

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

RAYMOND PITKA, )  
)  
) Employee, )  
) Claimant, )  
) )  
) v. )  
) )  
) CITY OF FAIRBANKS, )  
) )  
) Employer, )  
) and )  
) )  
) ALASKA MUNICIPAL LEAGUE JOINT )  
) INS. ASSOC., )  
) )  
) Insurer, )  
) )  
) Defendants. )

FINAL DECISION AND ORDER  
AWCB Case No. 200411938  
AWCB Decision No. 24-0010  
Filed with AWCB Fairbanks, Alaska  
on February 26, 2024

Raymond Pitka's (Employee) July 28, 2023 claim for re-issuance of a check for settlement proceeds, and his October 27, 2022 claim for a permanent partial impairment (PPI) benefit, were heard in Fairbanks, Alaska on February 1, 2024, a date selected on October 9, 2023. An August 28, 2023 hearing request gave rise to this hearing. Employee represented himself. Attorney Colby Smith appeared and represented the City of Fairbanks and the Alaska Municipal League Joint Insurance Association (Employer). Employee, the hearing's only witness, testified on his own behalf. The record closed at the hearing's conclusion of February 1, 2024.

## ISSUES

Employee contends he never received Employer's check for settlement proceeds from the parties' April 19, 2007 Compromise and Release (C&R) agreement, and documents evidencing

that he did were “forged” by his workers’ compensation attorney, whom he alleges kept the settlement proceeds. He seeks re-issuance of a check for settlement proceeds.

Employer contends substantial evidence shows Employee received its settlement check on April 30, 2007, endorsed it, and collected settlement proceeds that same day, so his claim seeking re-issuance of a check should be denied.

**1)Should Employer be ordered to re-issue a check for settlement proceeds under the terms of the parties’ April 19, 2007 C&R?**

Employee contends he was paid a 10 percent PPI benefit under the terms of the April 19, 2007 C&R, which was based on a rating from a doctor he never saw. Instead, he contends he should have been paid a benefit based on other doctors’ PPI ratings of 20 and 28 percent.

Employer contends Employee waived PPI benefits under a prior C&R and his claim is time-barred by statute and barred by the doctrine of laches. It further contends Employee cannot make the required showings that the April 19, 2007 C&R should be set aside, so his claim should be denied.

**2)Is Employee’s PPI claim foreclosed by the parties’ April 19, 2007 C&R?**

FINDINGS OF FACT

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

- 1) On March 18, 2002, and July 24, 2002, Employee suffered prior back injuries that resulted in him being provided a 20 percent PPI rating. (Cobden report, September 15, 2006).
- 2) On January 14, 2004, Employee reported his back pain was worsening. (C&R, April 19, 2007).
- 3) On July 7, 2004, Employee was exiting a garbage packer truck at the Fairbanks North Star Borough’s landfill when a compaction loader ran into his truck. The impact jolted Employee’s whole body and he reported a sore back. (Report of Occupational Injury or Illness, July 9, 2004).

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- 4) Employee was initially taken off work by his chiropractor and Employer began making benefit payments. (C&R, April 19, 2007; Compensation Report, July 19, 2004). Employee underwent medical treatment, including chiropractic, physical therapy, massage therapy, medication therapy, steroid injections, facet injections, and radiofrequency ablation. (C&R, April 19, 2007).
- 5) On an unknown date, Employee initiated a personal injury lawsuit against third parties for injuries he sustained on July 7, 2004, in *Ray Pitka v. Fairbanks NorthStar Borough*, Case No. 4FA-05-1414 CI. (*Id.*).
- 6) On March 17, 2005, James Green, M.D., performed an employer's medical evaluation (EME) and opined Employee was not medically stable without surgical decompression and possible fusion of his lower back. He provided a 20 percent whole person PPI "due to [Employee's] multiple degenerative discs, his spinal stenosis, and his Grade II spondylosis." (Green report, March 17, 2005).
- 7) On September 29, 2005, Dr. Green performed a follow-up EME, and opined Employee was medically stable on an objective basis because his condition had not changed since his last evaluation. He again opined Employee had a 20 percent whole person PPI rating and clarified the rating was based on findings that preexisted the work injury. (Green report, September 29, 2005).
- 8) On May 4, 2006, Employee underwent bilateral hemilaminectomy and foraminotomy surgery, which did not include fusion because of his chronic renal disease. (Cobden report, September 15, 2006).
- 9) On August 24, 2006, one of Employee's treating physicians, Nancy Cross, M.D., indicated her intention to refer Employee to Francine Pulver, M.D., for a PPI rating the following month. (Cross responses, August 24, 2006).
- 10) On September 7, 2006, Dr. Pulver provided a 10 percent whole person PPI rating. (Pulver report, September 7, 2006).
- 11) On September 15, 2006, Richard Cobden, M.D., evaluated Employee at the behest of Employee's third-party personal injury attorney, Ted Hoppner. He opined that Employee's permanent physical impairment had increased "approximately 8% above the preexisting 20% overall." (Cobden report, September 15, 2006).

12) Disputes arose between the parties concerning medical stability, PPI benefit payments, Employee's entitlement to chiropractic care, and his participation in a reemployment plan. (Controversion Notices, March 7, 2006; March 14, 2006; November 6, 2006). Employer specifically contended: "The employee's attending physician, Dr. Pulver, has rated him with a 10% permanent partial impairment rating. In excess of 19% PPI has been paid, and there may be an overpayment of PPI benefits." (Controversion Notice, November 6, 2006).

13) On February 13, 2007, Employer's attorney requested Employee's workers' compensation attorney, John Franich, advise her of the status of a C&R. (Rose email, February 13, 2007). The following day, Employee's attorney replied that Employee had given him a few minor changes to make, and he would try to get an edited draft back to Employer's attorney later that day or the next day. (Franich email, February 14, 2007).

14) On April 19, 2007, the parties submitted a C&R settling the parties' disputes. It provided payment to Employee of \$37,500 "in compromise of . . . all benefits for past, present and future disability or impairment, temporary or permanent. . . ." The settlement amount was allocated \$5,000 to the release of temporary total disability (TTD) benefits, \$5,000 to the release of PPI benefits, \$10,000 to the release of reemployment benefits, and \$17,500 to the partial release of certain medical benefits, including narcotic medications, emergency room visits and chiropractic care. The agreement also provided for a payment of \$3,900 to Employee's workers' compensation attorney. A hearing officer and two Board members reviewed and approved the C&R that same day, finding it was in Employee's best interests. (C&R, April 19, 2007).

15) The April 19, 2007 C&R states Employee's reasons for settlement: He had retired from his job and was receiving substantial retirement income from his union pension plan based on his years of service with Employer; he did not wish to be obligated to return to employment at that time or participate in the reemployment benefits process; and he was pursuing his third-party personal injury litigation and wished to pay litigation costs in that action. The C&R also included Drs. Green's, Pulver's and Cobden's PPI ratings, as well as the total amount of Employer's previous PPI benefit payments. Employee initialed numerous individual paragraphs, and each page of the C&R. Immediately above his signature to the agreement, it states:

**I INTEND TO DISCHARGE THE EMPLOYER AND COMPENSATION CARRIER'S LIABILITY AND TRULY INTEND TO RELEASE THEM COMPLETELY AS SET FORTH ABOVE.**

Employee further attested he had carefully read the C&R, was aware of its contents, and had freely signed it. (*Id.*) (emphasis in original).

16) Employee's workers' compensation attorney is an experienced and competent lawyer who has represented injured workers for decades. (Observations).

17) On April 26, 2007, Employer issued a check to Employee for payment of settlement proceeds and transmitted it via certified mail, return receipt requested. (Check No. 102907, April 26, 2007; Certified Mail Receipt, April 26, 2007). It also prepared a compensation report showing it had already paid Employee amounts including \$22,544.44 in PPI benefits, and was paying him another \$5,000 in PPI benefits pursuant to the April 19, 2007 settlement agreement. (Compensation Report, April 26, 2007).

18) On April 28, 2007, the balance on Employee's account at Alaska USA Federal Credit Union was \$586.43. (Alaska USA Statement of Account, April 22, 2007 through May 21, 2007).

19) April 29, 2007 was a Sunday. (Observations).

20) On April 30, 2007, Employee signed for receipt of Employer's settlement check. (Domestic Return Receipt, April 30, 2007). That same day, he endorsed Employer's check and received \$200 cash back at Alaska USA Federal Credit Union. (Check No. 102907, April 26, 2007). Notations were made under Employee's signature on the back of the check, including his driver's license number and account number. (*Id.*). The account number notation on the back of the check corresponds to the account number on Employee's account statement. (Observations). An "Alaska USA FCU" cancellation stamp, dated April 30, also appears on the back of the check. (*Id.*). Employee's account activity on April 30, 2007 includes a \$34,800 deposit from a check to his checking account and a \$2,500 deposit from a check to his savings account. (Alaska USA Statement of Account, April 22, 2007 through May 21, 2007). Other account activity occurring on April 30, 2007, included a \$25,002 check withdrawal and a \$2,500 telephone transfer from Employee's checking account to his savings account. (*Id.*).

21) On May 1, 2007, Employee's \$2,232.48 pension check from the Laborer's Union was deposited to his checking account. The balance on his checking account was \$6,420.25. (*Id.*).

22) On an unknown date, Employee entered into a tentative settlement agreement in his third-party personal injury lawsuit for \$25,000. (C&R, July 27, 2007).

- 23) Disputes again arose between the parties over the amount of Employer's lien and the nature and extent of Employer's remaining liability for workers' compensation benefits. (*Id.*).
- 24) On July 27, 2007, a second settlement agreement was approved where Employee waived his entitlement to remaining medical benefits and Employer waived a \$235,130.72 lien for compensation previously paid on Employee's behalf. Although the parties' agreement did not provide for payment of attorney's fees, Employee was represented by his third-party personal injury attorney, whose fees were to be paid from the third-party settlement proceeds. (*Id.*).
- 25) The agency record is silent on case activity involving Employee until December 29, 2014, when he requested a copy of his workers' compensation case file. (Incident Costs and Expense Reporting System (ICERS) event entry, December 29, 2014). Two months later, Employee also called the Workers' Compensation Division (Division) to report compensation reports from his case and actual benefit payments "don't line up." (ICERS event entry, March 4, 2015). Two weeks after that, another case note indicated Employee reported a "stolen check" to the Fairbanks Police Department. (ICERS event entry, March 19, 2015).
- 26) The agency record is again silent on case activity involving Employee until June 26, 2017, when Employee called the Division and reported he never received a check for settlement proceeds. (ICERS event entry, June 26, 2017).
- 27) The agency record is again silent on activity involving Employee until January 20, 2022, when he called the Division to inquire about his settlement proceeds. (ICERS event entry, January 20, 2022).
- 28) On February 17, 2022, Employee saw Dr. Cobden for an "Independent Medical Exam." Dr. Cobden's report summarizes Employee's work injury and subsequent treatment and includes a physical examination. He concluded his report by referencing his September 15, 2006 report, which stated that Employee had a 28 percent whole person impairment. Dr. Cobden's report did not specify the amount of physical impairment attributable to the July 7, 2004 work injury or previous injuries. (Cobden report, February 17, 2022).
- 29) On October 27, 2022, Employee filed a claim seeking PPI benefits. (Claim for Workers' Compensation Benefits, October 27, 2022).
- 30) On November 15, 2022, Employer denied Employee's October 27, 2022 claim on the basis he had waived PPI under the terms of the parties' April 19, 2007 C&R and because Employee's

claim was time barred under AS 23.30.105(a). (Answer, November 15, 2022; Controversion Notice, November 15, 2022).

31) On January 27, 2023, Employer amended its answer to Employee's October 27, 2022 claim, further contending it was barred by the doctrine of laches and, to the extent that Employee was seeking modifications of awards in prior settlement agreements, was time barred by AS 23.30.130. (Answer, January 27, 2023).

32) On March 29, 2023, Employer deposed Employee, who testified John Franich represented him in his workers' compensation case, and Ted Hoppner represented him in the civil lawsuit. (Pitka dep., March 29, 2023 at 11-12; 13). The signature on the April 19, 2007 C&R looks like his signature but he does not remember signing it. (*Id.* at 14; 15). Employee never received a check for settlement proceeds from the April 19, 2007 C&R. (*Id.* at 17). "Franich kept the check," according to Employee. (*Id.* at 17). Employee "went after Franich because he took that money." (*Id.* at 17-18). He further testified, "But like I told you, Franich kept the money." (*Id.* at 22). Employee thinks he was paid a 10 percent PPI benefit. (*Id.* at 16; 18; 19; 20; 21; 24; 25; 41; 43; 51). He repeatedly testified he never saw Dr. Pulver. (*Id.* at 17; 19; 20; 20-21; 41). Dr. Francine Pulver is a "fake name" that Franich put in the C&R. (*Id.* at 20). Employee thinks he should have been paid "somewhere in between" Dr. Green's 20 percent rating and Dr. Cobden's 28 percent rating. (*Id.* at 17; 20; 45). He repeatedly testified he did not have an account at Alaska USA at the time because he closed his Alaska USA account when he opened an account with Denali Federal Credit Union on February 2, 2002. (*Id.* at 20; 33; 34; 35). The endorsement on the back of Employer's check looks like his signature, but it is not. (*Id.* at 33). The signature is "forged." (*Id.* at 33; 37). Employee never received \$200 cash back from the check when it was deposited. (*Id.* at 34). "I never got anything," he testified. (*Id.*). He never received Employer's check. (*Id.* at 17; 32; 34; 36; 49). Employee never deposited Employer's check. (*Id.* at 34). The signature on the April 30, 2007 return receipt looks like his signature, but it is not. (*Id.* at 35). The signature is a "forgery" and a "fake." (*Id.* at 35; 36). His workers' compensation attorney forged his signature on the return receipt. (*Id.* at 35). The address on the return receipt was Employee's correct address at the time. (*Id.*). Employee has never seen Employer's April 26, 2007 settlement check before. (*Id.* at 37). His workers' compensation attorney forged his signature on the check. (*Id.*). When asked if he pursued a claim for settlement proceeds in 2007, Employee answered, "Yes. But the attorneys I went after, they

wouldn't go after Franich.” (*Id.* at 38). Employee did not file a claim for settlement proceeds in 2007. (*Id.*). In 2007, his dad was dying; in 2010 his brother died. In 2011, Employee had a “gallbladder thing” and had to be rushed to the hospital and his sister took his home away from him. (*Id.* at 38-39). He forgot about not receiving a check until 2012, when he thought, “God, I never got the check.” (*Id.* at 38-39). Employee did not file a claim for settlement proceeds in 2012, either. (*Id.* at 39). His workers’ compensation attorney did not coerce him or threaten him to sign the April 19, 2007 C&R. (*Id.* at 40).

33) Employee was asked at his deposition if he was trying to overturn the April 19, 2007 settlement. He replied, “If that’s what it takes, yeah. I’m just trying to get -- if I -- if I have more money coming, that’s what I’m trying to get.” (*Id.* at 24). Employee was also asked if he was trying to overturn the July 27, 2007 C&R so Employer could regain its \$235,130.72 lien against him. He answered, “Forget it. No.” (*Id.* at 28-29).

34) Employer’s questioning at Employee’s deposition included the following: “But if you take, for example, a 10 percent rating based on your date of injury, it would be worth \$13,500. Are you aware of that?” (*Id.* at 22). “And I’m - I will represent for the record you were paid over 20 percent already.” (*Id.* at 45). “And you - you understand a 10 percent rating at - at the time that you had your injury was \$13,000?” (*Id.* at 48).

35) The signatures that appear for Employee on the April 19, 2007 C&R, the April 30, 2007 return receipt, and the April 26, 2007 cancelled check, resemble Employee’s signatures on his October 27, 2022 and July 28, 2023 workers’ compensation claim forms, as well as other documents in the case file, such as the July 8, 2004 injury report and a July 27, 2005 medical release. (Observations).

36) On June 16, 2023, Employee filed a “Good Standing Letter” from Denali Federal Credit Union as evidence. The letter states Employee established a Basic Savings and Free Checking account on February 2, 2022. (Stewart letter, September 27, 2018).

37) On July 28, 2023, the parties met to discuss hearing issues. Employee wanted his claim for PPI benefits addressed as well as his request for re-issuance of a check for settlement proceeds. Employer pointed out that Employee had never filed a claim seeking re-issuance of the settlement check. Employee expressed frustration because he thought he had completed the necessary paperwork to seek re-issuance of a check. That same day, he filed a claim seeking re-



issuance of a check for settlement proceeds. (Claim for Workers' Compensation Benefits, July 28, 2023).

38) On August 15, 2023, Employer denied Employee's July 28, 2023 claim on the basis documents showed Employee received the settlement check and endorsed it when it was processed by Alaska USA Federal Credit Union. It also contended the claim was barred by the doctrine of laches and, to the extent that Employee was seeking modifications of awards in prior settlement agreements, he was time barred by AS 23.30.130. Employer further contended, to the extent Employee was seeking to set aside the C&Rs, it was entitled to a credit for Employee's third-party personal injury settlement proceeds pursuant to AS 23.30.015(g). (Answer, August 15, 2023).

39) On August 28, 2023, Employee filed copies of pages from a check register as evidence. Employer objected to the documents on numerous bases. (Request for Cross-Examination, (October 6, 2023). Employee later explained at hearing that he filed his check registers to demonstrate that he does not write his numbers the same as the numbers that are annotated on the back of the cancelled settlement check. (Employee).

40) On October 6, 2023, Employer requested an opportunity to cross-examine Dr. Cobden on his opinions in his February 17, 2022 report. (Request for Cross-Examination, October 6, 2023). Employee did not make Dr. Cobden available for cross-examination at hearing. (Record).

41) On February 1, 2024, Employee testified he did not receive Employer's check, did not sign the return receipt for Employer's check, and did not endorse Employer's check. Instead, his signature on the return receipt and the endorsement on the check were "forged" by his workers' compensation attorney. Employee never signed the April 19, 2007 C&R. It is a forgery. He denied ever seeing Dr. Pulver. Employee denied having an Alaska USA account because he left Alaska USA and went to Denali Federal Credit Union on February 2, 2004. Employee's workers' compensation attorney forged the Alaska USA account statement that shows deposit of C&R proceeds. He denied having any back injuries prior to the instant work injury and specifically denied having a back injuries on March 18, 2002 and July 24, 2002. Employee forgot about not receiving a settlement check until 2012 because his dad was dying, he was going through "this rehab," his brother was dying, his sister was trying to take his house, he had a gallbladder problem and his ex's father was dying. He is paid \$2,500 per month for his union retirement, which is \$30,000 per year. Although he grosses \$2,500 per month, he does not net

\$2,500 per month, because taxes are taken out; so, when he is paid his retirement benefit, it is less than \$2,500. (Employee).

42) When Employee was asked to provide his driver's license number at hearing, he recited it from memory. (Record). The driver's license number Employee recited matches the driver's license number notation on the back of the cancelled settlement check. (Observations).

### PRINCIPLES OF LAW

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.** . . . 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 . . . under this chapter. . . . 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 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.

A workers' compensation C&R agreement is a contract and is subject to interpretation as with other contracts. *Williams v. Abood*, 53 P.3d 134; 144 (Alaska 2002). Standards of common law contract formation and rescission of workers' compensation settlement agreements to the extent they are not overridden by statute. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079; 1093 (Alaska 2008). The Restatement (Second) of Contracts (1981) provides:

**§ 235 Effect of Performance as Discharge and of Non-Performance as Breach.** (1) Full performance of a duty under a contract discharges the duty. (2) When performance of a duty under a contract is due any non-performance is a breach.

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The commentary explains that nothing less than full performance will discharge a duty and “any defect in performance, even an insubstantial one, prevents discharge.” “The defect need not be willful or even negligent.”

Upon approval by the Board, settlement agreements have the same legal effect as awards, except they are more difficult to set aside. *Olsen Logging Company v. Lawson*, 856 P.2d 1155; 1158 (Alaska 1993). Once a party relying on the release establishes that it was given with an understanding of the nature of the instrument, the burden is on the releasor to show by clear and convincing evidence that the release should be set aside. *Id.* (citing the Board’s quotation of *Witt v. Watkins*, 579 P.2d 1065 (Alaska 1978)).

A C&R may be set aside for fraud, misrepresentation, or duress. *Seybert* at 1094; 1096. A party seeking to avoid a C&R for fraud or misrepresentation must show: 1) a misrepresentation; 2) which was fraudulent *or* material; 3) which induced the party to enter the contract; and 4) upon which the party was justified in relying. *Id.* at 1094 (emphasis in original). A party seeking to avoid a C&R for duress must show: 1) a party 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.* at 1096. For a party to avoid a C&R based on fraud or misrepresentation, the misrepresentation must have been made by the opposing party. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001; 1009 (Alaska 2009). Factual mistakes cannot serve as a basis for avoiding a C&R. *Olsen* at 1158-59.

**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 finding.” *Smith* at 1008.

At the time of Employee’s injury, the Alaska Workers’ Compensation Act provided:

**AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .

The statute previously provided for a PPI factor of \$135,000. Effective July 1, 2000, the legislature amended AS 23.30.190 by substituting "\$177,000" for "\$135,000" in the first sentence of subsection (a). am § 17 ch 105 SLA 2000.

ANALYSIS

**1) Should Employer be ordered to re-issue a check for settlement proceeds under the terms of the April 19, 2007 C&R agreement?**

A workers' compensation C&R is a contract and is subject to interpretation as with other contracts. *Williams*. Standards of common law contract formation and rescission apply to workers' compensation settlement agreements to the extent they are not overridden by statute. *Seybert*. Nothing less than full performance of a duty under a contract will discharge a party's obligation. Restatement (Second) of Contracts § 235.

Here, Employee is essentially contending Employer breached its duty to fully perform under the C&R by failing to deliver settlement proceeds to him. As initial observations, the signatures that appear for Employee on the April 19, 2007 C&R, the April 30, 2007 return receipt, and the April 26, 2007 cancelled settlement check resemble Employee's signatures on his October 27, 2022 and July 28, 2023 workers' compensation claims, as well as other documents in the case file, such as the July 8, 2004 injury report and a July 27, 2005 medical release. *Rogers & Babler*. Given these resemblances, examinations of the documents on which the signatures appear, Employee's acknowledgements that the signatures look like his signatures, Employee's confirmation of his correct address on the return receipt, his many years of inaction to recover purported missing settlement proceeds, and Employee's inability to point to any substantiating evidence, his fanciful contentions that his former workers' compensation attorney forged his signatures on the return receipt and the settlement check, forged the Alaska USA account statement and, according to his hearing testimony perhaps even the April 19, 2007 C&R itself, are not credible. AS 23.30.122; *Smith*. This conclusion is further reinforced by Employee's

deposition testimony, which indicates he unsuccessfully attempted to seek legal recourse against his former workers' compensation attorney, and the lack of any result to which he can point from his report of a "stolen check" to the Fairbanks Police Department. *Rogers & Babler*.

Conversely, Employee's sworn testimony that he never signed the return receipt for the settlement check, never received the settlement check, never endorsed the settlement check, never deposited settlement proceeds, never received settlement proceeds, and did not have an account at Alaska USA is not credible either since it is contradicted by contemporaneous documentary evidence. AS 23.30.122; *Smith*. To the contrary, the return receipt, the cancelled settlement check, and Employee's own Alaska USA account statement all evidence that he did. Since Employer fully performed under the terms of the parties' April 19, 2007 C&R, its obligation was discharged, and it will not be ordered to issue another check. Restatement (Second) of Contracts § 235.

**2) Is Employee's PPI claim foreclosed by the April 19, 2007 C&R?**

Employee's misunderstandings of Drs. Green's and Cobden's PPI ratings are at the heart of his claim but, as an incidental observation, it also appears Employer is confused over PPI benefit amounts. Its questioning at Employee's deposition and its November 6, 2006 Controversion Notice indicate it thinks the statutory PPI factor at the time of Employee's injury was \$135,000. *Rogers & Babler*. Effective July 1, 2000, the legislature amended AS 23.30.190 by substituting "\$177,000" for "\$135,000" in the first sentence of subsection (a). am § 17 ch 105 SLA 2000. Thus, in the interest of clarity, according to the April 26, 2007 Compensation Report, Employee had been paid \$22,544.44 prior to the parties' settlement in April 2007, which approximately equates to a 13 percent PPI benefit ( $\$22,544.44 / \$177,000 = 12.7$  percent). Then, the April 19, 2007, C&R allocated another \$5,000 towards a PPI benefit, for a total PPI amount of \$27,544.44 ( $\$22,544.44 + \$5,000 = \$27,544.44$ ), which approximately equates to a 16 percent PPI benefit ( $\$27,544.44 / \$177,000 = 15.6$  percent).

It may also help Employee's understanding by pointing out that the Act prescribes that a PPI rating "shall be reduced by a permanent impairment that existed before the compensable injury." AS 23.30.190(c). Drs. Green and Cobden made clear that Employee had a 20 percent

*preexisting* physical impairment, which Dr. Cobden specifically attributed to previous injuries on March 18 and July 24, 2002. So, although Dr. Cobden opined that Employee has a ratable physical impairment of 28 percent, only eight percent is attributable to the instant work injury, not the entire 28 percent as Employee believes. Meanwhile, Dr. Green has not provided any PPI rating attributable to the instant injury, let alone one equaling 20 percent. Oddly, the most favorable PPI rating in the record for Employee is Dr. Pulver's 10 percent rating and Employee thinks that rating is fictitious.

It is not clear whether Employee is trying to set aside the April 19, 2007 C&R. He has not indicated in a pleading or stated in a prehearing conference that he is seeking to have that C&R set aside. His deposition testimony indicates he simply now wants more money than he was previously paid and only wants to overturn the C&R, "If that's what it takes," for him to get more money. Not surprisingly, Employee did make clear though that he has no interest in setting aside the July 27, 2007 C&R releasing him from Employer's \$235,130.72 lien. Regardless, even if Employee was attempting to avoid the April 19, 2007 C&R, he would be unsuccessful.

A C&R may be set aside for fraud, misrepresentation, or duress. *Seybert*. However, Employee has not even alleged a fraudulent or material misrepresentation by Employer, let alone presented any evidence of one. For example, he does not contend Employer misrepresented the extent of his physical impairment to him; he just thinks he should have been paid more based on his current belief that he was paid a 10 percent PPI benefit when he also had 20 percent and 28 percent PPI ratings. Employee's misunderstandings of the PPI ratings are mistakes of fact that cannot serve as a basis for overturning a C&R. *Olsen*.

Additionally, although Employee makes many spectacular allegations against his former workers' compensation attorney, those cannot serve as a basis for avoiding the C&R either, even if the allegations were credible, because avoiding a C&R based on a fraudulent or material misrepresentation requires that the misrepresentation be made by the opposing party. *Smith*. Similarly, although Employee described many stressful life events such as his father dying in 2007, his brother dying in 2010, a "gallbladder thing" and his sister taking his house from him in 2011, these events cannot serve as bases for setting aside the C&R on grounds of duress because

they were not Employer's coercive acts, and neither did they cause Employee to involuntarily accept Employer's terms in April 2007. *Seybert*.

To the contrary, Employee had compelling reasons to settle. He had retired from his job and was receiving substantial retirement income from his union pension plan based on his years of service with Employer. Employee did not wish to be obligated to return to employment at that time or participate in the reemployment benefits process. He was also pursuing his third-party personal injury litigation and wished to pay litigation costs in that action.

Circumstances further demonstrate that Employee understood the nature of the C&R. *Olsen*. He was represented by a competent, experienced attorney, who provided him with legal advice. Employee contributed to the final form of the parties' agreement by having his attorney make changes to Employer's proposed C&R to suit his interests. *Rogers & Babler*. Drs. Green's, Pulver's and Cobden's respective PPI ratings are all set forth in the C&R, as well as the total amount of Employer's previous PPI benefit payments. Another \$5,000 was expressly allocated in the C&R to settle PPI benefits. The C&R compromised "all benefits for past, present and future disability or impairment, temporary or permanent." Employee initialed numerous individual paragraphs and each page of the C&R. He signed the C&R and further attested he had carefully read it, was aware of its contents, and had freely signed it. Employee conspicuously expressed his intent to "discharge the employer and compensation carrier's liability" and to "truly . . . release them completely." A hearing officer and two Board members reviewed the C&R, found it to be in Employee's best interest, and approved it. On April 19, 2007, the C&R became binding on the parties. AS 23.30.012.

Employee has not presented any evidence, let alone clear and convincing evidence, that the April 19, 2007 C&R should be overturned. The terms of that C&R, including benefits waived and the finality of the agreement, are unambiguous, and Employee understood the nature of the agreement. Employer's liability for additional benefits, including PPI, was discharged on April 19, 2007, and Employee's claim is now foreclosed by that agreement. *Id.*

CONCLUSIONS OF LAW





