Alaska Workers' Compensation Appeals Commission

Eric McDonald, Appellant, vs. Rock & Dirt Environmental, Inc. and Insurance Company of the State of Pennsylvania, Appellees.	Final Decision Decision No. 310 May 14, 2025 AWCAC Appeal No. 23-004 AWCB Decision Nos. 23-0059, 23-0067 AWCB Case Nos. 201410268M, 201410610J

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 23-0059, issued at Anchorage, Alaska, on October 24, 2023, by southcentral panel members William Soule, Chair; Anthony Ladd, Member for Labor; and Mark Sayampanathan, Member for Industry, and Final Decision and Order on Reconsideration No. 23-0067, issued at Anchorage, Alaska, on November 16, 2023, by southcentral panel members William Soule, Chair; Anthony Ladd, Member for Labor; and Mark Sayampanathan, Member for Industry.

Appearances: Eric McDonald, self-represented appellant; Colby J. Smith, Griffin & Smith, for appellees, Rock & Dirt Environmental, Inc. and Insurance Company of the State of Pennsylvania.

Commission proceedings: Notice of Appeal filed December 21, 2023; briefing completed February 24, 2025; oral argument was not requested by either party.

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

By: Andrew M. Hemenway, Chair.

1. Introduction.

On June 6, 2014, appellant, Eric McDonald, was injured while working for Rock & Dirt Environmental, Inc. (RDEI). Mr. McDonald, representing himself, has litigated his workers' compensation claims against his employer over the eleven years since his

injury.[1] In addition, represented by counsel, Mr. McDonald filed a lawsuit (third-party lawsuit) against two third parties whom he alleged were liable for his injuries.

In 2019, Mr. McDonald's attorneys withdrew from representing him in the third-party lawsuit, and the Alaska Superior Court (superior court) subsequently granted the third-parties' joint motion to dismiss the lawsuit on the basis of an alleged settlement agreement. Mr. McDonald filed a motion to set aside the dismissal, and his motion was granted on the ground that the third parties had not established the existence of the alleged settlement agreement. The third parties appealed, and the Alaska Supreme Court (supreme court) reversed, ruling that regardless of whether the initial dismissal order was correct, Mr. McDonald's motion to set the dismissal aside was untimely.

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[1] The Board has issued sixteen decisions in Mr. McDonald's Board cases, AWCB Nos. 201410268M and 201410610J: *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 18-0039 (Apr. 17, 2018)(*McDonald I*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 18-0076 (Aug. 2, 2018)(*McDonald II*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 18-0089 (Aug. 30, 2018)(*McDonald III*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 18-0109 (Oct. 23, 2018)(*McDonald IV*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 18-0121 (Nov. 19, 2018)(*McDonald V*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 19-0006 (Jan. 15, 2019)(*McDonald VI*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 19-0016 (Feb. 8, 2019)(*McDonald VII*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 19-0026 (Feb. 27, 2019)(*McDonald VIII*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 19-0030 (Feb. 28, 2019)(*McDonald IX*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 19-0066 (June 13, 2019)(*McDonald X*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 20-0092 (Oct. 7, 2020)(*McDonald XI*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 22-0032 (May 18, 2022)(*McDonald XII*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 22-0042 (June 10, 2022)(*McDonald XIII*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 23-0048 (Sept. 7, 2023)(*McDonald XIV*); *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 23-0059 (Oct. 24, 2023)(*McDonald XV*); and *McDonald v. Rock & Dirt Env't, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 23-0067 (Nov. 16, 2023)(*McDonald XVI*). We affirmed the Board's decisions in *McDonald II*, *IV*, and *V* in an order issued on Mr. McDonald's petition for review of those decisions. *McDonald v. Rock & Dirt Env't, Inc.*, AWCAC Appeal No. 18-025 (Apr. 12, 2019).

RDEI then filed a petition with the Alaska Workers' Compensation Board (Board) to dismiss Mr. McDonald's workers' compensation case on the ground that Mr. McDonald had settled the third-party lawsuit without its written approval. Following a hearing, the Board granted the petition and dismissed the workers' compensation case, ruling that the superior court's order dismissing the third-party lawsuit, which expressly found "the existence of a valid offer . . . , unequivocal acceptance . . . , consideration, and an intent to be bound[,]" was binding on the Board.[2] Mr. McDonald appeals the Board's decision to the Alaska Workers' Compensation Appeals Commission (Commission).

We vacate Board's order, because notwithstanding the wording of the superior court's order dismissing the third-party lawsuit, we conclude that the factual issue of whether an enforceable settlement agreement existed was not actually litigated for purposes of application of the doctrine of collateral estoppel in Mr. McDonald's workers' compensation case.

2. Factual background and proceedings.[3]

This case arises from a renovation project at Service High School in Anchorage, Alaska. Cornerstone General Contractors, Inc. was the prime contractor on the project. Eric McDonald was an employee of RDEI, a subcontractor. On June 6, 2014, Mr. McDonald was engaged in asbestos removal work at the work site when a cement-filled cinderblock wall collapsed, crushing him.[4] He incurred an aggravation to a preexisting left rotator cuff tear, a right shoulder separation, pelvis fractures, a right fibular fracture, a right knee ligament tear, a left metatarsal (foot) fracture, multiple rib

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[2] *McDonald XV* at 56, No. 5; 67, Nos. 25-27; 82.

[3] In this section of our decision, we make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[4] *McDonald XV* at 3, No. 1; R. 00001. The wall is described as a cement wall in the Board's decisions. *See e.g.*, *McDonald XV* at 3, No. 1. It is described as a cinderblock wall in Mr. McDonald's third-party lawsuit. R. 10118. Mr. McDonald's brief describes the wall as a cement-filled cinderblock retaining wall. Appellant's Br. at 2. Photographs in the record, submitted by Mr. McDonald, support the description in his brief. *See* R. 02319, 02321-22, 02325.

fractures, and assorted abrasions and contusions.[5] The injury required a five-week hospital stay.[6] Through its insurer, Insurance Company of the State of Pennsylvania, RDEI accepted liability for Mr. McDonald's injuries resulting from the accident.[7]

On January 6, 2015, Mr. McDonald underwent an employer's medical examination (EME) by three doctors selected by his employer. They concluded that most of Mr. McDonald's many injuries from the accident were medically stable, with the exception of the left shoulder rotator cuff tear, the right shoulder, and the right knee ligament tear.[8] He was diagnosed with chronic pain due to the work injuries,[9] but the examining psychiatrist did not find support for a diagnosis of post-traumatic stress disorder (PTSD) as a result of the work accident and he deemed Mr. McDonald to be psychiatrically stationary.[10] Following a subsequent examination by the same doctors on September 8, 2015, all of the physical injuries except for the left shoulder were deemed by them to be medically stable.[11] On October 29, 2015, RDEI controverted several benefits based on the EME reports.[12]

In November, 2015, Mr. McDonald, represented by counsel, filed a third-party lawsuit against an architectural firm, Architects Alaska, Inc. (Architects) and an engineering firm, BBFM Engineers, Inc. (BBFM), alleging that the injuries he incurred in the work accident were the result of their negligence.[13] According to the complaint,

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5 *McDonald VIII* at 7, No. 19.

6 *McDonald XV* at 3.

7 *See*, *e.g.*, R. 10931.

8 *Mc Donald VIII* at 7, No. 19; R. 12258-306.

9 *McDonald VIII* at 7-8, No. 20; R. 12199-257.

10 *McDonald VIII* at 8, No. 21.

11 *McDonald VIII* at 9-10, Nos. 29-31; R. 13645-784.

12 *McDonald VIII* at 10, No. 33; R. 00154-57.

13 *McDonald XV* at 3, No. 7; R. 10688, 10736. The record includes a copy of a complaint in *McDonald v. Architects Alaska, Inc. and BBFM Engineers, Inc.*, Alaska Superior Court Case No. 3KN-15-1012 CI marked as "received" by the Kenai Superior

Architects and BBFM had been hired to design and implement the demolition stage of the renovation project.[14]

On March 7, 2016, Mr. McDonald filed a petition seeking a Second Independent Medical Examination (SIME) by Board-appointed physicians, citing medical disputes regarding multiple physical conditions as well as PTSD.[15] At a prehearing conference on April 6, 2016, the parties agreed to proceed with the SIME.[16] Disputes arose regarding the timing and conduct of the SIME and on July 14, 2017, after Mr. McDonald declined to participate in the SIME process, RDEI filed its own petition to compel Mr. McDonald to participate in the previously-stipulated SIME.[17] Disputes regarding the SIME (and other matters)[18] continued into 2018,[19] culminating in a Board order on August 2, 2018, directing its designee "to move the SIME process in this case forward."[20] Mr. McDonald filed a petition for review of that decision (and two others), and the Commission affirmed the Board's decision in an order issued on April 12, 2019.[21]

Court on November 12, 2015. R. 10116-21. The Board found that the lawsuit was filed "on or about October 14, 2015[.]" *McDonald XV* at 3, No. 7. The superior court cited a date of November 9, 2015. R. 10736. Architects offers the date of November 5, 2015. R. 10576.

[14] R. 10117.

[15] R. 00924-5. Under AS 23.30.095(k), in the event of a medical dispute the Board may appoint an independent medical examiner to assist the Board in resolving the dispute. Rick Graber, Ph.D., had seen Mr. McDonald on October 6, 2015, and diagnosed PTSD due to prior trauma and PTSD due to the work accident. *McDonald VIII* at 6, Nos. 10, 13; R. 15624, 14303-08, 15519-21.

[16] R. 01208.

[17] R. 01205-06. *See McDonald XV* at 4, Nos. 11-12, 14, 16-17; 5, Nos. 18-19, 23; 6, Nos. 26-27. *See McDonald I*, *McDonald II*, *McDonald III*, *McDonald IV*.

[18] *See McDonald IV*.

[19] *McDonald XV* at 10, No. 47; 11-12, No. 55; 13, No. 62; *McDonald IV* at 6, No. 14; 7, Nos. 15-17.

[20] *McDonald II* at 15.

[21] AWCAC Appeal No. 18-025, Order on Petition for Review and Order on Motion to Stay SIME. Mr. McDonald filed a petition for review of the Commission's order

3. Undisputed evidence: events relevant to alleged settlement.[22]

As the foregoing events were unfolding before the Board, slowly moving in the direction of an SIME and potentially thereafter a hearing on the merits, the third-party lawsuit was similarly moving slowly along. At some point, Katherine Elsner, of the law firm of Ehrhardt, Elsner and Cooley, became the lead counsel for Mr. McDonald and the matter was assigned to Judge Eric A. Aarseth in Anchorage.[23] In 2017-2018, the parties to the third-party lawsuit took a number of depositions and engaged in other discovery proceedings, and the matter was ultimately set for trial to begin on August 26, 2019.[24] However, on April 11, 2019, Michael W. Seville, of the law firm of Burr, Pease & Kurtz, counsel for BBFM, emailed Ms. Elsner referencing a prior offer by the defendants to settle the case with both parties bearing their own attorney fees, and asking her to "revisit that possibility with Mr. McDonald" in light of recent deposition testimony.[25] The next day, Ms. Elsner responded, "We are in the process of determining what we plan to do moving forward. . . . I will be in touch once I have final direction."[26]

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with the supreme court. *See* R. 07666. The supreme court's records state the case was closed on June 12, 2019, due to the petitioner's failure to pay the filing fee or file a motion to waive the fee.

[22] The Board, in its decision, made no factual findings with respect to these events. In this section of our decision, we make no factual findings. We merely set forth evidence in the record that appears to us to be undisputed in the record before us. Both parties will have the opportunity on remand to identify evidence in the current record, or to submit additional evidence, creating a dispute as to any fact that might be reasonably inferred from the evidence we have set forth. The Board will resolve any such dispute in its fact-finding capacity.

[23] Venue for the lawsuit was changed from Kenai, Alaska, to Anchorage, Alaska, where the case was docketed as *McDonald v. Architects Alaska, Inc. and BBFM Engineers, Inc.*, No. 3AN 16-07620 CI. *See* R. 10577.

[24] R. 10577-78, 11790.

[25] R. 11541, 11790.

[26] R. 11542, 11548, 11790.

Mr. McDonald and his then-significant other and now wife, Heather Johnson,[27] met with Ms. Elsner and her law partner, Peter R. Ehrhardt, on May 9, 2019.[28] On May 14, 2019, Ms. Elsner emailed both defense counsel, stating, "I have been authorized to engage in discussions about resolving this case by dismissal with each side bearing their own costs and fees – i.e., walk away."[29] Later that day, Mr. Seville emailed Ms. Elsner, stating that Architects had agreed to a walk-away settlement and adding, "Assuming that we are all in agreement, I have taken the liberty of drafting a proposed Stipulation of Dismissal with Prejudice and would ask each of you to review and to let me know if you have any proposed modifications/revisions. If we are all on the same page, I will circulate for original signatures."[30] That evening, Ms. Elsner emailed Mr. McDonald, stating: "Architects has agreed to a 'walk-away' and I expect BBFM is going to honor their recent offer to do so as well."[31] Two days later, in response to an inquiry from Laura Barson, of the law firm of Hozubin, Moberly & Associates, counsel for Architects, Ms. Elsner replied

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[27] Mr. McDonald identified Ms. Johnson as his "significant other" in various filings. *See*, *e.g.*, R. 10690. More recently, she is identified as his wife. *See McDonald XV* at 35, No. 140.

[28] It is undisputed that Mr. McDonald and Ms. Johnson met with Mr. Ehrhardt and Ms. Elsner on that date. What was said is in dispute, but there is no evidence that at this meeting, or at any other time, Mr. McDonald authorized his attorney to settle his third-party lawsuit. Mr. McDonald avers that at the meeting he informed his attorneys that he did not wish to settle, and that he never authorized Ms. Elsner to discuss settlement, much less to settle. R. 10690-91. Ms. Johnson avers Mr. Ehrhardt and Ms. Elsner said, "they were not going to continue with the case" and urged Mr. McDonald to accept the walk-away settlement, but Mr. McDonald told them that he did not want to settle. R. 10137-38. Dr. Graber has stated that on May 14, 2019, after the meeting, he met with Mr. McDonald, who told him that he had rebuffed his attorneys' attempts to persuade him to settle. R. 10304. Ms. Elsner has asserted that at a meeting with Mr. McDonald, date not specified, he indicated a willingness to settle. R. 10095-96, 11549. Reviewing her records a year later, she told Mr. McDonald: "I reached out to opposing counsel based on my understanding of your willingness to explore the possibility of a walk away settlement on May 14." R. 10515.

[29] R. 11540, 11790.

[30] R. 11543, 11790-91.

[31] R. 10519.

that "I did review [the proposed stipulation for dismissal], I am just waiting for final approval from my client and then will circulate it up to you guys."[32] Mr. McDonald, however, did not give his final approval: rather, on May 20, 2019, Mr. McDonald sent Ms. Elsner an email stating, "I respect your decision not to continue in this case. Go ahead and withdraw, but I am going to go ahead pro-se. I'm not ready to give up yet.'"[33] He added, "I'm tied to this win or lose through work comp."[34] Mr. McDonald and his attorneys had a 32-minute phone conversation on May 21, 2019,[35] and on May 29, 2019, Mr. McDonald's attorneys sent him a motion to withdraw for his signature.[36]

On June 3, 2019, Ms. Elsner emailed defense counsel, stating, "'I anticipate having a final answer in the next couple of days, but my expectation is that we will be withdrawing as Mr. McDonald's attorney.'"[37] Mr. McDonald reiterated his decision not to settle the case in an email to Mr. Ehrhardt on June 7, 2019, stating, "After much deliberation, I have decided to continue the case."[38] On June 10, 2019, Mr. Ehrhardt emailed back to him (copying Ms. Elsner) confirming that the law firm would withdraw and Mr. McDonald would proceed on his own rather than consent to a walk-away

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[32] R. 11551, 11791.

[33] R. 11536, 11791. According to Mr. McDonald, his attorneys had informed him at the May 9, 2019, meeting that in the absence of settlement they would need to withdraw.

[34] R. 11536, 11791. At the hearing in *McDonald XV*, Mr. McDonald stated that he was "absolutely well aware" that he needed his employer's approval prior to settling his case. *McDonald XV* at 40, No. 146. At a prehearing conference in February 2019, Mr. McDonald had been informed that he needed to obtain RDEI's approval of a settlement. *McDonald XV* at 14-15, No. 68; R. 25494-99. In March 2019, his attorney was informed of the claimed lien amount. R. 11337.

[35] R. 10667.

[36] R. 10530.

[37] R. 11556, 11791.

[38] R. 11538, 11791.

dismissal.[39] On June 14, 2019, the law firm filed a motion to withdraw with consent.[40] On June 26, 2019, Mr. McDonald went by their office and picked up his file; Ms. Elsner mentioned that defense counsel was still pursuing a settlement and Mr. McDonald told her that he would contact them.[41] The court granted the motion to withdraw on July 3, 2019.[42]

4. Undisputed evidence: events subsequent to alleged settlement[43]

The long-delayed SIME examinations finally took place in San Diego, California, and Seattle, Washington, on July 10 and 12, 2019.[44] Dr. Ronald G. Early, Ph.D., M.D., diagnosed PTSD and major depression, with the accident being the substantial cause of both. He expressed the opinion that, with certain limitations, from a mental health perspective Mr. McDonald was capable of returning to work and was not totally disabled.[45] Dr. Sidney H. Levine similarly concluded that from an orthopedic standpoint, with certain restrictions, Mr. McDonald was capable of returning to work and was not totally disabled.[46]

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[39] R. 11539, 11791. The email indicates that the decision not to settle had been finalized "recently" in a meeting at the attorney's office. R. 11539. We have not identified in the record a reference to an in-person meeting on a specified date after the May 9, 2019, meeting and prior to June 10, 2019.

[40] R. 10545.

[41] R. 10208-13.

[42] R. 10542.

[43] The Board, in its decision, made no factual findings with respect to these events. In this section of our decision, we make no factual findings. We merely set forth evidence in the record that appears to us to be undisputed in the record before us. Both parties will have the opportunity on remand to identify evidence in the current record, or to submit additional evidence, creating a dispute as to any fact that might be reasonably inferred from the evidence we have set forth. The Board will resolve any such dispute in its fact-finding capacity.

[44] R. 11531-34.

[45] R. 16256-95.

[46] R. 16397-739.

On the same day the latter SIME report was issued, July 12, 2019, BBFM filed a motion in the superior court to enforce an alleged settlement agreement, supported by the email correspondence among counsel referenced above (the emails between Mr. McDonald and his attorney, in which he declined to dismiss the case, were not included, because they were at the time privileged attorney-client communications that had not been disclosed to defense counsel). Counsel for BBFM averred, with respect to Ms. Elsner's May 16, 2019, email, that he "understood [it] to mean that counsel for [Mr. McDonald] was waiting for approval from her client as to the form of the stipulation."[47] BBFM's motion was accompanied by a proposed order of dismissal, stating in relevant part, "[T]he court having considered all materials filed in connection with [the] motion, IT IS HEREBY Ordered that the defendants' motion shall be and hereby is granted. The case is dismissed with prejudice and with each party to bear its own costs and attorneys' fees." On July 17, 2019, Architects filed its joinder in the motion, with its own proposed order, this one worded as follows:

> This court, having considered the evidence, communications, and affidavits submitted by Defendant Architects Alaska, Inc. and Defendant BBFM Engineers, Inc. and all materials, if any, submitted by Plaintiff Eric McDonald, finds the existence of a valid offer encompassing all essential terms, unequivocal acceptance by the offerees, consideration, and an intent to be bound. As such, this court is required to enforce the settlement agreement between all named parties and grants BBFM's motion to enforce a settlement agreement.
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> IT IS HEREBY ORDERED that this action shall be dismissed with prejudice, each party to bear its own costs and attorney fees.[48]

On July 30, 2019, Judge Aarseth issued an order stating: "[D]efendants' motion shall be granted unless the plaintiff files an opposition no later than August 9, 2019. The court intends to utilize the proposed order filed July 17, 2019 unless an opposition is received by the deadline."[49] On August 1, 2019, having received by email a copy of BBFM's motion and Architects joinder in it from staff at the two defense counsels' firms,

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47 R. 10548-75.

48 R. 11275, 09017-18.

49 R. 11275

Mr. McDonald responded to both firms' staff by email, stating: "I am moving forward myself. I need a small portion of time to get up to speed. I will be filing a motion as soon as a can."[50] At a trial call hearing on August 7, 2019, which Mr. McDonald did not attend, Judge Aarseth indicated that in his view, the evidence before him established an oral contract to dismiss the case.[51] Defense counsel informed the court that they had received Mr. McDonald's August 1, 2019, email, but neither mentioned his stated intention to "mov[e] forward" on his own.[52] Mr. McDonald did not file a response to the defendants' motion to dismiss the third-party lawsuit on or before August 9, 2019, which was a Friday. He mailed to the court a "Motion for Continuance/Opposition to July 17th, 2019 Proposed Order" on or about August 7, 2019,[53] which was received in the court's mail on August 9, 2019,[54] lodged by the clerk on the following Monday, August 12, 2019, and returned to Mr. McDonald on August 12, 2019, because it lacked a service certification.[55] On August 13, 2019, no opposition to the motion to dismiss having been put before him, Judge Aarseth, in accordance with his July 30, 2019, order, signed the proposed order that had been submitted by Architects.[56] Mr. McDonald's motion/opposition was refiled with the corrected service certificate after the order of dismissal was issued.[57] On September 12, 2019, Judge Aarseth denied Mr. McDonald's motion for a continuance (without reference to Mr. McDonald's asserted opposition), noting the absence of a

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50 R. 10648-52, 10656-57.

51 R. 11564.

52 R. 09915.

53 R. 10662, 11798. Mr. McDonald's affidavit states that he mailed the motion on August 7, 2019. *See* R. 10679, ¶40. Elsewhere, Mr. McDonald stated that he mailed the motion to the court on August 8, 2019. R. 09913, ¶60(a)(1).

54 R. 10662.

55 R. 10648, 11798.

56 R. 09017-18, 11798.

57 The superior court stated the refiled motion/opposition was docketed on August 17, 2019, but a copy of the document in the record is date-stamped August 19, 2019. R. 11507, 11793. The online court docket shows a filing date of August 19, 2019. R. 10649.

showing of good cause to excuse his delayed response to the defendants' motion to dismiss.[58]

5. Events and proceedings subsequent to dismissal of third-party lawsuit.[59]

On December 17, 2019, RDEI filed a petition to dismiss Mr. McDonald's worker's compensation case pursuant to AS 23.30.015(h), asserting that he had dismissed his third-party lawsuit without RDEI's written approval.[60] While that petition was pending, prior to a hearing, on August 10, 2020, Mr. McDonald filed a motion in the third-party lawsuit to set aside the dismissal.[61] The lawsuit was reassigned to Judge Thomas A. Matthews and on January 25, 2021, Judge Matthews ruled that the motion to dismiss should have been treated as a motion for summary judgment and that there were material issues of fact as to the existence of the alleged settlement agreement; he therefore granted Mr. McDonald's motion to set aside the dismissal of the third-party lawsuit and vacated Judge Aarseth's August 13, 2019, decision enforcing the alleged settlement agreement.[62] RDEI and Architects filed a petition for review of the superior court's order; the supreme court accepted review.[63]

On May 12, 2023, the supreme court, in *BBFM, Inc.*, reversed Judge Matthew's order setting aside Judge Aarseth's order dismissing the third-party lawsuit, on the ground that even assuming the dismissal was erroneous, Mr. McDonald's motion to set it aside was untimely.[64]

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58 R. 11490.

59 In this section of our decision, we make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

60 *McDonald XV* at 23, No. 97; R. 09015-16.

61 R. 09861-10073.

62 *McDonald XV* at 27, No. 112; R. 11789-804.

63 *McDonald XV* at 27, No. 113.

64 *BBFM Engineers, Inc. v. McDonald*, 530 P.3d 352 (Alaska 2023).

On May 22, 2023, RDEI again petitioned the Board for an order dismissing Mr. McDonald's claim pursuant to AS 23.30.015(h) on the basis of an alleged settlement of the third-party lawsuit without its written approval.[65] RDEI asked for a written record hearing on that petition.[66] On September 21, 2023, Mr. McDonald requested and received signed subpoenas for numerous witnesses he intended to call at the scheduled October 4, 2023, hearing, including his attorneys in the third-party lawsuit, Mr. Ehrhardt and Ms. Elsner, and the defense attorneys in that case, Mr. Seville and Ms. Barson.[67]

On September 29, 2023, the Board's designee granted petitions to quash the subpoenas for the attorneys in the third-party lawsuit on the ground that those witnesses had no relevant testimony to offer, noting RDEI's reliance on Judge Aarseth's order.[68] On October 4, 2023, the Board conducted a hearing. In *McDonald XV*, the Board sustained the designee's order quashing the subpoenas and dismissed Mr. McDonald's claim, ruling that Judge Aarseth's finding that there had been a valid and enforceable settlement of the third-party lawsuit was binding on the Board. Mr. McDonald appeals.

6. Standard of review.

Whether to apply the doctrine of collateral estoppel to a given set of facts is a question of law.[69] On questions of law, the Commission does not defer to the Board's conclusions, but exercises its independent judgment.[70]

7. Discussion.

A claimant who settles a third-party lawsuit without the written approval of the employer loses the right to further workers' compensation benefits.[71] The sole disputed material factual issue before the Board was whether Mr. McDonald had settled his third-

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65 *McDonald XV* at 31, No. 124; R. 11304-05.

66 *McDonald XV* at 31, No. 125; R. 11307.

67 *McDonald XV* at 35, No. 140.

68 *McDonald XV* at 36, No. 143; R. 2716-84.

69 *Rapoport v. Tesoro Alaska Petroleum Co.*, 794 P.2d 949, 951 (Alaska 1990).

70 AS 23.30.128(b).

71 AS 23.30.015(h).

party lawsuit.[72] Mr. McDonald testified that he had not consented to a settlement, and argued that if he had been permitted to call his attorneys as witnesses they would have testified that there was not a valid and enforceable settlement of the third-party case.[73] RDEI argued to the Board, and the Board agreed, that it did not need to make an independent factual determination on that factual issue, because the superior court's order of dismissal, which included a factual finding that a valid and enforceable settlement agreement existed, was binding on the Board.[74]

The Board characterized its ruling as jurisdictional, asserting that it did not "have authority or jurisdiction to overrule Judge Aarseth's findings and order."[75] In support of that proposition, the Board quoted the statement in *AKPIRG* that the Board (and the Commission) lack jurisdiction "to hear any action outside of a workers' compensation claim."[76] But while the Board and the Commission lack jurisdiction to adjudicate any action other than a workers' compensation claim, the court, in *AKPIRG*, also made it clear that the Board and the Commission do have authority to apply equitable and common law principles when they arise in the context of a workers' compensation claim.[77]

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[72] Although the Board characterized the question of whether Mr. McDonald had obtained his employer's written approval as a disputed issue of fact for hearing, Mr. McDonald never disputed that he had not obtained the employer's approval. His argument was that he had not settled the case, and therefore the lack of written approval was immaterial.

[73] The record has support for this assertion. *See* R. 11550 (Ms. Elsner states that on May 9, 2019, she "reached out to opposing counsel based on my understanding of your willingness to explore the possibility of a walk away settlement."); R. 11568 (Mr. Ehrhardt: "they filed this motion to approve this so-called settlement that never existed.").

[74] *See*, *e.g.*, *McDonald XI* at 13; *McDonald XV* at 56, 67, 81.

[75] *McDonald XV* at 67, Nos. 25-27.

[76] *Id.* at 47. *Alaska Pub. Int. Rsch. Grp. v. State*, 167 P.3d 27, 36-7 (Alaska 2007).

[77] *Id.* at 69, No. 36 ("The Commission, like the Board, may be required to apply equitable or common law principles in a specific case, but both of these quasi-judicial bodies can only adjudicate in the context of a workers' compensation case.").

In this particular case, the Board was not being asked by Mr. McDonald to overturn Judge Aarseth's ruling dismissing the third-party lawsuit, which of course it did not have jurisdiction to do. Rather, the Board was being asked by RDEI to make a factual determination in the workers' compensation case, namely, that Mr. McDonald had settled his third-party lawsuit. RDEI asserted, and the Board agreed, that in making that determination the Board could, and in fact must, rely on Judge Aarseth's factual findings to that effect. Whether or not the Board was required to accept Judge Aarseth's factual findings calls for the application of the common law doctrine of collateral estoppel in the context of a specific workers' compensation case. The Board, and the Commission, have authority to apply the doctrine of collateral estoppel to determine, in a workers' compensation case, whether a prior factual finding by the superior court is binding on the parties in the workers' compensation case.

The doctrine of collateral estoppel, which may be applied in a workers' compensation proceeding, precludes the relitigation of a factual issue when that issue has been actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.[78] There is no question but that the factual issue of whether a valid and enforceable settlement had been reached was determined by Judge Aarseth, and that the judgment in the third-party lawsuit is valid and final. But was that factual issue "actually litigated" for purposes of collateral estoppel?

An issue is not actually litigated when the determination is the product of a default judgment.[79] In *Wall*, the court ruled that an order based on a failure to oppose the underlying motion was equivalent to a default judgment, for purposes of collateral estoppel.[80] The reason a default judgment is not sufficient to support application of the doctrine of collateral estoppel is that because the assertions and evidence presented to

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[78] *Bignell v. Wise Mech. Contractors*, 720 P.2d 490, 494 (Alaska 1986); Restatement of Judgments (2d) §27.

[79] *Wall v. Stinson*, 983 P.2d 736, 740 (Alaska 1999) (hereinafter, *Wall*). *See*, *F.T. v. State*, 862 P.2d 857, 864 n. 13 (Alaska 1993); Restatement of Judgments (2d) §27, comment e.

[80] *Wall*, 983 P.2d at 740.

the court in a default proceeding have not been contested,[81] they are not sufficiently probative as to warrant preclusive effect. It is for this reason that, in addition to judgments by default, "cases which are resolved by settlement or consent or confession of judgment do not involve actual litigation of an issue of fact or law[,]"[82] and, thus, are not preclusive in subsequent litigation.

The Board was of the view that because Judge Aarseth's order of dismissal did not mention an untimely opposition, it ought not to be characterized as the result of a failure to timely oppose the motion, that is to say, as uncontested or equivalent to a default judgment as in *Wall*.[83] But the order of dismissal is only one piece of the puzzle. It was preceded by an order stating that if Mr. McDonald did not file a response by a date certain, the court would sign the order of dismissal. Mr. McDonald did not file a response by the specified date, the court was not in possession of his response on the date the order was signed, and the online docket states that case was "dismissed by stipulation or unopposed motion[.]"[84] Moreover, when Mr. McDonald's response was filed, requesting additional time, the court denied the motion. In sum, the court's rulings clearly indicate that BBFM's

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81 *See Janjua v. Neufeld*, 933 F.3d 1061, 1066 (9th Cir. 2019), *citing* 18 Moore's Federal Practice §132.03(2)(a) ("The 'actually litigated' requirement simply requires the issue to have been raised, contested by the parties, submitted for determination by the court, and determined.").

82 *See*, *Jackinsky v. Jackinsky*, 894 P.2d 650, 655 (Alaska 1995), quoting Restatement of Judgments (2d) §27, comment e (1982). As the court noted, such judgments "can have preclusive claim effects." *Id*. But the preclusive effect of the superior court's dismissal applies to the claims at issue in the third-party lawsuit. A default dismissal has no preclusive effect on factual issues in subsequent litigation. *Compare*, *Tolstrup v. Miller*, 726 P.2d 1304 (Alaska 1986) (judgment by stipulation is preclusive as to other claims that might have been raised in the prior lawsuit), *with Strong v. Sullivan*, 435 P.3d 872 (Alaska 2018) (dismissal by stipulation does not have preclusive effect on factual issues).

83 *McDonald XV* at 63, No. 7.

84 R. 10649.

motion to dismiss the third-party lawsuit is best characterized as uncontested for purposes of collateral estoppel.[85]

The foregoing principles govern when the parties to the case in which collateral estoppel is sought to be applied are the same as the prior case. But even when collateral estoppel is justified under those principles, if the party invoking collateral estoppel was not a party to the prior case, certain circumstances may justify avoiding application of the doctrine.[86] In particular, when the parties are different, collateral estoppel may be avoided when "[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue."[87] That is the precise situation here: following a contested hearing in which both parties participated and submitted evidence, Judge Matthews ruled that BBFM and Architects had not established the existence of a valid and enforceable settlement agreement.[88] And, although the supreme court reversed Judge Matthews' decision to vacate the dismissal of the third-party lawsuit, the supreme court's decision did not call into question his factual determination that the BBFM and Architects had not established the existence of a settlement agreement.

The reason why prior inconsistent determinations justify avoiding application of collateral estoppel is the converse of the reason for applying the doctrine in the absence of prior inconsistency:

> Giving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct. Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted. The inference, rather, is that the outcomes may have been based on equally reasonable resolutions of doubt as to the probative

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85 *See*, *Cobbins v. Tennessee Dep't of Transp.*, 566 F.3d 582, 590 (6th Cir. 2009) (failure to oppose summary judgment).

86 Restatement of Judgments (2d) §29.

87 Restatement of Judgments (2d) §29, subsection (4).

88 Judge Matthews ruled that the motion for dismissal should have been treated as a motion for summary judgment, and that there were material issues of fact precluding summary judgement. R. 11798-99. *See Brooks Range Expl. Co., Inc. v. Gordon*, 46 P.3d 942, 944-45 (Alaska 2002).

> strength of the evidence or the appropriate application of a legal rule to the evidence. That such a doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against another adversary.[89]

Collateral estoppel is an equitable doctrine, not to be applied in a manner that defeats fundamental fairness.[90] In this particular case, the prior judicial determination that RDEI seeks to rely on was, (1) in effect, a default judgment that (2) was set aside in a subsequent adversarial proceeding in the same case. Given the existence of these two separate and independent grounds for avoiding application of the doctrine of collateral estoppel, we conclude as a matter of law on the current record that the doctrine does not bar Mr. McDonald from contesting the existence of a settlement agreement in subsequent litigation of a different claim, in a different forum, against a different party. The determination whether a valid settlement agreement exists was thus subject to independent determination by the Board. A finding by the Board that Mr. McDonald did not settle his third-party lawsuit, while inconsistent with Judge Aarseth's ruling and of no consequence for purposes of the third-party lawsuit, would be within the scope of the Board's fact-finding role in the workers' compensation case.[91]

Because the Board did not make an independent factual determination, we must remand this matter to the Board for fact-finding proceedings. However, because on the current record the evidence relevant to the question of whether a valid and enforceable settlement agreement exists appears to be undisputed, we will address the sufficiency of that evidence for the guidance of the Board.

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[89] Restatement of Judgments (2d) §29, comment f (1982).

[90] *See*, *e.g.*, *State, Dep't of Revenue v. BP Pipeline (Alaska), Inc.*, 354 P.3d 1053, 1068 (Alaska 2015); *McAlpine v. Pocarro*, 262 P.3d 622, 627 (Alaska 2013); *Misura v. Misura*, 242 P.3d 1037, 1040 (Alaska 2010); *Jordan v. Bancock*, 243 P.3d 120, 124 (Ore. App. 2010); *In Re Tonko*, 154 P.3d 397, 405 (Colo. 2007); *AA Oilfield Servs. v. New Mexico State Corp. Comm'n*, 881 P.2d 18, 25-26 (N.M. 1994); *Matter of Estate of Reed*, 693 P.2d 1156, 1160 (Kan. 1985).

[91] We observe that while public policy generally favors settlement, forfeitures are disfavored, and the effect of finding a settlement would be a forfeiture of Mr. McDonald's workers' compensation claim.

Settlement agreements are contracts, and the usual rules of contract formation apply to them.[92] The existence of a settlement agreement, like other contracts, turns on the expressed intent of the parties, not their unexpressed, subjective intention.[93] Whether the parties to an informal agreement become bound prior to execution of the written documents is a question of intent.[94] Intent is determined based on the parties' expressed intent and the surrounding circumstances.[95] The existence of a contract is a question of fact.[96]

So far as we can see, on the current record there are no disputed material facts regarding the parties' expressed intentions. Both BBFM and Architects expressed the intent to enter into a walk-away settlement. Because Mr. McDonald's express and repeated rejection of the proposed settlement was not directly communicated by his attorneys to opposing counsel, the undisputed fact that he opposed dismissal does not preclude a factual finding that a valid and enforceable settlement agreement existed, if

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[92] *See*, *e.g.*, *Chambers v. Scofield*, 247 P.3d 982, 987 (Alaska 2011); *Kazan v. Doughboys*, 201 P.3d 508, 513 (Alaska 2008); *Walton v. Ramas Assand & Co.*, 963 P.2d 1042, 1045-46 (Alaska 1998). The settlement of workers' compensation claims are similarly contracts subject to common law contract rules, except insofar as modified by statute. *See* AS 23.30.012; *Williams v. Abood*, 53 P.3d 134, 139 (2002).

[93] *See*, *e.g. Colton v. Colton*, 244 P.3d 1121, 1128 (Alaska 2010); *Kingik v. State, Dep't of Admin., Div. of Ret. and Benefits*, 239 P.3d 1243, 1251 (Alaska 2010); *Dutton v. State*, 970 P.2d 925, 928 (Alaska 1999); *Dickinson v. Williams*, 956 P.2d 458, 462 (Alaska 1999).

[94] *Juliano v. Angelini*, 708 P.2d 1289, 1291 (Alaska 1985).

[95] *Juliano*, *supra*, *citing Thrift Shop, Inc. v. Alaska Mut. Savings Bank*, 398 P.2d 657, 658-59 (Alaska 1965), Corbin on Contracts §30 (1963). Arguably, the surrounding circumstances could include Mr. McDonald's August 1, 2019, email to defense counsel and defense counsels' emails to Ms. Elsner after May 14, 2019, as well the various attorneys' knowledge (or lack thereof) of the effect of a settlement without RDEI's approval. Mr. McDonald has argued that if defense counsel was aware of that requirement, they would have reason to know that prior approval by RDEI was an essential element of any settlement contract. *See* R. 09923. By contrast, Mr. McDonald's unexpressed intent that settlement was contingent on RDEI's approval would not preclude a finding that a contract was reached. *See Juliano, supra*.

[96] *James v. Alaska Frontier Constructors, Inc.*, 468 P.3d 711, 720 n. 34, *quoting Earthmovers of Alaska, Inc. v. Pacific Ins. Co.*, 614 P.2d 781, 782 (Alaska 1980).

other evidence establishes that fact. At bottom, absent any additional evidentiary proceedings, the factual question for the Board on remand would be whether, in light of all of the surrounding circumstances, Ms. Elsner's May 14, 2019, email stating she had been authorized to "engage in discussions about resolving this case by dismissal with each side bearing their own costs and fees[,]" could reasonably be interpreted as the expression of an unequivocal intent on Mr. McDonald's part to accept defense counsels' prior offer to settle[97] or, alternatively, as BBFM and Architects have characterized it,[98] was objectively and reasonably interpreted as an unconditional offer[99] to settle that was subsequently accepted by BBFM and Architects rather than, as Judge Matthews viewed it, an invitation to negotiate.[100]

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[97] To form a contract, acceptance of an offer must be unequivocal. *Walton v. Ramos Aasand & Co.*, 963 P.2d 1042, 1046 (Alaska 1998), *quoting Thrift Shop, Inc. v. Alaska Mut. Savings Bank*, 398 P.2d 657, 659 (Alaska 1965).

[98] BBFM's motion characterizes Ms. Elsner's email as an offer, accepted by BBFM and Architects. *See* R. 10573. The wording of Architects' stipulation suggests that Architects interpreted Ms. Elsner's letter as an offer to settle, because it refers to acceptance by "offerees" in the plural: only the defense side of the third-party lawsuit had multiple parties. *See also* R. 10579-80. Ms. Elsner, for her part, has repeatedly characterized BBFM's and Architect's various emails as offers to settle, rather than as acceptances of what they have characterized as an offer by her on May 14, 2019. *See* note 28, *supra*.

[99] Restatement of Contracts (2d) §26 ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). *See generally*, *Copper River Sch. Dist. v. Traw*, 9 P.3d 280, 285 (Alaska 2001); *Munn v. Thornton*, 956 P.2d 1213 (Alaska 1998); *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1277 (Alaska 1985) ("A party cannot rely on its subjective intent to defeat the existence of a contract if its words and actions objectively and reasonably led another to believe a contract had been entered."); *Spenard Plumbing and Heating Co. v. Wright*, 370 P.2d 519, 524-25 (Alaska 1962).

[100] Judge Matthews relied on *Sea Hawk Seafoods v. City of Valdez*, 282 P.2d 359, 368 (Alaska 2012). *See also Valdez Fisheries Dev. Ass'n v. Alyeska Pipeline Serv. Co.*, 45 P.3d 663 (Alaska 2002); *Davis v. Dykman*, 938 P.2d 1002 (Alaska 1997). On appeal to the supreme court, Architects argued that his ruling was contrary to *Ghete v. Anchorage*, 948 P.2d 973 (Alaska 1997). R. 11252-254.

Because this matter will be remanded for further proceedings, we must also address Mr. McDonald's argument that the Board erred in refusing his request to call his own attorneys and defense counsel as witnesses. The Board's ruling that counsel could not offer any relevant testimony was, like its ruling on the merits, based on its view that Judge Aarseth's ruling was binding.[101] Whether the proposed witnesses can offer testimony relevant to the existence of a settlement agreement is a question for the Board to consider on remand, in the event further evidentiary proceedings occur.

8. Conclusion and order.

The decision of the Board is VACATED, and this matter is REMANDED to the Board for further proceedings consistent with this decision. The Commission does not retain jurisdiction.

Date: May 14, 2025 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 decision is issued under AS 23.30.128(e). A party may appeal this decision by filing a petition for review with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review not later than 10 days after the date shown in the Certificate of Distribution below.

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

101 *McDonald XV* at 70-71.

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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration not later than 10 days after the date shown in the Certificate of Distribution below. If a request for reconsideration of this decision is filed on time with the Commission, any proceedings to file a petition for review with the Alaska Supreme Court must be instituted not later than 10 days after the date shown in the Certificate of Distribution of the reconsideration decision.

I certify that, with the exception of changes made in accordance with the Errata issued on May 20, 2025, and in formatting for publication, this is a full and correct copy of Final Decision No. 310 issued in the matter of *Eric McDonald v. Rock & Dirt Environmental, Inc. and Insurance Company of the State of Pennsylvania*, AWCAC Appeal No. 23-004, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 14, 2025.

Date: *June 24, 2025*

Signed

K. Morrison, Appeals Commission Clerk