Alaska Workers' Compensation Appeals Commission

John W. Milton, Appellant, vs. UIC Construction, Alaska Insurance Guaranty Association, and Northern Adjusters, Inc., Appellees.	Final Decision Decision No. 143 December 23, 2010 AWCAC Appeal No. 10-009 AWCB Decision No. 10-0019 AWCB Case No. 198505382

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 10-0019, issued at Fairbanks on January 28, 2010, by northern panel members Judith DeMarsh, Chair, Damian Thomas, Member for Labor, Debra Norum, Member for Industry.

Appearances: John W. Milton, self-represented appellant; David D. Floerchinger, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees UIC Construction, Alaska Insurance Guaranty Association, and Northern Adjusters, Inc.

Commission proceedings: Appeal filed February 11, 2010; briefing completed October 12, 2010; oral argument was not requested by either party.

Commissioners: Jim Robison, Stephen Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, John W. Milton (Milton), was injured on February 9, 1985, while working for appellee, UIC Construction (UIC), in Barrow. In August 1989, Milton and UIC executed a Compromise and Release (C&R), which settled his claim once the Alaska Workers' Compensation Board (board) approved the C&R in October 1989.[1] More recently, Milton sought to have the C&R set aside and other relief. The board held a hearing on November 9, 2009, and issued a Decision and Order (D&O) on

[1] Appellees' Exc. 066-72.

January 28, 2010,[2] in which it denied Milton the relief he sought.[3] Milton requested reconsideration, which the board denied in a Final Decision and Order on Reconsideration and Modification (FD&OR&M).[4] Milton appeals. We affirm the board.

2. Factual background and proceedings.

On February 11, 1985, Milton sought medical treatment. The medical record pertaining to that treatment indicates that Milton reported a rock struck him in the left eye while at work two days earlier, on February 9, 1985. He was diagnosed with a left corneal ulcer.[5] On April 28, 1985, Milton was seen at the Veterans Administration (VA) Hospital in Madison, Wisconsin, complaining of having headaches for three weeks, slurred speech, and facial weakness.[6] He denied any recent or previous head injury.[7] Following a computed tomography (CT) scan, Milton was diagnosed with a chronic left subdural hematoma.[8] On April 29, 1985, a surgical procedure was performed to evacuate the subdural hematoma.[9]

Milton filed a Report of Injury on October 29, 1985, claiming he injured his head on February 9, 1985, when he fell off a ladder.[10] On October 30, 1985, he began treating with Ronald Martino, M.D., in Fairbanks.[11] As of June 1986, Dr. Martino attributed Milton's headaches, amnesia, and blackouts to either the reported work injury or his chronic alcoholism and drug abuse. He also suspected secondary gain was

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2 *See John W. Milton v. UIC Construction, et al.*, Workers' Comp. Bd. Dec. No. 10-0019 (Jan. 28, 2010)(*Milton I*).

3 *See Milton I*, Bd. Dec. No. 10-0019 at 41.

4 *See John W. Milton v. UIC Construction, et al.*, Workers' Comp. Bd. Dec. No. 10-0043 (Mar. 1, 2010).

5 Appellees' Exc. 044.

6 R. 580-81.

7 *Id.*

8 R. 314-15.

9 *Id.*

10 Appellees' Exc. 051.

11 *Id.* at 049-50.

playing a role in Milton's recent increase in memory deficit complaints.[12] UIC controverted all benefits on February 16, 1987.[13]

Milton was involved in a motor vehicle accident (MVA) on July 20, 1988, in which he sustained bilateral compound tibial fractures.[14] A toxicology report taken at that time indicated that Milton's blood test was positive for Acetaminophen, Dilantin, cocaine, amphetamines, and he had a blood alcohol level of .266.[15]

In the negotiations leading up to settlement in 1989, both Milton and UIC were represented by counsel, both of whom also signed the C&R.[16] The C&R recited the apparent discrepancy between the injury as first reported to health care providers on February 11, 1985, that Milton was hit in the eye with a rock, and the injury as reported to the board in the Report of Injury dated October 29, 1985, that he hurt his head in a 20-foot fall from a ladder.[17] Under the terms of the agreement, UIC paid Milton $15,000 in a lump sum, established an annuity which pays him $500 per month for the rest of his life, and paid him an additional lump sum of $7,500. In exchange, Milton agreed to release all disability compensation benefits, penalties, interest, and vocational rehabilitation benefits. Medical benefits related to the eye injury were left open.[18] After initially rejecting the agreement,[19] a hearing was held on October 10, 1989, at which time the board approved the C&R.[20]

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12 Appellees' Exc. 052-53.

13 *Id.* at 056.

14 *Id.* at 060-61.

15 *Id.* at 057.

16 *Id.* at 071-72.

17 *Id.* at 066 and 068.

18 *Id.* at 066-72.

19 *Id.* at 062-63.

20 *Id.* at 072.

Milton was diagnosed with service-related Post Traumatic Stress Disorder (PTSD) by the VA in Fairbanks in July 1990[21] and rated with a 30% disability related to his PTSD in April 1991.[22] He was involved in a second MVA on December 14, 1992, in which he reported that when the vehicle was struck from the side, his neck violently moved laterally. Milton was diagnosed with an injury to his cervical spine that aggravated an older neck injury.[23] Milton suffered a fall on July 8, 1993, which made his neck pain worse.[24] On September 12, 2003, Milton sought treatment at Fairbanks Memorial Hospital emergency room (ER) for injuries he sustained in a third MVA, which had occurred the week before.[25] On reporting to the ER again later that same day, Milton expressed concerns about seizures, and stated further that he had hit his head, but denied that he lost consciousness.[26] On September 18, 2003, he appeared again at the ER, and was diagnosed with a migraine headache. He was treated and discharged.[27] Milton presented at the ER again on September 21, 2003, was diagnosed with a migraine headache, and was discharged on the same day.[28] On September 25, 2003, Milton consulted Lawrence Whitehurst, M.D., with complaints of pain, numbness, and tingling in his left arm. Dr. Whitehurst diagnosed possible whiplash secondary to the September 2003 MVA and prescribed Celebrex and physical therapy.[29] Milton appeared for one physical therapy appointment.[30]

After receiving statements from Milton's Fairbanks medical providers, on November 29, 2006, UIC controverted medical benefits for his cervical spine owing to a

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21 Appellees' Exc. 073-75.

22 *Id.* at 077.

23 *Id.* at 080-81.

24 *Id.* at 084-85.

25 *Id.* at 100-01.

26 *Id.* at 102-03.

27 *Id.* at 104-05.

28 *Id.* at 109-10.

29 *Id.* at 111.

30 *Id.* at 112.

lack of evidence that the treatment was related to the February 9, 1985, injury.[31] On March 13, 2007, Milton filed a workers' compensation claim with a reported injury date of February 9, 1985. The claim was for injuries to Milton's spine, neck, and head. Milton contended that when he signed the C&R he was suffering from PTSD and was heavily medicated. He sought permanent total disability (PTD) benefits, medical costs, transportation costs, penalties, interest, and a finding of unfair or frivolous controversion.[32] UIC answered and controverted all of Milton's claims.[33]

UIC arranged for an employer's medical evaluation (EME) of Milton by Marilyn Yodlowski, M.D., an orthopedic surgeon, which took place on April 17, 2007. Dr. Yodlowski took a history from Milton, performed a records review, and conducted a physical examination.[34] According to Milton, when he fell off the ladder on February 9, 1985, he landed on his feet and did not hit his head, although he stated that "[a]ll the impact went straight to my head."[35] Dr. Yodlowski diagnosed chronic, progressive, degenerative cervical spondylotic disease. In Dr. Yodlowski's opinion, there was no causal connection between Milton's employment with UIC and his cervical spine degenerative disease.[36] In her July 2, 2008, deposition testimony, Dr. Yodlowski reaffirmed her opinion that Milton's cervical condition and symptoms were unrelated to the 1985 work incident.[37]

Dr. Yodlowski's report was forwarded to Dr. Martino, Milton's physician. In a response dated August 8, 2007, Dr. Martino commented that Milton was competent at the time the C&R was executed, that Milton was capable of understanding written and oral communication in English, that he concurred with Dr. Yodlowski's assessment and

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31 Appellees' Exc. 113.

32 *Id.* at 114-15.

33 *Id.* at 116-19.

34 *Id.* at 120-42.

35 *Id.* at 120.

36 *Id.* at 139-40.

37 *Id.* at 263.

opinion, and that the 1985 incident was not a substantial factor in causing Milton's current cervical condition.[38]

The parties stipulated to a second independent medical evaluation (SIME) by Fred Blackwell, M.D., which was conducted on July 20, 2008. In conjunction with the SIME, Dr. Blackwell took a medical history, reviewed medical records, and performed a physical examination of Milton.[39] In relation to Milton's claim, Dr. Blackwell diagnosed: 1) status post-operative for subdural hematoma; 2) post traumatic seizure disorder; and 3) chronic musculoligamentous strain/sprain of the cervicothoracic spine.[40] Dr. Blackwell was unable to offer an explanation as to the source of Milton's neck complaints, nor could he discern a relationship between Milton's complaints of upper left extremity pain and numbness that would correlate with radiculopathy linked to the 1985 injury. In his opinion, the 1985 injury did not aggravate, accelerate, or combine with a pre-existing condition to necessitate medical treatment of Milton's cervical spine and left upper extremity condition.[41] Dr. Blackwell concluded substantial evidence did not exist to indicate that the work injury was a substantial factor in the causation of Milton's neck, upper left extremity, and thoracic spine problems. In his view, Milton has clinical cervical and thoracic osteoarthritis, and age-related spondylosis that has been rendered symptomatic by both the aging process and repeated trauma from falls and MVAs.[42]

On November 13, 2008, Milton filed another workers' compensation claim that was similar to his March 13, 2007, claim. He sought benefits for injuries to his neck, left upper extremity, thoracic spine, and cervical spine. He requested temporary total disability (TTD) benefits from 1985 to 2008, PTD benefits, medical costs, penalties,

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38 R. 703.

39 Appellees' Exc. 285-326.

40 *Id.* at 291 and 323.

41 *Id.* at 324.

42 *Id.* at 325.

interest, and a finding of unfair or frivolous controversion.[43] UIC answered and controverted the claim.[44] On January 8, 2009, Milton filed a third claim, in this instance for TTD benefits related to his subdural hematoma.[45] UIC filed an answer and controversion.[46] Milton filed a fourth workers' compensation claim on April 13, 2009, seeking relief similar to the relief he had already sought and asserting that the C&R should be set aside.[47] UIC answered and controverted the claim.[48]

The board held a hearing on Milton's claims on November 9, 2009. It denied him the relief he sought in the D&O it issued on January 10, 2010.[49]

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[50] The board's findings regarding the credibility of the testimony of a witness are binding on the commission. We exercise our independent judgment when reviewing questions of law and procedure.[51]

4. Discussion.

In its D&O, the board declined to set aside the C&R and concluded that Milton's work injury was not a substantial factor in causing his cervical spine, thoracic spine, and other symptoms, his disability, or his need for medical treatment. We address these conclusions below.

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43 Appellees' Exc. 337-38.

44 *Id.* at 339-42.

45 *Id.* at 343-44.

46 *Id.* at 345-47.

47 *Id.* at 348-49.

48 *Id.* at 350-53.

49 *See Milton I*, Bd. Dec. No. 10-0019 at 41.

50 Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

51 *See* AS 23.30.128(b).

a. There is no factual or legal basis for setting aside the C&R.

A C&R is a contract and subject to interpretation as any other contract would be. To the extent they are not overridden by statute, common law principles of contract formation and rescission apply to C&Rs.[52] Milton sought to have the 1989 C&R set aside on two bases: 1) when he signed it he was suffering from PTSD and was heavily medicated; and 2) duress, misrepresentation, fraud, and regulatory violations on the part of UIC when the agreement was entered. As for the first basis, we infer that Milton is arguing that he was not mentally competent at the time he agreed to the C&R. In terms of the second, he is alleging UIC's misconduct.

Milton presented no medical evidence on the issue of his mental competency; he was represented by counsel both when the C&R was signed and at hearing before the board to obtain its approval. Dr. Martino testified, providing evidence that Milton could understand spoken and written English, and that he was competent to enter into the C&R when he did.[53] In a case with similar bases for asserting incompetence,[54] the Alaska Supreme Court held that indicia that the employee was competent when he signed the C&R included medical evidence of competency and representation of the employee by counsel. Likewise, we conclude that the foregoing was substantial evidence from which the board could find that Milton was mentally competent.

In support of Milton's argument that he was under duress when he signed the C&R, he maintained: 1) *his* attorney told him that if he did not sign the agreement, UIC would portray him as a drug addict and he would get nothing; and 2) the C&R set forth UIC's position that Milton's headaches, amnesia, and blackouts were the result of his alcohol and drug abuse. The board correctly concluded that any statements by Milton's counsel could not be used against UIC to provide the basis for setting aside the C&R and that UIC was simply reciting in the C&R what Dr. Martino had advised it concerning

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[52] *See Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093 (Alaska 2008).

[53] *See Milton I*, Bd. Dec. No. 10-0019 at 30-31.

[54] *See Williams v. Abood*, 53 P.3d 134, 144 (Alaska 2002).

Milton's health issues.[55] Thus, substantial evidence supported the board's conclusion in this respect.

The board is empowered to set aside a C&R as voidable for fraud or misrepresentation, if one party's assent to the agreement is induced by the other party's fraudulent or material misrepresentation on which the recipient has relied.[56] Milton argued similar grounds for fraud and misrepresentation as he did for duress, namely that his attorney told him UIC would attribute his health problems to alcohol and drug abuse, and that the C&R inaccurately recited that Milton's health issues were the result of drug and alcohol abuse. In rejecting Milton's argument, the board noted that Milton admitted having no communications with UIC or its carrier leading up to the C&R, that his attorney's remarks could not be attributed to the employer, and that the recitation in the C&R that UIC's position was that Milton's headaches, amnesia, and blackouts were caused by his alcohol and drug abuse was required by regulation.[57] This constitutes substantial evidence that there was no fraud or misrepresentation.

Finally, the board found that there were no statutory or regulatory violations leading to the C&R being executed by the parties.[58] Milton argued that AS 23.30.095(k) required the board to order an SIME. However, the board pointed out that an SIME was not mandatory and there was no dispute between Milton's attending physician and UIC's EME physician, as UIC did not have a physician of its choice conduct an EME before the C&R was executed. The board addressed Milton's other contentions and found that "there is no evidence the [b]oard did not follow the statute and regulations governing settlement agreements so as to create sufficient grounds to overturn the C&R."[59] The board observed that it had reviewed the C&R and, after initially rejecting it as having incomplete medical information, subsequently approved it following a hearing

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55 *See Milton I*, Bd. Dec. No. 10-0019 at 31-33.

56 *See Seybert*, 182 P.3d at 1094.

57 *See Milton I*, Bd. Dec. No. 10-0019 at 33-34 citing 8 AAC 45.160.

58 *See Milton I*, Bd. Dec. No. 10-0019 at 34-37.

59 *Milton I*, Bd. Dec. No. 10-0019 at 35.

on October 10, 1989. Ultimately, the board found that the requirements of both AS 23.30.012 and 8 AAC 45.160 were met in the process of approving the C&R.[60] We conclude there is substantial evidence supporting the board's resolution of these issues.

> *b. There is substantial evidence in the record as a whole supporting the board's conclusion that Milton's work injury was not a substantial factor in causing his cervical spine, thoracic spine, and other symptoms, his disability, or his need for medical treatment.*

Milton maintained that he injured his cervical spine and thoracic spine in the work-related incident in Barrow, and that the work injury was a substantial factor in his need for medical treatment for those injuries. Characterizing the issue as a complex medical question of causation requiring expert medical opinion, in ruling, the board set about applying the three-step presumption of compensability analysis in reviewing the medical evidence.[61]

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[60] *See Milton I*, Bd. Dec. No. 10-0019 at 36.

[61] *See Milton I*, Bd. Dec. No. 10-0019 at 37-40. Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *See, e.g., Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. *See, e.g., Tolbert v. Alascom, Inc.,* 973 P.2d 603, 610 (Alaska 1999). If the employee establishes the link, the presumption may be overcome when the employer presents substantial evidence that the injury was not work-related. *See Tolbert*, 973 P.2d at 611 (explaining that to rebut the presumption "an employer must present substantial evidence that either '(1) provides an alternative explanation which, if accepted, would *exclude* work-related factors as a substantial cause of the disability; or (2) directly eliminates *any reasonable possibility* that employment was a factor in causing the disability.'") (italics in original, footnote omitted); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility of the parties and witnesses is not examined at this point. *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985). If the board finds that the employer's evidence is sufficient, then the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence. *See Miller*, 577 P.2d at 1046. This means that the employee must "induce a belief" in the minds of the board members that the facts being asserted are probably true. *See Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). At this point, the board weighs the evidence, determines what inferences to draw from the evidence, and considers the question of credibility.

In terms of Milton's cervical complaints, the board found that Milton had raised the presumption, based on Milton's testimony that he fell off a ladder and the medical reports of Dr. Ramirez that Milton had a probable cervical radiculopathy that might be work-related. The board went on to conclude that UIC had rebutted the presumption through the EME report of Dr. Yodlowski, the SIME report of Dr. Blackwell, and Dr. Martino's reports and testimony. The board members noted that, consistent with case law setting forth the standard for rebutting the presumption, Dr. Yodlowski's and Dr. Blackwell's opinions provided alternate explanations for Milton's symptoms, which, if accepted, would rule out work-related causes of any disability or need for medical treatment. Dr. Yodlowski pointed to chronic progressive degenerative spondylotic disease, and Dr. Blackwell pointed to Milton's excessive drug use and history of falls and MVAs. Ultimately, the board observed that the only evidence that Milton's injuries might be work-related was the opinion of Dr. Ramirez. On the other hand, the board placed greater weight on the opinions of Drs. Yodlowski and Blackwell to the effect that Milton's employment was not a substantial factor because of their medical credentials and the thoroughness of their evaluations.[62] We agree with the board that Milton failed to prove by a preponderance of the evidence that his cervical spine condition was work-related.

As for Milton's thoracic complaints, after taking note of Dr. Blackwell's opinion that his employment was not a substantial factor in the onset of Milton's thoracic spine condition and the absence of any evidence to the contrary, the board concluded that Milton had failed to prove by a preponderance of the evidence that his thoracic spine condition was work-related.[63] We conclude that there was substantial evidence to support the board's conclusion.

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62 *See Milton I*, Bd. Dec. No. 10-0019 at 39.

63 *Id.* at 40.

5. Conclusion.

We AFFIRM the board's decision in *Milton I* in all respects.

Date: *_23 December 2010_* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision 10-0019 in all respects. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days after this decision was distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must

be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the Final Decision No. 143 issued in the matter of *Milton v. UIC Construction,* AWCAC Appeal No. 10-009, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 23, 2010.

Date: *January 4, 2011*

Signed

B. Ward, Appeals Commission Clerk