

Case: *Eva M. Birotte vs. Portland Habitation Center and Alaska Insurance Guaranty Association*, Alaska Workers' Comp. App. Comm'n Dec. No. 171 (November 9, 2012)

Facts: Eva Birotte (Birotte) injured her neck working in the laundry at Fort Richardson. She settled all her claims, except for future medical treatment, in a Compromise and Release (C&R) in February 1999. In 2011, she sought to have the C&R set aside, arguing that she did not understand its terms at the time she signed it because she was under unusual stress following the birth of a child with severe health problems. She also sought supervised physical therapy and a second independent medical evaluation (SIME). The board declined to set aside the C&R, ordered an SIME based on a records review after she missed her flight to meet with the SIME examiner, and denied her claim for supervised physical therapy. The board concluded that a home exercise program was a reasonable alternative to physical therapy. Birotte appeals.

Applicable law: A C&R can be voided if the claimant was induced to agree to the C&R because of duress from, or coercion by, the employer. *Helstrom v. North Slope Borough*, 797 P.2d 1192, 1196-97 (Alaska 1990). A C&R can also be set aside if there was fraud or misrepresentation by the employer. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093-94 (Alaska 2008).

AS 23.30.095(a) provides:

(a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require[.]

When reviewing a claim for continued treatment beyond two years from the date of injury, the board is not limited to reviewing the reasonableness and necessity of the particular treatment sought, but has latitude to choose among reasonable alternatives. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664 (Alaska 1991).

AS 23.30.120(a) presumption of compensability and related case law on the three-step analysis.

Issues: Was the board's decision to not set aside the C&R based on substantial evidence? Did the board abuse its discretion in limiting the SIME to a records review? Did substantial evidence support the board's decision to deny Birotte's physical therapy claim?

Holding/analysis: The commission affirmed the board's decision to not set aside the C&R. Birotte testified that she reviewed the C&R with her attorney at the time and that the attorney explained its terms to her. In addition, she acknowledged by initialing each page of the C&R that she had read and understood it and by swearing that she

read and understood it. This constituted substantial evidence that there was no basis to set aside the C&R.

The board did not abuse its discretion in limiting the SIME to a records review. The SIME examiner, Dr. Scoggin, told the board he did not need a physical examination to reach an opinion and his ensuing report was thorough.

The commission affirmed the board's decision to deny supervised physical therapy. Substantial evidence supported that Birotte failed to prove her claim by a preponderance of the evidence after the compensability presumption dropped out. The commission stated:

Not only did the opinions of Drs. Goldman and Scoggin weigh in the board's thinking, most importantly, on June 8, 2010, when Birotte returned to physical therapy for an evaluation, *the therapist recommended physical therapy once per week, for three weeks, to develop a home exercise program*. Dr. Roderer merely referred Birotte to physical therapy. The physical therapist, Dr. Goldman, and Dr. Scoggin were in agreement that a home exercise program would suit Birotte's needs. As opposed to supporting Birotte's assertion that she required supervised physical therapy, the preponderance of the evidence showed that a home exercise regimen was the better option. In accordance with established case law, the board chose a reasonable alternative form of treatment. Dec. No. 171 at 19.