

Case: *John W. Milton vs. UIC Construction, Alaska Insurance Guaranty Association, and Northern Adjusters, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 167 (August 10, 2012)

Facts: John W. Milton (Milton) was injured working for UIC Construction (UIC) on February 9, 1985. He and the employer settled his workers' compensation claim in an agreement approved by the board in October 1989. The Compromise and Release (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 on October 29, 1985, that he hurt his head in a fall from a ladder. The C&R also recited the dispute between the parties over whether Milton suffered headaches as a result of the head injury or drug and alcohol abuse. 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 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.

In 2007, Milton sought benefits for his spine, neck, and head. Milton also sought to overturn the C&R contending that when he signed the C&R he was suffering from post-traumatic stress disorder (PTSD) and was heavily medicated, and that the employer engaged in duress, misrepresentation, fraud, and regulatory violations when the agreement was entered. Conducting an employer medical evaluation (EME) in April 2007, 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. In a response dated August 8, 2007, Milton's doctor, Dr. Martino, concurred with Dr. Yodlowski's assessment and opinion. He also commented that Milton was competent at the time the C&R was executed.

The board rejected all of Milton's claims. Milton appealed. The commission affirmed the board in Dec. No. 143 (Dec. 23, 2010). Milton appealed that decision to the Alaska Supreme Court (supreme court), which remanded to the commission because some of the medical records were missing from the board record on the appeal. This is the commission's decision on remand.

Applicable law: At the time of Milton's C & R, 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[.]

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

Issues: Did Milton's PTSD render him mentally competent when he signed the C&R such that the C&R should be set aside? Did the employer's actions amount to duress, misrepresentation, fraud, or regulatory violations such that the C&R should be set aside? Does substantial evidence support that Milton's back and neck conditions were not work-related?

Holding/analysis: The board had substantial evidence that Milton was mentally competent at the time he signed the C&R. 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. Also, Dr. Martino testified that Milton was competent.

Substantial evidence supported the board's decision there was no duress by UIC. Milton argued that his attorney told him UIC would attribute his health problems to alcohol and drug abuse if he refused to sign the agreement, and that the C&R inaccurately recited that Milton's health issues were the result of drug and alcohol 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 the basis for Milton's headaches, amnesia, and blackouts.

Substantial evidence supported the board's decision that there was no fraud or misrepresentation. "[T]he Board noted that Milton admitted having no communications with UIC or its carrier leading up to the C&R, that his attorney's remarks could not be attributed to the employer, and that the recitation in the C&R that UIC's position was that Milton's headaches, amnesia, and blackouts were caused by his alcohol and drug abuse was required by regulation." Dec. No. 167 at 11-12.

Substantial evidence supported the board's conclusion that there were no statutory or regulatory violations in approving the C&R. Milton argued that the board was required to order a second independent medical evaluation (SIME) before approval. 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 conduct an EME before the C&R was executed. The board observed that it had reviewed the C&R and, after initially rejecting it as having incomplete medical information, subsequently approved it.

Substantial evidence supported that Milton's neck and back complaints were not work-related. The board correctly applied the presumption of compensability to both claims, finding that Milton attached it and the employer rebutted it. The substantial evidence supporting the absence of a work-related neck injury was: the EME report of Dr. Yodlowski; the SIME report of Dr. Blackwell, which pointed to Milton's drug use and history of falls and motor vehicle accidents as alternative causes; and Dr. Martino's reports and testimony. Only Milton's testimony that he fell off a ladder and Dr. Ramirez's report that Milton had a probable cervical radiculopathy that might be work-related supported Milton's claim and the board could choose, as it did, to reject that evidence. The substantial evidence supporting that Milton's thoracic complaints were not work-related was Dr. Blackwell's opinion that work was not a substantial factor in the onset of Milton's thoracic spine condition and the absence of any evidence to the contrary.

Lastly, the commission concluded the records at issue as missing "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[.]" *Id.* at 15. Moreover, the records at issue were missing only in the board file that was forwarded to the commission; the board had the records when it made its decision. Also many of the records at issue were in the parties' excerpts of record provided to the commission on appeal.

Note: This decision, No. 167, was appealed to the supreme court, which issued a memorandum opinion and judgment (MO&J) affirming the commission's decision that the board properly refused to set aside the C&R. Because MO&Js do not create legal precedent and because AS 23.30.008(a) provides that "Unless reversed by the Supreme Court, decisions of the commission have the force of legal precedent," the commission decision may still serve as legal precedent for the board and appeals commission. *See Alaska Pub. Interest Research Grp. v. State of Alaska*, 167 P.3d 27, 45 (Alaska 2007) (stating "we construe the provision that decisions of the Appeals Commission have the force of legal precedent as meaning that they serve as legal precedent for the Board and the Appeals Commission only.")