ALASKA WORKERS' COMPENSATION BOARD

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

TERESA R. YERKEY, Employee, Claimant, v. SOUTHEAST ROAD BUILDERS, Employer, and ALASKA TIMBER INSURANCE EXCHANGE, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201513125 AWCB Decision No. 20-0088 Filed with AWCB Juneau, Alaska on September 29, 2020

Teresa R. Yerkey's (Employee) March 16, 2020 petition to set aside a previously approved compromise and release (C&R) agreement was heard on August 4, 2020 in Juneau, Alaska, a date selected on July 9, 2020. Employee's July 8, 2020 request for an oral hearing gave rise to this hearing. Employee appeared, represented herself and testified. Attorney Martha Tansik appeared and represented Southeast Road Builders and Alaska Timber Insurance Exchange (Employer). This matter was originally heard on June 16, 2020, but the hearing equipment malfunctioned and the recording was irretrievable. The record closed on September 18, 2020, after deliberation.

ISSUES

Employee submitted additional argument and evidence on September 4, 2020. She contends it should be considered.

Employer contends the filings should be excluded because they are not relevant, contain hearsay and were filed late.

1) Should Employee's September 4, 2020 filings be excluded?

Employee contends the C&R agreement approved on February 26, 2019, should be set aside. She contends the C&R agreement contained misrepresentations of fact in the summary, which induced her to sign it. Employee contends she entered into the agreement under duress because she was unable to get medical care and was penniless. She contends she did not fully execute the C&R agreement because she did not initial the last page. Employee requests an order setting aside the C&R agreement.

Employer contends none of the legal tests for setting aside a C&R agreement are met. It requests an order denying Employee's petition to set aside the February 26, 2019 C&R agreement.

2) Should the February 26, 2019 C&R agreement be set aside?

FINDINGS OF FACT

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

1) On August 19, 2015, Employer reported Employee injured her knee on July 23, 2015, when she fell from a sign while working for Employer. (First Report of Occupational Injury or Illness, August 19, 2015).

2) On March 25, 2016, Employee followed up with Daniel Schlecht, PA-C four months after her left knee surgery. She reported intermittent pain but was able to return to full duties working with discomfort at the end of the day. PA-C Schlecht found she reached maximum medical improvement with no permanent impairment. He advised she would eventually need more invasive treatment. (Schlecht Progress Note, March 25, 2016).

3) On March 31, 2016, PA-C Schlecht authored a letter stating Employee sustained no permanent impairment as a result of the injury. (Schlecht Letter, March 31, 2016).

4) On November 28, 2018, Employee contacted the division and reported having trouble finding a doctor in California; she was unable to work and had problems getting paid for missed wages.

A workers' compensation officer informed her about the claim process and sent her a letter. The letter was accompanied by the pamphlet, "Workers' Compensation and You," a courtesy list of attorneys and an explanation of attorney representation in Alaska for injured workers. (ICERS, Phone Entry, November 28, 2019; Letter, November 28, 2018).

5) On December 31, 2018, Employee saw Gregory Schumacher, M.D., because "no one would take her case in California." She reported continuing left knee pain. Dr. Schumacher stated Employee was not a terrific candidate for a knee replacement but that may be where she ended up eventually. He recommended physical therapy and steroid injections. (Schumacher Medical Report, December 31, 2018). Dr. Schumacher injected lidocaine in her left knee. (Schumacher Procedure Report, December 31, 2018).

6) On January 7, 2019, Dr. Schumacher referred Employee to a medical provider in California for her left knee. (Schumacher Request for Consultation, January 7, 2019).

7) On January 10, 2019, Dr. Schumacher restricted Employee to light duty for six weeks and directed her to follow up with a doctor in California for a possible knee replacement. (Schumacher Letter, January 10, 2019).

8) On February 14, 2019, Employer filed a medical summary with 184 pages of medical reports. (Medical Summary, February 14, 2019).

9) On February 2, 2019, Employee contacted the division and requested another attorney list. (ICERS Phone Entry, February 2, 2019). A workers' compensation officer emailed her the attorney list. (Email, February 2, 2019).

10) On February 14, 2019, the parties submitted a fully executed C&R agreement. Employee initialed every page except the last page which she signed before a notary. The C&R agreement provided her $70,000 in exchange for waiving all benefits and stated:

> The parties whose signatures appear below do by this Compromise and Release Agreement agree to settle a disputed claim arising out of an injury to Employee on or about 07/23/15. . . . While Employee has previously gone through periods of medical stability. . . .
>
> [Employee] was working as a flagger in Naukati when she jumped up to place something atop a sign and fell, resulting in left knee pain and swelling. She continued to work, but her pain and swelling steadily increased over the following weeks. The initial diagnosis was a sprain and she received a work release. She returned to work in mid-August of 2015.

However, when symptoms persisted, she received a referral for orthopedic evaluation and an MRI. The 10/2/15 MRI showed a medial meniscus root tear, a grade I MCL sprain, moderate marrow edema at the medial tibial plateau with a chondral microtrabecular fracture, and a partial thickness PCL tear. The orthopedist noted a long history of taking medication to reduce edema in her lower extremities and her smoking status. He recommended that she use an immobilizer and not overuse the knee. Dr. McCord referred her to Swedish Hospital for consideration of surgical intervention.

On surgical consult, Dr. Wilcox did not think that there was a strong likelihood of improvement following surgery, but that it was a valid option. She wanted to be placed on a pain program as she was taking Percocet. However, rather than returning to Swedish for the procedure, she underwent a left knee arthroscopy, martial medial menisectomy, and chondroplasty of the medial femoral condyle, patella, and lateral tibial plateau with Dr. Bier at Ketchikan General Hospital in December of 2015.

At seven weeks post-surgery, PA-C Schlecht released her to full duty work without restrictions and provided a prescription for Tylenol-3 to wean her off of narcotics. A month later, she reported increased left knee symptoms with PA-C Schlecht believed were related to her chondromalacia/osteoarthritis of the medial compartment. She still used Norco as well as Mobic.

On March 31, 2016, PA-C Schlecht opined that Employee had not sustained permanent impairment as a result of the work injury.

In September of 2016, Employee moved to Arkansas. Chart notes document posttraumatic osteoarthritis secondary to the work injury and a prescription for an unloader brace and a prescription for 90-day supply of hydrocodone.

She established care at the Center for Interventional Pain Management in Northern Arkansas, who increased the strength of her narcotic prescription in November of 2016. Employer and insurer do not have any records between November 2016 and April of 2017, when new x-rays of the left knee demonstrated multicompartmental osteoarthritis worst in the medial compartment. Medical records again cease until 8/8/18, when she presented for a physical for Crain Walnut Shelling for a dispatcher desk job and reported the left knee chronic injury.

The Employer and Insurer then sent Employee for an IME with Dr. Joseph Lynch on 11/5/18 in order to obtain an updated understanding of her status and future treatment recommendations. He diagnosed pre-existing chondromalacia without evidence of osteoarthritis, a permanent aggravation of the left knee osteoarthrosis due to the work injury, her post-surgical status of from the work injury, and unrelated low back and neck pain. He recommended treatment, including a

medial unloader brace, steroid injections, or viscosupplementation to the left knee. The condition did not warrant a knee replacement at this time.

On a visit to family in Anchorage, she sought treatment with Dr. Schumacher on 12/31/18. He recommended against a knee replacement and further use of narcotics, suggesting an injection, brace, and physical therapy. He performed the injection and referral to NAPA Ortho. . . .

It is the position of Employee that because she is in California it is quite difficult to obtain treatment with a provider who will accept out of state Workers' Compensation. Rather than continue to pursue benefits through the Act, Employee wishes to settle her benefits and control her own treatment, including any potential future knee replacement, rather than try to find a provider who will take Alaska Worker's Compensation.

It is the position of Employer and Insurer that Employee is not a surgical candidate at this time and it is unknown if/when her condition will ever require a knee replacement as a result of the work injury. While Employer believes Employee should have to treat in accordance with the Alaska Fee schedule, they understand the difficulty she faces living out of state and are thus willing to provide her with the likely cash value of the claim. . . .

The parties stipulate Employee's work for Employer is not the cause of any inability to return to work, Employee plans to return to work, and for that reason Employee is not eligible or entitled to reemployment benefits. Employee has worked a variety of positions following the work injury. Employee has not received a reemployment benefits eligibility determination in relation to her work injury with Employer. . . .

Employee waives entitlement to past and future medical and related benefits, along with interest and penalties thereon arising from or necessitated by the 07/23/15 incident. . . .

Employee has elected to proceed on her own behalf in this matter without the assistance of legal counsel. Employee understands and acknowledges that any communications with Employer, Insurer or their agents with respect to her claim and this Compromise and Release Agreement cannot be construed as legal advice. . . .

Employee understands and acknowledges that her condition may progress, worsen, be greater in degree, or different in kind or character than that which is known at present, and that there may be latent or undiscovered injuries associated with said incidents. Nonetheless, Employee acknowledges her intent to release Employer and Insurer from any and all liability for the benefits waived through this agreement. . . .

> This settlement does not meet the CMS review threshold and the parties have taken Medicare's interests into consideration. Employee is not a Medicare beneficiary and applied for Social Security Disability benefits but was denied. Employee did not appeal that determination. Mployee[sic] will receive funds that can be used for medical treatment for her left knee condition as a result of this settlement. Employee understands and agrees that treatment related to the 07/23/15 injury that would otherwise be covered by Medicare should be paid by Employee from the portion of proceeds of the settlement funds which are allocated to closure of medical benefits. Employee further agrees and understands that Medicare will not pay for Medicare-covered medical expenses or Medicare-covered prescription drug expenses related to the 7/23/15 work injury until the medical settlement funds have been exhausted.
> . . . .
>
> I, [Employee], being first duly sworn, depose and say:
>
> 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 Employer or Insurer 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 Employer or Insurer or their agents in this matter.
>
> I further acknowledge receiving a copy of the Alaska Workers' Compensation Board pamphlet entitled: "Workers' Compensation and You" and/or having received the link to such publication . . . and having had an opportunity to review said publication prior to signing this Compromise and Release.
>
> I am signing this agreement freely and voluntarily because I agree that settlement is in my best interest. (C&R Agreement, February 14, 2019).

11) On February 25, 2019, Employee emailed Employer's attorney asking about the status of the C&R agreement:

> Good Afternoon, I am writing to check on the status of the compromise and release agreement that was sent off to the board on February 14, 2019. If you have any updates please let me know as soon as possible so I can get an injection scheduled. I have been turned down at this point even by my normal doctor for treatment until we resolve this issue, and I need to either have this knee replaced or something. Kim had stated that I needed to pay or set up cash pay so I need a

> little bit more information on time frame. My hands are tied at this point. (Email, February 25, 2019).

12) On February 26, 2019, a panel approved the C&R agreement without holding a hearing. (C&R Agreement, February 26, 2019).

13) On March 2, 2020, Employee emailed the division seeking to set aside the C&R agreement. (Email, March 2, 2020).

14) On March 5, 2020, a workers' compensation officer emailed Employee a petition form and informed her there is no form requirement and her email could be processed as a petition if it showed proof of service to the employer's attorney. (Email, March 5, 2020).

15) On March 16, 2020, Employee requested her C&R be set aside in several emails sent to the division and Employer's attorney:

> . . . . the C & R Release agreement, that was monetarily board approved, was technically never fully authorized by me (please see page 8 of 8 int on bottom of page) due to the facts that are still accurate as of 3/1/2020 10:48pm. I will list them below and than attach proof.
>
> On page 1 of the agreement that was drawn up by Martha Tansik, Esq, in her first paragraph labeled INSTRUCTION, "it states that I have had periods of medical stability" well guess what I have never had periods of medical stability since 07/23/2015, and considering I was denied any future medical as of February 2016, and just to insure herself that this order was carried out she had me denied in December 2016 in Arkansas clear through the present moment without me fighting tooth and nail. Which of course has left me completely broke throughout this whole period of time up until she restarted my lowered weekly benefits which mind you was under 80% of my original annual salary/weekly salary never the less never not even once offering any rehabilitation services, no re employment training, and of course when I was finally able to get Kimberely Dean/Pamela Scott to start weekly benefits once again threatened to take away those benefits every week if I did not find a PCP for my condition, which I was never and have never found as to this date 03/01/2020.
>
> page 2 paragraph 1
>
> When they offered me 72k of course by distorting the truth which I will continue to point out through this communication, I felt like I was being forced into accepting there offer that they knew I had to take, due to me not being able to find a surgeon or orthopedic doctor nor a pcp due to this work related injury dated 07/23/2015. I had not one penny to my name due to there negligence in my case. I received periodical weekly benefits, here and there as stated above, totaling

$48,464.02, even though they have averaged my annual income as being $61,308.02. In Alaska Timber and Trusts phantasy world I guess going from an annual income of $61,308.02 to lets see a periodical income of $48,464.02 averaged with there monetary settlement of $72,000.00 averaged over 49 months is 24,571.40 a year, is awesome for a lot of people, if this would be steady income with medical benefits than maybe. but having to cover past medical treatments due to this injury, plus xray costs, and mri costs at this time due to my loss in wages and no rehabilitation nor any medical, or re employment benefits this has become harder and harder. Kimberely and Pamela based there assumptions off my past work history, and as in to where I do have a lot of skills, they are not even close to up to date as even a kindergartner can work a phone and a computer better than I can.

Page 2 paragraph 2 and 3 under heading CLAIM HISTORY

it is stated that I jumped to put something on a sign. First of all I WAS a Traffic Control Supervisor/Flagger at the time and I was putting the locking mechanism on top of a delineator traffic sign to keep the sign in place to insure the safety of all public throughout Southeast Roadbuilders Work Zone. She also states the initial diagnosis was a sprain and huh come to find out after fighting tooth and nail to get Pamela to ok anything besides about 6 months of medical treatment, turned out to be as you all know,

In the medial compartment of my left knee there was and still is a complex tear of the medial meniscus. A radial tear at the posterior root, A flap-tare at the midportion extending to the posterior horn, not including the medial meniscus, being extruded with mild osteophytosis in the medial compartment, with the thinning of the cartilage, and the ligament was torn. In the Lateral compartment it turns out there were tares, and in my patellofemoral compartment there were multiple fissures along the patellar articular cartilage, and as time moved on only got worse and is now as Kimberley and Pamela both knew so was my right knee due to having to make up for the left knee. It also states that I had a long history of taking medication to reduce edema, which may be true but it was periodically through out oh 20 years, and it was not in my lower extremities it was actually in my face and in my neck. oh and that I had a smoking status. actually at that time I had only smoked cigarettes' for 5.7 years total throughout my life. and if it weren't for there Dr. McCord and Pamelas insisting I wear an immobilizer brace on my entire left leg, for approximately 4 months, before they decided to actually allow me to see a surgeon, my knee would have never gotten as bad as it did. And still is with no relief.

Page 2 Paragraph 4

it states that Dr. wilcox did not see a authroscopy surgery as being beneficial, which was actually decided by Alaska Timber and Trust not the Swedish hospital, and I was not the one who asked to be put on a pain management plan that had

actually been ordered by the original SEARCH Clinic in Craig Alaska, and than again by Ketchikan Orthopedics. (It is stated in here numerous times about pain management, opiod use which I mainly paid for myself due to being in constant pain, pamela not willing to cover them, and they were ordered and prescribed by ORTHOPEDIC SURGEONS for god sakes) now I also would like to state I did get addicted to opiods due to this , but I have also gotten myself completely off of them on my own!! I am in constant pain and now know how to use prescribed medications sparingly due to no medical coverage for my work related injury of 07/23/15.

Page 2 Paragraph 5

It states that seven weeks post surgery released me to full duty, this is a completely false statement in its entirety and I do believe facts should be checked first before putting them on paper.

Page 3 Paragraph 1 and 2

It states that employee moved to Arkansas, and documented post osteoarthritis secondary to the work related injury. now hmm so I had no money due to no benefits, no way of making money due to my knee, and Pamela acknowledged knowing this Permanent Partial Disability low and behold September 2016. After moving to Arkansas at my husbands family expense plus all the rest of the money we had in our savings, I was again denied medical and Pamela also told Northwest Arkansas that my left knee injury was not related to any workman's comp injury. Once again I was unable to find a PCP due to Pamela Scotts recommendations from Alaska Timber and Trust.

Page 3 Paragraph 3

It states that the employer and the insured than sent employee for an ime to obtain information basically in 11/2018. I tried every week begging Alaska Timber and Trust to please re open my case due to continual problems that were insane by this point (pain level at 8-10 for going on 5 years now non stop has a tendency to cause PTSD, amongst other mental and physical problems and non the less my knee still is not fixed due to know one even for cash will take my problem with my left and now right also on). She falsifys information once again stating that my neck and back pain which minds you was never even addressed at this IME was never related to my work injury.

Page 3 Paragraph 4

She falsely states on a visit to family in anchorage she sought treatment with Dr. Schumacher on 12/31/18. and that he recommended against a knee replacement and any further use of NARCOTICS and suggested a knee injection and a brace and physical therapy. I had no choice but to pay for a trip to anchorage due to

kim and pam telling me every week I was going to loose my benefits if I did not find a PCP. Oh and NARCOTICS she is very incorrect as I had been off NARCOTICS since May of 2018 which mind you were PAIN MANAGEMENT SELF PAYED FOR PRESCRIPTIONS OF PAIN MEDS DUE TO WORK RELATED INJURY. she also falsely states

Paragraph 5 page 3

that she had sent you workman's comp board each and every document that the Alaska Timber and Trust had ever been erved with..this should have said DOCUMENTS THAT ALASKA TIMBER AND TRUST APPROVED NOT ONES THAT WERE FILED!!

Under heading DISPUTES Page 3

The whole entire section is falsely stated and not even close it should say broke over a barrel had no choice.

Under all other Headings that follow the previous please see AS 23.30.105 and/or AS23.30.110(c) which mind you Mr. Kelly Nickerson of Southeast Roadbuilders actually stated that he did not feel that this agreement was in my best interest and medical benefits should be provided. He was my EMPLOYER AND BOSS!!!!

NOW IN STATING THIS PER AS23.30.105 AND/OR AS23.30.110(C) I WOULD PLEASE ASK FOR A BOARD REIVEW OF THIS C&R WHICH WAS NEVER FULLY AUTHORIZED BY MY, NOR MY EMPLOYER, SO THAT I CAN GET THE PROPER MEDICAL BENIFITS, REHABILITTION AND RETRAINNG IN ORDER TO GO BACK INTO THE WORKFORCE, AND COMPENSATION FOR PAIN AND SUFFERING AS WELL AS PAST AND FULL COMPENSATION, BECAUSE IF I HAD BEEN OFFERED ANY OF THSE WITHOUT THE TREAT OF VERY SMALL BENIFITS TAKEN AWAY EVERY WEEK I WOULD AT THIS POINT AND TIME HAVE HAD MY UNION BENIFITS PLUS MY INVESTED RETIREMNT FULLY UP AND RUNNING STEADILY CLIMBING TOWARDS RETIREMENT BENIFITS, NEVERTHELESS AN AWESOME NEW KNEE, AND PROVABLY STILL WORKING FOR EITHER SOUTHEAST ROADBUILDERS, OR KIEWIT OR STILL IN THE SAME CONSTRUCTION INDUSTRY DOING SOMETHING THAT I LOVED AND PUT MY INTIRE HEART AND SOUL INTO EACH AND EVERY POSITION THAT I HAVE EVER HELD, WITH ANY AND ALL INDUSTRYS THAT I HAVE WORKED IN WHICH INCLUDES EVERYTHING FROM CLEANING HOUSES TO GOVERNMENT AGENCIES. CONSTRUCTION JUST HAPPENED TO BE MY FAVORITE AND I WOULD LOVE TO RETURN TO MY PREVIOUS POSITION BUT WITHOUT HAVING BEEN OFFERED BENIFITS, BENIFITS BEING DENIED ONE RIGHT AFTER THE

> **<u>OTHER THIS MAY HAVE BEEN POSSIBLE NOW I CAN'T EVEN GET A FREAKING DESK JOB NOR A CASHIER JOB DUE TO MY WORK RELATED INJURY 07/23/15.</u>**
>
> Thank you for your time and consideration in this matter as my clock is ticking and I ain't getting any younger. What was that figure that Alaska puts on an individuals life span, $117,000.00 time what again? I'm a little unclear about that part but than again if I was an attorney I might have done my homework a little better.

In another email Employee stated:

> I had no money and hadn't had but sporadically when Kim reauthorize payment accepting all the documents that pam denied originally.
>
> Every week I was told that unless I could find an orthopedic physician to take me or a primary care provider that benefits would stop again. I haven't worked full time since 7/23/15.
>
> I was never given a ppi rating by no one no matter how many times I asked.
>
> I had to pay out of pocket prior to the C and r for care that Kim stated she would pay. My credit is shot due to injury I have no retirement due to having to withdraw it all to survive. This was prior to 2018. I have one retirement account left which is Alaska laborers and if I don't work 120 hours which I can't do before July I loose that as well.
>
> Due to being cut off with proof of injury with ongoing problems that A.T.I.C. had lots of documents on from 9/7/16 but than again I was cut off in 2/16 through 11/18 with an injury that is still untreated today due to all the comp issues. I had to use the original monitary funds to pay back bills, loans from family. . . .

Employee emailed the division and Employer:

> . . . . I went from being out of debt and making 60-80 thousand a year working full time, loving the job, loving Living in Alaska, happily married to making barely $3000.00 a year on food stamps, homeless and couch surfing, separated from my husband who is in Arkansas, having to not only renting my home out I am now having to sell it due to flat not being able to walk down the road. I've searched and moved between California and Arkansas trying to find a physician of any kind to help me, which I am have been unsuccessful in finding as Kim knew. At this point I'm praying the house does sell so that my husband and I can move back to Alaska so that I can get some help. . . .

Employee also attached a notice of authorization from the claims administrator authorizing an evaluation and six therapeutic services from October 1, 2018 to March 29, 2019, a December 27, 2016 letter to North Arkansas Regional Medical Center from the claims administrator stating the attached bills were being returned because they were not related to an on-the-job injury by this company and no medical treatment would be authorized for this claimant without the attached bills, various medical reports from 2015 and 2016, a page of the November 5, 2018 Employer Medical Evaluation, a 2018 letter offering Employee conditional employment dependent upon a pre-employment physical, emails between Employee and the claims adjuster to arrange travel for appointments, and a few documents regarding Employee's retirement accounts. (Emails, March 16, 2020; all errors in original). All of the various medical reports from 2015 and 2016 were filed with the February 14, 2019 medical summary. (Observation).

16) On March 16, 2020, Employee filed a November 19, 2018 letter from the claims manager stating it would cover a medial unloader brace and medical appointments for the viscosupplementation or steroid injection the EME physician recommended. (Email, March 16, 2020).

17) On March 19, 2020, Employer objected to Employee's March 16, 2020 request to set aside the C&R. It contended Employee was under no duress, the facts were not misconstrued in the C&R agreement and there is no requirement for the corner of each page to be initialed. Employer contended Employee failed to demonstrate by clear and convincing evidence that Employer or its agents committed fraud or misrepresented a material fact. It contended Employee inappropriately used the settlement funds to pay debt and "seeks a second bite at the apple." (Employer's Opposition to Employee's Petition to Set Aside Compromise and Release Agreement, March 19, 2020).

18) On March 19, 2020, Employer denied pain and suffering and wage replacement because they are not benefits available under the Act. (Controversion Notice, March 19, 2020).

19) On June 16, 2020, the parties attended a hearing; the hearing equipment malfunctioned and there is no record. (Observations).

20) On June 18, 2020, a letter informed the parties the hearing equipment malfunctioned and the recording was not recoverable. The division noticed the parties that a prehearing conference was scheduled on June 30, 2020 to discuss how to proceed. (Letter, June 18, 2020).

21) On June 30, 2020, Employee failed to attend the prehearing conference. The designee proceeded with the prehearing conference after attempting to contact her. The purpose of the prehearing conference was to determine how the parties wished to proceed to memorialize a hearing record. The June 16, 2020 hearing issues had included:

> 1. Employee's March 15, 2020 petition to set aside the C&R
> 2. Employee's request at hearing to keep the record open to submit additional evidence. An oral order was issued at the June 18, 2020 hearing and the request was not granted.

On June 30, 2020, the designee explained there are three options to preserve the hearing record:

> 1. Another oral hearing could be scheduled to rehear the case. The next available hearing date is August 4, 2020.
> 2. The case can be decided on the written record. The record would be reopened to receive additional written argument from the parties. The additional written argument must be filed with the board and served on the other parties.
> 3. The parties could stipulate to proposed factual findings and submit those to the board in writing.

Employer did not wish to stipulate to factual findings but had no preference regarding the other two options. The board designee issued an order requiring Employee to notify the board and Employer on or before 5: 00 p.m. Alaska Time on July 13, 2020, how she wished to proceed to memorialize the hearing record in this matter from the remaining two options listed above: an oral hearing or a hearing on the written record. If Employee failed to notify the board and Employer of her preference on or before 5:00 p.m. Alaska Time on July 13, 2020, the board designee would proceed with the second option and a letter would be issued notifying the parties in writing when the record would reopen and close to receive additional written argument from the parties to decide the case on the written record. (Prehearing Conference Summary, June 30, 2020).

22) On July 8, 2020, Employee elected to proceed with an oral hearing. (Email, July 8, 2020).

23) At hearing on August 4, 2020, Employee testified Employer failed to pay for past medical benefits. She went back to work after her work injury to complete working the season. Ten weeks after Employee's December 2015 surgery, she asked to be released to return to work because she was tired of arguing with the claims adjuster about travel for appointments, prescriptions, crutches and a brace. Employee wanted to go back to work. She saw physicians

again in April, May and June 2016 and Employer did not pay for the costs. Employee does not believe she ever reached medical stability after the work injury. When she finally got a knee brace, it helped a lot. Employee is in the same position she was before she signed the C&R agreement. She did not know what to do in September 2016 because she was broke and unable to work due to the work injury and she kept contacting people to get help. Employee thought the claims administrator represented her and was her advocate. She did not realize she had to contact workers' compensation herself for assistance. The claims administrator knew she was broke and unable to work due to the work injury when she signed the settlement agreement, which caused foreseeable harm to her person, family and professional and personal reputation. Employee moved to Arkansas because she was broke. Employer denied medical treatment in Arkansas when she was unable to work and needed medical treatment. She tried to find an orthopedic physician but was unable to find one willing to treat her. When the claims adjuster reopened the case, she harped on her to find an orthopedic surgeon. The claim adjuster tried to help her find a physician in California but they could not find one. The claim adjuster offered to pay for treatment in Washington or Oregon after Employee brought up seeking treatment in Anchorage. She paid for travel to Anchorage because she was afraid benefits would stop if she did not receive medical treatment. Every week the claims adjuster told her that her benefits would stop if she could not find a physician even though the medical records showed she needed treatment. An average knee replacement in California cost $47,000. Employee paid for two knee injections, past medical bills and a knee brace and paid back loans from family members with the settlement money. She cannot go back to work because of her work injury. Employee was diagnosed with post-traumatic stress disorder because of her inability to work. She worked as a traffic control supervisor for five to seven years before the work injury and did mortgages before that. Employee's computer skills are out of date and she cannot use a phone. She needs retraining to go back to work. (Employee, August 4, 2020).

24) At hearing on August 4, 2020, Employee contended she was under duress the entire time because she was broke, which the claims adjuster knew, and the claims adjuster told her every week that if she did not find an orthopedic physician or surgeon her benefits would stop. She contended she asked for a PPI rating but never got one. Employee contended the misstatements of fact in the C&R agreement constituted fraud and misrepresentation. (Employee hearing arguments, August 4, 2020).

25) On August 21, 2020, the hearing record was reopened because neither party provided evidence or argument on August 4, 2020, on whether Employee should be allowed additional time to file evidence, which was requested at the first hearing on June 16, 2020. Employee was ordered to file and serve written argument and evidence supporting her request to be allowed to file additional evidence by August 28, 2020. Employer was ordered to file and serve written argument and evidence in response by September 4, 2020. (Letter, August 21, 2020).

26) On August 28, 2020, Employee requested a one week extension of the filing deadline due to a family death. (Email, August 28, 2020).

27) On August 31, 2020, Employee's request for an extension was granted. She was ordered to file and serve written argument and evidence supporting her request to be allowed to file additional evidence by September 4, 2020. Employer was ordered to file and serve written argument and evidence in response by September 11, 2020. (Letter, August 31, 2020).

28) On September 3, 2020, Employee PA-C Schlecht for left knee pain. She complained of moderate to severe pain when weight-bearing and a nagging ache during rest. Employee stated she was unable to return to her previous level of employment due to pain. PA-C Schlecht diagnosed posttraumatic left knee osteoarthritis and recommended a new unloader brace, intra-articular injection, hyaluronic acid injections, physical therapy and an eventual total knee arthroplasty. He performed an intra-articular corticosteroid injection. (PA-C Schlecht Progress Note, September 3, 2020).

29) On September 4, 2020, Employee contended the claims adjuster closed her case based on medical stability in February 2016 and within a month she asked for it to be reopened because her left knee worsened. She contended this was an unfair or frivolous controversion. Employee contended the claims adjuster fraudulently misrepresented her case by refusing to pay for any medical bills or allow her to seek any medical attention for her work-related injury without paying out-of-pocket first. She contended Employer was not paying for her post-traumatic left knee osteoarthritis even though there were medical opinions stating it was caused by the work injury. Employee contended she relied on the claims administrator to help her and the claims adjuster counted on the fact she had not reached medical stability to intentionally induce her reliance. She contended she suffered irreversible damages to her person and finances. Employee contended the damages caused duress as she cannot return to work and is not medically stable. She contended the claims adjuster signed the C&R agreement, which proves fraud, knowledge of

misrepresentation and an intention to induce reliance. Employee contended she trusted the claims administrator to do the right thing and she had no idea she was supposed to be filing things with the board until the claims adjuster informed her the board would have to approve the C&R agreement. She contended the claims adjuster caused duress by pushing her to sign an agreement because she did not have a physician and she was homeless. Employee contends the claims adjuster knew she was no longer together with her husband, she was couch surfing and that she was desperate for every penny, proving fraud and misrepresentation. She contends she is not being treated like a United States citizen because of the damages caused to her by Employer. Employee attached her birth certification, marriage certificate, an August 7, 2020 letter from Alaska Division of Vocational Services, Disability Determination Services requesting additional information, a functional report for Social Security filled out by a friend dated August 24, 2020, and a September 3, 2020 progress note by PA-C Schlecht. (Employee Fax, September 4, 2020).

30) On September 11, 2020, Employer objected to Employee's September 4, 2020 argument and evidence. It contended Employee's September 4, 2020 filings should not be considered because they are not relevant and contain hearsay and because they were filed untimely. Employer contended it did not waive its right to cross-examination for the two pages of written argument, the September 3, 2020 medical record or the functional report. It requested the September 4, 2020 filings be excluded. (Employer's Opposition to Late Filed Evidence, September 11, 2020).

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 this chapter . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

A decision may be based not only on direct testimony and other tangible evidence, but also on "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn

from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

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

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*.).

In *Smith v. CSK Auto, Inc.*, 204 P.3d 1001 (Alaska 2009), the Alaska Supreme Court criticized the board's approval of a settlement agreement absent testimony from the injured worker particularly because the board "had incomplete medical records before it when it approved the agreement." This, in conjunction with boilerplate assertions stating the settlement was "in the employee's best interest," was "inadequate" to prove the settlement was in the employee's best interest. *Smith* held such actions constituted an "abuse of discretion." (*Id*. at 1013).

> **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* at 1008.

> **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. . . .**

(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. . . .

8 AAC 45.052. Medical summary. . . .

(c) . . . .

> (4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence. . . .

(d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board. . . .

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter. . . .

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. . . . Irrelevant or unduly repetitious evidence may be excluded on those grounds.

(f) Any document . . . 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 . . . .

> (i) If . . . a document is received by the board less than 20 days before hearing, the board will rely upon that document only if the parties expressly waive the right to cross-examination or if the board determines the document is admissible under a hearsay exception of the Alaska Rules of Evidence. . . .
>
> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999) (citing Alaska Evidence Rule 401).

> **8 AAC 45.160. Agreed settlements.** (a) The board will review a settlement agreement that provides for the payment of compensation due or to become due and that undertakes to release the employer from any or all future liability. A settlement agreement will be approved by the board only if a preponderance of evidence demonstrates that approval would be for the best interest of the employee or the employee's beneficiaries. . . .
>
> (b) All settlement agreements must be submitted in writing to the board, must be signed by all parties to the action and their attorneys or representatives, if any, and must be accompanied by form 07-6117.
>
> (c) Every agreed settlement must conform strictly to the requirements of AS 23.30.012 and, in addition, must
>
> > (1) be accompanied by all medical reports in the parties' possession, except that, if a medical summary has been filed, only those medical reports not listed on the summary must accompany the agreed-upon settlement;
> >
> > (2) include a written statement showing the employee's age and occupation on the date of injury, whether and when the employee has returned to work, and the nature of employment;
> >
> > (3) report full information concerning the employee's wages or earning capacity;

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

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

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

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

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

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

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

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

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

. . . .

Evidence Rule. 801. Definitions. The following definitions apply under this article:

(a) Statement. A statement is

(1) an oral or written assertion or

(2) nonverbal conduct of a person, if it is intended by the person as an assertion. . . .

(c) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. . . . .

Evidence Rule. 802. Hearsay. Hearsay is not admissible . . . .

Evidence 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 preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. . . .

In *Frazier v. H.C. Price*, 794 P.2d 103 (Alaska 1990) Frazier gave notice he intended to introduce into evidence a medical report prepared at H.C. Price's request and expense. The employer asserted a right to cross-examine the reports' authors and the Board held Frazier should bear the costs of the cross-examination. The Board's holding was reversed. The Supreme Court held written medical reports prepared at the employer's request and expense and which the employee intends to introduce are not hearsay, and thus the employee is not obligated to bear the costs of employer's cross-examination of the reports' authors. The employer, by requesting that the employee submit to examination by clinical physicians of its choice, vouches for credibility and competence of those physicians. *Id*. at 105.

In *Dobos v. Ingersoll*, 9 P.3d 1020 (Alaska 2000), a personal injury case, the Alaska Supreme Court held "medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule," unless there is some reason to doubt the records' authenticity. *Id*. at 1027. Ingersoll asked Dobos to admit that Ingersoll's medical records were genuine under the Alaska Civil Rules. Dobos refused, arguing the evidence was hearsay. He wanted Ingersoll to put the witnesses on the stand at her expense so he could question them. During trial, Ingersoll called her doctors to testify and lay a foundation for the records. On appeal, the Alaska Supreme Court noted medical records are exceptions to the hearsay rule under Evidence Rule 803(6) and remanded back for sanctions against Dobos for failing to admit the genuineness of Ingersoll's medical records. The court reasoned, "Requiring testimony that medical records were made and kept in the regular course of business is a waste of time unless there is some reason to believe that the records are not genuine or trustworthy." *Id*.

at 1028. Further, the Court said Dobos could have called Ingersoll's doctors to the stand himself after he denied Ingersoll's request to admit their records. *Id*.

In *Noffke v. Perez*, 178 P.3d 1141 (Alaska 2008), another personal injury case, the Alaska Supreme Court said evidence of the plaintiff's medical treatment and diagnosis, even in the form of a doctor's letter to the Social Security Disability Determination Unit, could be admissible under *Dobos* provided litigants established "it was the regular practice" of the doctor to prepare and send such reports. *Id*. at 1146. *Parker v. Power Constructors*, AWCB Decision No. 91-0150 (May, 17, 1991), addressed "trustworthiness" under Alaska Rule of Evidence 803(6), noted:

> Statements by professionals, such as doctors, expressing their opinion on a relevant matter, should be excluded only in rare circumstances, particularly if the expert is independent of any party, and especially if the reports have been made available to the other side through discovery so that rebuttal evidence can be prepared. (*Id*. at 7, *citing* 4 Weinstein's Evidence Rule 803 at 803-211 (1990)).

In *Parker*, an insurer petitioned the board to admit three documents, contending they fell within exceptions to the hearsay rule. The employee contended the documents should not be admitted over his cross-examination request. The three documents pertaining to the employee included: (1) a discharge summary from a nursing home; (2) a physical examination report prepared during the employee's residence at the nursing home; and (3) a letter written to the employee's attorney from the employee's attending physician giving an opinion on compensability. After discussing the history of the *Smallwood* objection, the board reviewed relevant Alaska Supreme Court cases and relied heavily upon *Frazier*. *Parker* noted Alaska Supreme Court precedent, including Frazier, represented an "extension rather than a limitation of our regulation permitting admission of certain documents over *Smallwood* objections." *Parker* determined the three documents in question had long been in the employee's possession and were trustworthy enough to permit admission under exceptions to the hearsay rule. *Parker* also noted while Frazier did not agree to "re-examine *Smallwood*," it also did not overrule or refuse to apply the board's regulations permitting certain documents to be admitted over *Smallwood* objections. (*Id*. at 11).

<u>ANALYSIS</u>

1) Should Employee's September 4, 2020 filings be excluded?

At the first hearing on June 16, 2020, Employee requested to keep the record open to submit additional evidence. However, the hearing recording was unrecoverable and a rehearing was held on August 4, 2020. Neither Employer nor Employee addressed her request at the rehearing so the record was reopened to allow Employee to file argument and evidence on the issue and Employer to submit a response. Employee submitted additional argument and evidence which Employer objected to, contending they were irrelevant, untimely and hearsay.

Procedure in workers' compensation cases is liberal. AS 23.30.135(a); AS 23.30.155(h). "Any relevant evidence" is admissible, 8 AAC 45.120(e), and a panel may rely on "[a]ny document" appropriately served and filed. 8 AAC 45.120(f). Generally, documents are required to be filed 20 days in advance of a hearing but a panel has the authority to reopen the hearing record to receive additional evidence and legal memoranda if the hearing was not completed. 8 AAC 45.070(a); 8 AAC 45.120(m). Employee's argument will not be excluded.

If documentary evidence is filed less than 20 days prior to hearing, those documents will only be relied upon if the parties waive their cross-examination rights or the documents are admissible under a hearsay exception set forth in the Alaska Rules of Evidence. 8 AAC 45.120(i). The Alaska Rules of Evidence define "hearsay" as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid. R. 801(c). Meanwhile, a statement is an oral or written assertion. Evid. R. 801(a).

The August 24, 2020 functional report completed by Employee's friend was not filed 20 days before the hearing. But it could not be filed 20 days before the hearing because it did not exist before the August 4, 2020 hearing. However, it is hearsay because it is a written statement made by Employee's friend offered to prove Employee's current functional capacity and her friend did not testify. Employer has not waived its right to cross-examination. It does not fall under a hearsay exception. Evid. R. 803. Therefore, the August 24, 2020 functional report will be excluded.

The September 3, 2020 progress report was not filed 20 days before the August 4, 2020 hearing and could not be filed 20 days before the hearing because it did not exist. PA-C Schlecht assessed Employee's left knee and issued a progress note based upon her pain complaints and her medical history. It is a document written by a physician offered to prove Employee's continuing need for medical treatment and disability. The progress report provided a similar diagnosis and recommended the similar treatment cited in the C&R agreement. It is relevant. *Granus*. Employer did not waive its right to cross-examination. While Employer has not had the opportunity to obtain rebuttal testimony, there is no reason to doubt the authenticity or trustworthiness of the progress note. *Noffke*; *Dobos*; *Parker*. The September 3, 2020 progress report falls under the business record exception. Evid. R. 803(6); 8 AAC 45.052(c). It will not be excluded.

Irrelevant evidence may be excluded. 8 AAC 45.120(e). The evidence required to set aside an approved C&R agreement does not include a person's immigration status. *Seybert*; *Shehata*. Employee's marriage certificate and birth certificate are not relevant to her March 16, 2020 petition to set aside a previously approved C&R agreement. *Granus*. Therefore, they will be excluded.

2) Should the February 26, 2019 C&R agreement be set aside?

A workers' compensation C&R agreement is a contract subject to interpretation as any other contract. *Seybert*. Standards of common law contract formation apply to formation and rescission of workers' compensation settlement agreements to the extent these standards are not overridden by statute. *Id*. A C&R agreement may be set aside for fraud, misrepresentation, coercion, or duress. *Id*. A C&R agreement may not be set aside due to a unilateral mistake of fact. *Id*. A party seeking to void a C&R agreement for fraud or misrepresentation must show by clear and convincing evidence: 1) a misrepresentation occurred; 2) which was fraudulent or material; 3) which induced the party to enter the contract; and 4) upon which the party was justified in relying. *Shehata*. A party seeking to void a C&R agreement for coercion or duress must show by clear and convincing evidence: 1) a party involuntarily accepted the terms of

another, 2) circumstances permitted no other alternative, and 3) such circumstances were the result of coercive acts by the other party. *Seybert*.

Employee contended she did not fully execute the C&R agreement because she did not initial the last page which she signed before a notary. However, there is no requirement that she initial each page. AS 23.30.012(b); 8 AAC 45.160. According to the unambiguous terms of the February 26, 2019 C&R agreement, Employee signed the agreement waiving all future benefits under the Act, including medical benefits, knowing her injury may be continuing and progressive in nature, and understanding the extent of her injuries and disability may not have been fully known at the time of signature. The C&R agreement became binding on the parties when approved on February 26, 2019. AS 23.30.012(b); 8 AAC 45.160.

Employee contended she felt pressured to sign the C&R agreement because she was unable to find a physician willing to be her treating physician under the Act. She contended she was broke and unable to work due to the work injury and Employer took advantage of her financial situation to induce her to sign the agreement. Employee also contended mistakes of fact in the factual summary in the C&R agreement constituted fraud and misrepresentation which induced her to sign it. However, Employee had alternative options. She could have filed a claim seeking past benefits she felt she was owed and any continuing benefits she felt she was entitled to but was not receiving. Employee was informed about the claims process in November 2018. Employer tried to help her find a treating physician and paid temporary total disability when Employee was able to provide medical evidence supporting her disability. It is not a coercive act to inform Employee benefits may stop if she is unable to obtain medical evidence of her disability and need for treatment. She could have persisted in finding a treating physician and continued to receive time loss and medical benefits with additional medical evidence. Instead, Employee opted to settle her benefits to control her own treatment because she had difficulty finding a physician willing to treat her injury and wanted to pay the physician directly. This unfortunate difficulty was cited in the C&R agreement as the reason she sought approval of the agreement. *Smith*. There is a complete medical record which the C&R settlement agreement described appropriately which also described the difficulty she faced. *Id*. Employee signed the agreement stating she read and understood it, was signing it freely and voluntarily and the facts

were accurately stated to the best of her knowledge. There is no evidence the medical record was incomplete, Employer misrepresented facts, Employee was pressured by Employer to sign the agreement, she had no alternative but to sign the agreement, or she agreed to the C&R agreement terms involuntarily. AS 23.30.001; AS 23.30.135; AS 23.30.122; *Smith*; *Seybert*; *Shehata*; *Rogers & Babler*.

Employee testified she used to funds to pay for some medical treatment for her knee and to pay back loans made to her from a relative, but she still needs a knee replacement, which costs about $47,000 in California, and she cannot work due to her injury and needs retraining. If Employee was not aware of the full extent of her future need for medical treatment, disabilities and need for training when she signed the C&R agreement, she made a mistake of fact. A C&R agreement may not be set aside because a party made a mistake in their determination of a material fact. *Seybert*.

Employee contended she thought the claim adjuster was her advocate. She contacted the division in November 2018 and was informed about the claims process and given the workers' compensation pamphlet and a list of attorneys. Employee read and signed the agreement after she was informed of her right to pursue a claim, how to pursue a claim and her right to seek an attorney to represent her. The C&R agreement stated she understood and acknowledged that "any communications with Employer, Insurer or their agents with respect to her claim and this Compromise and Release Agreement cannot be construed as legal advice." There is no evidence Employer misrepresented itself or was her legal advocate. AS 23.30.122; *Smith*; *Seybert*.

Because she offered no evidence she was unduly influenced, or that her judgment was so impaired as to lack mental capacity to enter into a contract, no basis exists in fact or law to set aside the C&R agreement in this case. AS 23.30.001; AS 23.30.135; *Smith*; *Seybert*; *Shehata*; *Rogers & Babler*. The February 26, 2019 C&R agreement should not be set aside. Employee's March 16, 2020 petition to set aside the parties' February 26, 2019 C&R agreement will be denied.

CONCLUSIONS OF LAW

1) Three of Employee's September 4, 2020 filings should be excluded and two should not be excluded.
2) The February 26, 2019 C&R agreement should not be set aside.

ORDER

Employee's March 16, 2020 petition to set aside a previously approved C&R agreement is denied.

Dated in Juneau, Alaska on September 29, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Bradley Austin, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of TERESA R. YERKEY, employee / claimant v. SOUTHEAST ROAD BUILDERS, employer; ALASKA TIMBER INSURANCE EXCHANGE, insurer / defendants; Case No. 201513125; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 29, 2020.

/s/

Dani Byers, WC Officer II