

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

WILBUR W. JAMES,)	
)	FINAL DECISION AND ORDER
Employee,)	
Claimant,)	AWCB Case No. 200902276
)	
v.)	AWCB Decision No. 13-0130
)	
STATE OF ALASKA)	Filed with AWCB Juneau, Alaska
)	on October 22, 2013
Self-Insured Employer,)	
Defendant.)	
_____)	

Wilbur James' (Employee) November 21, 2012 petition for review of the reemployment benefit administrator's (RBA) November 16, 2012 failure to cooperate determination was heard on October 8, 2013, in Juneau, Alaska, a date selected on April 4, 2013. Employee appeared, represented himself, and testified. Attorney Patricia Shake appeared and represented the State of Alaska (Employer). Rehabilitation specialist Denise Van Der Pol appeared and testified. The record closed at the hearing's conclusion on October 8, 2013.

ISSUE

Employee appeals the RBA's November 16, 2012 determination he failed to cooperate in the reemployment benefits process under AS 23.30.041(n). Employee contends the RBA erred by proceeding with the noncooperation hearing when Employee did not have an attorney and was not at the hearing. He also contends he needs a new plan and a new reemployment specialist. He requests reinstatement of his reemployment benefits.

Employer contends the RBA did not abuse his discretion when he determined Employee failed to cooperate in the reemployment benefits process. It seeks an order affirming the RBA's decision.

Should the RBA's November 16, 2012 determination Employee failed to cooperate in the reemployment benefits process under AS 23.30.041(n)(1) be affirmed?

FINDINGS OF FACT

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

- 1) On March 5, 2009, Mary Owen, M.D., treated Employee for bilateral foot pain and diagnosed plantar fasciitis. (Chart Note, Dr. Owen, March 5, 2009).
- 2) On March 16, 2009, Employee reported bilateral foot pain incurred by working for years on his feet for Employer. (Report of Occupational Injury or Injury, March 16, 2009; Chart Note, John Bursell, M.D., April 12, 2010).
- 3) On January 12, 2010, rehabilitation specialist Denise Van Der Pol recommended Employee be found eligible for reemployment benefits. (Eligibility Determination, January 12, 2010).
- 4) On February 4, 2010, RBA Designee Deborah Torgerson found Employee eligible for reemployment benefits. (Letter to Employee from Deborah Torgerson, February 4, 2010).
- 5) On March 8, 2010, Employee elected to receive reemployment benefits and selected Ms. Van Der Pol to prepare a reemployment plan. (Election to Either Receive Reemployment benefits or Waive Reemployment Benefits and Receive a Job Dislocation Benefit Instead, March 8, 2010).
- 6) On April 12, 2010, John Bursell, M.D., performed a permanent partial impairment (PPI) rating for Employee's plantar fasciitis and assessed zero percent PPI. Employee told Dr. Bursell his podiatrist Anh Lam, D.P.M., recommended Employee not return to work on the Alaska Marine Highway system. Dr. Bursell agreed with Dr. Lam, because of the risk Employee's plantar fasciitis would reoccur. (Chart Note, Dr. Bursell, April 12, 2010).
- 7) On August 11, 2010, the RBA notified the reemployment specialist all parties had approved and signed Employee's reemployment plan. The plan's goal was to retrain Employee as an office assistant over 23 months, with an anticipated August 15, 2012 end date. Because Employee was not computer literate, Employee's plan included job-specific vocational training at the University of Alaska Southeast (UAS) from September 2010 to May 2012, with on-the-job

training during the 2011 and 2012 summer months. Employee's responsibilities were identified as:

1. Participate fully in the vocational technical training and on-the-job training plan outlined to become retrained as an Office Assistant.
2. Notify Denise Van Der Pol immediately if events arise which interfere with the timely completion of this Reemployment Benefit Plan.
3. Cooperate with the rehabilitation specialist to receive copies of grades and certifications documenting satisfactory progress and completion of the curriculum.

(RBA Letter to Denise Van Der Pol, August 11, 2010; Reemployment Benefits Plan, August 2, 2010).

8) On September 8, 2010, the reemployment specialist issued a report on Employee's plan progress. She stated Employee had been out of contact with her since August 20, 2010, and numerous attempts to contact him were unsuccessful. Because Employee seemed overwhelmed with the whole school process, the specialist modified the plan, with Employee delaying his UAS Computer Literacy class by a semester and instead first taking an Introduction to Computers class with The Learning Connection. The reemployment specialist reminded Employee his lack of communication was not acceptable and any future incidents would be deemed noncooperation with the reemployment process. (Progress Report, September 8, 2010).

9) On January 28, 2011, the reemployment specialist issued a report on Employee's plan progress. She stated Employee received an "A" in his UAS introductory English class, the only UAS course he took that semester. The specialist noted most of his remaining UAS classes would be taught over the internet. Employee reported work was being done on his residence so he did not have a place to live, leaving him without a contact telephone number and delaying internet connection hookup until the end of the month. The specialist stated, "He was given the opportunity to call from The Learning Connection any day Monday through Thursday since he was supposed to be there anyway to provide updates on his living situation. I have not heard from him since Thursday, January 20, 2011. His last communication was that he was sick and did not know if he was going to class or not. I asked him to call me the next day and let me know, and have not heard from him since." (Progress Report, January 28, 2011).

10) On April 22, 2011, the reemployment specialist issued a report on Employee's plan progress. She stated Employee's plan was still delayed because of Employee's lack of a permanent residence and computer hook up. She stated, "Now his cell phone does not work either. I am dependent on him calling in." (Progress Report, April 22, 2011).

11) On June 17, 2011, the reemployment specialist issued a report on Employee's plan progress. She stated:

Mr. James has not made contact with me since June 8 when he left a message saying that he needed to talk with me and that he would call later. . . . Mr. James does not have a phone and he does not check his email at The Learning Connection reliably. . . . Mr. James does go to The Learning Connection as agreed and he does participate in the free computer tutoring that is offered on Fridays. I have asked him to begin study preparation on "Work Keys" because they offer the lessons and prep work. Work Keys are used for state employment and since that is what he will be targeting, he needs to prepare as much as possible so he can be the best candidate for the job. He does not seem to realize the seriousness of the plan for retraining purposes and seemed somewhat puzzled when I told him this plan will come to an end and the money will stop. He needs to be trained for a job before that happens. . . . I tried to set up an on-the-job training for him during the summer months and he reported that he did not feel he had enough computer skills to be useful, he said he was still working on his typing. He did not think he could do more than he already was. So, I scrapped the idea of an OJT, for his participation with the Learning Connection Monday through Friday. I do still hope that Mr. James will get his housing under control so that we can move forward with Internet hook up and some more indepth (sic) training than what he has already exhausted at The Learning Connection. . . . Mr. James isn't especially motivated to learn new skills besides what The Learning Connection offers. We have made agreements in the past for him to stay in touch with me, but that seems to go by the wayside in favor of other events he finds more interesting or more pressing.

Employee reported he did not have the money he needs to move forward on the work which needed to be done on his house. (Progress Report, June 17, 2011).

12) On July 26, 2011, the reemployment specialist issued a report of noncooperation. She stated

Mr. James began the reemployment benefits plan on 9-02-2010. . . . He remains out of contact with me since 7-05-2011 when he left an after hours (sic) message saying we were playing, "phone tag." I have not heard from him since and that was 21 days ago. He said he needed to work on his typing and that he would have to be able to type 65 WPM in order to pass [an upcoming distance class in computers]; I have not made those plans with him and don't know of any entry

level course in computers that would require typing at that level. He is not participating in any reemployment benefits plan activities as far as I can tell.

. . . His behavior at this time is non cooperative (sic). He is not in any way participating in the plan that was written for him. The insurance company and I kept holding out hope that he would get his housing/living situation in order so that he had a place to live, but that has not happened in the past 10 months. Mr. James reported to me that he does not have a phone. We tried to communicate through email when he was at The Learning Connection but that has long since ceased to happen since he told me on 5-31-2011 that he had not been checking his email.

(Report of Noncooperation, July 26, 2011).

13) On August 8, 2011, Employee left a voice message for the rehabilitation specialist stating he only ever reaches a recording and wanted to register for classes on August 12, 2011. He stated his daughter just got married and it had been a bad year. (Reemployment Specialist Notes, August 8, 2011).

14) On December 27, 2011, Employer controverted reemployment benefits stating Employee failed to cooperate in the reemployment benefit process. Employer also controverted reemployment benefits because on April 12, 2010, Employee's physician assessed zero percent impairment as a result of his work injury. (Controversion Notice, December 27, 2011).

15) On January 30, 2012, Employee filed a workers' compensation claim. Employee's claim requested review of the reemployment process cooperation issue. (Claim, January 30, 2012).

16) On February 22, 2012, and in response to Employee's inquiry regarding why his reemployment benefit checks had ceased, Workers' Compensation Technician Debra Reed notified Employee it was based on his noncooperation. Ms. Reed notified Employee if he wanted the noncooperation issue addressed, he must request a hearing with the RBA. (Letter to Employee from Debra Reed, February 22, 2012).

17) On May 5, 2012, Employee requested a formal rehabilitation conference (RBA hearing) with the RBA on the issue of noncooperation, and an RBA hearing was scheduled for June 6, 2012. (Letter to RBA from Employee, May 5, 2012; Letter from Debra Reed, May 4, 2012).

18) On May 10, 2012, the parties appeared at a prehearing conference. The board designee reminded the parties an RBA hearing was scheduled for June 6, 2012 on the issue of Employee's noncooperation under AS 23.30.041. The board designee quoted AS 23.30.041(n) and (o) in the prehearing conference summary. The board designee reminded Employee should he wish to

retain an attorney and the attorney agrees to take Employee's case, Alaska workers' compensation statutes and regulations provide for payment of Employee's attorney if Employee prevails at hearing. If Employee does not prevail at hearing, the attorney is precluded by regulation from charging more than \$300.00 in fees from Employee and most attorneys on the board's list do not charge an initial consultation fee, or waive the fee if employees are unable to pay. The board designee provided Employee with a claimant attorney list. (Prehearing Conference Summary, May 10, 2012).

19) On June 4, 2012, the RBA granted Employee's request for a hearing continuance over Employer's objections. Employee requested the continuance so he could find an attorney. The RBA continued the hearing to July 19, 2012. (Letter from RBA, June 4, 2012).

20) On June 11, 2012, Employer again controverted reemployment benefits stating Employee failed to cooperate in the reemployment benefit process. (Controversion Notice, June 11, 2012).

21) On July 18, 2012, Workers' Compensation Officer Sue Reishus-O'Brien left Employee a voice message on his telephone mailbox, reminding him of the July 19, 2012 noncooperation hearing. (Workers' Compensation Database Notes, July 18, 2012).

22) On July 19, 2012, the RBA conducted a hearing on the issue of Employee's noncooperation. Employee failed to appear. The reemployment specialist testified it was typical Employee would say he was really busy and that he would call later and "absolutely weeks would go by." She asked Employee to begin study preparation for "Work Keys," an assessment of foundation workplace skills used by employers, including the State of Alaska, in the hiring process. She also encouraged him to work on his typing speed that he reported as 23 words per minute. Employee stated he would do Work Keys "if he can remember." There was no direct contact between the specialist and Employee from May 9, 2011 through August 16, 2011. When Employee did call, he would only call after hours or on Sundays. Employee left a message on June 24, 2011, sixteen days after his most recent contact, after receiving the reemployment specialist's previous report requesting contact. Employee's message stated he would call back that day or the following Monday but he did not contact Employee until July 5, 2011, when he left a message with the reemployment specialist stating "We are playing phone tag." The reemployment specialist testified:

And that's probably what really did it to me was the "phone tag," because I'm there at the office all the time... There's no reason for phone tag. He's supposed

to be at The Learning Connection four days a week from 5:00 to 7:00. He could have called me any time from there and none of that occurred.

In a previous meeting with the reemployment specialist, Employee stated he did not have enough computer skills for on-the-job training and he refused to do it. The specialist concluded this refusal, Employee's approach to the Work Keys option and his low typing speed were indicative he was deliberately not doing what he was supposed to be doing in his plan. Employee would say he would call, but would not; he would say he was in class when he was not. (RBA Hearing Transcript at 13, 24-29, *James v. State of Alaska*, July 19, 2012; Progress Report, June 17, 2011; Reemployment Specialist Notes, May 9, 2011 through August 16, 2011).

23) On November 16, 2012, the RBA found Employee did not cooperate in reemployment benefits under AS 23.30.041(n)(1)(D) starting May 10, 2011. He found Employee did not cooperate under AS 23.30.041(n)(1)(C) and (E) starting June 8, 2011. The RBA found Employee's last fairly consistent, weekly attempt at communication was May 10, 2011. He found Employee was unreasonably and completely out of contact with the specialist from May 10, 2011 through May 30, 2011 and communicated only by leaving voice messages on the specialist's telephone from May 9, 2011 through August 16, 2011. The RBA also found Employee unreasonably failed to participate in any activities relating to reemployability after June 8, 2011, and unreasonably failed to attend the designated programs after June 8, 2011. (*James v. State of Alaska*, RBA Decision No. 12-0001 at 25 (November 16, 2012)).

24) On November 21, 2012, Employee filed a petition for review of the RBA's November 16, 2012 decision. Employee explained the basis for his petition as, "Appeal the decision! I wasn't able to obtain an Attorney (sic) also wasn't at the hearing." (Petition, November 21, 2012).

25) On April 4, 2013, the parties appeared at a prehearing conference and agreed Employee's petition for review would be heard on October 8, 2013. (Prehearing Conference Summary, April 4, 2013).

26) At hearing on October 8, 2013, Employee acknowledged he had actual notice of the July 19, 2012 RBA hearing, knew he had an RBA hearing on that day, but did not attend. When questioned why he failed to attend the July 19, 2012 RBA hearing, Employee stated he could not recall why. Employee wants to be retrained as a third mate or boat captain. Employee explained he asked for this plan initially but the reemployment specialist would not approve it. Employee repeatedly stated he did not want the current plan and had never wanted it. He stated:

I feel I was steered down the wrong path. If I would have done what I wanted to do, we would be done with this and wouldn't be here today . . . what I wanted to do wasn't what I received. I wanted to pursue my captain's license. I stressed strongly this is what I wanted to do. But this was dropped. . . . From the get-go I did not like this and I asked for a different program. I just knew this wasn't going to work. I wanted to stick with what I knew and what I spent years doing. . . . I did not want his plan. I could be a third mate. . . . [The plan] just didn't work, it was a program I did not want. . . . Everything steers towards what I put years of my life toward.

Employee stated he has a job opportunity working as a charter boat captain with the park service over in Glacier Bay, which if he accepts he will do next year. He stated the plan to retrain him as an office assistant is inappropriate for him. Employee agreed he told the reemployment specialist he was interested in computers but stated his dream was to be on boats. He stated at the time the plan began, he was completely computer illiterate and did not even know how to turn on a computer. However, Employee acknowledged he had obtained a computer in lieu of rent on March 9, 2010, and had attended introductory computer classes at The Learning Connection as early as March 2010. He stated he did not have the ability to complete distance coursework because he had no computer hookup in his house nor did he have a working computer. He stated the UAS course he completed required computer literacy, explaining, "everything had to be done on computer. . . . All essays had to be typed and printed off on a computer and I was computer illiterate." However, Employee acknowledged he had received an "A" in that class. Employee also requested a new reemployment specialist, stating the specialist was rude to him, told him she could not help Employee because she has her hands full, and when Employee's housing was ready for computer hook up, the reemployment specialist refused to do it. When asked what he was doing to participate in the plan from May 2011 through August 2011, Employee stated he was taking classes at The Learning Connection. He stated although the hours he was there fluctuated, he was there from two hours to five hours a day. However, when explaining why he did not maintain email contact with the reemployment specialist when he had access to email at The Learning Connection, he stated "Because I am not at The Learning Connection all the time." Employee acknowledged the reemployment specialist asked him to take the Work Keys program and participate in on-the-job training in 2011, but he refused. He refused because he "could not hardly type and was just starting to get used to a computer." Employee acknowledged he failed to communicate at times with the reemployment specialist

and provided various reasons for his lack of contact including allergies or other illnesses; loss of family members; not being able to get his computer to work; not being in a place where he could hook up a computer; not being able to contact the reemployment specialist, especially on Fridays; the reemployment specialist refusing to hook up his computer once he had a place to do it in April 2011; and his cellular telephone was either stolen, broken, wet, or otherwise not working. Employee stated he could not recall if he had contact with the reemployment specialist from May 10, 2011 to May 30, 2011, and agreed he only left voice messages for the reemployment specialist from May 9, 2011 through August 16, 2011. Employee acknowledged when he left messages for the reemployment specialist, he did not leave a return telephone number. He kept the same telephone number throughout the reemployment process. (Employee).

27) Employee never asked the reemployment specialist to be retrained as a boat captain. Employee asked to be retrained as a third mate on the Alaska Marine Highway system. Retraining Employee as an Alaska Marine Highway third mate is not an option for Employee, because Employee's treating physician said Employee should never work on the Alaska Marine Highway again because of the boat vibration which aggravates his plantar fasciitis. The parties agreed to, and the reemployment specialist approved, a plan to retrain Employee as an office assistant. This plan was chosen because Employee told the reemployment specialist he was very interested in computers, had obtained a computer in lieu of rent on March 9, 2010, and Employee attended introductory computer classes at The Learning Connection as early as March 2010, well before the start of Employee's reemployment plan. Employee needed a place to do his computer coursework because Employee's trailer was uninhabitable and Employee was moving from place to place. Because of Employee's living situation, his plan was modified to allow Employee to take The Learning Connection courses instead of UAS courses in the spring and summer of 2011. Employee had access to computers at The Learning Connection, the UAS computer lab, city libraries, and at the Tlingit and Haida Indian Tribes of Alaska Vocational Training and Resource Center. The reemployment specialist did not refuse to give Employee a laptop. Employee never told the reemployment specialist in April 2011 his place was habitable and therefore available for computer hook up. The reemployment specialist was always available for Employee to contact, including on Fridays. The reemployment specialist was unable to contact Employee by telephone. When Employee contacted her and left a message, she would return his

call immediately. However, when she returned his call, his telephone message voice mailbox was either full, his phone not working, or he did not provide her with a contact number of where he was staying or calling from. (Reemployment Specialist Van Der Pol).

28) Employee is not credible. (Experience, judgment, observations and inferences drawn from all the above).

29) Denise Van Der Pol is credible. (*Id.*).

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 so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

The board may base its decision not only on direct testimony, medical findings, 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.

. . .

(n) After the employee has elected to participate in reemployment benefits, if the employer believes the employee has not cooperated, the employer may terminate reemployment benefits on the date of noncooperation. Noncooperation means

(1) unreasonable failure to

(A) keep appointments;

(B) maintain passing grades;

(C) attend designated programs;

(D) maintain contact with the rehabilitation specialist;

(E) cooperate with the rehabilitation specialist in developing a reemployment plan and participating in activities relating to reemployability on a full-time basis;

(F) comply with the employee's responsibilities outlined in the reemployment plan; or

(G) participate in any planned reemployment activity as determined by the administrator; or

(2) failure to give written notice to the employer of the employee's choice of rehabilitation specialists within 30 days after receiving notice of eligibility for benefits from the administrator as required by (g) of this section.

(o) Upon the request of either party, the administrator shall decide whether the employee has not cooperated as provided under (n) of this section. A hearing before the administrator shall be held within 30 days after it is requested. The administrator shall issue a decision within 14 days after the hearing. Within 10 days after the administrator files 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 unless evidence is submitted supporting an allegation of abuse of discretion on the part of the administrator; the board shall render a decision within 30 days after completion of the hearing.

Under AS 23.30.041(o), the RBA makes the initial determination whether an employee has failed to cooperate in the reemployment benefits process. Either party may seek review of the RBA's decision by requesting a hearing before the board under AS 23.30.110. The board reviews the RBA's decision for abuse of discretion. AS 23.30.041(o). An abuse of discretion exists when a decision is, "arbitrary, capricious, manifestly unreasonable, or stems from an improper motive." *Id.* 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).

AS 23.30.110. Procedure on claims.

...

(d) At the hearing the claimant and the employer may each present evidence in respect to the claim. . . .

Both the employer and the employee are entitled to "present evidence in respect to the claim" at a hearing. *Irvine v. Glacier General Const.*, 984 P.2d 1103, 1105 (Alaska 1999); AS 23.30.110(d). In *Irvine*, the Alaska Supreme Court noted:

[T]he “abuse of discretion” standard . . . must yield to the Board’s authority to make de novo determinations under AS 23.30.110 when, on appeal from an RBA decision . . . the parties present relevant evidence to the Board that the RBA failed to consider. Because the RBA’s decision in such cases would not have been based on all of the relevant evidence properly before the Board, the Board’s deference to the RBA under the “abuse of discretion” standard would be inappropriate.

Id. at 1077 n. 13. 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 v. Construction & Rigging, Inc.*, 851 P.2d 69 (Alaska 1993). If, in light of all the evidence, the RBA’s decision is not supported by substantial evidence, the RBA abused his discretion and the case is remanded for reexamination and further action.

Employees in workers’ compensation cases do not enjoy a constitutional right to counsel, as do criminal defendants. While the Alaska Supreme Court has found a right to counsel in a small number of civil cases, it has held injured workers seeking benefits under the Workers’ Compensation Act do not have an important enough interest to protect to justify the absolute guarantee of an attorney. *Bustamante v. Alaska Workers’ Compensation Board*, 59 P.3d 270, 274 (Alaska 2002).

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

...

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

- (1) proceed with the hearing in the party’s absence and, after taking evidence, decide the issues in the application or petition;
- (2) dismiss the case without prejudice; or
- (3) adjourn, postpone, or continue the hearing

ANALYSIS

After Employee elected to participate in reemployment benefits, he had to cooperate “full time” in the reemployment benefits process. AS 23.30.041(n). Employee’s cooperation required keeping appointments, maintaining passing grades, attending designated programs, maintaining contact with the rehabilitation specialist, cooperating with the rehabilitation specialist in developing a reemployment plan, participating in activities relating to reemployability on a full time basis, complying with Employee’s responsibilities outlined in the reemployment plan and participating in any planned reemployment activity as determined by the RBA. The RBA decides initially whether Employee failed to cooperate under AS 23.30.041(n). The RBA found Employee non-cooperative. Either party may seek review of the RBA’s decision and Employee appealed.

Employee implies his due process rights were violated because the July 19, 2012 RBA hearing proceeded without an attorney to represent him. Employee was provided a claimant attorney list on May 10, 2012. The RBA hearing was originally scheduled for June 6, 2012, but was continued to July 19, 2012, so Employee could try to find an attorney. Employee was unable to do so. Employee had sufficient time both before the July 19, 2012 RBA hearing and before the October 8, 2013 RBA determination review hearing to obtain attorney representation. Although due process may require a right to counsel in a small number of civil cases, injured workers seeking benefits under the Workers’ Compensation Act do not have an important enough interest to protect to justify the absolute guarantee of an attorney at public expense. *Bustamante*, 59 P.3d at 274.

Employee was informed at a May 2012 prehearing conference of the statutory framework for attorney’s fees recovery in workers’ compensation cases. Nothing prevented Employee from hiring private counsel. Injured workers frequently and successfully represent themselves at hearings. Employee provided no persuasive argument or legal authority supporting his implied argument the RBA violated his due process rights by proceeding with the RBA hearing even though Employee did not have attorney representation. The RBA did not abuse his discretion by proceeding with the July 19, 2012 RBA hearing.

Employee also implies his due process rights were violated because the July 19, 2012 RBA hearing proceeded without his participation. Employee was properly served with notice of the July 19, 2012 RBA hearing and acknowledged he had actual notice of the hearing. The designee also called prior to the hearing to remind Employee. No one requested a continuance of the July 19, 2012 hearing. Employee could not recall why he failed to attend the RBA hearing. Employee was accorded the opportunity to participate in his hearing and chose not to appear.

The law provides a discretionary priority to handle situations where proper hearing notice is given to a party and the party does not appear at the hearing. 8 AAC 45.070(f). The first order of priority in such cases is to proceed with the hearing in the party's absence and, after taking evidence, decide the issues. 8 AAC 45.070(f)(1). The RBA chose the first priority. The RBA followed the regulation and did not abuse his discretion by proceeding with the July 19, 2012 RBA hearing in Employee's absence.

Because additional testimony was taken in the instant hearing, specifically Employee's and the reemployment specialist's testimony, the standard for review becomes *de novo* and not abuse of discretion. Both Employer and Employee are entitled to "present evidence in respect to the claim" at a hearing. *Irvine v. Glacier General Const.*, 984 P.2d 1103, 1105 (Alaska 1999); AS 23.30.110(d). The parties in this case were allowed to offer admissible evidence, and all evidence was reviewed to assess whether the RBA's decision was supported by substantial evidence and therefore reasonable. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69 (Alaska 1993).

Employee contends he cooperated in his plan but also offers various reasons for his noncooperation. Employee is not credible. AS 23.30.122. His testimony was often inconsistent or not believable. He stated at the time the plan began, he was completely computer illiterate and did not even know how to turn on a computer. However, Employee acknowledged he had taken some free computer classes prior to starting his plan and agreed he told the reemployment specialist he was very interested in computers. He stated he did not have the ability to complete distance coursework because he had no computer hookup in his house nor did he have a working computer. However, he acknowledged the UAS course he completed required computer literacy, all essays had to be typed and printed off on a computer, and he had received an "A" in that

class. Employee stated he was at The Learning Connection classes from two hours to five hours a day. However, when explaining why he did not maintain email contact with the reemployment specialist when he had access to email at The Learning Connection, he stated: “Because I am not at The Learning Connection all the time.” Employee acknowledged the reemployment specialist asked him to take the Work Keys program and participate in on-the-job training in 2011 but he refused claiming he “could not hardly type and was just starting to get used to a computer.” However, by spring 2011, Employee had been attending computer classes at The Learning Connection for approximately one year and had successfully completed one college course.

Employee acknowledged he failed to communicate at times with the reemployment specialist and provided various reasons, including: allergies or other illnesses; loss of family members; not being able to get his computer to work; not being in a place where he could use a computer; not being able to contact the reemployment specialist, especially on Fridays; the reemployment specialist refused to hook up his computer in April 2011; and his cellular telephone was either stolen, broken, wet, or otherwise not working. However, because Employee’s trailer was uninhabitable and Employee was moving from place to place, his plan was modified to allow Employee to take The Learning Connection courses instead of UAS courses in the spring and summer of 2011. Employee had computer access at: The Learning Connection, the UAS computer lab, city libraries, and the Tlingit and Haida Indian Tribes of Alaska Vocational Training and Resource Center. The reemployment specialist did not refuse to give Employee a laptop. Employee never told the specialist in April 2011 his place was habitable and therefore available for computer hook up.

Employee stated he could not recall if he had contact with the reemployment specialist from May 10, 2011 to May 30, 2011, and agreed he only left voice messages for the reemployment specialist from May 9, 2011 through August 16, 2011. Employee’s allergies or other illnesses and loss of family members could explain some lack of communication but would not explain his continued, repeated lack of contact. The reemployment specialist was available for Employee to contact, including on Fridays. The reemployment specialist was unable to contact Employee by telephone and was dependent on Employee contacting her, which he did infrequently. When Employee contacted her and left a message, the specialist would return his

call immediately, but Employee's voice mailbox was either full or his phone was not working. Employee was cautioned more than once his lack of communication was not acceptable. He was also cautioned it could be deemed noncooperation with the reemployment process.

Employee's testimony about the plan he actually wants versus the plan he agreed to participate in evidences the real reasons for Employee's lack of cooperation and contact. Employee wants to be retrained as a third mate or boat captain. Employee says he asked for this plan initially but the reemployment specialist would not approve it. Employee repeatedly and candidly stated he did not want the current plan and never wanted it. However, Employee never told the reemployment specialist he wanted to be retrained as a boat captain. Employee asked to be retrained as a third mate on the Alaska Marine Highway system, but this is not an option for Employee because his treating physicians opined Employee should not return to work on the Alaska Marine Highway because it may aggravate his plantar fasciitis. The parties and the reemployment specialist agreed to a plan to retrain Employee as an office assistant. This plan was chosen because Employee was interested in computers, had obtained a computer in lieu of rent on March 9, 2010, and had attended introductory computer classes prior to the start of his plan.

The reasons Employee gives for his lack of cooperation and contact are not credible. AS 23.30.122. They are also "unreasonable." AS 23.30.041(n)(1). Employee has a job opportunity to work as a charter boat captain, which if he accepts he will do next year. The real reason Employee failed to cooperate in his plan and remain in contact with the reemployment specialist is because he plans to work as a boat captain and does not intend to work as an office assistant. The plan Employee wants is not the one he agreed to participate in nor is it recommended by his physicians. The record shows Employee unreasonably failed to maintain contact with the reemployment specialist and cooperate with her. AS 23.30.041(n); *Irvine*.

Other than Employee's testimony, there was no other evidence presented at hearing to support a finding Employee's conduct was either reasonable or excusable. There is no evidence the RBA abused his discretion. His decisions were supported by substantial evidence as discussed above and were therefore reasonable. *Yahara*. This decision's *de novo* review, which includes Employee's and the reemployment specialist's hearing testimony, similarly finds Employee unreasonably failed

to cooperate with activities related to reemployment, on a full time basis, and failed to maintain contact with the reemployment specialist. AS 23.30.041(n)(1)(D) and (E). Employee's appeal from the RBA's November 16, 2012 decision will be denied and the RBA's decision will be affirmed. AS 23.30.041(o).

CONCLUSION OF LAW

The RBA's November 16, 2012 determination Employee failed to cooperate in the reemployment benefits process under AS 23.30.041(n)(1) will be affirmed.

ORDER

Employee's appeal from the RBA's November 16, 2012 decision is denied and the RBA's November 16, 2012 determination Employee failed to cooperate in the reemployment benefits process under AS 23.30.041(n) is affirmed.

Dated in Juneau, Alaska on October , 2013.

ALASKA WORKERS' COMPENSATION BOARD

Marie Y. Marx, Designated Chair

Bradley S. Austin, Member

Charles M. Collins, Member

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the board are parties to an appeal. 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 because the board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation 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 grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

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 Final Decision and Order in the matter of WILBUR W. JAMES, employee / applicant v. STATE OF ALASKA, self-insured employer; Case No. 200902276; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, on October 22, 2013.

Sue Reishus-O'Brien, Workers' Compensation Officer