ALASKA WORKERS' COMPENSATION BOARD

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

CHRISTOPHER RODRIGUEZ, Employee, Claimant, v. NORTH PACIFIC SEAFOODS, INC., Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201810064 AWCB Decision No.20-0068 Filed with AWCB Anchorage, Alaska on July 30, 2020.

Christopher Rodriguez' (Employee) December 13, 2019 and May 12, 2020 petitions for a second independent medical evaluation (SIME) and to set aside the May 3, 2019 Compromise and Release Agreement (C&R) were heard on June 16, 2020, in Anchorage, Alaska, a date selected on May 14, 2020. The May 12, 2020 hearing request gave rise to this hearing. Employee appeared telephonically, testified and represented himself. Attorney Michael Budzinski appeared telephonically and represented North Pacific Seafoods, Inc. and its insurer (collectively Employer). Former adjuster Miles Bottomley and adjuster Ashley Pool appeared telephonically and testified for Employer. The record remained open for additional responses and closed on June 30, 2020.

ISSUES

Employee contends he timely filed and served evidence on May 14, 2020; therefore, the May 13, 2020 note signed by Michael Leathers, M.D., should be admitted as evidence.

Employer contends it was not timely served with Employee's evidence and did not have an opportunity to request cross-examination or address the document at hearing. It also contends the note is suspect because it may be based on hearsay. It asks Dr. Leathers' May 13, 2020 note be excluded as evidence.

1) Should Employee's May 14, 2020 evidence be excluded?

Employee contends permanent partial impairment (PPI) benefits allocated in the C&R were not based on an actual PPI rating and asks for an SIME to obtain a rating.

Employer contends an SIME should not be ordered because (1) there is no medical dispute between an attending physician and its employer's medical evaluator (EME); (2) under the C&R, his entitlement to medical benefits lapsed after May 6, 2020; and (3) Employee waived PPI benefits.

2) Should an SIME be ordered?

Employee contends Employer misrepresented in the C&R by including a false PPI rating and forced him to sign it by exploiting his financial distress. He further contends Employer promised medical benefits for one year but it neither contacted him to provide it nor approved treatment he sought. Employers request the C&R be set aside.

Employer contends there is no clear and convincing evidence Employee agreed to the C&R due to fraud, duress or a material misrepresentation. It contends the C&R should not be set aside.

3) Should the C&R be set aside?

FINDINGS OF FACT

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

1) On July 7, 2018, Employee injured his right arm and shoulder while working for Employer. (First Report of Injury, July 17, 2018).

2) On November 19, 2018, John Osland, M.D., saw Employee for an EME and diagnosed "an unstable right shoulder after three dislocations" with joint laxities. Dr. Osland opined Employee has a permanent right shoulder instability, caused by the work injury. He said Employee was not

medically stable and recommended physical therapy two times a week for six weeks. Dr. Osland recommended a magnetic resonance arthrogram, if Employee's condition did not improve, followed by surgery if indicated for stabilization. (Osland report, November 19, 2018).

3) On January 16, 2019, David Wang, M.D., an orthopedic surgeon, saw Employee and diagnosed right humerus anterior subluxation and right shoulder multidirectional instability. He recommended physical therapy and restricted repetitive or overhead activities and lifting to 10 pounds. (Wang report, January 16, 2019).

4) On January 23, 2019, Employee claimed temporary total disability (TTD) and a compensation rate adjustment. (Claim, January 23, 2019).

5) On January 29, 2019, Bottomley emailed Employee, "A PPI rating cannot be done until you have completed your medical treatment and your treating doctor has release you from care. When that happens, we will ask your treating doctor if they can rate you according to the AMA guides, 6th edition or refer you to a doctor who can. If they cannot do either, we will attempt to schedule you for another IME for a rating with Dr. Osland. If Dr. Osland is not available, we will schedule you with a different doctor." (Email, January 29, 2019).

6) On March 5, 2019, Randall Schaefer, M.D., an orthopedic surgeon, saw Employee and diagnosed right shoulder pain and limited range of motion, shoulder instability suggested by history, pain out-of-proportion to injury, generalized ligament laxity, and probable multi-directional instability. However, Employee did not relax enough and could not be evaluated properly. Dr. Schaefer recommended home exercises and said Employee was a poor surgical candidate. (Schaefer report, March 5, 2019). Employee exercised his right to change attending physician without Employer's written consent. (Observation; judgment).

7) On March 22, 2019, Dr. Osland conducted a records review EME and diagnosed a right shoulder laxity with probable multidirectional instability and "aggravation that has not returned to pre-aggravation status related to the injury of July 7, 2018, which was an industrial injury." Dr. Osland said the work injury was the substantial cause of Employee's disability, and he was not medically stable. Dr. Osland recommended physical therapy and further follow-up with Dr. Schaefer. (Osland report, March 22, 2019).

8) On April 2, 2019, Employee and Bottomley exchanged the following email messages:

> **Bottomley**: "Hi Chris, here is the report from Dr. Osland."

> **Employee**: "Okay. I have had a chance to review the report. However, I did have some questions regarding where we go from this point on my with my claim. Thanks again Miles I look forward to hearing from you."
>
> **Employee**: "Hello Miles, Is this all you need to determine how much my settlement would be? I'm curious what steps id need to end my case now that we have the report. . . ."
>
> **Bottomley**: "Hi Chris, I will answer you on this when I can. Need to figure a couple of things out first. Hopefully within a day or two."
>
> **Employee**: "No problem was just trying to follow up myself, thank you I look forward to hearing back from you." (Emails, April 2, 2019).

9) On April 3, 2019, Employee and Bottomley exchanged email messages:

> **Bottomley**: "Since you do not want to see Dr. Wang or Dr. Schaefer again, you will need to establish care with a new doctor in order to get medication. Please let me know which doctor you would like to see and I will authorize treatment."
>
> **Employee**: "When would we be able to talk about a Compromise And Release Agreement?"
>
> **Bottomley**: "North Pacific Seafoods must pre approve any settlement offers before we make the offer to you. I have already reached out to them with our proposal and will let you know as soon as I can." (Emails, April 3, 2019).

Employer gave a written consent allowing Employee to change his attending physician. (Observation; judgment).

10) On April 17, 2019, Employee and Bottomley exchanged email messages:

> **Bottomley**: "Hi Chris, they confirmed with me that they sent it today. If you have any questions after reading it let me know."
>
> **Employee**: "Great, thanks for the update. I will keep you posted." (Emails, April 17, 2019).

11) On April 23 and 24, 2019, Employee and Bottomley exchanged email messages:

> **Employee**: "Good morning Miles, I just wanted to update you and let you know I did receive the contract on Saturday afternoon. And I'm expecting my check to arrive in just a couple of hours when the mail comes as soon as I get it cashed I will

> go get the contract notarized and I will try to get it overnight shipped to you, once I complete that I will send you the tracking information."
>
> **Employee**: "Hello Miles, I got the contract Signed, Notarized, and Over night Expressed shipped back to Michael Budzinski here are the Receipts and tracking information for you. . . . Please let me know when it has been received and once it has been overviewed by Michael and submitted or signed. I look forward to hearing from you thank you."
>
> **Bottomley**: "Thanks Chris – best to send it back to Michael Budzinski's office rather than mine if you get this in time by the way. But if you already sent it here, should be okay."
>
> **Employee**: "Hello Miles, I just checked my Notification and it said it has arrived As of 2:37pm. Just wanted to give you a heads up thanks again."
>
> **Bottomley**: "Hi Chris, Michael signed & it's being sent off to the board today. This will be the part that will take some time since they have so many cases to review at a time. Hopefully only 1-2 weeks. They might want to schedule a hearing so they ca discuss the settlement with you, or they might just approve it without discussing with you. We'll see."
>
> **Employee**: "Yeah I figured that as well okay no problem I hope they don't schedule a hearing but in case they do to verify im prepared to confirm with them that im fully aware of the amount im agreeing to and signing off on potentially more in the futer if it worsens instead of healing. However, I feel confident outside of a year with this amount I should be back into working condition I believe its just on the cusp on fairness with the amount were agreeing to along with the medical still being provided.. Now that Ill be able to become stable with my living situation things should ve easier to focus on medically wise for me. But alright , will the Bored let you know when they finally get to my file once they review it ? Im just keeping my family updated with this information as well so they know when I can get outa there way and my other family to know when and if to expect me thanks again miles. If anything else is needed from me please let me know." (Emails, April 23 and 24, 2019).

12) On April 24, 2019, the parties reached an agreement and filed the C&R. (Agency record). In negotiating the C&R, Bottomley discussed with Employee giving him PPI benefits that are equivalent to a five percent rating based on his experience with similar cases. (Bottomley). In the C&R, the $16,490 settlement includes of $2,640 in TTD benefits, $8,850 in PPI benefits and $5,000 in medical benefits. $8,850 is equivalent to five percent PPI rating ($177,000 x 0.05 = $8,850). (C&R, May 3, 2019; observation; inferences drawn from the above).

13) Employee was proactive and eager to settle his case. He determined the C&R was in his best interest after considering his circumstances and medical condition. (Observation; judgment; inferences from the above).

14) Injured workers often choose to settle their cases before reaching medical stability. (Observation).

15) On May 3, 2019, the C&R was approved; in pertinent part it states:

> 5. COMPROMISE AND RELEASE OF CLAIMS
> . . . .
>
> A. Consideration
>
> The employer and carrier agree to pay the employee the sum of $16,490.00 [SIXTEEN THOUSAND FOUR HUNDRED NINETY AND 00/100 DOLLARS] without any offset or deduction. In addition, the employer and carrier agree to pay for one (1) year of medical care as described in section 5D of this agreement, after which time liability for further medical and related benefits will cease. . . .
>
> B. Claims for Disability and Impairment Benefits
>
> The employee waives his entitlement to any and all past, present, and future disability and impairment 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 or necessitated by the 07/07/2018 incident.
> . . . .
>
> D. Claims for Medical and Related Benefits
>
> The employer and carrier agree to retain liability for medical and related benefits arising from or necessitated by the 07/07/18 incident for treatment received within one year of the date of Board approval of this agreement, which benefits shall be paid subject to the terms, conditions and limitations provided under the Alaska Workers' Compensation Act and related regulations. The employee waives his entitlement to medical and related benefits arising from or necessitated by the 07/07/18 incident for all treatment received after one year from the date of Board approval of this agreement. . . . (C&R, May 3, 2019; agency file).

16) On May 9, 2019, Employee and Bottomley exchanged the following email messages:

> **Bottomley**: "Hi Chris, we received the board approved document, your settlement check is going out today."

Employee: "Awsome Thank you Miles!"

Bottomley: "No problem Chris. Let me know when you figure out your plans for Oregon."

Employee: "I will as soon as I Figure everything out myself im contacting my family out there now so I can update them and figure out a better since of direction of when ill be heading out there and setting up a date to meet the new doctor I will let you know when I receive the check as well." (Emails, May 9, 2019).

17) On November 18, 2019, Employee and Pool exchanged email messages:

Employee: "Hello Good Morning Ashley, Its been a while since I last spoke with My Previous Claims Adjuster Miles Bottomley, I was told im reassigned to you from here on out. Miles And I had. Originally agreed to a Impairment Rating of 5% And $16,490 And full closure after one full year. We have not spoke since I had received my Check, And now I come to a dead in with no options. After Receiving my Lump sum of $16,490 I had went and stayed with relatives who had tried to take advantage of my situation instead of help assist me. Long story short I had came home to Sacramento and put that money down to live on a house for a year with a deposit and have been doing in home PT. While still being out of work and not being able to find anything within my guidelines of capabilities with my messed up shoulder and utility bills and cost of living im completely left with nothing. Im aware even after accepting the offer I can still receive additional funds from the insurance company if reevaluated im reaching out to see what is best for my situation and if I can get a additional lump sum by just requestion or have the Board reevaluate me and my current situation or if im eligible to apply for Permanent Disability. And if you would be able to help assist with that as a reference on my application as someone to contact about my Injury to verify all the information with Diagnostics and Ime Reports and My Rating Percentage, I have been trying to avoid opinionated so called 'Doctors' and just do In-home physical therapy with some medical equipment I had purchased and restricted myself to heavy lifting but I will still need to attend to chiropractors I'm going to reach out to to have a steady follow up with if I'm able to get a new Insurance card as well that would be greatly appreciated I look forward to hearing back from thank you very much."

Pool: "Good Morning Chris, You are correct. Miles is no longer with Alaska National and I will be your adjuster going forward. I have reviewed your file and your Compromise and Release Agreement. All indemnity benefits including PPI, were settled through the agreement. There is no further monetary benefits available for you through the claim. As you mentioned you do have medical benefits open until May 6, 2020. Chiropractic treatment would need a referral to be written by your attending physician. That would be Dr. Schaefer or Dr. Wang. It looks like

> you received an evaluation from both but did not follow up with treatment recommendations. You will need to pick one of these doctors to treat with for the remainder of you available treatment. If that doctor feels it is appropriate to seek chiropractic treatment they will need to write you a referral. Otherwise the only recommendation for treatment that we have is for PT. . . ." (Emails, November 18, 2019).

18) On November 20, 2019, Employee and Pool exchanged email messages:

> **Employee**: "Hello Ashley, This is the closest location to me it is 3.8 miles away they accept workers compensation but wont accept the insurance card number as is, they would need to speak with you and for you to fax a approval document to them before hand. Are you able to contact them for me please there contact number is 1 916-xxx-xxxx Thank you -Christopher Rodriguez."
>
> **Pool**: "Hi Chris, I have spoke with Dr. Schaefer's office today and they are still able to schedule you as a patient. Treating with a chiropractor would be an unauthorized change of physician. However, if Dr. Schaefer was to refer you to them for your physical therapy then you would be able to follow that referral. Ashley Pool."

Employee also asked for a records review by EME Dr. Osland. (Evidence, May 14, 2020).

19) On December 10, 2019, Employee contacted the division and inquired about setting aside the May 3, 2019 C&R. He said Employer "tricked him into signing a C&R because he was losing his home." (Call log, December 10, 2019).

20) On December 13, 2019, Employee claimed medical costs. He also requested an SIME and a C&R set aside stating "false PPI% negotiated to be on C&R contract. I was lied to and promised medical treatment for 1 full year. Had no contact since C&R, refused medical treatment and communication." (Claim; Petition, December 13, 2019). On the same date, Employer informed Employee, "as to medical treatment for your shoulder. . . Alaska National will pay for reasonable and necessary treatment provided by a doctor of your choice until your medical benefits cease under the settlement agreement that is in place. Medical benefits under that agreement are available until May 6, 2020. As I told you, you may seek a new physician or return to Dr. Schaefer to either be treated by him or to receive a referral by him to another physician." (Evidence, May 14, 2020).

21) Employer erroneously denied Employee's request to see a chiropractor on November 20, 2019, because on April 3, 2019, Employer gave written consent allowing Employee to change his attending physician. On December 13, 2019, Employer withdrew its November 20, 2019

denial. Thus, Employer's incorrect advice created a lapse of 23 days in medical benefits coverage. (Judgment; inferences drawn from the above).

22) On May 1, 2020, Employee sought an authorization for x-rays from Employer. Pool faxed the authorization to the provider on May 5, 2020. (Pool).

23) On May 8, 2020, Employee contacted the division and said he was frustrated because "he was not taken care of after the C&R and is now homeless and permanently injured." (Call log, May 8, 2020).

24) On May 12, 2020, x-rays did not show any abnormalities in Employee's right shoulder. Employer agreed to pay for these x-rays. On the same date, Employee requested an SIME and a C&R set-aside for the second time. (Petition, May 12, 2020).

25) On May 14, 2020, the parties agreed to an oral hearing on June 16, 2020. The designee ordered the parties to serve and file evidence on or before 20 days from the hearing date. (Prehearing Conference Summary, May 14, 2020).

26) On May 14, 2020, Employee filed evidence via facsimile without a proof of service. The evidence included the May 13, 2020 note signed "ML" by "Michael Leathers, M.D.," which states:

> WE WERE IN CONTACT WITH ASHLEY AT ALASKA NATIONAL INSURANCE COMPANY. INFORMED HER WE AGREED TO SEE MR. RODRIGUEZ AFTER RECEIVING HIS RECORDS BACK AROUND APRIL 13TH. WE ORDERED XRAYS TO THIS DAY WE HAVE NOT RECEIVED AN AUTHORIZATION FOR CONSULT JUST BY WORD OF MOUTH. WE HAVE DONE ALL WE COULD DO IN ATTEMPT TO SEE CHRISTOPHER BUT NO COOPERATION FROM ALASKA NATIONAL INSURANCE COMPANY EXCEPT GETTING RECORDS. (Evidence, May 14, 2020).

27) Dr. Leathers' May 13, 2020 note is not a medical report but is a business record. It does not discuss Employee's medical condition or treatment; it is exclusively administrative in nature. (Observation; inference; judgment).

28) Pool testified she first communicated with Dr. Leathers' office on April 13, 2020; she faxed the EME reports and mailed Employee's medical records on April 14, 2020. Pool said she mainly spoke to "Taylor" at Dr. Leathers' office, and when "Taylor" asked for an authorization to see Employee, she informed the "claim was open and billable" until May 6, 2020. Pool also said Dr.

Leathers' office never asked for a written authorization, and her intention was not to authorize any treatment or visit beyond May 6, 2020. (Pool).

29) Stating Employee's claim is "open and billable" does not amount to an authorization. It simply means his case has not been controverted, Dr. Leathers may see him, but payment will be subject to Employer's review. An authorization would state: Employee's visit will be paid pursuant to the Act. (Observation; judgment).

30) Medical offices regularly seek written authorizations to see patients to avoid billing issues; they do not want to know if they might be paid; they want to know they will be paid. Providing a written authorization when requested by a doctor's office is reasonable assistance that an adjuster must give to an unrepresented claimant. (Observation; judgment).

31) Employee could not see Dr. Leathers because Employer did not provide a written authorization, and consequently, there was another lapse of 23 days in medical benefits coverage. (Judgment; inferences drawn from the above).

32) Employee testified Employer "lied" in the C&R by including a false PPI rating and forced him to sign it by exploiting his financial distress. He said Employer promised medical benefits for one year but it did not contact him to provide it. Employee also said Dr. Leathers could not see him because the May 12, 2020 x-rays were not ready by May 6, 2020 and Employer denied any visit after May 6, 2020. (Employee).

33) Following the C&R approval, a settlement check was sent to Employee. Bottomley did not have any contact with Employee until he quit working for Employer in July 2019. (Bottomley).

34) At hearing on June 16, 2020, Employer stated it was not served with Employee's May 14, 2020 evidence. Employee testified he faxed the evidence to "everyone." (Employee). The chair left the record open until June 30, 2020, to allow Employer to review Employee's May 14, 2020 evidence and file any responses. (Record). On June 16, 2020, the chair emailed a copy of Employee's May 14, 2020 evidence to the parties: "Please find the attached document Mr. Rodriguez filed on 05/14/2020. Mr. Budzinski, please file your response by no later than 6/30/2020, on which date the record will close. Mr. Rodriguez, you may file a brief explaining your position with regard to the above document, if you choose to do so." (Email, June 16, 2020).

35) On June 30, 2020, Employer objected to Employee's Dr. Leathers' May 13, 2020 note stating it was not timely filed and served by May 27, 2020, pursuant to 8 AAC 45.120(e), and Employer did not have an opportunity to request cross-examination of the author under 8 AAC

45.120(f) or to address the document at hearing. Employer also contended the note is suspect because the reference to "we" in it implies communication between Pool and "Taylor" at Dr. Leather's office; if Dr. Leather wrote the note, it would be based on hearsay. Further, Employer stated the note is the only indication Dr. Leather's office asked for a written authorization to see Employee; however, when it was written, Employee's entitlement to medical benefits had expired under the C&R. In short, Employer contended Dr. Leathers' note should be excluded from evidence, and even if admitted, the note would not relate to events leading up to the settlement and justify setting aside the C&R. (Employer's Supplemental Hearing Brief, June 30, 2020).

36) Medical offices routinely communicate with adjusters to obtain visit or treatment authorizations and inform patients. (Observation).

37) There is no medical record showing a medical dispute between Employee's attending physicians and EME Dr. Osland. There is no gap in the medical evidence or a lack of understanding of the medical evidence that would prevent the fact-finders from ascertaining the rights of the parties. (Agency file; record).

38) Employer did not request the cross-examination of Dr. Leathers or "Taylor" between June 16, 2020, and June 30, 2020. (Agency file; observation).

39) There is no evidence indicating Employer committed fraud, duress or material misrepresentation in negotiating the C&R. (Agency file; record; observation).

40) Employer did not provide one full year of medical benefits; there was a total lapse of 46 days in medical benefits coverage. (Judgment; inferences drawn from the above).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. . . .
> . . . .
>
> (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.

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) . . . after 30 days subsequent to the date of the injury, the employer and the employee . . . have the right to reach an agreement in regard to a claim for injury . . . . 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.
>
> (b) The agreement shall be reviewed by a panel of the board if the claimant . . . is not represented by an attorney licensed to practice in this state . . . 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. . . .

Seybert v. Cominco Alaska Exploration, 182 P.3d 1079, held a workers' compensation settlement is a contract, in which common law standards of contract formation and rescission apply to the extent these standards are not overridden by statute. The board is empowered to set aside a C&R as voidable for fraud or misrepresentation, if one party's assent to the agreement is induced by the other party's fraudulent or material misrepresentation on which the recipient has relied. *Id*. 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).

The Alaska Workers' Compensation Act does not permit workers' compensation settlement agreements to be set aside because of a unilateral or mutual mistake of fact. *Olsen Logging Co. v. Lawson*, 856 P.2d 1155 (Alaska 1993). A workers' compensation claimant's argument a C & R should be set aside because the claimant did not know the extent of his or her disability at the time the agreement was signed, is a mistake of fact on the claimant's part, which cannot serve as a basis to set aside an agreement. *Smith v. CSK Auto, Inc*., 204 P.3d 1001 (Alaska 2009).

McKean v. Municipality of Anchorage, 783 P.2d 1169 (Alaska 1989), held *res judicata* applies in workers' compensation cases and set forth the test to determine when *res judicata* or its subset collateral estoppel may be applied in a particular workers' compensation case:

> (1) The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action;
>
> (2) The issue to be precluded from relitigation by operation of the doctrine must be identical to that decided in the first action;
>
> (3) The issue in the first action must have been resolved by a final judgment on the merits. *Id*. at 1171.

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment. . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. . . .

> **AS 23.30.110. Procedure on claims.**
> . . . .
>
> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require.

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp*., AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under AS 23.30.095(k) and AS 23.30.110(g). With regard to AS 23.30.095(k), the AWCAC confirmed "[t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer." *Id*. Under AS 23.30.110(g), the board has discretion to order an SIME when there is a significant gap in the medical evidence or a lack of understanding of the medical or scientific evidence prevents the board from ascertaining the rights of the parties and an opinion would help the board. *Id*. at 5.

> **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 23.30.135. 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. . . .
>
> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating
>
> (1) that the right of the employee to compensation is controverted;
> (2) the name of the employee;
> (3) the name of the employer;
> (4) the date of the alleged injury or death; and
> (5) the type of compensation and all grounds upon which the right to compensation is controverted.
>
> . . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion. . . .

> (f) If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment. The additional amount shall be paid at the same time as, but in addition to, the compensation, unless review of the compensation order making the award as provided under AS 23.30.008 and an interlocutory injunction staying payments is allowed by the court. The additional amount shall be paid directly to the recipient to whom the unpaid compensation was to be paid.
> . . . .
>
> (h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties. . . .

An employer's duty to pay or controvert medical benefits does not arise only when Employee incurs actual medical bills, because an employee may not be able to afford the prescribed treatment on his own. *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014). The Alaska Supreme Court has taken a broad reading of the term "controverted," and has held a "controversion in fact" can occur when an employer did not file a formal notice of controversy. *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978). A controversion-in-fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation. *Shirley v. Underwater Construction, Inc*., 884 P.2d 156; 159 (Alaska 1994).

> **3 AAC 26.100. Additional standards for prompt, fair, and equitable settlements 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:
> . . . .
>
> (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;
> . . . .

Seybert v. Comico Alaska Exploration, 182 P.3d 1079 (Alaska 2008), held the workers' compensation is an adversarial system; there is no fiduciary relationship between workers' compensation claimant and employer's workers' compensation insurer. Regulations impose some duties on an insurer with regard to a claimant, but they do not require duties of loyalty and the disavowal of self-interest. *Id*.

> **8 AAC 45.120. Evidence**
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.
>
> (f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.
> . . . .
>
> (h) If a request is filed in accordance with (f) of this section, an opportunity for cross-examination will be provided unless the request is withdrawn or the board determines that (1) under a hearsay exception of the Alaska Rules of Evidence, the document is admissible; (2) the document is not hearsay under the Alaska Rules of Evidence; or (3) the document is a report of an examination performed by a physician chosen by the board under AS 23.30.095(k) or AS 23.30.110(g). . . .
>
> **8 AAC 45.195. Waiver of procedures**. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not

> be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.
>
> **Rule 803. Hearsay Exceptions -- Availability of Declarant Immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . . .
>
> (6) Business records. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of the preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes . . . profession, occupation, and calling of every kind, whether or not conducted for profit. . . .
>
> **Restatement (Second) of Contracts § 17 (1981). Requirement of a Bargain.** (1) . . . the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. . . .
>
> **Restatement (Second) of Contracts § 357 (1981). Availability of Specific Performance and Injunction.** (1) . . . specific performance of a contract duty will be granted in the discretion of the court against a party who has committed . . . a breach of the duty. . . .
>
> **Restatement (Second) of Contracts § 357 cmt. a (1981). Specific performance**. An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced. It usually, therefore, orders a party to render the performance that he promised. . . . Such relief is seldom granted unless there has been a breach of contract. . . by non-performance. . . .

In *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445 (Alaska 1963), the Alaska Supreme Court held the board must assist claimants by advising them of important facts bearing on their case and instructing them how to pursue their right to compensation.

ANALYSIS

1) Should Employee's May 14, 2020 evidence be excluded?

Employee filed his evidence on May 14, 2020; he testified he timely served it to Employer on the same date. By contrast, Employer contends it had not been served with Employee's evidence, and consequently, Dr. Leathers' May 13, 2020 note should be excluded as evidence because Employer did not have an opportunity to address it at hearing or cross-examine its author.

Employee is not represented by a lawyer and is not familiar with procedural requirements. *Rogers & Babler*. Excluding the note by strictly applying the regulation and finding Employee failed to properly serve the evidence would result in manifest injustice because other than his own words, the note is the only piece of evidence to support his contention that Employer denied his treatment. 8 AAC 45.120(e); 8 AAC 45.195. Therefore, to ensure fairness, avoid unnecessary delay and provide an opportunity for Employer to address the note, the chair left the record open until June 30, 2020, and emailed a copy of Employee's evidence to the parties after the hearing on June 16, 2020. AS 23.30.001(1), (4); AS 23.30.135(a); 8 AAC 45.120(e); 8 AAC 45.195. Employer had more than 10 days to review the note and file any responses. 8 AAC 45.120(f). Nevertheless, while it filed a supplemental brief on June 30, 2020, expressing its position on the note's admissibility, Employer did not request cross-examination of "Taylor" or Dr. Leathers, 8 AAC 45.120(h), or an extension of time to litigate the issue. AS 23.30.135(a). Employer was afforded due process and an opportunity to scrutinize the note, but it chose not to pursue it any further. AS 23.30.001(4).

Employer's contention that Dr. Leathers' note should be excluded as evidence because it may be based on hearsay is incorrect. Employer notes the reference to "we" in the note implies communication between Pool and "Taylor"; if Dr. Leather wrote the note, it would be based on hearsay. However, regardless of whether it was written by Dr. Leathers, "Taylor" or anyone else in Dr. Leathers' office, the note is admissible evidence as a business record; it reflects communication between Pool and Dr. Leathers' office regarding Employee's visit authorization. Alaska R. Evid. 803(6); 8 AAC 45.120(e). Medical offices routinely communicate with adjusters to obtain visit or treatment authorizations and inform patients. *Rogers & Babler*. As the note does

not discuss Employee's medical condition or treatment, it is exclusively administrative. *Id.* Therefore, regulations regarding medical records do not apply here. 8 AAC 45.120(f). Based on these analyses, Employee's May 14, 2020 evidence will not be excluded. 8 AAC 45.120(e); (f); 8 AAC 45,195.

2) Should an SIME be ordered?

Employee asks for an SIME. AS 23.30.095(k). Yet, no record shows a medical dispute among Employee's attending physicians and EME Dr. Osland. *Id*. Doctors agreed Employee sustained a work-related right shoulder injury and is not medically stable; they diagnosed right shoulder instability and recommended physical therapy. Also, there is no medical gap in Employee's medical records. AS 23.30.110(g); *Bah*; *Rogers & Babler*.

Employee contends PPI benefits allocated in the C&R was not based on an actual rating and asks for an SIME to obtain one. An impairment evaluation cannot be done until an injured worker is medically stable. *Rogers & Babler*. Here, the parties agreed to settle the case before Employee reached medical stability; in his November 18, 2019 email to Pool, Employee admitted he "agreed to a[n] Impairment Rating of 5%." Nonetheless, regardless of whether the five percent PPI rating was accurate or not, an SIME would not assist the fact-finders because the PPI issue cannot be revisited due to *res judicata*. *Bah*; *McKean*. Employee waived his entitlement to PPI benefits in the C&R, and once approved, the C&R became "enforceable the same as an order" and discharged Employer's liability for PPI for good. AS 23.30.012(a); (b); *McKean*. Re-litigating the PPI issue related to the same injury and Employer that the C&R had already resolved is barred by law. *McKean*. Therefore, Employee's request for an SIME will be denied.

3) Should the C&R be set aside?

A C&R may be set aside as voidable for fraud or misrepresentation, if one party's assent to the agreement is induced by the other party's fraudulent or material misrepresentation on which the recipient has relied. *Seybert*. Employee contends Employer misrepresented in the C&R by including a false PPI rating and forced him to sign it by exploiting his financial distress.

Nonetheless, on January 29, 2019, Employer emailed Employee, "A PPI rating cannot be done until you have completed your medical treatment and your treating doctor has release you from care." As neither his attending physician nor EME Dr. Osland had opined he was medically stable, Employee likely knew he was not ready for an "actual" PPI rating. Yet, in April 2019, Employee contacted Employer to initiate the settlement negotiation, agreed to an amount equivalent to a five percent PPI rating, and signed the C&R. He was proactive and eager to settle his case. *Rodgers & Babler*. Injured workers often choose to settle their cases before reaching medical stability. AS 23.30.012(a); *Rogers & Babler*. When Employer told him about a potential C&R hearing, Employee stated, "im prepared to confirm. . . im fully aware of the amount im agreeing to and signing off on potentially more in the [future] if it worsens instead of healing. However, I feel confident outside of a year with this amount I should be back into working condition I believe its just on the cusp on fairness with the amount were agreeing to along with the medical still being provided. Now that Ill be able to become stable with my living situation things should ve easier to focus on medically wise for me." Employee considered his medical condition and financial circumstances and determined that the C&R was in his best interest. *Rogers & Babler*. He may have not known the extent of his disability at the time the C&R was signed or may have miscalculated the settlement amount was sufficient to support his plan. However, Employee's mistake of fact cannot be the basis to set aside the C&R. *Lawson*; *Smith*. In other words, the C&R is not voidable because Employee voluntarily negotiated the settlement and knowingly agreed to waive PPI benefits after Employer explained there cannot be a rating without medical stability. *Shehata*; *Seybert*. Employee was not induced to sign the C&R by Employer's fraudulent or material misrepresentation, because it made no fraudulent or material misrepresentation. *Id*.

Employee further contends Employer "lied" when it said he could receive medical benefits for one year but it neither contacted him to provide it nor approved treatments he sought. Employee misunderstands Employer's role; it does not have to contact him to provide medical care. In fact, workers' compensation is an adversarial system; there is no fiduciary relationship between Employee and Employer. *Seybert*. Regulations impose some duties on Employer with regard to Employee, such as providing necessary claim forms, written instructions, and reasonable assistance to comply with the law and requirements, but they do not require duties of loyalty and

the disavowal of self-interest. Employer had no duty to initiate contact with Employee to check on his medical condition or coordinate care. 3 AAC 26.100(2); *Id*.

Because the C&R is a contract, common law standards of contract formation apply to the extent these standards are not overridden by statute. *Seybert*. A contract was formed when the parties agreed Employee would waive all benefits in his case except his entitlement to medical benefits for one year; in exchange, Employer would pay $16,490 and provide medical benefits for one year. *Restatement (Second) of Contracts* §17. Whether Employer provided medical benefits after the C&R approval relates to performance, not contract formation. *Id*. Therefore, even if Employer failed to perform its promise to provide medical benefits, that cannot be the basis to set aside the C&R. *Seybert*. In short, without evidence of duress, fraud or misrepresentation prior to its filing, the C&R will not be set aside. *Shehata*; *Seybert*.

Therefore, the issue is whether Employer provided medical benefits for one year as promised, and if it did not, what remedy Employee would be entitled to. *Seybert*. When Employee changed his physician from Dr. Wang to Dr. Schaefer, he exercised his right to change attending physician without Employer's written consent. AS 23.30.095(a). Yet, on April 3, 2019, Bottomley emailed Employee, "Since you do not want to see Dr. Wang or Dr. Schaefer again, you will need to establish care with a new doctor in order to get medication. Please let me know which doctor you would like to see and I will authorize treatment." Through Bottomley on April 3, 2019, Employer gave written consent allowing Employee to change his attending physician. *Id*. Employee did not seek medical care until November 2019. On November 20, 2019, Employee sought authorization to see a chiropractor, but Pool denied his request, "Treating with a chiropractor would be an unauthorized change of physician." However, on April 3, 2019, Employer had already authorized Employee to seek a different attending physician. Thus, Employer erroneously denied Employee's request to see a chiropractor. On December 13, 2019, Employer withdrew its denial and informed Employee he could "seek a new physician or return to Dr. Schaefer to either be treated by him or to receive a referral by him to another physician." Thus, Employer's incorrect advice created a lapse of 23 days in medical benefits coverage. *Id*.

It is undisputed Employee sought treatment with Dr. Leathers on April 13, 2020. Employer contends Pool gave a verbal authorization for Employee's visit, and by April 14, 2020, Dr. Leathers' office knew the "claim was open and billable" until May 6, 2020. Pool also said Dr. Leathers' office never asked for a written authorization, and her intention was not to authorize any visit or treatment beyond May 6, 2020. In contrast, Employee contends Employer did not provide a written authorization as requested by Dr. Leathers' office; Dr. Leathers' May 13, 2020 note supports his contention. *Rogers & Babler*. The note states, "We. . . informed [Employer] we agreed to see Mr. Rodriguez after receiving his records back around April 13th. . . . We have not received an authorization for consult just by word of mouth. We have done all we could do in attempt to see [Employee] but no cooperation from [Employer] except getting records."

Informing Dr. Leathers' office that Employee's case is "open and billable" does not amount to an authorization. *Rogers & Babler*. It implies Employee's case has not been controverted, Dr. Leathers may accept him as a patient, but payment will be subject to Employer's bill review. *Id*. On the other hand, an authorization would state "Employee's visit or treatment will be paid pursuant to the Act." *Id*. Employer did not provide an oral authorization. *Id*. Regardless, Dr. Leathers' office may have construed "open and billable" "by word of mouth" as an oral authorization. Thus, the remaining questions are whether Dr. Leathers' office insisted on obtaining a written authorization, and Pool was legally required to provide it, and if so, Employee's legal remedy.

Medical offices regularly seek written authorizations to see patients to avoid billing issues; they do not want to know if they might be paid; they want to know if they will be paid. *Rogers & Babler*. Considering Employee's "claim was open and billable" until May 6, 2020, it would make sense for Dr. Leathers' office ascertain coverage in writing as there are no fixed deadlines for medical treatments. *Id*. Employee's testimony supported by Dr. Leathers' note is given greater weight; Dr. Leathers' office asked for a written authorization from Employer, and Employer did not provide one. AS 23.30.122; *Smith*.

Pool had a legal duty to "provide necessary . . . assistance that is reasonable" so that Employee could obtain proper medical benefits. 3 AAC 26.100(2). Dr. Leathers' office insisted on a written

authorization to see Employee; thus, providing one was necessary and reasonable assistance for Employee to obtain medical benefits. 3 AAC 26.100(2); *Rodgers & Babler*. Thus, Employee could not see Dr. Leathers because Employer did not provide a written authorization, and consequently, there was another lapse of 23 days in medical benefits coverage. *Rogers & Babler*.

In short, Employer did not provide one full year of medical benefits as it promised in the C&R; there was a total lapse of 46 days in medical benefits coverage. Based on Employer's partial breach of the C&R, this decision will order specific performance of its duty to provide medical benefits for 46 days. *Seybert*; *Restatement (Second) of Contracts* § 357. This way Employer's performance due under the C&R can be produced as nearly as practicable. AS 23.30.001(1); *Restatement (Second) of Contracts* § 357 cmt. a (1981).

Lastly, it should be noted Employer had to either furnish or controvert Employee's medical benefits. AS 23.30.095(a); *Harris*. If it controverted medical benefits, it had to file a controversion notice. AS 23.30.155(d). On November 20, 2019, Employer denied Employee's request to see a chiropractor but it did not file a controversion notice. AS 23.30.155(a); *Houston*. In April 2020, Employer did not provide a written authorization to Dr. Leathers' office; it did not "unqualifiedly accept" Employee's request for treatment. *Shirley*. Employer's duty to pay or controvert medical benefits may arise when Employee seeks medical treatment, not just when he incurs actual medical bills because he may not be able to afford the treatment on his own. *Harris*. Penalty is not an issue for this decision; however, Employee may be entitled to it based on Employer's failure to properly furnish or controvert benefits. AS 23.30.155(a); (e); (f); (h); *Richard*.

CONCLUSIONS OF LAW

1) Employee's May 14, 2020 evidence should not be excluded.
2) An SIME should not be ordered.
3) The C&R should not be set aside. However, because Employer partially breached the C&R by failing to provide medical benefits for 46 days, it should be subject to specific performance of providing medical benefits to Employee for 46 days.

ORDER

1) Employee's May 14, 2020 evidence is admitted.
2) An SIME shall not be ordered.
3) The C&R shall not be set aside.
4) Employer shall provide medical benefits for 46 days from August 3, 2020.

Dated in Anchorage, Alaska on July 30, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Sara Faulkner, Member

/s/
Nancy Shaw, 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 Christopher Rodriguez, employee / claimant v. North Pacific Seafoods, Inc., employer; Alaska Natioal Insurance, insurer / defendants; Case No. 201810064; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on July 30, 2020.

/s/
Kimberly Weaver, Office Assistant II