ALASKA WORKERS' COMPENSATION BOARD

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

TITO ROJAS, Employee, Claimant, v. WEIDNER PROPERTY MANAGEMENT, LLC, Employer, and UNITED STATES FIRE INSURANCE CO., Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201119376 AWCB Decision No. 13-0118 Filed with AWCB Anchorage, Alaska on September 26, 2013

Weidner Property Management LLC's (Employer) August 16, 2013 petition for a hearing continuance; Employer's April 15, 2013 petition for review of the Reemployment Benefit Administrator designee's (RBA designee) April 4, 2013 determination of eligibility; and Tito Rojas' (Employee) July 9, 2013 claim were heard on August 21, 2013, in Anchorage, Alaska, a date selected on May 8, 2013. Attorney Christopher Beltzer appeared and represented Employee. Attorney Rebecca Holdiman-Miller appeared and represented Employer and its workers' compensation carrier. This decision examines oral orders denying Employer's continuance request and overruling Employer's objection to the issues set for hearing; it also addresses Employer's petition and Employee's claim on their merits. There were no witnesses. The record remained open for Employee to submit an affidavit of supplemental attorney's fees and costs. The record closed on August 21, 2013.

ISSUES

As a preliminary matter, Employer's August 16, 2013 petition for a continuance contended good cause existed to continue the hearing so an updated opinion from Employee's treating physician, Dr. Jeffrey Moore, M.D., could be obtained and considered to determine whether the RBA designee's eligibility determination should be affirmed. Dr. Moore was unavailable for deposition since August 9, 2013, and could not testify at the August 21, 2013 hearing. Employer requested either a continuance or an order leaving the record open to allow it to subpoena or depose Dr. Moore.

Employee objected to both a continuance and an order leaving the record open, contending Employer did not satisfy procedural requirements or establish Dr. Moore as a material witness. Employee contended any evidence elicited from Dr. Moore after April 4, 2013, would be inadmissible either because with due diligence it could have been produced prior to the eligibility determination, or it was irrelevant to this hearing because it was an opinion formed since the RBA designee's decision. Employee asserted continuances are disfavored and Employer failed to demonstrate good cause for one. An oral order denied Employer's continuance request, and by implication, its request to leave the record open.

1) Was the oral order denying Employer's continuance request correct?

Employee contended the August 7, 2013 prehearing conference summary stated the parties agreed hearing issues were Employer's appeal of the RBA's April 4, 2013 finding of eligibility; temporary total disability (TTD) and AS 23.30.041(k) stipend from March 1, 2013 onward; interest; and attorney's fees and costs.

Employer objected to Employee's issues, contending the August 7, 2013 prehearing conference summary was incorrect and the only hearing issue should be Employer's appeal of the RBA's determination. An oral order overruled Employer's objection.

2) Was the oral order overruling Employer's objection to the hearing issues correct?

Employer contends either this decision, or the designee on remand, should find Employee ineligible for reemployment benefits. Employer contends at a minimum it wants a review of the April 4, 2013 reemployment eligibility determination to ensure the designee considered evidence Employer asserts was filed April 1, 2013: surveillance video filmed February 22-27, 2013, and the March 27, 2013 medical opinion of Employer's Independent Medical Examiner (EME) Dr. Matthew Provencher, M.D. Employer contends a remand is warranted because there is no indication the designee weighed this "new or newly discovered" evidence. Employer also contends the designee impermissibly relied on medical opinions signed by a certified physician's assistant, Jared Crawford, PA-C, rather than his supervising physician, Dr. Moore.

Additionally Employer contends a new eligibility determination should take into consideration evidence obtained after April 4, 2013: Dr. Moore's as yet undiscovered medical opinion regarding the surveillance video, and Employee's August 7, 2013 deposition testimony. Employer contends when all relevant facts and evidence are examined, Employee will be found able to return to work at medium duty, including his job at the time of injury and earlier jobs.

Employee contends the designee did not abuse her discretion; substantial evidence supports her decision and it should therefore be upheld. He contends no provision in the Alaska Workers' Compensation Act (Act) permits a review or remand solely because evidence exists that may not have been considered by the designee. Employee contends if Employer thinks the designee made the wrong decision, the proper recourse is to submit the "new or newly discovered" evidence in a petition for modification based on a change in conditions or mistake in determination of fact.

Employee contends the Act allows an RBA designee to base an eligibility determination on opinions issued by a certified physician's assistant supervised by a licensed medical doctor. Employee further contends a remand would cause undue delay and hardship to Employee, who has received no benefits since April 19, 2013.

3) Should the RBA designee's April 4, 2013 determination of reemployment benefits eligibility be affirmed?

Employee contends he is due TTD benefits plus interest through March 4, 2013, because treating physician Dr. Moore opined medical stability was not attained until March 5, 2013. Employer contends TTD benefits were properly ended on February 28, 2013, based on Dr. Provencher's EME opinion. Employer contends Employee reached medical stability on February 28, 2013.

4) Is Employee entitled to TTD benefits plus interest for March 1, 2013 through March 4, 2013?

Since he is entitled to reemployment benefits and accepted his permanent partial impairment (PPI) compensation in a lump sum, Employee contends he is also entitled to AS 23.30.041(k) compensation from the date his PPI benefits would have been exhausted had they been paid bi-weekly. He also contends he is entitled to interest. He seeks an order awarding these benefits.

Employer contends Employee is not eligible for reemployment benefits. Therefore, it contends Employee cannot be entitled to §041(k) compensation and his claim must be denied.

5) Is Employee entitled to AS 23.30.041(k) compensation plus interest beginning June 22, 2013?

Post-hearing, Employee filed an August 21, 2013 motion to allow evidence clarifying his 10-year work history, contending Employee's counsel did not fully understand the facts at hearing due to a language barrier. On August 26, 2013, Employer objected and moved to exclude this evidence, contending the record was not left open for its submission, and Employer did not have the opportunity to cross examine Employee or address the evidence's significance at hearing. On September 4, 2013, Employee opposed Employer's motion to exclude evidence, contending Employer raised an issue with Employee's work history for the first time at hearing, and Employee was entitled the opportunity to present rebuttal evidence.

6) Should the parties' post-hearing requests for relief and objections be considered?

Employee contends he is entitled to attorney's fees and costs through August 21, 2013. He seeks an order awarding these benefits.

Employer did not object to the hours, rate or costs requested. However, as it contends Employee is entitled to no relief, it implicitly contends he is entitled to no attorney's fees or costs.

7) Is Employee entitled to attorney's fees and costs?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On December 12, 2011, Employee during the course and scope of employment incurred an injury to the left shoulder (Report of Occupational Injury or Illness, December 15, 2011).

2) On January 27, 2012, Dr. Moore examined Employee and recommended surgical treatment (Clinic note, January 27, 2012).

3) From January 31, 2012 through April 29, 2012, Employee received TTD benefits (Compensation Report, May 1, 2013).

4) On February 24, 2012, Dr. Moore and PA-C Crawford performed orthopedic surgery on Employee's left shoulder (Operative Report, February 24, 2012).

5) From February 28, 2012 through March 5, 2013, Dr. Moore, or PA-C Crawford under Dr. Moore's supervision, examined Employee nine times (Clinic notes, February 28, 2012; March 27, 2012; April 24, 2012; July 10, 2012; September 11, 2012; October 23, 2012; November 13, 2012; January 3, 2013; and March 5, 2013).

6) From April 30, 2012 through November 20, 2012, Employee received temporary partial disability (TPD) benefits (Compensation Report, May 1, 2013).

7) On September 26, 2012, EME Dr. Provencher performed an orthopedic examination of Employee and opined he could do light duty work on a full-time basis. Dr. Provencher restricted Employee to no overhead activity, no lifting more than 20 pounds, no climbing or stooping, and no ladders (EME report, September 26, 2012).

8) From November 21, 2012, through February 28, 2013, Employee received TTD benefits (Compensation Report, May 1, 2013).

9) On December 20, 2012, Rehabilitation Specialist Peter Vargas was assigned to perform Employee's reemployment benefits eligibility evaluation (Reemployment Benefits letter, December 20, 2012).

10) On January 3, 2013, Dr. Moore and PA-C Crawford predicted Employee would have a PPI rating greater than zero, and could return to light work with permanent restrictions of no overhead reaching or lifting more than 25 pounds. Employee stated his 10-year work history included the following jobs, as classified in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (SCODRDOT): Painter (construction); Maintenance Repairer, Building (any industry); Laborer, Landscaper (agriculture); Painter, Sprayer II (any industry); Insulation Worker (construction); and Baker (bakery products). Dr. Moore and PA-C Crawford predicted Employee would not have the permanent physical capacities to perform the physical demands of these jobs, all of which were medium to heavy work (Clinic note, January 3, 2013).

11) On February 4, 2013, specialist Vargas recommended Employee was eligible for reemployment benefits, based in part on Dr. Moore's opinions (Eligibility Evaluation Report, February 4, 2013.)

12) From February 22–27, 2013, Employer surveilled Employee by video (DVD evidence filed August 9, 2013).

13) On Feb. 28, 2013, Dr. Provencher found Employee medically stable and released him to "sedentary to light or light-medium category" work. Dr. Provencher agreed with Dr. Moore's permanent restrictions of lifting no more than 25 pounds and no repetitive left overhead activities. Dr. Provencher disapproved all jobs Employee held in the prior 10 years, including maintenance repairer, laborer, painter, insulation worker and baker (EME report, February 28, 2013).

14) Employee did not work from March 1, 2013 through March 5, 2013 (record).

15) On March 5, 2013, Employee's attending physician examined him. On Dr. Moore's behalf, PA-C Crawford opined medical stability was effective that day and Employee would incur a ratable PPI. Mr. Crawford wrote, "We think he is very functional but we would like to protect this shoulder with maintaining permanent work restrictions and avoid overhead reaching activities as well as a 25-lb. weight limit" (Moore/Crawford Corvel Questionnaire; Crawford clinic note).

16) On March 14, 2013, 15 days after the February 22-27, 2013 surveillance concluded, Employer sent the video to EME Dr. Provencher. At hearing, Employer had no explanation for not sending the video sooner (record).

17) On March 27, 2013, Dr. Provencher issued an EME addendum. Based on the surveillance video, Dr. Provencher approved Employee for all jobs at a medium category. However Dr. Provencher also opined Employee "should have no more than 35 pounds of lifting" and approved Employee for "lifting below the waist at 35 pounds" (EME addendum, March 27, 2013).

18) Official notice is taken that the SCODRDOT defines "medium work" as exerting 20 to 50 pounds of force occasionally (up to 1/3 of the time), or 10 to 25 pounds of force frequently (from 1/3 to 2/3 of the time), or an amount greater than negligible and up to 10 pounds constantly (2/3 or more of the time) to move objects (SCODRDOT, 1993).

19) On March 29, 2013, Dr. Shawn P. Johnston, M.D., issued a four percent PPI rating for Employee's shoulder injury (Johnston chart note, March 29, 2013).

20) On April 1, 2013, Employer controverted TTD, TPD, and vocational rehabilitation benefits based on EME Dr. Provencher's March 27, 2013 addendum report. Employer stated Dr. Provencher opined Employee was cleared to return to work with a 35-pound permanent lifting restriction, which put him in the "medium" work category and "fell within his pre-injury employment." At hearing Employer stated the February 22–27, 2013 surveillance video was filed on April 1, but this is not indicated in the agency file and Employer concededly had no proof of its filing (Controversion, April 1, 2013; record).

21) On April 4, 2013, the RBA designee found Employee eligible for reemployment benefits based on PA-C Crawford's January 3, 2013 report. There is no indication whether she considered the February 22-27 surveillance video or Dr. Provencher's March 27, 2013 opinion (Eligibility letter, April 4, 2013; record).

22) On April 15, 2013, Employer petitioned for review of the designee's eligibility determination, asserting on March 27, 2013, Dr. Provencher opined Employee retained the physical capacities to perform medium-duty work, which included his job held at the time of injury (Petition, April 15, 2013).

23) On April 15, 2013, Employer filed a hearing request attesting it had completed necessary discovery, obtained necessary evidence, and was fully prepared for the issues presented in the April 15, 2013 petition for review (Affidavit of Readiness for Hearing (ARH), April 15, 2013).

24) Employer's May 1, 2013 Compensation Report indicated Employee's gross weekly earnings were $636.00 and his TTD and PPI compensation benefits were $452.13 weekly. From these figures, his spendable weekly wages are calculated to be $565.16. Employer terminated TTD on

February 28, 2013, and Employee received PPI from March 1, 2013 to March 30, 2013. At four percent impairment, Employee's PPI benefits totaled $7,080.00; he was paid the balance in a lump sum on April 19, 2013. Employee has received no workers' compensation benefits since (Compensation Report, May 1, 2013; record).

25) At prehearing on May 8, 2013, a hearing was set on Employer's April 15, 2013 appeal of the RBA designee's finding of eligibility for reemployment benefits. August 1, 2013 was set as the deadline for filing evidence (Prehearing conference summary, May 8, 2013).

26) On June 4, 2013, Employer objected to any further action on Employee's reemployment plan, based on the April 15, 2013 petition for review of the April 4, 2013 eligibility determination (Employer letter to RBA, June 4, 2013).

27) On July 9, 2013, Employee filed a Workers' Compensation Claim based on the April 1, 2013 controversion of TTD and retraining benefits. The claim sought TTD from March 1, 2013 to March 4, 2013; an AS 23.30.041(k) stipend from May 27, 2013 through ongoing; and attorney's fees and costs (claim, July 9, 2013).

28) On July 31, 2013, Employer controverted the July 9, 2013 claim. Employer maintained all benefits due Employee had been timely paid or controverted based on fact or law (Answer and Controversion Notice, July 31, 2013).

29) On August 1, 2013, Employee filed an ARH based on his July 9, 2013 claim (ARH, August 1, 2013).

30) On August 6, 2013, Employer filed an affidavit of opposition to the August 1, 2013 ARH, contending it had not completed discovery because it had not deposed Employee and it might need to schedule another EME and depose Dr. Provencher (Affidavit, August 5, 2013).

31) At deposition on August 7, 2013, Employee stated the surveillance video showed him lifting a fifty-pound bag from a grocery cart to his car. He also testified he worked as a dishwasher at Alaska Regional Hospital at some point in the 10 years before the 2011 injury (Deposition transcript at pp.13-14 and p.38).

32) At prehearing on August 7, 2013, the parties agreed the hearing issues were: "Appeal of RBA decision, TTD/.041(k) stipend from 3/01/2013-, interest, costs and attorney's fees." The prehearing conference summary does not mention incomplete discovery (Prehearing Conference Summary, August 7, 2013).

33) Neither party filed a written objection to the August 7, 2013 prehearing conference summary (record).

34) On August 9, 2013, Employer filed the deposition transcript and surveillance video (record).

35) On August 16, 2013, Employer petitioned for a hearing continuance based on Dr. Moore's unavailability. Employer also filed an affidavit stating it learned on August 16, 2013, both Dr. Moore and PA-C Crawford were unavailable for deposition from August 9, 2013 through August 20, 2013, and Dr. Moore was unavailable to testify at hearing on August 21, 2013. The affidavit did not set out the facts Employer expected Dr. Moore's testimony to prove. The affidavit was the first filed indication Employer wanted additional discovery from Dr. Moore or intended to call him as a witness (Petition and affidavit, August 16, 2013; record).

36) On August 19, 2013, parties filed witness lists. Employer indicated Dr. Moore or PA-C Crawford might testify live or telephonically regarding matters relevant to Employee's treatment and current physical abilities, and return-to-work issues (Employer and Employee witness lists, August 19, 2013).

37) On August 19, 2013, Employee filed an affidavit of attorney's fees, based on a $300 hourly rate, and costs, totaling $10,069.22 (Affidavit, August 19, 2013).

38) On August 21, 2013, Employee opposed Employer's petition for continuance (Opposition, August 21, 2013).

39) At hearing on August 21, 2013, Employer stated it had no proof the February 22-27, 2013 surveillance video of Employee was filed prior to August 9, 2013 (record).

40) The hearing record was left open until close of business, August 21, 2013, for Employee to file updated attorney's fees and costs (record).

41) Post-hearing on August 21, 2013, Employee filed an affidavit of supplemental attorney's fees and costs, totaling $4,560.00, and a motion to allow clarifying evidence regarding his work history. The invoice included $150.00 in fees and $14.25 in costs incurred in preparing the post-hearing motion (Affidavit and motion, August 21, 2013).

42) On August 27, 2013, Employer filed an objection to Employee's August 21, 2013 motion to allow clarifying evidence, and moved to exclude it (Motion, August 26, 2013).

43) On September 5, 2013, Employee filed an opposition to Employer's August 26, 2013 motion to exclude evidence (Opposition, September 4, 2013).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter.
It is the intent of the legislature that

1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to . . . employers. . . .

AS 23.30.005. Alaska Workers' Compensation Board.
. . .

(h) The department shall . . . adopt regulations to carry out the provisions of this chapter. . . Process and procedure under this chapter shall be as summary and simple as possible.
. . .

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.041. Rehabilitation and reemployment of injured workers. . . . .
. . .

(d) . . . 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 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."
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> (k) . . .If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability or permanent partial impairment benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability or permanent partial impairment benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). . .
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> (r) In this section . . .
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> (5) "physical demands" means the physical requirements of the job such as strength, including positions such as standing, walking, sitting, and movement of objects such as lifting, carrying, pushing, pulling, climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling, fingering, feeling, talking, hearing, or seeing;
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> . . .

Medical evidence of eligibility for reemployment benefits must satisfy three requirements: first, the evidence must take form of prediction; second, the person making the prediction must be physician; and third, the prediction must the compare the physical demands of employee's job, as the United States Department of Labor describes them, with employee's physical capacities. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 73 (Alaska 1993). A rehabilitation applicant's designated treating physician must be consulted, and his views must be considered, in making an eligibility determination. *Irvine v. Glacier General Construction*, 984 P.2d 1103

(Alaska 1999). If faced with two conflicting medical opinions, both of which constitute substantial evidence, the RBA designee and the board have discretion to favor either opinion over the other. *Yahara* at 72-73.

The language of AS 23.30.041(e)(1) was found clear and unambiguous in *Konecky v. Camco Wireline*, 920 P.2d 277 (Alaska 1996). Claimants were found eligible for reemployment benefits only if their physical capacities were less than the physical demands as described in the SCODRDOT, not the actual physical demands of a particular job.

The RBA's decision must be upheld absent an abuse of discretion. AS 23.30.041(d). Several definitions of "abuse of discretion" appear in Alaska law although none appears in the 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). 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).

In *Haight v. Kiewit Pacific Co.*, AWCB No. 08-0203 (October 31, 2008), an employer petitioned for modification of an RBA designee's determination based on an SIME opinion issued five months after the employee was found eligible. After the petition but prior to hearing, the treating physician and the employee both provided new material evidence. The case was remanded to the RBA to determine whether to modify the eligibility determination.

> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the

> services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
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> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id.* at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* In this latter scenario, reasonable fees may be awarded. *Id.* at 152-53.

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 973 (Alaska 1986), the Alaska Supreme Court held attorney fee awards under AS 23.30.145(b) should be "both fully compensatory and reasonable so that competent counsel will be available to furnish legal services to injured workers." In determining a reasonable fee under AS 23.30.145(b), the board is required to consider the contingency nature of representing injured workers, the nature, length, and complexity of the services performed, the resistance of the employer, the benefits resulting from the services obtained, the fee customarily charged in the locale for similar services, and the experience, reputation and ability of the lawyer performing the services. *Id.* at 975.

> **AS 23.30.395. Definitions.**
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> In this chapter,
> . . .
> (3) "attending physician" means one of the following designated by the employee under AS 23.30.095(a) or (b):
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> (A) a licensed medical doctor;
> . . .

> (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;
> . . .
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> **AS 44.62.570. Scope of review**. . . .
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> 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. . . . 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 (2) substantial evidence in the light of the whole record.

On appeals to the Alaska Workers' Compensation Appeals Commission or the courts, decisions reviewing designee determinations are subject to reversal under the "abuse of discretion" standard in AS 44.62.570, incorporating the "substantial evidence test." Generally, a decision of the board will survive a challenge if substantial evidence exists to support its findings of fact. *Yahara* at 72. Substantial evidence is that which a reasonable mind, viewing the record as a whole, might accept as adequate to support a decision. *Id*. When applying a substantial evidence standard, "[the 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).

Determining whether an abuse of discretion has taken place is aided by the practice of allowing additional evidence at the review hearing, based on the rationale expressed in several superior court opinions addressing Board decisions. *See, e.g., Kelley v. Sonic Cable Television*, Superior Court Case No. 3AN 89-6531 CIV (February 2, 1991); *Quirk v. Anchorage School District*, Superior Court Case No. 3AN-90-4509 CIV (August 21, 1991). Nevertheless, 8 AAC 45.070(b)(1)(A) precludes additional evidence if the party offering it failed to exercise reasonable diligence in developing and presenting it to the RBA designee. *See, e.g., Snell v. Interstate Brands Corp.*, AWCB Decision No. 99-0110 (May 12, 1999); *Kin v. Norcon*, AWCB

Decision No. 99-0041 (March 1, 1999); *Lemire v. B&R Construction*, AWCB Decision No. 99-0019 (January 28, 1999).

After allowing parties to offer admissible evidence, all the evidence is reviewed to assess whether the RBA's decision was supported by substantial evidence and therefore reasonable. *Yahara* at 72. If, in light of all the evidence, the eligibility decision is not supported by substantial evidence, the RBA designee abused her discretion and the case is remanded for reexamination and further action. *Id.*

> **8 AAC 45.065. Prehearings**. . . .
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> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.
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> (d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.
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> **8 AAC 45.070. Hearings**. . . .
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> (b). . .
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> (1) A hearing is requested by using the following procedures:
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> (A) For review of an administrator's decision issued under AS 23.30.041(d) . . . the board may not consider evidence that was not available to the administrator at the time of the administrator's decision unless the board determines the evidence is newly discovered and could not with due diligence have been produced for the administrator's consideration.

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable;

. . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

. . .

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing ....

8 AAC 45.120. Evidence. . . .

. . .

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

8 AAC 45.525. Reemployment Benefit Eligibility Evaluations. . . .

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(h) Any additional information for the administrator's consideration in the eligibility determination shall be filed with the administrator and served on all parties and the rehabilitation specialist no later than 10 days after the rehabilitation specialist's report is filed.

ANALYSIS

1) Was the oral order denying Employer's continuance request correct?

Employer contended good cause for a continuance existed under AS 23.30.074(b)(1)(A) because material witness Dr. Moore was unavailable for deposition from August 9, 2013 through August 20, 2013, and could not testify at hearing. Employer asserted Dr. Moore's as yet undiscovered medical opinion regarding the surveillance video should be taken into consideration in a new eligibility determination.

However in its April 15, 2013 ARH, Employer swore it had completed necessary discovery, obtained necessary evidence, and was fully prepared for hearing. Employer's August 16, 2013 affidavit, five days before hearing, was the first filed indication Employer wanted additional discovery from Dr. Moore or intended to call him as a witness. The affidavit did not set out the facts Employer expected to prove through Dr. Moore's testimony. Therefore Employer neither complied with the procedural requirements of AAC 45.074(a)(1)(A) nor established Dr. Moore as a material witness whose unavailability constituted good cause for a continuance under 8 AAC 45.074(b)(1)(A).

Employer also failed to prove it exercised due diligence to warrant a continuance under 8 AAC 45.074(b)(l)(N). On September 26, 2012, the EME physician recommended only light duty work, and the eligibility determination process started on December 20, 2012, when a rehabilitation specialist was assigned. The rehabilitation specialist completed his eligibility evaluation report on February 4, 2013. Under 8 AAC 45.525(h) any additional information for the designee's consideration in the eligibility determination had to be filed and served on all parties and the specialist no later than February 14, 2013. Employer was aware of these developments, but delayed preparing its case. The surveillance video was not recorded until February 22-27, 2013, and Employer has no explanation for waiting 15 days before sending the video to Dr. Provencher.

Similarly, Employer made no attempt to obtain an updated medical opinion from Dr. Moore prior to the April 4, 2013 eligibility determination. Any evidence Employer elicited from Dr.

Moore afterwards would be inadmissible at hearing for one of two reasons: (1) it was an opinion Employer could with due diligence have produced for the designee's consideration prior to the eligibility determination; or (2) it was an opinion formed after April 4, 2013, in which case it is immaterial in a review for abuse of discretion. 8 AAC 45.070(b)(1)(A).

Furthermore, under 8 AAC 45.074(b), continuances are not favored, will not be routinely granted, and may be ordered "only for good cause and in accordance with this section." Under these facts, the oral order denying the continuance request was correct.

Lastly, Employer requested the record be left open to allow it to subpoena or depose Dr. Moore. As analyzed above, under 8 AAC 45.070(b)(1) only medical opinions that with due diligence could have been produced prior to the eligibility determination are material to the current hearing. Employer could have, but did not depose Dr. Moore before April 4, 2013. Any opinion Dr. Moore formed after that date is inadmissible in a review for abuse of discretion, and the record will not be left open for this purpose.

2) Was the oral order overruling Employer's objection to the hearing issues correct?

The May 8, 2013 prehearing conference summary indicated the hearing was "set on Employer's 4/15/2013 appeal of the RBA's finding of eligibility for reemployment benefits." However, at the most recent prehearing conference, on August 7, 2013, the parties agreed the issues were: "Appeal of RBA decision, TTD/.041(k) stipend from 3/01/2013-, interest, costs and attorney's fees." Prior to hearing, Employer did not object to the second summary, and it was not modified or amended. Under 8 AAC 45.065, the hearing issues were governed by the August 7, 2013 prehearing conference summary. Employer's objection was correctly overruled.

3) Should the RBA designee's April 4, 2013 determination of reemployment benefits eligibility be affirmed?

When an injured worker is evaluated for reemployment benefits eligibility, the Act provides he is eligible upon written request and if a physician predicts he will have permanent physical capacities "less than the physical demands" of his job at the time of his injury, or other jobs he

held or received training for within 10 years before the injury, or he held following the injury for a period long enough to obtain competitive skills in the labor market. AS 23.30.041(e); *Yahara.*

Here the designee followed proper procedure. On January 3, 2013, Dr. Moore and PA-C Crawford predicted Employee would have a PPI rating greater than zero, and would not have the permanent physical capacities to perform the physical demands of any jobs he held in the previous 10 years, all of which SCODRDOT categorized as medium to heavy work. The fact PA-C Crawford signed the report, rather than Dr. Moore, is of no legal significance, because a licensed physician assistant acting under supervision of a licensed medical doctor meets the definition of "attending physician" under AS 23.30.395(3)(D).

It is unknown whether the designee considered Dr. Provencher's March 27, 2013 addendum report, but the issue is moot. If the designee weighed Dr. Provencher's and Dr. Moore's reports, she had the discretion to choose one over the other. *Yahara.* If she did not review the recently filed EME opinion, she still fulfilled her *Irvine* duty to consider the treating physician's medical opinion. Whether she watched the surveillance video is irrelevant, because the Act does not require her to do so.

In a review of an RBA designee's eligibility decision, additional evidence is not considered unless the party offering it demonstrates it could not, with due diligence, have produced the newly discovered evidence prior to the eligibility determination. 8 AAC 45.070(b)(1)(A). As analyzed above, Employer did not exercise due diligence in timely procuring and submitting either Dr. Provencher's March 27, 2013 EME addendum or the undiscovered evidence Employer wants to elicit from Dr. Moore. Employee's deposition testimony was not obtained until August 7, 2013, and therefore it too is immaterial in reviewing a determination made April 4, 2013.

Employer cites *Haight* to support its contention newly discovered evidence warrants a remand here. However *Haight* is distinguishable because it concerned a petition for modification, where the case was remanded to the RBA designee to consider evidence that could not with due diligence been produced prior to the eligibility determination. Here, Employer has not petitioned for modification. Its April 15, 2013 petition merely contends the RBA designee should have

relied upon Dr. Provencher's opinion rather than Dr. Moore's. Employer alleges the designee abused her discretion; it does not allege a factual mistake. Thus, *Haight* does not apply.

When reviewing a designee's decision under the abuse of discretion standard, the question is not whether the designee reached the best decision or whether a higher authority would have reached the same decision. The designee's determination must be upheld unless it is arbitrary, capricious, manifestly unreasonable, stems from an improper motive, or improperly applies controlling law. AS 23.30.041(d); *Sheehan; Manthey*. The evidence is not reweighed; if substantial evidence supports a designee's determination, it must be upheld. AS 44.62.570; *Yahara*; *Miller*. Here the RBA designee's decision was based on substantial evidence, and there is no indication she abused her discretion. The April 4, 2013 determination of reemployment benefits eligibility will be affirmed.

4) Is Employee entitled to TTD benefits plus interest for March 1, 2013 through March 4, 2013?

Parties agree Employee was entitled to TTD from November 21, 2012 through February 28, 2013. However, Dr. Moore opined Employee reached medical stability on March 5, 2013, while Dr. Provencher set the date as February 28, 2013. When faced with two conflicting medical opinions, both of which constitute substantial evidence, this decision has discretion to favor either opinion over the other. *Yahara*. As attending physician and surgeon, Dr. Moore had greater knowledge of Employee's medical history, condition, and treatment. Dr. Moore examined Employee nine times in the 13 months after surgery, while EME physician Dr. Provencher examined him twice. Dr. Moore's opinion will be given greater weight. AS 23.30.122. Medical stability is established on March 5, 2013, and Employee is therefore entitled to TTD benefits plus interest for March 1, 2013 through March 4, 2013.

5) Is Employee entitled to AS 23.30.041(k) compensation plus interest beginning June 22, 2013?

Employee's impairment rating is four percent, which equals $7,080.00. He received this amount in two payments, the second a lump sum on April 19, 2013. Employee's bi-weekly PPI should

have begun on March 5, 2013, the day after he reached medical stability and TTD ceased. Employee's PPI rate was $452.13 weekly. If he had not received a lump sum payment, his PPI benefits would have expired 15 weeks and 4 days later, on June 21, 2013. Beginning June 22, 2013, Employee is entitled to ongoing §041(k) compensation equaling 70 percent of his $565.16 spendable weekly wages, or $395.61 per week plus interest. AS 23.30.041(k).

6) Should the parties' post-hearing requests for relief, and objections, be considered?

The record was left open until the end of the hearing day for the sole purpose of allowing Employee to submit updated attorney's fees and costs. No provision was made to allow any other filings regarding the hearing, and the record was not reopened for additional evidence or legal memoranda. Therefore, under 8 AAC 45.120(m), this decision and order will not consider the following: Employee's August 21, 2013 motion to allow clarifying evidence; Employer's August 27, 2013 motion to exclude evidence and objection to Employee's motion to allow clarifying evidence; and Employee's September 5, 2013 opposition to Employer's motion to exclude evidence.

7) Is Employee entitled to attorney's fees and costs?

Employer controverted disability and vocational rehabilitation benefits on April 1, 2013, and July 31, 2013. Employee retained counsel who successfully obtained an affirmation of his eligibility for reemployment benefits, four days of TTD, AS 23.30.041(k) compensation, and interest. Employee is entitled to a fees and costs award under AS 23.30.145.

In making fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on behalf of the employee, and the benefits resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings, and fully but reasonably compensate attorneys, commensurate with their experience, for services performed on issues for which the employee prevails.

Employee's counsel has been practicing law in Alaska for eight years and is an experienced litigator specializing in workers' compensation law. He provided two itemized invoices based on $300.00 per hour plus costs, totaling $14,629.22. Employer did not contest fees or costs.

Based on Employee's counsel's efforts and success in this case, his years of experience, the contingent nature of workers' compensation cases, and recent awards to attorneys similarly situated, a $300.00 hourly rate is reasonable. However, Employee is not entitled to $164.25 in fees and costs incurred in the preparation of unauthorized supplemental materials not considered in this decision and order. Employee will therefore be awarded actual fees and costs totaling $14,464.97.

CONCLUSIONS OF LAW

1) The oral order denying Employer's continuance request was correct.
2) The oral order overruling Employer's objection to the hearing issues was correct.
3) The RBA designee's April 4, 2013 eligibility determination of reemployment benefits eligibility will be affirmed.
4) Employee is entitled to TTD benefits plus interest from March 1, 2013 through March 4, 2013.
5) Employee is entitled to AS 23.30.041(k) compensation plus interest beginning June 22, 2013.
6) The parties' post-hearing requests for relief, and objections, will not be considered.
7) Employee is entitled to attorney's fees and costs.

ORDER

1) Employer's petition for review of the RBA designee's eligibility determination is denied.
2) Employee's claim for TTD benefits from March 1, 2013 through March 4, 2013 is granted in the amount of $258.36, plus interest.
3) Employee's claim for an AS 23.30.041(k) reemployment stipend beginning June 22, 2013, is granted in the amount of $395.61 weekly, plus interest.
4) Employer is directed to pay Employee's counsel $14,464.97 in attorney's fees and costs.

Dated in Anchorage, Alaska on September 26, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
Margaret Scott, Designated Chair

_____
Michael O'Connor, Member

_____
Stacy Allen, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filling a petition for reconsideration under AS 44.62.540 and in accord 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 accord 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 Final Decision and Order in the matter of TITO ROJAS employee / applicant; v. WEIDNER PROPERTY MANAGEMENT, LLC, employer; and UNITED STATES FIRE INSURANCE CO. insurer /defendants; Case No. 201119376, dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, on September 26, 2013.

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Anna Subeldia, Office Assistant