

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

BENJAMIN E. BODI, )  
Employee, )  
Claimant, ) FINAL DECISION AND ORDER  
v. )  
AWCB Case No. 201206222  
JOHNSON'S TIRE SERVICE, )  
Employer, ) AWCB Decision No. 14-0145  
and ) Filed with AWCB Anchorage, Alaska  
on October 29, 2014  
REPUBLIC INDEMNITY CO. OF )  
AMERICA, )  
Insurer, )  
Defendants. )

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Johnson Tire Service's August 13, 2013 petition for review of the reemployment benefits administrator (RBA) designee's eligibility determination and February 20, 2014 petition to dismiss Mr. Bodi's claim were heard October 15, 2014 in Anchorage, Alaska. This hearing date was selected on August 20, 2014. Attorney Joseph Cooper appeared and represented Johnson Tire Service (Employer). Mr. Bodi (Employee) did not appear. The record closed at the hearing's conclusion on October 15, 2014.

## ISSUES

Employee did not appear for the hearing, and attempts to reach him at his telephone number of record resulted in a "no longer in service" message. The designated chair orally ruled that the hearing proceed in Employee's absence.

1. *Was the oral ruling to proceed with the hearing in Employee's absence correct?*

Employer contends that because it filed a controversion notice stating Employee's injury did not arise in the course and scope of the employment, the RBA designee erred in finding Employee eligible for reemployment benefits. Because Employee did not appear at hearing, his position is unknown, but it is assumed he contends the RBA designee did not err.

2. *Did the RBA designee err in finding Employee eligible for reemployment benefits?*

Employer contends Employee's claim should be dismissed because Employee did not sustain a work injury. Employee's position is again unknown, but it is presumed he is opposed to dismissal.

3. *Should Employee's claim be dismissed because there was no work injury?*

#### FINDINGS OF FACT

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

1. Employee worked for Employer as a tire technician. On April 22, 2012, he reported an injury to his right shoulder. He did not report a traumatic injury, but stated "worked really hard; shoulder started to hurt really bad; kept working through it, and it went out." (Report of Injury, May 1, 2012).
2. On May 9, 2012, Employee was seen Gary Benedetti, M.D. Dr. Benedetti noted Employee reported that he did not feel a tear or a pop, just the sudden onset of pain. Employee reported no prior shoulder injuries, but stated he would occasionally get a pop in his shoulder with a dull ache when the pop occurred. After reviewing an MRI, Dr. Benedetti diagnosed a small right rotator cuff tear/strain and a probable small superior labrum tear. He prescribed physical therapy. (Dr. Benedetti, Chart Note, May 9, 2012).
3. An MRI with contrast on June 8, 2012 showed a prominent superior labrum anterior-posterior (SLAP) lesion including complex tears. (Robert Bridges, M.D., MRI Report, June 8, 2012).
4. On August 2, 2012, Dr. Benedetti performed an arthroscopic SLAP and anterior labral repair. (Mat-Su Regional Medical Center, Operative Report, August 22, 2012).

5. Because Employee was unable to return to work for 90 consecutive days, an eligibility evaluation was ordered on August 30, 2012. (Letter, Darlene Charles to Employee, August 30, 2012).
6. On April 10, 2013, Ross Brudenell, M.D., one of Employee's treating physicians, responded to a letter from Employer's adjuster asking if the work activities of April 22, 2012 were the substantial cause of Employee's continued need for treatment. Dr. Brudenell answered that the work activities were the substantial cause. (Letter, Jessica Rush to Dr. Brudenell, April 9, 2013, with handwritten responses).
7. On June 5, 2013, Employee was seen by John Swanson, M.D., for an employer's medical evaluation (EME). Dr. Swanson explained the type of injury Employee suffered required some trauma and was not caused by wear and tear. Given Employee's explanation of how the injury occurred, Dr. Swanson stated Employee's shoulder injury did not occur at work on April 22, 2012, but was the result of a prior unreported injury. (Dr. Swanson, EME Report, June 5, 2013).
8. On June 12, 2013, Employer controverted all benefits based on Dr. Swanson's EME Report. The Controversion Notice states, "The employer relies upon Dr. Swanson's June 5, 2013 report, wherein he opined that the reported April 22, 2013 work injury is not the substantial cause of the employee's right shoulder condition and need for treatment." (Controversion Notice, June 11, 2013).
9. On August 1, 2013, the RBA designee determined Employee was eligible for reemployment benefits. The eligibility determination letter included a footnote stating:

I am aware of the fact that Northern Adjusters has controverted your claim based upon the opinion of Independent Medical Evaluator Dr. John Swanson. Dr. Swanson concluded that your April 22, 2012 injury is not the substantial cause of the employee's right shoulder condition and need for treatment. I cannot resolve the issue of compensability, on (sic, only) the Board can address this issue. However, I based my determination on the opinion of your attending physician, Dr. Brudenell. (Eligibility Determination, August 1, 2013).
10. On August 13, 2013, Employer filed a petition seeking review of the RBA designee's eligibility determination. Employer contended that its June 11, 2013 controversion had the effect of denying all benefits as the injury did not arise out of and in the course of

employment, and, consequently, the reemployment process should have stopped under 8 AAC 45.510(b). (Petition, August 13, 2013).

11. On February 24, 2014, Employer filed a petition seeking “dismissal of this claim.” Employer contended that Employee did not sustain an injury in the course and scope of his employment. (Petition, February 20, 2014).
12. A prehearing conference was held on April 11, 2014. Employee attended telephonically. Employer explained its position that work was not the substantial cause of Employee’s current shoulder condition. Employee stated that his treating physician had a differing opinion. The board designee explained the adjudication process, and Employee stated he would file for the benefits he felt he was owed. (Prehearing Conference Summary, April 11, 2014).
13. An undated Post-it note in the board file indicates Employee asked to have his telephone number changed. However, Employee’s telephone number in the board’s computerized database was not updated. (Record).
14. On August 20, 2014, another prehearing was held. The board designee was unable to reach Employee at the number in the board’s computerized database. A hearing was set for October 15, 2014 on Employer’s petitions for review of the RBA designee’s eligibility decision and to dismiss Employee’s claim. The prehearing conference summary was served on Employee by mail at his address of record on August 21, 2014. (Prehearing Conference Summary, August 20, 2014).
15. On September 15, 2014, notice of the October 15, 2014 hearing was mailed to Employee at his address of record. (Hearing Notice, September 15, 2014).
16. At the October 15, 2014 hearing, the chair was unable to reach Employee at the telephone number in the board’s computer database, and orally ruled that the hearing should proceed in Employee’s absence as Employee had received notice of the hearing.

#### PRINCIPLES OF LAW

**Sec. 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) Worker's compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

**Sec. 23.30.005. Alaska Workers' Compensation Board.**

. . .

(h) The department shall adopt rules . . . and 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 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, 533-534 (Alaska 1987).

"Harmless errors are those that do not affect the outcome of the case." *J. C. Marketing v. You Don't Know Jack*, AWCAC Decision No. 132 at 3, n. 31 (March 30, 2010) (holding Board's failure to strike SIME report, if it was error at all, was harmless error, because parties could still depose doctor). *Christopher v. Louisiana Pacific Corp.*, AWCAC Decision No. 87-0185 (August 13, 1987) (holding on reconsideration while Board's reliance on an inadmissible medical opinion was error, it was harmless error because "substantial evidence exists for each of our findings without reliance" on the inadmissible medical opinion). *Sampert v. Dokoozian & Associates, Inc.*, AWCAC Decision No. 05-0095 (April 6, 2005) (holding the RBA abused his discretion and erred by assigning the next rehabilitation specialist on the list to the employee's case, rather than the next specialist in the employee's senate district, but this was harmless procedural error because it did not outweigh "the public interest in prompt rehabilitation and reemployment").

**Sec. 23.30.041. Rehabilitation and reemployment of injured workers.**

. . . .

(d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held

within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.

(e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the 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 Dictionary of Occupational Titles.'

....

The RBA's decision must be upheld absent "an abuse of discretion on the administrator's [designee's] part." *Miller v. ITT Arctic Services*, 367 P.2d 884, 889 (Alaska 1962). Several definitions of "abuse of discretion" appear in Alaska law although none appear in the Alaska Workers' Compensation Act (Act). The Alaska Supreme Court stated abuse of discretion consists of "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). *See also Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to apply controlling law or to exercise sound, reasonable and legal discretion may also be considered an abuse of discretion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1013 (Alaska 2009); *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1107, n. 13 (Alaska 1999); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

The RBA fails to exercise sound, reasonable and legal discretion where he relies on a rehabilitation specialist's report which fails to consider statutorily mandated factors. *Irvine v. Glacier General Construction*, 984 P.2d 1103 (Alaska 1999). Where the board upholds an RBA decision based on such a flawed report, the board commits legal error. *Id.* at 1107.

The Administrative Procedures Act, at AS 44.62.570, provides another definition used by courts in considering appeals from administrative agency decisions. It contains terms similar to those cited above, and expressly includes reference to a “substantial evidence” standard:

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.

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).

**8 AAC 45.070. Hearings**

. . . .

(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.

**8 AAC 45.510. Request for reemployment benefits eligibility evaluation**

(a) For injuries occurring on or after November 7, 2005, if the employee has been totally unable to return to the employee's employment at time of injury for at least 60 consecutive days, but less than 90 consecutive days, as a result of the injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The requesting party must file with the administrator and serve all other parties with

- (1) a written request for the evaluation;

(2) a physician's prediction the injury may permanently preclude the employee from returning to the employee's job at the time of the injury; and

(3) documentation the employee has been totally unable to return to the employee's employment at the time of the injury for at least 60 consecutive days, but less than 90 consecutive days, as a result of the injury.

(b) The administrator shall consider a written request for an eligibility evaluation for reemployment benefits, unless the employer controverts on grounds the employee's injury did not arise out of and in the course of employment, on grounds the employee's total inability to return to the employee's employment at the time of injury is not a result of the injury, or on grounds identified under AS 23.30.022 , 23.30.100, 23.30.105, or 23.30.250. If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference regarding the controversion no later than 30 days after the board receives the matter. If a claim is filed and if requested by the employee, the board will conduct a hearing no later than 90 days after the prehearing conference in accordance with 8 AAC 45.060(e) and 8 AAC 45.070(b) (3), limited to the grounds set out in this subsection

**8 AAC 45.522. Ordering an eligibility evaluation without a request**

(a) For injuries occurring on or after November 7, 2005, if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation, unless the employer controverts on grounds identified under AS 23.30.022 , 23.30.100, 23.30.105, and 23.30.250, or 8 AAC 45.510(b) . If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference and hold a hearing in accordance with 8 AAC 45.510(b).

ANALYSIS

*1. Was the oral ruling to proceed with the hearing in Employee's absence correct?*

Where a party does not appear at hearing, but was served with notice of the hearing, the first option in order of priority under 8 AAC 45.070(f) is to proceed with the hearing in the party's absence. Here, the hearing was scheduled at the August 20, 2014, prehearing conference. Employee did not participate in the prehearing. However, because the board's file had not been updated to reflect Employee's new telephone number, the board designee's attempt to reach him by telephone was unsuccessful. Likewise, the designated chair's attempt to reach Employee by telephone for the October 15, 2014 hearing was unsuccessful because Employee's current



telephone number had not been entered into the board's records.

The August 20, 2014 prehearing conference summary and the September 15, 2014 hearing notice were both mailed to Employee at his address of record. Nevertheless, it is unknown whether Employee would have participated in the October 15, 2014 hearing, had he been contacted telephonically. It was error to proceed with the hearing in Employee's absence given the incorrect information in the board's file.

2. *Did the RBA designee err in finding Employee eligible for reemployment benefits?*

Because the decision to proceed with the hearing in Employee's absence was incorrect, the determination of this issue will be deferred until Employee is properly noticed and has the opportunity to participate in a hearing.

3. *Should Employee's claim be dismissed because there was no work injury?*

Because the decision to proceed with the hearing in Employee's absence was incorrect, a determination of this decision will be deferred until Employee is properly noticed and has the opportunity to participate in a hearing.

CONCLUSIONS OF LAW

1. The oral ruling to proceed with the hearing in Employee's absence was incorrect.
2. A decision as to whether the RBA Designee erred in finding Employee eligible for reemployment benefits will be deferred until Employee has the opportunity to participate in a hearing.
3. A decision as to whether Employee's claim should be dismissed will be deferred until Employee has the opportunity to participate in a hearing.

ORDER

1. The hearing incorrectly proceeded in Employee's absence.
2. A prehearing conference is scheduled for November 14, 2014, to schedule a hearing on Employer's petitions.

BENJAMIN E. BODI v. JOHNSON'S TIRE SERVICE

Dated in Anchorage, Alaska on October 29, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Designated Chair

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David Kester, Member

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 filing 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 BENJAMIN E. BODI, employee / claimant; v. JOHNSON'S TIRE SERVICE, employer; REPUBLIC INDEMNITY CO. OF AMERICA, insurer / defendants; Case No. 201206222; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on October 29, 2014.

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Pamela Murray, Office Assistant