer or adjuster committed fraud by making any representation much less a material misrepresentation about the Florida order. (*Id*.).

(2) Employer and its agents made no false representation through silence.

Employee also implies Employer or its agents, by intentionally keeping silent, concealed a material fact. In some cases, remaining silent in the face of a duty to speak can be a material misrepresentation. *Shehata*. Notwithstanding Kalal's testimony that she would have been "obligated" to inform Employee, and would have informed him, about the Florida child support withholding order had she seen it sooner, the parties have not presented any case law, statute or regulation showing an adjuster has duty to disclose a child support enforcement order to an injured worker, other than to explain deductions from compensation payments made pursuant to such order. There may well be such a rule, but neither party cited it and the panel has not found one.

The Alaska Administrative Code sets forth standards and an insurer's duties to avoid an unfair claim settlement act or practice. However, the code does not provide an affirmative duty on an adjuster to notify an injured worker that the adjuster has received a child support withholding order, before redistributing applicable funds. 3 AAC 26.100(1)-(3). The Act creates an adversarial system and Employer and its agents have no fiduciary duty to Employee. *Seybert*.

By contrast, under Alaska law, "without prior notice to the obligor," a child support agency may issue to any person or entity an order to withhold and deliver property to satisfy child support arrearages. AS 25.27.250(a), (b), (e), (f)(1), (J). In other words, a child support agency has no duty to give the obligor parent prior notice that it is sending a withholding order to those who have the obligor's property. Such property includes workers' compensation benefits. AS 25.27.900(7). Without citing a legal duty to disclose, Employee cannot prove a material misrepresentation by silence. *Shehata.* Nevertheless, the instant decision found Kalal did not see the Florida withholding order until after the settlement had already been approved. Since Employee cannot prove the first prong of his allegation that Employer and its agents committed fraud, his request to set aside the C&R on fraud grounds will be denied. Given this result, this decision need not address the other common law fraud elements.

(b) The C&R will not be set aside based on misrepresentation.

Employee also contends Employer or its agents materially misrepresented facts sufficient to set aside his approved C&R on this basis. In addition to fraudulent misrepresentation, material misrepresentation can be a valid basis for setting aside a workers' compensation settlement agreement. *Seybert*. To succeed on this ground, Employee must show with clear and convincing evidence (1) a misrepresentation, (2) which was fraudulent *or* material, (3) which induced him to enter into the C&R, and (4) he was justified in relying on it. He must show Employer, its attorney or its adjuster made the alleged material misrepresentation. Once again, if Employee fails on any prong in this test, his petition on this ground fails.

The instant decision has already determined Employer and its agents did not make a fraudulent misrepresentation. That leaves a material misrepresentation as the last ground for Employee's petition. For the reasons stated in subsection (a), immediately above, Employee failed to present

clear and convincing evidence Employer, its attorney, its insurer or its adjuster made any material misrepresentations concerning the Florida child support withholding order. In summary, because of a mistake, Employer and its agents were not aware of the Florida withholding order until after the claim had settled. The adjuster's mistake cannot form the basis to rescind the approved C&R as a matter of law. AS 23.30.012(b); AS 23.30.130. Because he failed to produce evidence showing either an affirmative material misrepresentation or a material misrepresentation by silence, Employee's petition will fail on this ground.

(c) The C&R will not be set aside based on duress.

Employee did not specifically include duress as a basis for his petition to vacate his approved C&R. However, he did say he had no choice other than to pay Florida the amount his attorney negotiated once he found out the adjuster had the Florida withholding order in her possession.

Seybert implied duress may be a basis for setting aside a C&R. To prove Employer or its agents got him to agree to settle his case by duress, Employee must show (1) he involuntarily accepted the terms of another; (2) the circumstances permitted no alternative; and (3) such circumstances were the result of coercive acts of the other party. (*Id*.). Employee's comments about having no options or choice pertain only after the C&R was already approved. He made these comments in reference to finding out about the Florida child support withholding order and having to pay Florida the amount his attorney negotiated. Employee made no argument and presented no clear and convincing evidence that the C&R, which he wishes to set aside, was signed under duress. The separate, post-C&R agreement with Florida had nothing to do with his C&R. It addressed only to whom the adjuster was to pay some of his settlement proceeds. Therefore, to the extent Employee contends he entered into his C&R under duress, this basis for his petition will fail.

Employee's overarching issue here is his firm belief he owes no child support to the Florida agency, because the child's mother illegally took the child out of state and violated a court order. This decision has no jurisdiction to decide this issue and it is irrelevant. Employee may resolve child support arrearage issues with the appropriate child support enforcement agencies. Nevertheless, apart from the above findings and conclusions, Employer's insurer and adjuster were still legally obligated to pay to Florida the amount set forth in the withholding order. Failure to do

so would have made them civilly liable for the entire amount owed, interest and attorney fees and costs. AS 25.27.260(a)(1)-(5), (b). Though Florida made it clear Employee still owes the balance on its lien, his attorney successfully negotiated a significantly lower amount withheld from his settlement, which is a considerable benefit to him. In other words, without that added negotiation, the adjuster would have had to pay the entire amount Florida claimed on its lien. Employee would have received significantly less of his settlement. He can still dispute the amounts owed in any state in accordance with the laws in the jurisdictions where he allegedly owes child support.

CONCLUSION OF LAW

The approved settlement agreement will not be set aside.

ORDER

Employee's June 8, 2018 petition to set aside his approved C&R is denied.

Dated in Fairbanks, Alaska on August 2, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert C. Weel, Member

/s/
Donna Phillips, 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 Vincent Swopes, employee / claimant v. Doyon Universal Services, LLC, employer; Alaska National Insurance, insurer / defendants; Case No. 201501719; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 2, 2019.

/s/
Ronald C. Heselton, Office Assistant II