Alaska Workers' Compensation Appeals Commission

Hugo Rosales, Appellant, vs. Icicle Seafoods, Inc. and Seabright Insurance Company, Appellees.	Final Decision Decision No. 225 April 20, 2016 AWCAC Appeal No. 14-027 AWCB Decision No. 14-0110 AWCB Case No. 200706610

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 14-0110, issued at Anchorage, Alaska, on August 7, 2014, by southcentral panel members Margaret Scott, Chair, Stacy Allen, Member for Labor, and Robert Weel, Member for Industry.

Appearances: Hugo Rosales, self-represented appellant; Richard A. Nielsen, Nielsen Shields, PLLC, for appellees, Icicle Seafoods, Inc. and Seabright Insurance Company.

Commission proceedings: Appeal filed November 10, 2014; briefing completed December 1, 2015; oral argument was not requested.

Commissioners: James N. Rhodes, S. T. Hagedorn, Andrew M. Hemenway, Chair.

By: Andrew M. Hemenway, Chair.

1. Introduction.

The Alaska Workers' Compensation Board (Board) approved an agreement between Hugo Rosales and Icicle Seafoods, Inc. (Icicle) to settle Mr. Rosales' workers' compensation claim based on a 2007 injury. Mr. Rosales filed a petition to set aside the settlement. Following a hearing the Board denied the petition. We affirmed the Board's decision and the Alaska Supreme Court affirmed our decision.

Mr. Rosales filed another petition to set aside the settlement, as well as a new claim for compensation based on the 2007 injury. Following a hearing, the Board denied the petition and dismissed the claim under the legal doctrine of *res judicata*. We affirm the Board's decision.

2. Factual background and proceedings.[1]

Hugo Rosales was employed by Icicle on the processing line aboard the seafood processing vessel M/V Bering Star.[2] On May 13, 2007, he was pushing a cart loaded with frozen fish when a pan of fish hit him on the head.[3] Mr. Rosales, *pro se*, filed a workers' compensation claim with the Board against Icicle on November 7, 2007, identifying cervical, lumbar, and left foot injuries.[4] In addition, represented by counsel, Richard Davies, Mr. Rosales filed a maritime personal injury claim under the Jones Act.[5]

Mr. Davies entered his appearance as Mr. Rosales' attorney in the workers' compensation case on July 14, 2008.[6] In late 2009, the parties agreed to a settlement of both the Jones Act and workers' compensation claims.[7] The workers' compensation settlement agreement was filed with the Board on December 7, 2009.[8] The agreement reflects that Icicle had paid a total of $37,569.80 in workers' compensation disability, medical, and reemployment benefits, and states that no additional compensation was due as of the date of the settlement agreement.[9] Icicle agreed to pay an outstanding

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[1] We make no factual findings. We state the facts as set forth in the Board's decisions, citing to the Board's factual findings as set forth in those decisions and to portions of the record that support the Board's findings. In the absence of specific factual findings by the Board, we provide context and detail by citation to the record. In addition, we identify the dates and contents of the parties' Board filings by reference to the record as it has been presented to us.

[2] *Hugo Rosales v. Icicle Seafoods, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 11-0065 at 3 (No. 1) (May 19, 2011) (*Rosales Bd. I*). *See Hugo Rosales v. Icicle Seafoods, Inc.,* Alaska Workers Comp. App. Comm'n Dec. No. 163 at 2 (July 11, 2012) (*Rosales Comm'n I*); R. 664.

[3] *Id. See Rosales Comm'n I* at 2; R. 1, 243-244.

[4] *Rosales Bd. I* at 3 (No. 3). *See Rosales Comm'n I* at 2; R. 40-41.

[5] 46 U.S.C. §688 *et seq. See Rosales Bd. I* at 4 (No. 13); *Rosales Comm'n I* at 2; R. 18, 20.

[6] *Rosales Bd. I* at 4 (No. 12); R. 133-134.

[7] *See Rosales Bd. I* at 5 (No. 18); *Rosales Comm'n I* at 2; R. 237-253.

[8] *Rosales Bd. I* at 5 (No. 18); *Rosales Comm'n I* at 5; R. 243-253.

[9] *See* R. 245.

lien of $18,056.71 for medical treatment previously paid by Medicare.[10] The agreement provided for the settlement of Mr. Rosales' remaining workers' compensation claim for payment of $5,000.[11] The agreement stated that settlement of the workers' compensation claim was part of a global settlement of $200,000 including Mr. Rosales' Jones Act claim, with a total net recovery for Mr. Rosales, after payment of a one-third contingency attorney's fee and costs, of $113,223.56.[12]

On December 9, 2009, the Board wrote to Mr. Rosales' attorney, explaining that the Board would not approve the agreement without a hearing, in part because although the employer's medical evaluation indicated Mr. Rosales still had work-related foot problems, the agreement waived future medical benefits.[13] The letter also informed counsel that the Board would need to review a copy of the Jones Act settlement in order to determine if the workers' compensation settlement was in Mr. Rosales' best interest.[14]

On December 14, 2009, Mr. Rosales (under his own signature) filed an amended workers' compensation claim, asking that the Board not approve the workers' compensation settlement agreement.[15] In support of his claim and request, Mr. Rosales wrote that "new evidence shows that employee is not medically stable, may need reemployment services and may have a permanent partial impairment."[16] With his claim and request, Mr. Rosales filed copies of a neurological medical evaluation by Dr. Arthur H. Ginsberg dated May 6, 2009, and vocational and physical capacity

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10 R. 246.

11 R. 247.

12 R. 247-248.

13 *See Rosales Bd. I* at 5 (No. 19); *Rosales Comm'n I* at 5; R. 323.

14 *Id.*

15 *See Rosales Bd. I* at 5 (No. 21); *Rosales Comm'n I* at 5; R. 228-232.

16 R. 230.

evaluations by Theodore J. Becker, Ph.D., and Kent Shafer, M.Ed., dated June 15 and 17, 2009, respectively.[17]

On January 5, 2010, on behalf of Mr. Rosales, Mr. Davies wrote to the Board, providing a copy of the Jones Act settlement and asking that a hearing be scheduled to approve the workers' compensation settlement agreement.[18] In addition, the letter stated, "Mr. Rosales' workers' compensation claim filed on December 14, 2009 is hereby withdrawn as the case has been fully settled[.]"[19]

The Board conducted a hearing on the proposed workers' compensation settlement on February 2, 2010.[20] At the hearing, counsel for Icicle explained that Mr. Rosales had been paid $195,000, and that $5,000 of the total settlement amount ($200,000) had been "held back pending approval of the Alaska [workers'

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[17] *Rosales Bd. I* at 5 (No. 21), 12, 13; *Rosales Comm'n I* at 9, note 47; R. 846 (medical summary), 847-848 (physical capacity evaluation) (Mr. Becker), 849-854 (neurologic medical evaluation) (Dr. Ginsberg), 855-862 (vocational evaluation) (Mr. Shafer).

[18] *Rosales Bd. I* at 5 (No. 22); *Rosales Comm'n I* at 5-6; R. 236-242.

[19] R. 236.

[20] *Rosales Bd. I* at 6 (No. 24); *Rosales Comm'n I* at 6.

compensation] agreement."[21] She added that because "there is no double recovery,[22] there's a credit available to the employer/carrier in this situation . . . the money is all essentially one pot[.]"[23]

The Board explained to Mr. Rosales that Icicle would be entitled to a credit (offset) against the "$113,000 or the $108,000 that you've received under the Jones Act settlement before they would have to pay any benefits under the Alaska Workers'

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[21] Hr'g Tr. at 8:8-13, Feb. 2, 2010; R. 340.

[22] Hr'g Tr. at 8:16, Feb. 2, 2010; R. 340. The Alaska Supreme Court has held that in order to avoid a double recovery, an employer may offset damages awarded under the Jones Act with amounts previously paid under the Alaska Workers' Compensation Act. *Barber v. New England Fish Company*, 510 P.2d 806, 813, note 39 (Alaska 1973). However, there is federal authority that amounts awarded as damages for pain and suffering under the Jones Act may not be offset with amounts previously paid under Alaska's or another state's workers' compensation statute, because there is no double recovery for pain and suffering. *See Massey v. Williams-McWilliams*, 414 F.2d 576, 679-680 (5th Cir. 1969) (offset for "items of damages [under the Jones Act] . . . that bear a reasonable relation to the items of loss compensated by workers' compensation benefits"; "No such credit is required as to . . . pain and suffering . . . or . . . loss of earning capacity subsequent to the date of payment of the last compensation benefit."); *Bryan v. Icicle Seafoods*, 2007 WL 3125274 (W.D. Wash. 2007) ("[T]he offset . . . will include only the overlapping areas of plaintiff's damages, so that plaintiff does not reap a double recovery for such items as maintenance and cure, lost wages, and medical payments. . . . No offset will be allowed against other Jones Act damages such as pain and suffering, or loss of future earning capacity."). As for using damages previously awarded under the Jones Act to offset amounts payable under the Alaska Workers' Compensation Act, the Board has ruled that "no distinction is made between federal awards of general compensation and awards for medical expenses. The employer in a later compensation proceeding is entitled to offset all prior Jones Act payments against any compensation or benefits awarded under our Act.". *Murray v. Trident Seafoods Corporation*, Alaska Workers' Comp. Bd. Dec. No. 98-0242 (Sept. 22, 1998) (emphasis in original), citing *Lemay v. Veco, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 91-0214 (July 26, 1991). We express no opinion on the propriety of that ruling. In his petitions to set aside the workers' compensation settlement agreement, Mr. Rosales has consistently argued that Icicle is not entitled to offset amounts payable under the Alaska Workers' Compensation Act with amounts previously paid to him as damages for pain and suffering under the Jones Act. *See* Hr'g Tr. at 39:12-24, Apr. 27, 2011; Hr'g Tr. at 55:16-19, July 24, 2014; R. 1870-1872.

[23] Hr'g Tr. at 8:17-18, Feb. 2, 2010; R. 340.

Compensation Act[.]"[24] Mr. Rosales expressed concern about whether the settlement funds would be sufficient to pay for future medical treatment resulting from the injury, and he asked for additional time to consider the settlement agreement.[25] Accordingly, the Board declined to rule on the settlement, and scheduled another hearing.

At a second hearing on February 23, 2010, Mr. Rosales testified that he had talked the matter over with his attorney, Mr. Davies, and that he believed the settlement would provide sufficient money to pay for his future medical costs.[26] He asked that the Board approve the workers' compensation settlement agreement.[27] The Board did.[28]

On October 12, 2010, Mr. Rosales (under his own signature) filed a request to modify the workers' compensation settlement (in effect, a petition to set aside that settlement), asking for additional compensation benefits.[29] He asserted that the Board had approved the settlement without considering medical reports from the same three individuals he had identified in his December 14, 2009, filing (Mr. Shafer, Mr. Becker, and Dr. Ginsburg).[30] He asserted that Dr. Ginsburg had related his lumbar, cervical, and left foot injuries to the 2007 injury, and that the reports recommended vocational

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[24] Hr'g Tr. at 12:14-18, Feb. 2, 2010; R. 341. Mr. Rosales received a net payment of $113,223.56 in total, $5,000 of which was allocated to his workers' compensation claim. Thus, the maximum amount of the offset available to Icicle is $108,223.56, assuming that all of the amounts in the Jones Act settlement (including damages for pain and suffering) may be offset against amounts subsequently payable for medical treatment or other benefits under the Alaska Workers' Compensation Act. *See supra*, note 22.

[25] R. 341-342 (Hr'g Tr. at 13:6, 15:13, Feb. 2, 2010).

[26] *Rosales Bd. I* at 6 (No. 26); *Rosales Comm'n I* at 6; R. 343 (Hr'g Tr. at 19:24 – 21:8, Feb. 23, 2010).

[27] *Id.*

[28] *Rosales Bd. I* at 6 (No. 26); *Rosales Comm'n I* at 6; R. 253.

[29] *Rosales Bd. I* at 7 (No. 28); *Rosales Comm'n I* at 7; R. 261-262.

[30] R. 265-266.

retraining and avoidance of heavy labor.[31] With his request he filed copies of medical records from Dr. Stanton J. Cohen concerning his foot, dated September 11 – December 14, 2009.[32]

Mr. Rosales' attorney withdrew from the case.[33] Mr. Rosales represented himself at a Board hearing conducted on April 27, 2011. At the hearing, Mr. Rosales argued that the workers' compensation settlement should be set aside because Icicle had misrepresented that it had submitted to the Board medical records from Dr. Ginsberg, Mr. Becker, and Mr. Shafer, as well as from another physician (whom Mr. Rosales had not mentioned in his filings of December 14, 2009, or October 12, 2010), Dr. Eric Feldman.[34] He submitted as an exhibit a copy of a deposition of Dr. Feldman taken on October 14, 2009, which had not previously been filed with the Board.[35]

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[31] R. 266.

[32] R. 1221-1222. In addition, Mr. Rosales refiled copies of the same records of Dr. Ginsburg, Mr. Shafer, and Mr. Becker that he had previously filed with the Board on December 14, 2009. *See* R. 1223-1238; *supra*, note 17.

[33] R. 268-271.

[34] *See* Hr'g Tr. at 9:2 – 10:5, Apr. 27, 2011.

[35] *See* R. 355 (Exhibit No. 9), 403-448. Mr. Rosales also submitted as exhibits the records of Dr. Ginsburg, Mr. Becker, and Mr. Shafer, marking the third time he filed those records with the Board. R. 355 (Exhibit No. 3), 371-386. *See supra*, notes 17, 32. His list of exhibits also identified Dr. Feldman's medical records as an exhibit. R. 355 (Exhibit No. 3). Records from Dr. Feldman's office dating from January 27 – June 11, 2009, are in the Board's file, but the date on which those records were filed with the Board is not certain. *See* R. 1196-1203; *Rosales*, 316 P.3d 580, notes 25, 27.

The Board issued a decision declining to set aside the settlement.[36] We affirmed the Board's decision,[37] and the Alaska Supreme Court affirmed our decision.[38]

On December 3, 2013, after the Alaska Supreme Court issued its decision, Mr. Rosales again petitioned the Board to set aside the worker's compensation settlement[39] and on December 27, 2013, he filed another worker's compensation claim relating to the May 13, 2007, work injury.[40] Icicle filed a petition to dismiss the worker's compensation claim, and the Board considered both petitions in a hearing conducted on July 24, 2014. Following the hearing, the Board issued a decision denying Mr. Rosales' petition to set aside the settlement and granting Icicle's petition to dismiss the worker's compensation claim, on the ground that both proceedings were barred under the doctrine of *res judicata*.[41]

3. Standard of review.

We must uphold the board's factual findings if they are supported by substantial evidence in light of the whole record.[42] On questions of law, including application of the doctrine of *res judicata*, we do not defer to the board's conclusions. We exercise our independent judgment.[43]

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[36] *Rosales Bd. I*. The Board declined to reconsider this decision. *Hugo Rosales v. Icicle Seafoods, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 11-0089 (June 22, 2011) (*Rosales Bd. II*).

[37] *Rosales Comm'n I*.

[38] *Rosales v. Icicle Seafoods, Inc.*, 316 P.3d 580 (Alaska 2013). Mr. Rosales' petition for writ of certiorari to the United States Supreme Court was denied. *Rosales v. Icicle Seafoods, Inc.*, 134 S. Ct. 1516 (2014).

[39] *Rosales v. Icicle Seafoods, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 14-0110 at 6 (No. 2) (Aug. 7, 2014) (*Rosales Bd. III*); R. 1677-1678.

[40] *Rosales Bd. III* at 7 (No. 6); R. 1701-1702.

[41] *Rosales Bd. III*.

[42] AS 23.30.128(b).

[43] AS 23.30.128(b).

4. Discussion.

The legal doctrine of *res judicata* applies in workers' compensation cases, although it is not always applied as rigidly in such proceedings as it is in judicial proceedings.[44] The doctrine bars the relitigation of a claim that was, or could have been, raised in a prior case between the same parties.[45] The doctrine applies when (1) the prior case is the subject of a final judgment; (2) the court issuing the judgment had jurisdiction; and (3) the case involved the same parties and the same cause of action.[46] The doctrine does not apply, however, unless in the initial proceeding the party against whom it is to be applied had a full and fair opportunity to litigate the claim.[47]

The Board ruled that the doctrine of *res judicata* barred both Mr. Rosales' petition to set aside the settlement agreement and his claim for workers' compensation benefits. In this appeal, Mr. Rosales argues *res judicata* does not apply, because the prior proceedings, both at the Board level and on appeal, did not comport with due process of law, in that they did not provide him with a full and fair opportunity to litigate his claims.[48] Mr. Rosales contends that because the Board, in its decision to approve the settlement and in its decision denying his first petition to set the settlement aside, failed to mention the medical records of Dr. Feldman, it did not give him a full and fair opportunity to litigate his case.[49] The proceedings before the Commission and

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[44] *See Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 779-780 (Alaska 2002). A related doctrine, collateral estoppel, precludes the relitigation of a factual issue that was conclusively determined in a prior proceeding. *See McKean v. Municipality of Anchorage*, 783 P.2d 1169, 1170-1171 (Alaska 1989).

[45] *Id.*

[46] *Id.*

[47] *See Patterson v. Infinity Insurance Company*, 303 P.3d 493, 499 (Alaska 2013); *Sengupta v. University of Alaska*, 21 P.3d 1240, 1254 (Alaska 2001).

[48] *See* Statement of Grounds for Appeal at 1-2; Appellant's Brief at 1-2, 7, 11-12, 14, 23-29; Hr'g Tr. at 10:12-24, 17:14-19, 20:25 – 21:7, 24:2-3, 24:16-19, 54:17 – 55:7, 57:2-3, July 24, 2014.

[49] *Id.* See Hr'g Tr. at 35:6-8, 54:22 – 55:12, July 24, 2014.

the Alaska Supreme Court did not cure the Board's failure to mention Dr. Feldman's medical records and deposition, Mr. Rosales argues, because the Commission did not mention them,[50] and the Alaska Supreme Court, although it mentioned them, did not adequately explain why they would not have changed the outcome of his appeal.[51]

As may be seen from the history of this case, all of Mr. Rosales' efforts to set aside the workers' compensation settlement have been premised on his view that in reaching the determination that the settlement was in his best interest, the Board did not consider all of the relevant medical evidence. In his first petition to set aside the settlement, he identified the records of Dr. Ginsberg (relating to his cervical and lumbar spine), Mr. Shafer, and Mr. Becker as not having been considered by the Board when it approved the settlement,[52] and he filed copies of those records as well as those of Dr. Cohen (relating to his foot).[53] At the hearing on his first petition to set aside the settlement, he identified, in addition, the medical records and deposition of Dr. Feldman (relating to his cervical and lumbar spine) as not having been considered by the Board when it approved the settlement.[54] He asked that the Board reconsider its earlier decision to approve the settlement, based on the information contained in all of those records.[55] In his second petition, from which this appeal is taken, Mr. Rosales did not add any new medical records or other information to the record for consideration by the Board; rather, he focused on the Board's failure, in its decision on his first petition, to

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50 *See* Hr'g Tr. at 17:18-23, 28:4-10, July 24, 2014; Rosales Brief at 7-10.

51 *See* Hr'g Tr. at 17:24, 28; Rosales Brief at 11-14, 26-29.

52 *See supra*, notes 30, 31.

53 *See supra*, note 32.

54 *See supra*, notes 34, 35.

55 *See* Hr'g Tr. at 9:25 – 10:5 (Apr. 27, 2011) ("I think that because the Employer did not submit those records, they want to take advantage of me and they commit misrepresentation and duress. So I want the Board to take a look at my records. And if they think they're mistake, to cancel the agreement I signed with Icicle Seafoods.").

mention Dr. Feldman's medical records and deposition, characterizing that failure as a deprivation of due process of law.[56]

Dr. Feldman's medical records establish that Dr. Feldman examined Mr. Rosales on May 12, 2009, and recommended treatment through physical therapy and medication,[57] and that he saw Mr. Rosales again on June 11, 2009, and adjusted the medication regime.[58] Those medical records are consistent with Dr. Ginsberg's assessment,[59] and with the Board's understanding (based in part on Mr. Rosales' own testimony) when it approved the settlement, that Mr. Rosales' cervical and lumbar injures were unlikely to require surgery, that his need for future medical care relating to those injuries and to his foot was limited in scope, and that the proposed settlement would adequately provide for his future medical needs related to his injuries.[60]

Dr. Feldman's deposition (which is not a medical record) was taken on October 14, 2009. Dr. Feldman testified that he considered Mr. Rosales' cervical and lumbar spine symptoms consistent with the work injury he had incurred.[61] He added that he did not see surgery as a solution, and that physical therapy and pain medication was the appropriate treatment, with other non-surgical treatments if those modalities were unsuccessful.[62] He provided estimates for the cost of various treatments,

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[56] *See supra*, notes 50-52; R. 1847-1850, 1873, 1876, 1880, 1889; Hr'g Tr. at 24:22 – 25:7, 27:7-10; 54:22-25, July 24, 2014.

[57] R. 1201-1202. *See* R. 412 (line 16) – 421 (line 1).

[58] R. 1203. *See* R. 421 (line 2) – 422 (line 22).

[59] *See* R. 853 ("I do not believe that any further curative medical treatment is necessary other than a cardiovascular training program, . . . use of . . . medication, and perhaps non-narcotic analgesics as well as an aquatherapy program and intermittent massage therapy.").

[60] *See* Hr'g Tr. at 10:20 – 11:8, 20:4-13, Feb. 9, 2010.

[61] R. 419 (line 22) – 420 (line 1).

[62] R. 424 (line 6) – 425 (line 8).

including $600-$1,000 annually for physical therapy and $6,000-$12,000 annually for medication.[63]

The medical records and deposition of Dr. Feldman were not in the Board's file when the Board approved the settlement. Mr. Rosales' first petition to set aside the settlement brought the prior absence of Dr. Feldman's medical records and deposition (and Dr. Cohen's medical records) to the attention of the Board.[64] He argued that Icicle's failure to file Dr. Feldman's medical records and deposition (and Dr. Cohen's medical records, as well as those of Dr. Ginsberg and the physical and vocational evaluations) with the Board prior to the hearing on the settlement agreement was a ground to set aside the settlement, and he asked that the Board reconsider its determination to approve the settlement in light of all of the additional documentation he had submitted, including Dr. Feldman's medical records and deposition.[65] The Board's decision on the first petition to set aside the settlement concluded that Icicle's failure to file the medical records of Dr. Ginsberg, Dr. Cohen, and the vocational and physical evaluations did not warrant setting the settlement aside, because: (1) those reports were filed before the Board approved the settlement;[66] (2) Mr. Rosales' attorney had an equal obligation to file them;[67] and (3) those medical records did not indicate a need for treatment beyond prescriptions.[68] However, the Board's decision made no mention of either Dr. Feldman's medical records or of his deposition.

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63 R. 425-426.

64 *See supra*, notes 30-32, 34, 35.

65 *See supra*, note 56.

66 *Rosales Bd. I* at 12. With respect to Dr. Cohen's records, the Board was mistaken. Dr. Cohen's medical records were not filed with the Board until October 14, 2010. *See Rosales Comm'n I* at 10, note 54; R. 1220-1222. Mr. Rosales testified that the materials were not in a copy of his file provided to him in March 2010. Hr'g Tr. at 48:8-13, 50:2 – 52:17, Apr. 27, 2011. *See* R. 402, 671. They were in the copy of the Board's file presented to the Commission in the prior appeal, and in this appeal. *See Rosales Comm'n I* at 9, notes 47-49.

67 *Rosales Bd. I* at 13.

68 *Id.*

We cannot agree with Mr. Rosales that the Board's failure to mention Dr. Feldman in its decision on his first petition to set the settlement aside deprived Mr. Rosales of due process of law, or of a full and fair opportunity to be heard. Dr. Feldman's deposition, and apparently his medical records as well, were in the Board's file when the Board considered Mr. Rosales' first petition to set the settlement aside.[69] Mr. Rosales argued in his prior appeal that the Board's failure to address Dr. Feldman's medical records and deposition was error,[70] but the Alaska Supreme Court rejected Mr. Rosales' argument that the Board had made inadequate findings,[71] and it concluded that the absence of Dr. Feldman's medical records from the Board's file when it approved the settlement was immaterial.[72] It further concluded that because all of the medical records were available to Mr. Rosales' attorney, Icicle's failure to provide them to the Board was not a sufficient ground to set the settlement aside.[73] Because Mr. Rosales had a full and fair opportunity to submit Dr. Feldman's medical records and deposition into evidence before the Board approved the settlement, and to address their absence at that time in his first petition to set the settlement aside, and on appeal from the Board's decision on that petition, the doctrine of *res judicata* bars his second petition to set aside the settlement based on the

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[69] *See supra*, note 35. Even if Dr. Feldman's medical records were not in the record at that time, this would be harmless error. At his deposition, Dr. Feldman described the contents of those records and elaborated on them. *See* R. 411 (line 10) – 424 (line 5).

[70] *See, e.g.*, R. 1538.

[71] *Rosales*, 316 P.3d at 588 ("The Board's questions . . . indicate that it . . . made adequate findings about his best interests.").

[72] *Rosales*, 316 P.3d at 587 ("[T]he missing medical records . . . were not so critical to the Board's best-interest analysis that their absence required the Board to set aside the agreement[.]"). The court did not, in this passage, differentiate between Dr. Feldman's medical records and his deposition. The court noted, "Rosales does not point to anything requiring a party to file a deposition with the Board." *Id.*, note 29.

[73] *See Rosales Comm'n I* at 9-10, notes 51, 55; *Rosales*, 316 P.3d at 587, notes 29, 35.

absence of Dr. Feldman's medical records and deposition at the time the settlement was approved.

5. Conclusion.

When the Board approved Mr. Rosales' settlement, his attorney had in his possession or available to him all of the information that Mr. Rosales contends the Board should have considered, and the Board's file included the medical records of Dr. Ginsberg, and the physical and vocational rehabilitation reports of Mr. Becker and Mr. Shafer. When the Board denied his first petition to set the settlement aside, the Board's file included all of those materials and, in addition, Dr. Cohen's medical records, Dr. Feldman's deposition, and, it appears, Dr. Feldman's medical records. Mr. Rosales had a full and fair opportunity in his first petition to set the settlement aside to address the absence of any of those materials at the time the Board approved the settlement. Therefore, his second petition to set aside the settlement is barred by the doctrine of *res judicata*, and the Board's decision is AFFIRMED.

Date: _____*4/20/2016*_____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Andrew M. Hemenway, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the supreme court must be filed no later than 30 days after the date shown in the commission's notice of distribution (the box below).

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

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the date shown in the commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date 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 Final Decision No. 225 issued in the matter of *Hugo Rosales vs. Icicle Seafoods, Inc. and Seabright Insurance Company*, AWCAC Appeal No. 14-027, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on April 20, 2016.

Date: *April 21, 2016*

Signed
K. Morrison, Appeals Commission Clerk