Alaska Workers' Compensation Appeals Commission

Charles McKee, Appellant, vs. Alaska Functional Fitness, LLC and Ohio Casualty Insurance Company, Appellees.	Final Decision Decision No. 241 October 24, 2017 AWCAC Appeal No. 17-006 AWCB Decision No. 16-0124 AWCB Case No. 201501065

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 16-0124, issued at Anchorage, Alaska, on December 20, 2016, by southcentral panel members Matthew Slodowy, Chair, Mark Talbert, Member for Labor, and Ron Nalikak, Member for Industry.

Appearances: Charles McKee, self-represented appellant; Rebecca Holdiman Miller, Holmes Weddle & Barcott, PC, for appellees, Alaska Functional Fitness, LLC and Ohio Casualty Insurance Company.

Commission proceedings: Appeal filed February 24, 2017; briefing completed July 31, 2017; oral argument held on September 12, 2017.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Charles McKee was injured on December 31, 2014, while working for Alaska Functional Fitness, LLC, and filed a workers' compensation claim.[1] Following mediation in 2015, he signed a Compromise and Release Agreement (C&R) that was approved by

[1] 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.

the Alaska Workers' Compensation Board (Board) on October 27, 2015.[2] Mr. McKee moved by petition to set aside this C&R and on December 20, 2016, the Board issued its decision denying his petition.[3] Mr. McKee then filed a petition for reconsideration on December 29, 2016.[4] This petition was deemed denied without a Board order. Mr. McKee appealed this decision to the Alaska Workers' Compensation Appeals Commission (Commission) on February 24, 2017, after he learned of the denial. Alaska Functional Fitness objected on March 7, 2017, to Mr. McKee's appeal, contending it was untimely. The Commission allowed the late-filed appeal in its order of April 7, 2017, in part, because Mr. McKee asserted he filed his appeal as soon as he learned from the Board his petition had been denied. Alaska Functional Fitness asked for reconsideration of this order and the Commission denied reconsideration on April 24, 2017. The Commission noted that since the Board had not issued a decision on the petition for reconsideration, Mr. McKee, as a self-represented litigant, had difficulty knowing the date on which the petition had been denied.[5] Alaska Functional Fitness also contested the briefing submitted by Mr. McKee, asserting it was inadequate and did not address the issues on appeal. Oral argument was heard on September 12, 2017. The Commission now affirms the Board's denial of Mr. McKee's petition to set aside the C&R.

2. Factual background and proceedings.

On December 31, 2014, Mr. McKee was cleaning the shower stall at work when he fell backwards, hitting his head on wet concrete and injuring his right hand while trying

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[2] *McKee v. Alaska Functional Fitness, LLC*, Alaska Workers' Comp. Bd. Dec. No. 16-0124 at 5, No. 5 (Dec. 20, 2016)(*McKee II).*

[3] *McKee II*.

[4] R. 593-601.

[5] Confusion over the date on which a petition for reconsideration is deemed denied, especially when the petition is filed by a self-represented litigant, might be avoided in the future if the Board would consider establishing a procedure for issuing a routine decision. A short decision indicating the date of the denial would let a self-represented litigant know when to file an appeal, and would fulfill the Alaska Supreme Court's mandate to provide assistance to these litigants regarding procedures to be followed.

to break his fall.[6] On January 20, 2015, Mr. McKee began receiving temporary total disability (TTD) payments at the weekly rate of $110.00.[7] On March 4, 2015, he filed a claim for a compensation rate adjustment, asserting Alaska Functional Fitness had not taken into account his seasonal income.[8] On March 25, 2015, Alaska Functional Fitness controverted the compensation rate adjustment asserting that it had not received any documentation justifying a revision of Mr. McKee's weekly rate. Alaska Functional Fitness added that upon receipt of additional earning documentation and wage records, it would re-calculate its findings to determine if a revised compensation rate was warranted.[9]

On April 1, 2015, attorney Keenan Powell entered her appearance on behalf of Mr. McKee, and Mr. McKee amended his March 4, 2015, claim to include attorney fees and costs. The new claim sought to clarify the request for TTD and compensation rate adjustment, and requested that his rate be based on wages earned at time of injury. Prior to employment with Alaska Functional Fitness, Mr. McKee had voluntarily left the job market for several months in 2014, while waiting for an opening at Alaska Functional Fitness's facility for a full-time permanent job. Before that Mr. McKee worked seasonal jobs. Mr. McKee also filed several pieces of financial evidence including:

> his pay stub from [Alaska Functional Fitness] dated January 23, 2015; his 2014 W-2 Wage and Tax Statement from [Alaska Functional Fitness]; his 2014 1099-G Statement of Earnings from unemployment insurance; his 2014 and 2013 Wage and Tax Statements from Arctic Catering, Inc.; and a copy of a check, dated February 3, 2015, for $161.15, representing TTD "adjustment" from January 20-27, 2015.[10]

On May 18, 2015, Alaska Functional Fitness again controverted his claim reiterating the language of its March 25, 2015, controversion:

> To date, the employer has received no documentation justifying a revision of the employee's weekly workers' compensation rate. Upon receipt of

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[6] *McKee v. Alaska Functional Fitness, LLC*, Alaska Workers' Comp. Bd. Dec. No. 15-0123 (Sept. 24, 2015)(*McKee I*) at 2, No. 1.

[7] *Id.*, No. 2.

[8] *Id.*, No. 3.

[9] *Id.*, No. 4.

[10] *McKee I* at 2-3, No. 5.

> additional earning documentation and wage records, the employer will re-calculate its findings to determine if a revised compensation rate is warranted.[11]

At a prehearing on August 18, 2015, a hearing was scheduled for September 22, 2015, on the issue of the compensation rate adjustment.[12] On September 2, 2015, attorney Powell withdrew as Mr. McKee's counsel.[13] On September 16, 2015, non-attorney representative Barbara Williams entered her appearance on behalf of Mr. McKee.[14]

At an emergency prehearing on September 18, 2015, the parties attempted to stipulate verbally to postpone the September 22, 2015, hearing to allow for further settlement discussions. The designee instructed the parties to attend the September 22, 2015, hearing and to provide a written, signed stipulation at that time.[15]

On September 22, 2015, the parties filed a stipulation to cancel the hearing that day, stating good cause for continuance existed under 8 AAC 45.074(b)(1)(I): "Based on the limited issues, the parties believe that disputes will best be resolved by means of mediation and are currently seeking an appropriate mediator."[16]

At hearing, the parties stated they had emailed a request for mediation to Chief of Adjudications Amanda Eklund that morning. They also stated they were involved in settlement discussions, both on the compensation rate issue and on Mr. McKee's entire claim, and hoped to reach a settlement agreement soon.[17] The Board issued an oral order granting the continuation and rescheduling the hearing to October 21, 2015.[18]

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11 *McKee I* at 3, No. 6.

12 *Id.*, No. 7.

13 *Id.*, No. 8.

14 *Id.*, No. 9.

15 *Id.*, No. 10.

16 *Id.*, No. 11.

17 *McKee I* at 3, No. 12.

18 *Id.* at 4, No. 13.

On October 21, 2015, the parties attended mediation.[19] The same day they executed the C&R that was filed the next day for Board review. The C&R provides:

> To resolve all disputes among the parties with respect to compensation rate, compensation for disability (whether the same be temporary total, temporary partial, permanent partial impairment, or permanent total), penalties, interest, claims for unfair or frivolous controversion, reemployment benefits, AS 23.30.041(k) benefits, and AS 23.30.041(g) job dislocation benefits, the employer will pay the employee the sum of $19,000.00 without offset . . . .
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> Except as provided below, the employee agrees to accept this amount in full and final settlement and discharge of all obligations, payments, benefits, and compensation which might be presently due or might become due to the employee at any time in the future under [the Act] . . . .
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> The parties agree that the employee's entitlement, if any to future medical and related transportation benefits under [the Act] is not waived by the terms of this agreement . . . .
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> The employee does not intend to pursue additional surgical treatment relative to his injuries under this claim. He will meet with his treating physician and obtain future conservative treatment recommendations, after which he will supply to the employer who in turn agrees to obtain a Medicare Set-Aside proposal so a medical settlement can be pursued . . . .

The C&R was signed by Alaska Functional Fitness's attorney and Mr. McKee's non-attorney representative. Mr. McKee initialed each page and signed the C&R before a notary public.[20] He signed a paragraph stating he had read the entire settlement agreement and understood its contents. The C&R stated Mr. McKee agreed the settlement was in his best interests.[21] The Board approved the C&R on October 27, 2015.[22]

On November 9, 2015, Mr. McKee filed a short handwritten letter contending he was mistaken when he signed the October 27, 2015, C&R, and he had been coerced into signing "without full disclosure." He attempted to rescind his signature from the C&R and

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19 *McKee II* at 4, No. 4.

20 *Id.* at 4-5, No. 4; Appellee's Exc. 000005-24.

21 Appellee's Exc. 0000023.

22 *McKee II* at 5, No. 5.

requested a hearing.[23] The letter did not detail the nature of the alleged mistake or the coercion, nor did Mr. McKee explain how he was mistaken.[24] The Board construed Mr. McKee's November 9, 2015, handwritten letter as a petition to set aside the October 27, 2015, C&R.[25]

On January 21, 2016, Mr. McKee sent Alaska Functional Fitness a typed document titled "Settlement Agreement," which stated:

> Medical costs for the restoration of wrist, shoulder, and brain injuries were estimated at over $113,000.00. I, Charles E. McKee, will accept a one time payment of $113,000.00 now for complete closure and settlement of this claim . . . .

The document also stated, in a handwritten comment, "Due within eight days of presentment." Mr. McKee signed and dated the letter.[26]

On February 3, 2016, Mr. McKee sent Alaska Functional Fitness a handwritten document titled "Nonnegotiable Notice of Acceptance of Dishonor." Portions of the letter are illegible, but Mr. McKee demanded Alaska Functional Fitness pay him a penalty of $60,000.00, in addition to the previous $113,000.00.[27]

On February 11, 2016, Mr. McKee sent Alaska Functional Fitness a typed letter setting out his legal contentions in support of a contract arising from the January 21, 2016, offer. The letter also demanded an "hourly fee" of $10,000.00 for time spent on this case, $1,000.00 for any additional hearings or prehearings, and a $750.00 penalty for each day payment was not made.[28] On February 11, 2016, Alaska Functional Fitness sent Mr. McKee a letter stating no agreement or contract of any kind had been formed pursuant to the January 21, 2016, offer. The letter also stated Alaska Functional Fitness

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23 *McKee II* at 5, No. 6.

24 *Id.*

25 *Id.*, No. 7.

26 *Id.*, No. 8.

27 *Id.*, No. 9.

28 *Id.*, No. 10.

was prohibited by law from settling medical benefits prior to the completion of the Medicare Set-Aside discussed in the October 27, 2015, C&R.[29]

On February 14, 2016, Mr. McKee sent Alaska Functional Fitness a letter that contained both typed and handwritten demands and described a "potential fee" Alaska Functional Fitness must pay of $1,000,000.00, if payment on the January 21, 2016, offer was not made within 24 hours.[30] On March 5, 2016, Mr. McKee sent another letter to Alaska Functional Fitness containing an accounting of his settlement demands, and stating the "total immediately due" was $4,231,750.00.[31]

On April 6, 2016, Mr. McKee filed a claim, on which he wrote "petition."[32] The majority of the handwritten information is illegible.[33] A clerk's note in the Division's computer system described the document as "petition for potential conflict between pending settlement and AK Statutes."[34]

Mr. McKee filed and sent to Alaska Functional Fitness several more documents in the following months, which contained legal arguments and excerpts from legal treatises on contracts in support of his position the January 21, 2016, offer entitles him to compensation and penalties.[35]

On May 13, 2016, Mr. McKee filed a handwritten document titled "petition" for "tortious interference" and attached pages copied from legal treatises or legal encyclopedias.[36] On June 6, 2016, Mr. McKee filed a handwritten document titled "petition for settlement agreement."[37] The Board construed the June 6, 2016,

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29 *McKee II* at 6, No. 11.

30 *Id.*, No. 12.

31 *Id.*, No. 13.

32 *Id.*, No. 14.

33 *Id.*

34 *Id.*

35 *Id.*, No. 15.

36 *Id.*, No. 16.

37 *Id.*, No. 17.

handwritten letter as a petition to enforce a settlement agreement arising out of his January 21, 2016, offer to Alaska Functional Fitness.[38]

On June 22, 2016, Mr. McKee filed a handwritten letter titled "notice of presentment of settlement agreement," which contained an accounting of his settlement demands, and stated the current amount due to him was now $5,372,250.00[39] On July 22, 2016, the parties attended a second mediation.[40] Alaska Functional Fitness contended the only issue for mediation was enforcement of the Medicare Set-Aside provision of the October 27, 2015, C&R.[41]

On July 25, 2016, Mr. McKee filed a handwritten letter titled "notice of breach of contract" which outlined his legal arguments supporting his claim for penalties and fees.[42]

On July 26, 2016, Alaska Functional Fitness sent Mr. McKee a packet of medical release forms with the request for him to sign and return them within two weeks.[43] The packet was received by Mr. McKee as confirmed by the signed certified mail return receipt, although the date of receipt is illegible.[44] The releases sought medical and pharmacy information from December 30, 2012, and onward.[45]

On August 2, 2016, Mr. McKee filed another handwritten legal memorandum.[46] On August 16, 2016, Mr. McKee also filed a handwritten letter titled "notice of default."[47]

On August 29, 2016, Alaska Functional Fitness filed a petition to compel Mr. McKee to sign releases, or alternatively, to dismiss his claim for failure to cooperate in discovery.

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38 *McKee II* at 6, No. 18.

39 *Id.*, No. 19.

40 *Id.*, No. 20.

41 *Id.*

42 *Id.* at 7, No. 21.

43 *Id.*, No. 22.

44 *Id.*

45 *Id.*

46 *Id.*, No. 23.

47 *Id.*, No. 24.

Alaska Functional Fitness's petition stated it sent Mr. McKee releases on July 26, 2016, by certified mail, and Mr. McKee neither returned the releases, nor filed a petition for protective order.[48]

On September 13, 2016, Mr. McKee filed a petition for protective order concerning the July 26, 2016, medical releases.[49]

On October 4, 2016, at a prehearing conference, the Board designee denied Mr. McKee's September 13, 2016, petition for protective order and granted Alaska Functional Fitness's August 29, 2016, petition to compel. Mr. McKee contended the October 27, 2015, C&R was invalid under common law, in part due to the Medicare Set-Aside provision. A hearing was set for November 22, 2016, with the issues listed as:

1. Whether the 10/22/2015 Partial C&R has been or should be rescinded.
2. Whether a subsequent settlement contract between the parties exists, and, if so, what its terms are.
3. Whether the Board or Board staff have tortiously interfered with the settlement contract.
4. Whether Alaska Functional Fitness owes additional fees for delaying tactics.
5. Penalty.
6. Interest.
7. Alaska Functional Fitness's 8/29/2016 petition to dismiss, if Mr. McKee does not sign and return releases as ordered at this prehearing.[50]

On October 20, 2016, Alaska Functional Fitness filed a petition to dismiss Mr. McKee's claims and a memorandum in support.[51]

Mr. McKee testified at hearing that the main point in support of his tortious interference with contract claim was that Division staff failed to advise him of his "status," although Mr. McKee was unable to define this more clearly. Mr. McKee believes the Medicare Set-Aside provision of the October 27, 2015, C&R is contrary to the common

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48 *McKee II* at 7, No. 25.

49 *Id.*, No. 26.

50 *Id.* at 7-8, No. 27.

51 *Id.* at 8, No. 28.

law, and, therefore, the entire C&R is void. Regarding fraud during negotiations leading to the October 27, 2015, C&R, one of Mr. McKee's contentions is the validity of U.S. currency with which the settlement proceeds were paid. Mr. McKee also stated he was unfamiliar with the law and procedure concerning C&R agreements, and he felt pressured to settle his case for a quick recovery. Mr. McKee did receive and deposit the proceeds from the October 27, 2015, C&R. Mr. McKee, at hearing, said he believed Alaska Functional Fitness had cut off his medical benefits.[52] Alaska Functional Fitness noted medical benefits remain open under the C&R.

On December 20, 2016, the Board issued its decision and declined to set aside the October 27, 2015, C&R. The Board additionally held no contract arose from Mr. McKee's January 21, 2016, offer to Alaska Functional Fitness, and ordered Mr. McKee to return signed and executed releases to Alaska Functional Fitness and to obtain the future medical treatment recommendations as outlined in the October 27, 2015, C&R. Mr. McKee's petition to find tortious interference with the settlement contract was denied, as was Alaska Functional Fitness's petition to dismiss.[53]

3. Standard of review.

The Board's findings of fact are to be upheld if the findings are supported by substantial evidence in the record as a whole.[54] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[55] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[56] On

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[52] *McKee II* at 8, No. 29.

[53] *Id*. at 22-23.

[54] AS 23.30.128(b).

[55] *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[56] *McGahuey v. Whitestone Logging, Inc.,* Alaska Workers Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) citing *Land & Marine Rental Co. v. Rawls,* 686 P. 2d 1187, 1188-89 (Alaska 1984).

questions of law and procedure, the Commission does not defer to the Board's conclusions but rather the Commission exercises its independent judgment.[57]

Settlement agreements in workers' compensation matters are governed by AS 23.30.012, which requires an agreement be "in a form prescribed by the director" and filed with the division.[58] The Board is obligated to review any settlement where the claimant is not represented by "an attorney licensed to practice in this state . . . ."[59] A settlement approved by the Board has the same legal effect as a Board order and such approved settlements are not subject to modification under AS 23.30.130.[60] A C&R may be set aside for intentional misrepresentation by an employer if the claimant is able to show by clear and convincing evidence that the misrepresentation was (1) fraudulent or material; (2) induced the party to enter into the contract; and (3) the party was justified in relying on the misrepresentation.[61]

4. Discussion.

Mr. McKee contends he agreed at mediation to accept $113,000.00 for his shoulder injury, but for some reason this figure was not the figure included in the final C&R. He further asserts he was not presented with the full C&R at the time of signing and only saw the last page. Mr. McKee states he signed the last page before the notary public under duress at the mediation. Further, he contends that at common law a federally required Medicare Set-Aside Trust is illegal and so the language requiring one should not have been included in the C&R. Mr. McKee also asserts the letter he sent to Alaska Functional Fitness in January 2016 was a full and binding contract under common law. Mr. McKee claims that when Alaska Functional Fitness did not respond, its silence under common law meant acceptance of the offer. A binding contract, he contends, occurred

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[57] AS 23.30.128(b).

[58] AS 23.30.012(a).

[59] AS 23.30.012(b).

[60] *Olsen Logging Co. v. Lawson,* 856 P.2d 1155, 1158-1159 (Alaska 1993).

[61] *Seybert v. Cominco Alaska Exploration,* 182 P.3d 1079, 1094 (Alaska 2008); *Witt v. Watkins*, 579 P. 2d 1065, 1068-70 (Alaska 1978).

when Alaska Functional Fitness did not respond within the "eight days of presentment" time frame contained in the letter.[62] Therefore, he wants this contract enforced. He further asserts that statutory law does not bind him, either Federal or State, since he has opted out of the "corporation" which he says replaced the State of Alaska and the United States of America. He claims he is only bound by common law, which he contends is superior to statutory law. He wants his "bond" enforced against the Board and Alaska Functional Fitness, the amount of which, he said at oral argument, is now at $6,000,000.00.

Alaska Functional Fitness asserts the Board's decision, affirming the C&R and refusing to set it aside, is supported by substantial evidence. The Board's decision ordering Mr. McKee to sign and return executed releases and to obtain medical recommendations from his treating doctor regarding future medical needs is also supported by substantial evidence. The Board was also correct in denying Mr. McKee's petition for a finding of tortious interference with a contract, which the Board denied because tort claims must be brought in the courts and are not encompassed by the Board's statutory jurisdiction. Further the Board was correct in finding the letter of January 21, 2016, did not constitute a binding contract.

The Commission's statutory jurisdiction is limited to reviewing a Board's decision to ascertain if the Board's decision is supported by substantial evidence in the record as a whole. To set aside a signed and approved C&R is very difficult and may be done only under very specific conditions.

a. Is there substantial evidence to support the Board's decision denying Mr. McKee's petition to set aside the 2015 C&R?

A workers' compensation settlement is a contract and is subject to interpretation like any other contract.[63] Like a contract, a C&R may not be set aside simply because a party made a mistake of fact.[64] However, a C&R may be set aside for fraud or material

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[62] *McKee II* at 5, No. 8.

[63] *Seybert*, 182 P.3d 1079, 1093.

[64] *Id.*, citing *Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1158-59 (Alaska 1993).

misrepresentation.[65] In order to set aside a C&R for fraud or material misrepresentation, Mr. McKee must show (1) there was a misrepresentation; (2) the misrepresentation was fraudulent or material; (3) he was induced to rely on the misrepresentation; and (4) he was justified in relying on the misrepresentation.[66] The C&R in question here was negotiated during a mediation conducted by a Board hearing officer. His non-attorney representative accompanied Mr. McKee.

Mr. McKee claims a misrepresentation of a material fact when he asserts he thought he was settling for $113,000.00 with closed medical benefits instead of $19,000.00 with open medical benefits. He also may not have understood the full nature of his disability. However, these are mistakes of fact over which he had control and thus are not a sufficient basis for setting aside a C&R.[67]

The settlement at issue was reached after a mediation with a Board hearing officer and with Mr. McKee assisted by his non-attorney representative. Both the Board hearing officer and his non-attorney representative were present to help Mr. McKee understand the consequences of the settlement agreement and the signing of the C&R. The hearing officer and his non-attorney representative were available to explain any of the provisions if he had any questions.

The C&R comprises 20 pages setting forth the dispute between the parties and detailing the settlement terms. The settlement document clearly states the amount in consideration for settlement was $19,000.00, allocated as $12,390.00 for permanent partial impairment (PPI) benefits, $5,000.00 for job dislocation benefits in lieu of reemployment benefits, $1,273.40 in TTD benefits based on a compensation rate adjustment, and $336.60 in penalty and interest for the TTD adjustment. His entitlement to future medical treatment remains open under the settlement. Mr. McKee agreed to consult with his treating doctor to obtain recommendations for future conservative

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65 *Seybert*, 182 P.3d 1079, 1094.

66 *Id.*

67 *See, e.g., Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1158-59 (Alaska 1993).

treatment. This latter information was to be provided to Alaska Functional Fitness for use in obtaining a Medicare Set-Aside proposal in consideration of a possible future settlement of Mr. McKee's right to future medical benefits under the Alaska workers' compensation system.

Mr. McKee, in support of his claim of mistake of a material fact, asserts he did not realize the settlement was for $19,000.00 instead of $113,000.00 because he did not see the entire C&R when he signed it. He further contends he only signed the last page in front of the notary under pressure from the mediator and his own non-attorney representative. However, the evidence shows that Mr. McKee initialed each page of the C&R, and signed it in two places with his full name. On page 18 of the C&R, he signed under the paragraph stating "this Settlement Agreement contains the entire agreement among the parties and constitutes the full and complete settlement of all claims, whether actual or potential, described above."[68] On page 19, Mr. McKee signed the paragraph that states:

> I, Charles McKee, being first duly sworn, depose and say:
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> I am the employee named in this Settlement Agreement. I have read this Agreement carefully and understand its contents. I have signed this Agreement freely and voluntarily. I attest, under oath, that this Agreement is in my best interest. If filing under AS 23.30.012(a): I verify I am at least 18 years of age, am competent to sign this document, and am represented by legal counsel, other benefits as provided by the Social Security Act, 42 U.S.C. §301 *et seq.* I also verify that I do not receive, have not applied for, and am not entitled to receive, Medicare benefits as set forth in 42 U.S.C. §1395 *et seq.*[69]

Moreover, the amount of the settlement is spelled out in the C&R, and he initialed the pages on which the settlement amount is identified. His assertion that he did not understand the amount of the settlement does not hold up after examination of the C&R. Furthermore, Mr. McKee does not state how he would have been justified in relying on any misrepresentation made to him about the amount of the settlement when the C&R clearly states the amount on pages he initialed. On the same day Mr. McKee signed the

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[68] Appellees' Exc. 000022.

[69] Appellees' Exc. 000023.

C&R, it was also signed by both Mr. McKee's non-attorney representative, Barbara Williams, and counsel for Alaska Functional Fitness. His initials and these signatures are prima facie evidence Mr. McKee had the entire document before him when he signed it. This is substantial evidence he had the entire document and had an opportunity to read and discuss it.

Mr. McKee also stated at hearing that his non-attorney representative did not accurately represent him at the mediation because the C&R did not memorialize his claimed settlement amount of $113,000.00.[70] It is difficult for Mr. McKee to contend now that he did not know the contents of the C&R and he relied to his detriment on a misrepresentation by Alaska Functional Fitness at the mediation, since he initialed each page and signed with his full signature on two different pages.

Furthermore, Mr. McKee presented no evidence showing how he was under duress to sign the C&R. He merely states he felt compelled to sign it. He states that without the pressure to sign he might have noticed the discrepancy between his understanding of the settlement amount and the actual settlement amount. The only duress articulated by Mr. McKee is his claim that he did not understand the workers' compensation system and his non-attorney representative did not accurately tell him the amount of the settlement. However, statements by his representative are not statements by Alaska Functional Fitness and, therefore, do not constitute duress or fraud by Alaska Functional Fitness.[71]

To show duress in a contract case, the person alleging duress "must show that (1) he involuntarily accepted the terms offered by another party; (2) the circumstances permitted no alternative course of action; and (3) such circumstances were the result of the coercive acts of the other party."[72] He presented no evidence Alaska Functional Fitness took any coercive action to induce him to sign the C&R. Mr. McKee offered no evidence or testimony that he involuntarily accepted the settlement and had no

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70 Hr'g Tr. at 16:1-5, Nov. 22, 2016.

71 *Rosales v. Icicle Seafoods, Inc.,* 316 P.3d 580, 588 (Alaska 2013).

72 *Id.*

alternative to accepting the settlement arrived at during the mediation. Even if his non-attorney representative encouraged him to sign the settlement in spite of any reservations he may have had, this action was not an action by Alaska Functional Fitness and so could not constitute duress as defined above.[73]

Mr. McKee agreed at hearing that he received the $19,000.00 from the settlement and cashed the check. However, he seems to contend that the payment was inadequate because the instrument was not backed by gold, and a "federal reserve debt instrument" is not valid.[74] Moreover, he contends he was under duress because he did not fully understand the workers' compensation system because of his "status change" which "opened up access through this administrative to lay claim against the debt department of the treasury to my – my trust account . . . ."[75] These are the reasons, he argued to the Board and to the Commission, for setting aside the C&R.

Additionally, Mr. McKee states the C&R should be declared invalid since it asks him to contact his treating physician for recommendations about future medical treatment, which would be used by Alaska Functional Fitness to ascertain an amount to fund a Medicare Set-Aside Trust. Mr. McKee asserts a Medicare Set-Aside Trust is illegal under common law and, thus, should be grounds for setting the C&R aside. This argument is without merit. First, the C&R only asks for information for a possible future Medicare Set-Aside Trust. Therefore, even if Mr. McKee's understanding of the law were true, the request for information in itself would not be inappropriate since future medical treatment remains open under the C&R.

However, if Mr. McKee should want to settle out his right to future medical treatment under the Alaska Workers' Compensation Act (Act), Alaska Functional Fitness is required by federal law to take Medicare's interests into account through a Medicare Set-Aside Trust. The Board would not be willing to approve a C&R closing future medical benefits, if the party is likely to become Medicare eligible within a certain period, without

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[73] *Rosales*, 316 P.3d 580, 587-588.

[74] Hr'g Tr. at 32:13 – 33:24.

[75] Hr'g Tr. at 6:17-19.

documentation that Medicare's interests had been taken into consideration. To do so, would leave an employee potentially without medical care and thus such a settlement would not be in an employee's best interests.[76] The Board must approve any C&R closing future medical benefits and in doing so must first ascertain that the settlement is in the employee's best interests.[77] Thus, the request for information that would be useful should the parties in the future attempt to reach a settlement closing future medical benefits is not a basis for setting aside the C&R. The Board's reasoning is supported by substantial evidence.

Contrary to the assertions by Mr. McKee that common law prevails over federal and state law, the opposite is true. Federal law and Alaska state law supersede common law, if the statute covers the issue.[78] Mr. McKee misapprehends the law and, thus, his reasoning is not a basis for setting aside the C&R.

The Board's findings that there was "no basis . . . in fact or law to set aside the C&R in this case" is supported by substantial evidence in the record as a whole.

b. Was an enforceable contract formed by the non-response of Alaska Functional Fitness to Mr. McKee's January 2016 letter?

Mr. McKee asserts the January 21, 2016, letter of settlement to Alaska Functional Fitness became a contract at common law when Alaska Functional Fitness did not accept or respond within the eight days he required in the letter. He states that, at common law, silence created a binding contract. However, under Alaska law there must be an unequivocal acceptance of an offer before there is a binding contract.[79] In *Bingman,* Mr. Bingman argued he had formed a contract because the City had not terminated "its power to accept . . . in accordance with the terms of the offer."[80] The Court stated,

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76 42 U.S.C. §1395 *et seq.*

77 AS 23.30.012 (b); *see, e.g., Rosales*, 316 P.3d 580.

78 *See, e.g., Nickels v. Napolilli,* 29 P.3d 242, 248 (Alaska 2001).

79 *Bingman v. City of Dillingham*, 376 P.3d 1245, 1247 (Alaska 2016).

80 *Id.*

"[u]ntil an offeree unequivocally accepts the offeror's terms, there is no contract."[81] Here, Alaska Functional Fitness expressly told Mr. McKee by written letter that no agreement or contract existed under his January 21, 2016, letter. There never was a meeting of the minds following the January 21, 2016, letter and, thus, no contract was ever formed.

Under the Act, a settlement agreement closing future medical benefits must be approved by the Board.[82] The Board never approved the offer in the January 2016 letter. Therefore, by statutory law, if there were a settlement under the January 2016 letter, that settlement is null and void.[83] The Board's finding on this point is supported by substantial evidence in the record.

c. Did the Board or Alaska Functional Fitness tortiously interfere with a contract?

Mr. McKee also asserts tortious interference with the alleged contract in the January 21, 2016, letter. He contends the Board tortiously interfered with the "contract" by failing to approve the contract arising from his January 21, 2016, letter. However, as noted above, the January 2016 letter did not constitute a settlement contract under the requirements of the Act. The Commission, like the Board, is an administrative agency and, as such, can only decide issues within the jurisdiction provided by statute. An injured worker's rights to benefits are governed solely by the statutory scheme found in the Act.[84] This statute is in effect a compromise between workers and employers to supersede common law rights and remedies, except in extraordinary situations.[85] In Alaska, all workers' compensation claims come under the jurisdiction of the Alaska Workers' Compensation Board. This jurisdiction includes the right to approve and enforce

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81 *Bingman*, 376 P.3d 1245, 1247.

82 AS 23.30.012(b).

83 *Id.*

84 AS 23.30.055; *See, e.g., Van Biene v. ERA Helicopters, Inc.,* 779 P.2d 315, 318 (Alaska 1989).

85 *Wright v. Action Vending Company, Inc.,* 544 P.2d 82, 84-85 (Alaska 1975) citing *Smither & Co. v. Coles*, 100 U.S. App. D.C. 68, 242 F.2d 220, 222, cert. denied, 354 U.S. 914, 77 S.Ct. 1299, 1 L.Ed.2d 1129 (1957).

approved settlements. The Board found there was not an approved settlement based on the January 2016 letter because the settlement proposed did not conform to the requirements of the Act. Therefore, there is no settlement for the Board to enforce. The Board could not and did not tortiously interfere with any settlement contract arising out of the January 2016 letter, because there was no settlement contract meeting the requirements of the Act. This finding by the Board is supported by substantial evidence in the record and under the law. The Commission, like the Board, generally does not have jurisdiction to rule on other tort claims.[86] The Board properly denied Mr. McKee's petition for a finding of tortious interference with a settlement contract.

Similarly, no penalties, fees, or interest are owed based on the January 2016 letter because it was not an approved settlement. The Board's finding is affirmed.

d. Did the Board properly order Mr. McKee to sign releases?

Mr. McKee's rights to ongoing medical benefits remains open under the 2015 C&R. In order for Alaska Functional Fitness to investigate Mr. McKee's medical condition and treatment, it is entitled to written authority from Mr. McKee to obtain his current medical records.[87] Alaska Functional Fitness sent releases to Mr. McKee on July 26, 2016, but he never executed and returned these releases.[88] Substantial evidence supports the Board's decision to require Mr. McKee to sign and return releases, since his right to medical benefits remains open. The Board also properly informed Mr. McKee that failure to sign and return releases may be grounds for dismissing his claim.[89]

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[86] *Van Biene, 779* P.2d at 318*; Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

[87] AS 23.30.107(a).

[88] *McKee II* at 7 No. 22.

[89] AS 23.30.135; 8 AAC 45.054; *See, e.g., Khalsa v. Chose*, 261 P.3d 367 (Alaska 2011).

5. Conclusion.

The Board's decision denying the petition to set aside the 2015 Compromise and Release Agreement is supported by substantial evidence in the record. Therefore, the Board's decision is AFFIRMED.

Date: *24 October 2017* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Michael J. Notar, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

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

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

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

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 241 issued in the matter of *Charles McKee vs. Alaska Functional Fitness, LLC and Ohio Casualty Insurance Company*, AWCAC Appeal No. 17-006, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 24, 2017.

Date: *October 26, 2017*

Signed

K. Morrison, Appeals Commission Clerk