Alaska Workers' Compensation Appeals Commission

Terry L. Smith,
Appellant,

vs.

CSK Auto Inc., Royal and SunAlliance, and Arctic Adjusters (Wilton Adjustment Services),
Appellees.

Final Decision
AWCAC Dec. No. 037 April 5, 2007

AWCAC Appeal No. 06-010
AWCB Decision No. 06-0053
AWCB Case No. 200106934

Appeal from Alaska Workers' Compensation Board Decision No. 06-0053, issued March 3, 2006, by the northern panel at Fairbanks, William Walters, Chair, and Chris Johansen, Member for Management.

Appearances: Terry L. Smith, appellant, pro se. Robert Griffin, Griffin and Smith, for appellees CSK Auto Inc., Royal and SunAlliance and Arctic Adjusters (Wilton Adjustment Services).

Commissioners: Jim Robison, Philip Ulmer, and Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Jim Robison, Appeals Commissioner.

Terry Smith appeals the board's decision denying his petition to set aside a partial compromise and release agreement settling his claims to permanent total disability compensation and vocational reemployment benefits under AS 23.30.041. Because the board correctly applied the relevant law and its findings are supported by substantial evidence, we affirm its decision denying Smith's petition.

Facts and proceedings.[1]

[1] The commission does not make findings of fact on appeal. Although many issues and claims have been raised in the course of this workers' compensation case, this appeal is limited to the question of the validity of a compromise and release agreement and we recite only the facts necessary to set this appeal in context.

Terry Smith injured his back lifting boxes while working as a delivery driver for CSK Auto, Inc., on March 29, 2001. Through its insurer, Royal and SunAlliance, and its adjuster, Wilton Adjustment Services,[2] CSK Auto paid temporary total disability compensation and permanent partial disability compensation, medical benefits, and reemployment benefits to Smith.

On October 3, 2001, the Reemployment Benefits Administrator assigned rehabilitation specialist Douglas Cluff to evaluate Smith's eligibility for reemployment benefits. Specialist Cluff contacted Smith's attending physician at the time, Dr. Susan Klimow, who approved his return to work as a hardware salesman, sporting goods salesman, auto parts salesman and auto tire salesman — all positions he had held in the ten years preceding his injury. Based at least in part on this information, on December 17, 2001, Cluff recommended that Smith not be found eligible for reemployment benefits. On January 8, 2002, the Reemployment Benefits Administrator issued a determination finding Smith ineligible. Smith appealed that determination on January 15, 2002.

While that appeal was pending, on October 10, 2002, Smith, who was represented by non-attorney representative Barbara Williams of the Alaska Injured Workers' Alliance, signed a compromise and release (settlement) agreement with CSK Auto. The agreement was approved by the board on October 17, 2002. Under the terms of the settlement, Smith waived any right to reemployment benefits or permanent total disability benefits in exchange for $10,000. No other benefits were addressed or settled by the settlement agreement.

On July 23, 2003, an employer medical examination of Smith was conducted by physiatrist Patrick Radecki, M.D. Dr. Radecki reported that he believed that Smith's lumbar disc bulge was not symptomatic, that he was medically stable, and that his continuing symptoms were unrelated to his 2001 back injury and that no additional treatment was required for the work injury. Based on this report, CSK Auto filed a

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[2] Wilton Adjustment Services was succeeded by Arctic Adjusters, which is substituted as appellee in this proceeding.

controversion notice on September 15, 2003, denying all temporary disability benefits after February 20, 2003, all medical treatment after July 31, 2003 and permanent partial disability compensation.

On December 17, 2004, Smith filed a Workers' Compensation Claim, asking for additional temporary total disability compensation, authorization for surgery, additional medical benefits and related transportation, penalties and interest. On January 10, 2005, Smith filed a petition to vacate the settlement agreement. The board heard the petition on February 16, 2006.

At the hearing, Smith testified that he had only signed the settlement agreement because he believed that CSK Auto's adjuster would not approve his IDET surgery[3] until he had signed the settlement agreement; that his representative, Barbara Williams, had threatened to withdraw if he did not sign; that he had not initialed each page of the agreement because the appropriate medical releases were not attached; and that, although he knew before signing the settlement agreement that his surgery had been scheduled, he believed that the adjuster might still cancel it if he did not sign.

His representative, Barbara Williams, also appeared at the hearing. She testified that she had agreed to represent Smith for the limited purpose of settling the issue of his reemployment benefits. She testified that she had discussed the settlement agreement with him; that he had not objected to the absence of any medical reports; and that she believed he knew that his surgery had been approved when he signed the agreement.

The adjuster, Susan Kosinski, also testified, explaining that she had received a request to authorize the IDET surgery from Smith's physician on September 10, 2002 and had approved the surgery the following day by telephone. She testified that it was not her practice to inform the employee directly of the approval, but rather that she left it to the physician to contact the employee to schedule the approved treatment. She testified further that she believed that Smith had scheduled the surgery with his

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[3] Intradiscal Electrothermal Therapy (IDET) involves advancing a small, flexible catheter into the vertebral disc and heating the disc.

physician because she received a letter from him, dated October 7, 2002, asking her to make travel arrangements for his pre-operative appointment and for his surgery. She received the letter on October 11, 2002, and made the arrangements on October 14, 2002. Finally, she testified that she had never suggested to anyone that she would not approve the surgery nor would her approval ever have been contingent upon Smith's signing the settlement agreement.

Smith argued at the hearing that his signature on the settlement agreement had been obtained through misrepresentation and duress; that the settlement agreement was void because the proper medical records had not been attached; and that he had not understood that he was waiving his right to reemployment benefits and permanent total disability benefits. He also argued that the employer's controversion of his medical benefits had deprived him of the benefits of the bargain he made in the agreement, thereby violating the agreement. He claimed that Barbara Williams had misrepresented the situation to him and failed to fulfill her fiduciary obligations to him.

The board's decision.

The board quoted the Supreme Court for the rule that settlement agreements that have been reviewed and approved by the board "have the same legal effect as awards, except that they are more difficult to set aside."[4] However, the board held that under *Blanas v. Brower*,[5] it did have the authority to set aside a settlement agreement for fraud or duress. Any such claim of fraud or duress had to involve conduct by the employer, it noted, thus making Smith's allegations against Barbara Williams irrelevant to the validity of the agreement.

The board held that to show duress in the context of a settlement agreement a party must demonstrate "hardship intentionally created by overreaching or improper interference by the employer to coerce the employee to sign."[6] To show fraud, a party

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[4] *Terry L. Smith v. CSK Auto, Inc.*, AWCB Dec. No. 06-0053, 8 (March 3, 2006), *quoting Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1158 (Alaska 1993).

[5] 938 P.2d 1056, 1061-63 (Alaska 1997).

[6] *Terry L. Smith*, AWCB Dec. No. 06-0053 at 9.

must establish a misrepresentation and reliance on that misrepresentation.[7] The board also noted that either fraud or duress must be shown by clear and convincing evidence.[8]

Applying these standards, the board upheld the settlement agreement. The board explicitly found that Smith's testimony (that he did not understand the terms of the agreement) was not credible and that Smith was capable of reading and understanding the agreement. The board also found that the adjuster had approved Smith's surgery before the settlement agreement was signed and that there was no evidence in the record that the employer ever threatened to withdraw or withhold that approval in order to compel Smith to sign the settlement agreement. Thus, it found no evidence of fraud or duress.[9] Finally, the board noted that the employer's controversion of Smith's medical benefits was irrelevant to the issue of the validity of the settlement agreement and that, even if it had found a basis to void the settlement agreement, that would have no effect on Smith's ongoing claim for medical benefits.[10]

Our standard of review.

When reviewing decisions of the workers' compensation board, the commission is bound by the board's findings regarding the credibility of witnesses that appear before the board.[11] If there is substantial evidence in light of the whole record to support the board's findings of fact, the commission will uphold those findings.[12] However, in reviewing questions of law or procedure, the commission exercises its independent judgment.[13]

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7 *Id.*, at 9-10.

8 *Id.*, at 10.

9 *Id.*

10 *Id.*, at 10-11.

11 AS 23.30.128(b).

12 *Id.*

13 *Id.*

Appellant's arguments to the commission.

On appeal to the commission, Smith raises three legal arguments as to why the board's decision denying his petition to vacate the settlement should be reversed. First, he argues that, because he did not intend to give up his claim to permanent total disability compensation, there was no meeting of the minds and therefore no valid contract. He claims that he could not understand that he was giving up his right to permanent total disability compensation, because he did not know that the IDET surgery would fail. Therefore, he argues, under *Witt v. Watkins*,[14] the settlement should be set aside. Second, he claims that the insurer was harassing him and threatening not to approve the surgery or the associated travel, and this was duress because he was told to sign in order to get his IDET surgery. Finally, he argues that the settlement agreement should be set aside because his medical benefits are no longer being paid and this is denying him the benefit of the bargain. A contract that is not performed is "voidable."

Discussion.

1. *There is substantial evidence to support the board's finding that Smith was able to read and understand a plain, unambiguous settlement agreement.*

We begin by noting that the board did not find Terry Smith's assertion that he did not understand the settlement agreement credible.[15] He testified as a witness before the board and we are bound by the board's credibility determination under AS 23.30.128(b). We approach our review with that in mind.

Considering the terms of the settlement, we agree with the board's finding that "the terms of the C&R are plain and unambiguous."[16] The contract language is clear that Smith "acknowledges an intent to release the employer and carrier/adjuster from any and all liability for vocational rehabilitation/reemployment benefits, including .041(k) stipend benefits, and permanent total disability benefits, arising out of or in any

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[14] 579 P.2d 1065 (Alaska 1978).

[15] *Terry L. Smith*, AWCB Dec. No. 06-0053, 10 (March 3, 2006).

[16] *Id*.

way connected to the condition referred to above, and any known or as yet undiscovered disabilities, injuries, or damages associated with such condition." [Exc. 032] Moreover, the board had substantial evidence that Terry Smith was, as they found, "capable of reading and understanding the C&R."

Smith relies on *Witt v. Watkins* for the proposition that a release may be set aside if the releasor, at the time of signing, did not "intend[ed] to discharge the disability which was subsequently discovered."[17] He argues that because he did not know that the IDET surgery would fail, he could not have intended to waive his right to permanent total disability compensation. But, in fact, the settlement Smith signed specifically states that the parties knew his condition may be progressive and continuing, and that its nature and extent "may not be fully known at this time." The compensation he waived was clearly identified. The board was not required to engage in fact finding to determine if Smith was aware of the possibility that the IDET procedure would fail to relieve his back pain in order to uphold the settlement.

In effect, Smith argues that he could not have intended to waive permanent total disability compensation for $10,000 because he believed he would be able to return to work after the IDET procedure and thus the possibility of needing such compensation was remote. The board was in the best position to determine if the settlement was in the employee's best interest based on the conflicting evidence it had at hand at the time the agreement was approved. That the employee later came to believe it was a bad deal does not mean it was not then in his best interests. He naturally sees the settlement's value in the context of his view of his situation now - not, as the board did when the agreement was approved, in light of all the possibilities at the time, including

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[17] *Witt v. Watkins*, 579 P.2d at 1068-69. Mr. Smith fails to understand that *Witt v. Watkins*, to the extent that it sets out a test for setting aside a settlement agreement due to mistake, unilateral or mutual, was distinguished by the Supreme Court in *Olsen Logging Co. v. Lawson,* 856 P.2d 1155 (Alaska 1993). In that case, the Court held that settlements of workers' compensation claims may not be set aside on the basis of mistake, whether mutual or unilateral. 856 P.2d at 1158-59.

the possibility that a board decision might have been in the employer's favor if the issue had gone to hearing on October 17, 2002.

There is substantial evidence in light of the record as a whole to support the board's findings that the settlement agreement was plain and unambiguous and that Smith was capable of reading and understanding it at the time he signed the agreement. Smith's wrong prediction of his future does not mean he did not understand the meaning and nature of the agreement he signed. We agree the board was not required to set the agreement aside under *Olsen Logging Co. v. Lawson.*[18]

2. *There was substantial evidence to support the board's findings that there was neither fraud nor duress.*

In considering whether there was evidence of fraud or duress sufficient to justify setting aside the settlement agreement, we note as an initial matter that the board applied the correct burden of proof, requiring Smith to present "clear and convincing evidence" of fraud or duress once it was established that the he signed the release "with an understanding of the nature of the instrument."[19] We also find that there was

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[18] 856 P.2d 1155 (Alaska 1993).

[19] *Terry L. Smith*, AWCB Dec. No. 06-0053 at 10; *Witt*, 579 P.2d at 1070; *Cameron v. Beard*, 864 P.2d 538, 546 n. 11 (Alaska 1993) (citing *Witt* in reference to a workers' compensation release and noting once it is established that the release was given with an understanding of the nature of the instrument, "the burden shifts to the releaser to 'show by clear and convincing evidence that the release should be set aside.'"); *Blanas v. The Brower Co.,* 938 P.2d 1056, 1062-63 (Alaska 1997). *Compare Witt,* 579 P.2d at 1070 n. 16, (noting that "has also been suggested that releases executed by employees should be more readily set aside" due to their relatively poor bargaining position), *with Zeilinger v. SOHIO Alaska Petroleum Co.,* 823 P.2d 653, 656 n. 5 (Alaska 1992) (explaining *Witt*, n. 16, as "merely suggesting the possibility that a lighter burden might apply where an employee executed a *personal injury release* with her employer" and noting that the "special pressure inherent in negotiating a release with the party for whom one *continues* to work should be obvious." (emphasis in original)); *but see DeNuptiis v. Unocal Corp.,* 63 P.3d 272 (Alaska 2003) (holding that proof of misrepresentation or fraud for a reimbursement claim, AS 23.30.250(b), requires proof by a preponderance of the evidence).

substantial evidence to support the board's finding that there was "no credible, specific evidence of misrepresentation or fraud or duress by the employer."[20]

Smith's claim of duress rests on his assertion that he believed approval for his surgery was contingent on his signing the settlement agreement. His testimony was contradicted by testimony from both his representative, Barbara Williams, and the adjuster, Susan Kosinski, and belied by the fact that he requested that travel arrangements be made for the surgery prior to signing the agreement. This is substantial evidence in light of the whole record to support the board's finding that there was no evidence of misrepresentation, fraud, or duress exerted by the employer against Smith.

Smith's fraud theory really seeks to hold the employer liable for his complaints about his own representative, Barbara Williams, but the employer is not responsible for her actions. His complaints about Williams are not a matter for resolution by the board. If an employee were to establish that he was induced to sign a settlement agreement on the basis of misrepresentations by his own counsel, the matter is one for the courts, because AS 23.30.250(a) and AS 23.30.260 require enforcement by the civil or criminal law system and not the board.

3. *The validity of the settlement agreement is unrelated to the controversion of Smith's medical benefits*

Finally, we note that the board correctly interpreted the settlement agreement as applying only to vocational reemployment benefits and permanent total disability compensation. There is no provision in the settlement promising unlimited future medical benefits on demand. The agreement specifically states that "the right of the employer and carrier/adjuster to contest liability for future benefits is not waived under the terms of this settlement agreement." The contract was fully performed by the employer's payment of $10,000. The employer's subsequent controversion of medical benefits has no effect on the validity of the agreement and has not denied Smith the benefit of the bargain contained therein.

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[20] *Terry L. Smith*, AWCB Dec. No. 06-0053 at 10.

Conclusion

Because the board applied the proper legal standards and its findings are supported by substantial evidence in light of the whole record, we AFFIRM the board's decision.

Date: *April 5, 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. This final decision affirms (upholds) the board's March 3, 2006 decision dismissing the employee's petition to set aside a compromise and release (settlement) agreement. It becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted. Look at the Certification on the last page to find the date this decision was filed in the commission. After November 7, 2005, proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision in the commission and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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).

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 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision on the appeal of *Terry L. Smith vs. CSK Auto, Inc., Royal and SunAlliance, and Arctic Adjusters (Wilson Adjustment Services);* AWCAC Appeal No. 06-010; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on this *5th* day of April, 2007.

Signed
C. J. Paramore, Appeals Commission Clerk

DISTRIBUTION: I certify that on *4/5/07* a copy of the above Final Decision in Appeal No. 06-010 was mailed to Terry L. Smith (certified), and R. Griffin, at their addresses of record, and a copy was faxed to AWCB Appeals Clerk, AWCB Fairbanks, and Director WCD.

Signed
C.J. Paramore, Appeals Commission Clerk