ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

GLENN A. GRACIK, Employee, Claimant, v. INTERIOR TOWING & SALVAGE, INC., Employer, and AMERICAN INTERSTATE INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201506873 AWCB Decision No. 16-0065 Filed with AWCB Fairbanks, Alaska on July 30, 2016.

Glenn Gracik's (Employee) March 22, 2016 Workers' Compensation Claim for Review of the Reemployment Benefits Administrator's Designee's (RBA Designee) finding of ineligibility for rehabilitation and reemployment benefits, was heard on June 30, 2016, in Fairbanks, Alaska. The hearing was selected on April 26, 2016. Attorney Robert Groseclose appeared and represented Employee. Attorney Michael Budzinski appeared and represented Interior Towing & Salvage, Inc. and American Interstate Insurance Company (Employer). Employee appeared and testified. The record closed at the hearing's conclusion on June 30, 2016.

ISSUES

On June 27, 2016 Employee, filed a Supplement to Notice of Intent to Rely. At the June 30, 2016 Hearing, Employer objected to that report being considered because it was past the June 10, 2016 deadline the parties had agreed to for submitting evidence. Employee argued that the evidence was cumulative.

1) ***Should the Employee's June, 27 2016 Supplement to Notice of Intent to Rely be excluded from consideration by the board?***

Employee contends his vocational rehabilitation should be reconsidered based upon Dr. Richard Cobden's April 28, 2016 report that he is not physically capable of returning to his tow truck driver job, or any of the other employment he has held in the past ten years. Employee contends the RBA Designee's decision was made prematurely and without the benefit of Dr. Cobden's opinion. Employee ultimately requests a vocational rehabilitation re-evaluation.

Employer contends the RBA Designee based her decision on Dr. Mark Wade's February 9, 2016 opinion predicting Employee would have the physical capabilities to perform the jobs in his past ten year history before the injury. Employer contends that Dr. Wade's opinion constitutes substantial evidence to support the decision. Employer contends the RBA Designee did not abuse her discretion and that her decision should be upheld.

2) ***Did the RBA Designee abuse her discretion by finding Employee ineligible for reemployment benefits under AS 23.30.041?***

FINDINGS OF FACT

A review of the available record establishes the following facts and factual conclusions by a preponderance of the evidence:

1) On January 30, 2015, Employee injured his left shoulder and right knee in the course of his employment as a tow truck driver when he slipped and fell from his tow truck. (Report of Occupational Illness or Injury, May 5, 2015).

2) Employer accepted compensability of the injury and began paying timeloss and medical benefits.

3) On June 12, 2015, Dr. Wade performed left shoulder surgery on Employee. (Record).

4) On January 14, 2016, Dr. Wade opined Employee could not be released to work:

> Glenn Gracik is here today for evaluation of his left shoulder. He wants to have a full release for a truck driver. Unfortunately, I feel that given the fact he had a large massive rotator cuff repair and allograft, I do not think that he is in the position to do any heavy labor or any repetitive demands on the shoulder for the remainder of his life. Clearly, a low sedentary-style job that requires more of a clerical-type environment as opposed to picking up heavy chains and cables is not in his best interest. I explained to Mr. Gracik that given the significant amount of degeneration

> and what was required to repair his left shoulder that I believe that possibly vocational rehab would be in his best interest. He had a massive rotator cuff repair that required allograft material simply to achieve humeral head coverage, and given these findings, I do not think heavy labor and exertional demands on his left shoulder are in his best interest. (Dr. Wade Opinion, January 14, 2016).

5) On January 26, 2016, Employee was referred for an eligibility evaluation for reemployment benefits with rehabilitation specialist Tommie Hutto. Mr. Hutto prepared an occupation description for the jobs Employee held in the ten years prior to his injury. These jobs included: tow-truck operator; instructor, vocational training; stock clerk; and teacher, adventure education. (RBA Referral Letter, January 26, 2016; Hutto Consulting Report, February 13, 2016).

6) On February 9, 2016, Dr. Wade opined that Employee would have the permanent physical capacities to perform each job in his ten year job history. Dr. Wade then referred Employee to Dr. Cobden for a permanent partial impairment rating. (Hutto Consulting Report, February 13, 2016).

7) Neither party contacted Dr. Wade regarding the differences in his January 14, 2016 opinion and February 9, 2016 opinion. (Observations; record).

8) On March 9, 2016, the RBA Designee issued a decision finding Employee ineligible for reemployment benefits based on Dr. Wade's February 9, 2016 opinion that he could perform the jobs in his ten-year work history. (RBA Determination, March 9, 2016).

9) On March 22, 2016, Employee filed a Workers' Compensation Claim (WCC) requesting review of the RBA's finding of ineligibility for rehabilitation and reemployment benefits. (WCC, March 22, 2016).

10) On April 28, 2016, Dr. Cobden assigned Employee a 6% PPI rating. Dr. Cobden also opined that Employee would not be able to return to work as a tow truck driver. Dr. Cobden's record stated:

> [Employee] apparently has been turned down for vocational rehabilitation based upon Dr. Wade's suggestion that he can return to driving a tow truck. After reviewing Dr. Wade's notes, his physical findings, and his prior training and work experience, I do not think that he could perform this job adequately. Therefore I would suggest that vocational rehabilitation be reconsidered. (Dr. Cobden Report, April 28, 2016).

11) On June 17, 2016, Dr. Cobden responded to questions following up on his April 28, 2016 report. Dr. Cobden checked the boxes indicating that Employee would have less than the physical demands of his former tow-truck driver position and the other jobs that exist in the labor market that

Employee had held or received training for within 10 years before the injury. (Supplement to Notice of Intent to Rely, June 27, 2016).

12) At the April 26, 2016 prehearing conference (PHC), the parties agreed to the following: "Hearing is set for June 30, 2016. Witness lists (8 AAC 45.112) and written briefs (8AAC 45.114) must be served and filed by June 23, 2016. All evidence must be served and filed by June 10, 2016." (PHC Summary, April 26, 2016).

13) On June 8, 2016 Employee filed a Notice of Intent to Rely on Dr. Cobden's April 28, 2016 medical record. On June 16, 2016 Employee filed a hearing brief. On June 23, 2016 Employer filed a hearing brief without exhibits. On June 27, 2016 Employer filed a hearing brief with exhibits. On June 27, 2016 Employee filed a Supplement to Notice of Intent to Rely. (Record).

13) Both Employee and Employer filed evidence after the June 10, 2016 deadline. (Record).

14) Employee credibly testified about his employment history, his injury, and his left shoulder surgery. Employee testified that Dr. Wade advised him there was no guarantee that he would fully recover from the surgery. Employee stated that the surgery improved his condition, but it did not fully resolve it. He can lift and raise his arm and has range of motion, but has no strength. He was advised not to do more than household chores. He testified that he does not think he is physically capable of doing any of the work in his ten-year history. (Employee).

PRINCIPLES OF LAW

AS 23.30.041. Rehabilitation and reemployment of injured workers.

. . .

(c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. If the

> administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.
>
> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. The administrator may grant up to an additional 30 days for performance of the eligibility evaluation upon notification of unusual and extenuating circumstances and the rehabilitation specialist's request. Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.
>
> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles' for
>
> > (1) the employee's job at the time of injury; or
> > (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles.'

Pursuant to AS 23.30.041(e)'s express language, medical evidence of eligibility must satisfy three requirements. First, the evidence must take the form of a *prediction.* Second, the person making the prediction must be a *physician.* Third, the prediction must compare the physical demands of the employee's job, as the U.S. Department of Labor describes it, with the

employee's physical capacities. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 73 (Alaska 1993).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases or decreases the compensation, or award compensation.

The RBA-Designee's decision must be upheld absent "an abuse of discretion." Several definitions of "abuse of discretion" appear in Alaska law although none appear in the Alaska Workers' Compensation Act. The Alaska Supreme Court describes abuse of discretion as "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). *See also Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962); *Black's Law Dictionary* 8 (7th ed. 2000).

The Administrative Procedure Act (APA) provides another, similar definition used by courts in considering appeals from administrative agency decisions. It expressly includes reference to a "substantial evidence" standard:

> **AS 44.62.570. Scope of review**.
>
> . . .
>
> (b) Inquiry in an appeal extends to the following questions: (1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. . . .
>
> . . .

> (c) . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by
>
> (1) the weight of the evidence; or
>
> (3) substantial evidence in the light of the whole record.

When applying a substantial evidence standard of review, a "[reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order . . . must be upheld." *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978).

> **8 AAC 45.150. Rehearings and modifications of board orders**. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
>
> (b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.
>
> (c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.
>
> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
>
> (1) the facts upon which the original award was based;
>
> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
>
> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
>
> (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

In *Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 960-61 (Alaska 1998), the Alaska Supreme Court held a petition for modification under AS 23.30.130(a) is timely, and the board may consider modification, if the petitioner files the request within one year of the last payment of compensation, or of the filing of the challenged decision and order. The Alaska Supreme Court discussed subsection 130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 164 (Alaska 1974): "The plain import of this amendment (adding "mistake in a determination of fact' as a ground for review) was to vest a deputy commissioner with broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Interior Paint Co.*, 522 P.2d at 168 (citations omitted). The board applies AS 23.30.130 to changes in condition, including those affecting reemployment benefits and vocational status (*see, e.g., Imhof v. Eagle River Refuse*, AWCB Decision No. 94-0330 (December 29, 1994)).

ANALYSIS

1) Should the Employee's June 27, 2016 Supplement to Notice of Intent to Rely be excluded from consideration by the board?

Both parties filed evidence past the agreed upon June 10, 2016 deadline. On June 27, 2016 the Employee filed a Supplement to Notice of Intent to Rely and the Employer filed his June 23, 2016 brief with exhibits for the first time. Further, the evidence filed with Employee's June 27, 2016 Supplement to Notice of Intent to Rely is cumulative of evidence Employer had knowledge of prior to the hearing and in preparing its brief. The board will therefore consider all of the evidence filed by both parties.

2) Did the RBA Designee abuse her discretion by finding Employee ineligible for reemployment benefits under AS 23.30.041?

In its written brief, and at the June 30, 2016 hearing, Employee presented medical evidence from Dr. Cobden that he would not be physically capable of returning to work in his current job or jobs in his ten-year history before the injury. Dr. Cobden gave this opinion on April 28, 2016, a month and

a half after the RBA Designee issued her decision denying eligibility for reemployment benefits. Under 8 AAC 45.150(d)(2) this evidence is newly discovered and Employee could not with due diligence have produced it for the RBA Designee's consideration prior to her March 9, 2016 finding of ineligibility.

8 AAC 45.150(e) requires specific facts, not just a general allegation, of a change of condition or mistake of fact to serve as a basis for modification. In this case, Employee identifies specific medical evidence developed after the RBA Designee's determination, which he argues should render him eligible for reemployment benefits under AS 23.30.041. In addition to Dr. Cobden's opinion, there is also the January 14, 2016 and February 9, 2016 differing opinions of Dr. Wade to consider. Although Dr. Wade opined on February 9, 2016 that Employee was able to perform the physical requirements of any of the positions he held prior to his work injury, he opined that Employee could not return to work on January 14, 2016 and referred Employee to Dr. Cobden for a PPI rating. On review of the entire medical file as it now exists, there is a basis to find Employee will have less than the physical demands of jobs he held within the ten years prior to his work injury, as required under AS 23.30.041(e)(2). Accordingly, based on the evidence in the present record, Employee may be eligible for benefits under AS 23.30.041.

Based on the record available to her at the time of her determination, substantial evidence existed to support the RBA Designee's finding of eligibility. However, on review of the present record, including the newly discovered and newly developed evidence, in light of AS 23.30.041(e)(2) there is not substantial evidence to support the RBA Designee's determination. The matter is remanded to the RBA Designee to re-evaluate Employee's eligibility for reemployment benefits.

CONCLUSIONS OF LAW

1) The Employee's June 27, 2016 Supplement to Notice of Intent to Rely is accepted into the record.
2) The RBA Designee did not abuse her discretion by finding Employee eligible for reemployment benefits under AS 23.30.041(e), based on the evidence before her.

3) This matter should be remanded to the RBA to consider whether Employee is eligible for reemployment benefits, based on Dr. Cobden's new opinion.

ORDER

1) Employee's March 22, 2016 Workers' Compensation Claim for Review of Reemployment Eligibility is DENIED.

2) The RBA Designee's March 9, 2016 determination is VACATED. The matter is REMANDED to the RBA Designee for reevaluation and consideration of Dr. Cobden's April 28, 2016 opinion.

Dated in Fairbanks, Alaska this 30th day of July, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kelly McNabb, Chair Designee

/s/
Jacob Howdeshell, Board member

Unavailable for Signature
Sarah Lefebvre, Board Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of GLENN A GRACIK, employee / claimant; v. INTERIOR TOWING & SALVAGE, INC., employer; AMERICAN INTERSTATE INSURANCE COMPANY, insurer / defendants; Case No. 201506873; dated and filed in the Alaska Workers' Compensation Board's

office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 2, 2016.

/s/
Elizabeth Pleitez, Office Assistant