Alaska Workers' Compensation Appeals Commission

John W. Milton, Appellant, vs. UIC Construction, Alaska Insurance Guaranty Association, and Northern Adjusters, Inc., Appellees.	Final Decision on Remand Decision No. 167 August 10, 2012 AWCAC Appeal No. 10-009 AWCB Decision No. 10-0019 AWCB Case No. 198505382

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

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

Commission proceedings: Appeal filed February 11, 2010; briefing on remand completed June 15, 2012; oral argument was not requested by either party.

Commissioners: James N. Rhodes, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, John W. Milton (Milton), was injured on February 9, 1985, while working for appellee, UIC Construction (UIC),[1] in Barrow. In August 1989, Milton and UIC executed a Compromise and Release (C&R), which settled his workers' compensation claim (WCC) once the Alaska Workers' Compensation Board (Board)

[1] Additional appellees in this matter are Alaska Insurance Guaranty Association, and Northern Adjusters, Inc.

approved the C&R in October 1989.[2] Years later, Milton sought to have the C&R set aside and other relief. The Board held a hearing on November 9, 2009, and issued a Decision and Order (D&O), denying Milton the relief he sought.[3] Milton requested reconsideration, which the Board denied in a Final Decision and Order on Reconsideration and Modification.[4]

Milton appealed the first Board decision to the Workers' Compensation Appeals Commission (Commission). The Commission issued a decision affirming the Board.[5] The Commission's decision was appealed by Milton to the Alaska Supreme Court (Supreme Court). During the pendency of that appeal, the Supreme Court issued an Order dated January 19, 2012, which stated in relevant part: "This matter is **REMANDED** to the Commission for reconsideration of its decision, with supplemental briefing if necessary, in light of the medical records discovered by the Board and forwarded to the Commission to supplement the record on appeal."

On remand, Milton and UIC submitted supplemental briefing to the Commission. In order to provide context to our decision on remand, we restate portions of our decision in *Milton I*.

2. Factual background and proceedings.

On February 11, 1985, Milton sought medical treatment. The medical record pertaining to that treatment indicates that Milton reported a rock struck him in the left eye while at work two days earlier, on February 9, 1985. He was diagnosed with a left corneal ulcer.[6] On April 28, 1985, Milton was seen at the Veterans Administration (VA) Hospital in Madison, Wisconsin, complaining of having headaches for three weeks,

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[2] Appellees' Exc. 073-79.

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

[4] *See John W. Milton v. UIC Construction, et al.*, Alaska Workers' Comp. Bd. Dec. No. 10-0043 (Mar. 1, 2010); Errata Sheet Dec. No. 10-0043 (Mar. 10, 2010) corrected errors of a clerical nature.

[5] *See John W. Milton v. UIC Construction, et al.*, Alaska Workers' Comp. App. Comm'n Dec. No. 143 (Dec. 23, 2010) (*Milton I*).

[6] Appellees' Exc. 048.

slurred speech, and facial weakness. He denied any recent or previous head injury.[7] Following a computed tomography scan, Milton was diagnosed with a chronic left subdural hematoma.[8] On April 29, 1985, a surgical procedure was performed to evacuate the subdural hematoma.[9]

Milton filed a Report of Injury on October 29, 1985, claiming he injured his head on February 9, 1985, when he fell off a ladder.[10] On October 30, 1985, he began treating with Ronald A. Martino, M.D., in Fairbanks.[11] As of June 1986, Dr. Martino attributed Milton's headaches, amnesia, and blackouts to either the reported work injury or his chronic alcoholism and drug abuse. He also suspected secondary gain was playing a role in Milton's recent increase in memory deficit complaints.[12] UIC controverted all benefits on February 16, 1987.[13]

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

In the negotiations leading up to settlement in 1989, both Milton and UIC were represented by counsel, who also signed the C&R.[16] The C&R recited the apparent discrepancy between the injury as first reported to health care providers on February 11, 1985, that Milton was hit in the eye with a rock, and the injury as reported to the board in the Report of Injury dated October 29, 1985, that he hurt his head in a

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7 Appellees' Exc. 051-52.

8 Appellees' Exc. 053.

9 Appellees' Exc. 053-54.

10 Appellant's Exc. 004.

11 Appellees' Exc. 055-56.

12 Appellees' Exc. 058-59.

13 Appellees' Exc. 062.

14 Appellees' Exc. 064-65.

15 Appellees' Exc. 063.

16 Appellees' Exc. 078-79.

20-foot fall from a ladder.[17] Under the terms of the agreement, UIC paid Milton $15,000 in a lump sum, established an annuity which pays him $500 per month for the rest of his life, and paid him an additional lump sum of $7,500. In exchange, Milton agreed to release all disability compensation benefits, penalties, interest, and vocational rehabilitation benefits. Medical benefits related to the eye injury were left open.[18] After initially rejecting the agreement,[19] a hearing was held on October 10, 1989, at which time the Board approved the C&R.[20]

Milton was diagnosed with service-related post traumatic stress disorder (PTSD) by the VA in Fairbanks in July 1990[21] and rated with a 30% disability related to his PTSD in April 1991.[22] He was involved in another MVA on December 14, 1992, in which he reported that when the vehicle was struck from the side, his neck violently moved laterally. Milton was diagnosed with an injury to his cervical spine that aggravated an older neck injury.[23] Milton suffered a fall on July 8, 1993, which made his neck pain worse.[24] On September 12, 2003, Milton sought treatment at Fairbanks Memorial Hospital emergency room (ER) for injuries he sustained in another MVA, which had occurred the week before.[25] On reporting to the ER again later that same day, Milton expressed concerns about seizures, and stated further that he had hit his head, but denied that he lost consciousness.[26] On September 18, 2003, he appeared again at the

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17 Appellees' Exc. 073-75.

18 Appellees' Exc. 076-78.

19 Appellees' Exc. 069-70.

20 Appellees' Exc. 079.

21 Appellees' Exc. 080-82.

22 Appellees' Exc. 084.

23 Appellees' Exc. 085-86.

24 Appellees' Exc. 091-92.

25 Appellees' Exc. 122-23.

26 Appellees' Exc. 124-25.

ER, and was diagnosed with a migraine headache. He was treated and discharged.[27] Milton presented at the ER again on September 21, 2003, was diagnosed with a migraine headache, and was discharged on the same day.[28] On September 25, 2003, Milton consulted Lawrence R. Whitehurst, M.D., with complaints of pain, numbness, and tingling in his left arm. Dr. Whitehurst diagnosed possible whiplash secondary to the September 2003 MVA and prescribed Celebrex and physical therapy.[29] Milton appeared for one physical therapy appointment.[30]

After receiving statements from Milton's Fairbanks medical providers, on November 29, 2006, UIC controverted medical benefits for his cervical spine owing to a lack of evidence that the treatment was related to the February 9, 1985, injury.[31] On March 13, 2007, Milton filed a WCC with a reported injury date of February 9, 1985. The claim was for injuries to Milton's spine, neck, and head. Milton contended that when he signed the C&R he was suffering from PTSD and was heavily medicated. He sought permanent total disability (PTD) benefits, medical costs, transportation costs, penalties, interest, and a finding of unfair or frivolous controversion.[32] UIC answered and controverted all of Milton's claims.[33]

UIC arranged for an employer's medical evaluation (EME) of Milton by Marilyn L. Yodlowski, M.D., an orthopedic surgeon, which took place on April 17, 2007. Dr. Yodlowski took a history from Milton, performed a records review, and conducted a physical examination.[34] According to Milton, when he fell off the ladder on February 9, 1985, he landed on his feet and did not hit his head, although he stated that "[a]ll the

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27 Appellees' Exc. 126-27.

28 Appellees' Exc. 131-32.

29 Appellees' Exc. 133.

30 Appellees' Exc. 134.

31 Appellees' Exc. 135.

32 Appellees' Exc. 136-37.

33 Appellees' Exc. 138-41.

34 Appellees' Exc. 142-64.

impact went straight to my head."[35] Dr. Yodlowski diagnosed chronic, progressive, degenerative cervical spondylotic disease. In Dr. Yodlowski's opinion, there was no causal connection between Milton's employment with UIC and his cervical spine degenerative disease.[36] In her July 2, 2008, deposition testimony, Dr. Yodlowski reaffirmed her opinion that Milton's cervical condition and symptoms were unrelated to the 1985 work incident.[37]

Dr. Yodlowski's report was forwarded to Dr. Martino, Milton's physician. In a response dated August 8, 2007, Dr. Martino commented that Milton was competent at the time the C&R was executed, that Milton was capable of understanding written and oral communication in English, that he concurred with Dr. Yodlowski's assessment and opinion, and that the 1985 incident was not a substantial factor in causing Milton's current cervical condition.[38]

The parties stipulated to a second independent medical evaluation (SIME) by Fred Blackwell, M.D., which was conducted on July 20, 2008. In conjunction with the SIME, Dr. Blackwell took a medical history, reviewed medical records, and performed a physical examination of Milton.[39] In relation to Milton's claim, Dr. Blackwell diagnosed: 1) status post-operative for subdural hematoma; 2) post traumatic seizure disorder; and 3) chronic musculoligamentous strain/sprain of the cervicothoracic spine.[40] Dr. Blackwell was unable to offer an explanation as to the source of Milton's neck complaints, nor could he discern a relationship between Milton's complaints of upper left extremity pain and numbness that would correlate with radiculopathy linked to the 1985 injury. In his opinion, the 1985 injury did not aggravate, accelerate, or combine with a pre-existing condition to necessitate medical treatment of Milton's cervical spine

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35 Appellees' Exc. 142.

36 Appellees' Exc. 161-62.

37 Yodlowski Dep. 6:23–8:20; Appellees' Exc. 289-90.

38 Appellees' Exc. 276-77.

39 Appellees' Exc. 314-55.

40 Appellees' Exc. 320.

and left upper extremity condition.[41] Dr. Blackwell concluded substantial evidence did not exist to indicate that the work injury was a substantial factor in the causation of Milton's neck, upper left extremity, and thoracic spine problems. In his view, Milton had clinical cervical and thoracic osteoarthritis, and age-related spondylosis that had been rendered symptomatic by both the aging process and repeated trauma from falls and MVAs.[42]

On November 13, 2008, Milton filed another WCC that was similar to his March 13, 2007, claim. He sought benefits for injuries to his neck, left upper extremity, thoracic spine, cervical spine, and head. He requested temporary total disability (TTD) benefits from 1985 to 2008, PTD benefits, medical costs, transportation costs, penalties, interest, and a finding of unfair or frivolous controversion.[43] UIC answered and controverted the claim.[44] On or about December 22, 2008, Milton filed another WCC, in this instance for TTD benefits related to his subdural hematoma.[45] UIC filed an answer and controversion.[46] Milton filed another WCC on April 13, 2009, seeking relief similar to the relief he had already sought and asserting that the C&R should be set aside.[47] UIC answered and controverted the claim.[48]

The Board held a hearing on Milton's claims on November 9, 2009. It denied him the relief he sought in the D&O it issued on January 28, 2010.[49] Following his unsuccessful appeal to the Commission of this Board decision, Milton appealed to the Supreme Court. While the matter was before that court, the Board notified the Supreme Court's clerk that certain medical records were discovered at the Board which

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41 Appellees' Exc. 353.

42 Appellees' Exc. 354.

43 Appellees' Exc. 366-67.

44 Appellees' Exc. 368-71.

45 Appellees' Exc. 372-73.

46 Appellees' Exc. 374-76.

47 Appellees' Exc. 377-78.

48 Appellees' Exc. 379-83.

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

should have been available as part of the record on appeal to the Commission.[50] Review of those medical records prompted the Supreme Court to issue the above-quoted Order on January 19, 2012, remanding this matter to the Commission.

The medical records in question were available to the Board for both the hearing it held on November 9, 2009, and when it issued its D&O on January 28, 2010. The records are referred to by the Board in the D&O.[51] Despite not having been provided to the Commission as part of the full record on appeal, many of these medical records were submitted to us in connection with Milton's original appeal to the Commission as excerpts of record accompanying the parties' briefing.[52] On the basis of these records and other evidence, the Commission decided and issued *Milton I*.

3. Standard of review.

The Commission is to uphold the Board's findings of fact if they are supported by substantial evidence in light of the whole record.[53] The Board's findings regarding the credibility of the testimony of a witness are binding on the Commission.[54] We exercise our independent judgment when reviewing questions of law and procedure.[55]

4. Discussion.

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

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[50] Appellees' Exc. 465.

[51] *See Milton*, Bd. Dec. No. 10-0019 at 2-23.

[52] *Milton I*, Alaska Workers' Comp. App. Comm'n Dec. No. 143; Appellant's Exc. 002-09, 012, 025-26, 044; Appellees' Exc. 047-50, 052-53, 057-61, 073-112, 120-42, 285-326.

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

[54] *See* AS 23.30.128(b).

[55] *See id.*

a. Applicable law.

At the time the C&R was entered into by the parties and approved by the Board, AS 23.30.012 provided in relevant part:

> [T]he employer and the employee . . . have the right to reach an agreement in regard to a claim for injury . . . under this chapter . . . but a memorandum of the agreement in a form prescribed by the board shall be filed with the board. Otherwise, the agreement is void for any purpose. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. The board may approve lump-sum settlements when it appears to be to the best interest of the employee[.]

Likewise, at that time, 8 AAC 45.160 provided:

> (a) The board will review settlement agreements which provide for the payment of compensation due and which undertake to release the employer from any or all future liability. Settlement agreements will be approved by the board only where a dispute exists concerning the rights of the parties or, where clear and convincing evidence demonstrates that approval would be for the best interests of the employee or his beneficiaries.
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> (b) All settlement agreements must be submitted in writing to the board, must be signed by all parties to the action and their attorneys or representatives, if any, and must be accompanied by form 07-6117.
>
> (c) Every agreed settlement must conform strictly to the requirements of AS 2.330.012 and, in addition, must:
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> (1) be accompanied by all medical reports in the parties' possession, except that, if a medical summary has been filed, only those medical reports not listed on the summary must accompany the agreed-upon settlement;
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> (2) include a written statement showing the employee's age and occupation on the date of injury, whether and when the employee has returned to work, and the nature of employment;
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> (3) report full information concerning the employee's wages or earning capacity;
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> (4) state in detail the parties' respective claims;

(5) state the attorney's fee arrangement between the employee . . . and the attorney, including the total amount of fees to be paid;

(6) itemize in detail all compensation previously paid on the claim with specific dates, types, amounts, rates, and periods covered by all part payments; and

(7) contain other information the board will, in its discretion and from time to time, require.

(d) The board will inquire into the adequacy of all agreed settlements and will, in its discretion, set the matter for hearing to determine whether an agreement should be approved or disapproved. Agreed settlements between the employer and the employee or other persons claiming benefits under the Act are not final until approved by the board.

(e) Agreed settlements in which the employee waives medical benefits or benefits during rehabilitation training are presumed unreasonable and will not be approved absent a showing that the waiver is in the employee's best interests. In addition, lump-sum settlements of board-ordered permanent total disability claims are presumed unreasonable and will not be approved absent a showing that the lump-sum settlement is in the employee's best interests.

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

A C&R is a contract and subject to interpretation as any other contract would be. To the extent they are not overridden by statute, common law principles of contract formation and rescission apply to C&Rs.[56] Milton sought to have the 1989 C&R set aside on two bases: 1) when he signed it he was suffering from PTSD and was heavily medicated; and 2) duress, misrepresentation, fraud, and regulatory violations on the part of UIC when the agreement was entered. As for the first basis, we infer that Milton is arguing that he was not mentally competent at the time he agreed to the C&R on account of his PTSD. In terms of the second, he is alleging UIC's misconduct.

Milton presented no medical evidence on the issue of his mental competency; he was represented by counsel both when the C&R was signed and at the hearing before the Board to obtain its approval. Dr. Martino testified, providing evidence that Milton could understand spoken and written English, and that he was competent to enter into

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

the C&R when he did.[57] In a case with similar bases for asserting incompetence,[58] the Supreme Court held that indicia that the employee was competent when he signed the C&R included medical evidence of competency and representation of the employee by counsel. Likewise, we conclude that the foregoing was substantial evidence from which the Board could find that Milton was mentally competent.

In support of Milton's argument that he was under duress when he signed the C&R, he maintained: 1) *his* attorney told him that if he did not sign the agreement, UIC would portray him as a drug addict and he would get nothing; and 2) the C&R set forth UIC's position that Milton's headaches, amnesia, and blackouts were the result of his alcohol and drug abuse. The Board correctly concluded that any statements by Milton's counsel could not be used against UIC to provide the basis for setting aside the C&R and that UIC was simply reciting in the C&R what Dr. Martino had advised it concerning Milton's health issues.[59] Thus, substantial evidence supported the Board's conclusion in this respect.

The Board is empowered to set aside a C&R as voidable for fraud or misrepresentation if one party's assent to the agreement is induced by the other party's fraudulent or material misrepresentation on which the recipient has relied.[60] Milton argued similar grounds for fraud and misrepresentation as he did for duress, namely that his attorney told him UIC would attribute his health problems to alcohol and drug abuse, and that the C&R inaccurately recited that Milton's health issues were the result of drug and alcohol abuse. In rejecting Milton's argument, the Board noted that Milton admitted having no communications with UIC or its carrier leading up to the C&R, that his attorney's remarks could not be attributed to the employer, and that the recitation in the C&R that UIC's position was that Milton's headaches, amnesia, and blackouts

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57 *See Milton*, Bd. Dec. No. 10-0019 at 30-31.

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

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

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

were caused by his alcohol and drug abuse was required by regulation.[61] This constitutes substantial evidence that there was no fraud or misrepresentation.

Finally, the Board found that there were no statutory or regulatory violations leading to the C&R being executed by the parties.[62] Milton argued that AS 23.30.095(k) required the Board to order an SIME. However, the Board pointed out that an SIME was not mandatory and there was no dispute between Milton's attending physician and UIC's EME physician, as UIC did not have a physician of its choice conduct an EME before the C&R was executed. The Board addressed Milton's other contentions and found that "there is no evidence the Board did not follow the statute and regulations governing settlement agreements so as to create sufficient grounds to overturn the C&R."[63] The Board observed that it had reviewed the C&R and, after initially rejecting it as having incomplete medical information, subsequently approved it following a hearing on October 10, 1989. Ultimately, the Board found that the requirements of both AS 23.30.012 and 8 AAC 45.160 were met in the process of approving the C&R.[64] We conclude there is substantial evidence supporting the Board's resolution of these issues.

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

Milton maintained that he injured his cervical spine and thoracic spine in the work-related incident in Barrow, and that the work injury was a substantial factor in his need for medical treatment for those injuries. Characterizing the issue as a complex medical question of causation requiring expert medical opinion, in ruling, the Board set

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61 *See Milton*, Bd. Dec. No. 10-0019 at 33-34 (citing 8 AAC 45.160).

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

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

64 *See Milton*, Bd. Dec. No. 10-0019 at 36.

about applying the three-step presumption of compensability analysis in reviewing the medical evidence.[65]

In terms of Milton's cervical complaints, the Board found that Milton had raised the presumption, based on Milton's testimony that he fell off a ladder and the medical reports of L. F. Ramirez, M.D., that Milton had a probable cervical radiculopathy that might be work-related.[66] The Board went on to conclude that UIC had rebutted the presumption through the EME report of Dr. Yodlowski, the SIME report of Dr. Blackwell, and Dr. Martino's reports and testimony. The Board members noted that, consistent with case law setting forth the standard for rebutting the presumption, Dr. Yodlowski's and Dr. Blackwell's opinions provided alternate explanations for Milton's symptoms, which, if accepted, would rule out work-related causes of any disability or need for medical treatment. Dr. Yodlowski pointed to chronic progressive degenerative

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

[66] Appellant's Exc. 037. Dr. Ramirez was involved in treating Milton at the VA Hospital in Madison, Wisconsin, in April 1985.

spondylotic disease, and Dr. Blackwell pointed to Milton's excessive drug use and history of falls and MVAs.

Ultimately, the Board observed that the only evidence that Milton's injuries might be work-related was the opinion of Dr. Ramirez. On the other hand, the Board placed greater weight on the opinions of Drs. Yodlowski and Blackwell to the effect that Milton's employment was not a substantial factor because of their medical credentials and the thoroughness of their evaluations.[67] We agree with the Board that Milton failed to prove by a preponderance of the evidence that his cervical spine condition was work-related.

As for Milton's thoracic complaints, after taking note of Dr. Blackwell's opinion that his employment was not a substantial factor in the onset of Milton's thoracic spine condition and the absence of any evidence to the contrary, the Board concluded that Milton had failed to prove by a preponderance of the evidence that his thoracic spine condition was work-related.[68] We conclude that there was substantial evidence to support the Board's conclusion.

d. The Commission is not persuaded that the additional medical records warrant a revision of its decision in Milton I that the Board did not err in declining to set aside the C&R.

As UIC pointed out in its supplemental briefing, the Board possessed all of Milton's medical records and referenced many of them in its D&O.[69] However, in the Commission's view, the Supreme Court's concern, and the reason for its remand, was not whether the *Board* had the records. Its concern was that the records were not available to the Commission in the process of reaching its decision in *Milton I*. As referenced earlier in this decision on remand, many of the records at issue were provided to the Commission as excerpts of record in connection with the parties'

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

68 *See id.* at 40.

69 Appellees' Supp. Br. 18-20.

briefing in Milton's original appeal.[70] In any event, the additional medical records provide an insufficient evidentiary basis for the Commission to conclude that the Board was mistaken when it decided not to set aside the C&R which settled Milton's claims against UIC.[71]

5. Conclusion.

We AFFIRM the Board's decision in *Milton,* Bd. Dec. No. 10-0019, and adhere to our conclusions in *Milton I*, Alaska Workers' Comp. App. Comm'n Dec. No. 143.

Date: *10 August 2012* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

[70] *See* n.52, *supra*. Notably, the medical records in the excerpts of record on remand are virtually the same as the medical records in the parties' excerpts of record in the original appeal. We infer that the medical records that the parties deem are the most significant in terms of their arguments on appeal to the Commission have been submitted to us as excerpts of record.

[71] We would also point out that the context of the present dispute is important. The Board was not approving the C&R; it was deciding whether to set it aside. Given the posture of the matter before the Board, compliance by the Board with AS 23.30.012 and 8 AAC 45.160, the statute and regulation covering *approval* of C&Rs, is problematic here. By the same token, the Commission is not passing judgment on the Board's approval of the C&R in 1989. We are tasked to decide whether the Board erred in not setting aside the C&R in 2009. Complete medical records are arguably not as critical to that process.

APPEAL PROCEDURES

This is a final decision on remand on the merits of this appeal. On remand, the Commission affirms the Board's decision 10-0019. The Commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).[72] For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[73] and be brought by a party-in-interest against all other parties to the proceedings before the Commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The Commission is not a party.

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

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

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

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the Commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the Commission, any

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[72] A party has 30 days after the distribution of a final decision of the Commission to file an appeal to the supreme court. If the Commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

[73] *Id*.

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 correction of typographical and grammatical errors, this is a full and correct copy of the Final Decision No. 167 issued in the matter of *Milton v. UIC Construction,* AWCAC Appeal No. 10-009, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 10, 2012.

Date: *August 14, 2012*

Signed

B. Ward, Appeals Commission Clerk