

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JAMES GROVES, )  
) )  
) Employee, ) FINAL  
) Petitioner, ) DECISION AND ORDER  
) )  
) v. ) AWCB Case No. 201214445  
) )  
) AWCB Decision No. 14-0006  
FRED MEYER, INC., )  
) )  
) Self-Insured Employer, ) Filed with AWCB Fairbanks, Alaska  
) on January 13, 2014  
and )  
) )  
SEDGWICK, )  
) )  
) Adjuster, )  
) Respondents. )  
) )

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James Groves' (Employee) September 5, 2013 claim seeking review of the Reemployment Benefits Administrator (RBA) designee's August 27, 2013 decision finding him ineligible for reemployment benefits was heard in Fairbanks, Alaska, on December 5, 2013, on the written record. The hearing date was selected on October 8, 2013. Robert Rehbock represents Employee. Vicki Paddock represents Fred Meyer, Inc. and Sedgwick (Employer). The record closed after deliberation on December 5, 2013.

## ISSUES

Employee contends the RBA designee's decision finding him ineligible for reemployment benefits should be reversed because the designee's failure to follow board regulations constituted an abuse of discretion and her decision was not supported by substantial evidence.

Employer contends the RBA designee's decision was not an abuse of discretion, was supported by substantial evidence, and should be upheld.

***Should the designee's August 27, 2013 determination finding Employee not eligible for reemployment benefits be upheld?***

FINDINGS OF FACT

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

- 1) On September 28, 2012, Employee injured his left shoulder lifting 50-lb cases of lettuce while working as a produce clerk for Employer. (Report of Occupational Injury or Illness, September 28, 2012).
- 2) On March 8, 2013, a workers' compensation technician notified Employee rehabilitation specialist Larry Hintz of Compensation Risk Consultants had been selected to complete an eligibility evaluation to determine whether Employee was entitled to reemployment benefits. (Letter from Reemployment Benefits section to Employee, March 8, 2013).
- 3) On April 15, 2013, Larry Hintz sent copies of the "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (SCODRDOT) job descriptions for stock clerk, retail store manager, athletic trainer, and physical instructor to Employee's treating physician Mark Wade, M.D., for review and comment. (L. Hintz letter to Dr. Wade, April 15, 2013).
- 4) On April 17, 2013, Dr. Wade predicted Employee would incur a ratable permanent impairment greater than zero arising from the work injury. Dr. Wade also predicted Employee would not have the permanent physical capacities to perform the job duties of stock clerk, but would have the permanent physical capacities to perform the job duties of retail store manager, athletic trainer and physical instructor. (Dr. Wade hand-written note responding to Larry Hintz, April 17, 2013).
- 5) On April 24, 2013, rehabilitation specialist Larry Hintz submitted a Reemployment Benefits Eligibility Evaluation to the RBA.

Post-Injury Employment:

Mr. Groves did not return to work with Fred Meyer Stores, Inc. after the injury.

From August 15, 2012, until January 9, 2013, Mr. Groves was employed by Anytime Fitness as a “General Manger/Fitness Trainer”. At the time of interview, Mr. Groves described the following job duties: Provided day-to-day management of a small privately owned gymnasium and fitness center in Washington Plaza mall. Supervised contracted workers including other fitness trainers and a janitor. Marketed the facility and it’s (sic) services to the general public to increase membership. Signed up new members. Showed prospective customers/members the facilities and services available. Discussed membership price options and membership contract terms. Performed light duty maintenance of gym equipment and machinery. Inspected all equipment and machines regularly to insure they were in safe operating condition. . . . Was also allowed to have personal fitness clients who would pay him directly for his fitness training services using the facility he managed. They would typically pay him on an hourly rate and would meet with him at times other than when he was on the clock managing the facility. . . .

From August 17, 2011 until his date of injury, Mr. Groves was employed by Fred Meyer Stores, Inc. as a “Produce Clerk. . . .”

From May 23, 2011 until December 31, 2011, Mr. Groves owned and operated AK Built Training Systems. At the time of interview, Mr. Groves described the following job duties: Marketed to the general public and provide individualized fitness training services to customers wanting to get into better physical condition. . . .

From 1993 until 2010 (closed business in 2010), Mr. Groves was co-owner and operated Jungle Gym Fitness Center. At the time of interview, Mr. Groves described the following job duties: Started and ran a small gym/fitness center business in south Fairbanks with his wife and sold memberships to the club for customers to use it’s (sic) facilities and services. In addition to having commercial quality, gymnasium exercise and weight lifting machines, cable operated machines and free weights, the center offered personal fitness training and specialty fitness exercise classes. Mike showed new members how to use the various pieces of exercise equipment safely and effectively. He also was the fitness trainer for those customers wanting and willing to pay extra for one-on-one fitness training and dietary consultation for improved health and weight loss. He also ran a small café inside Jungle Gym which sold various fresh and prepackaged food and beverage items for members to buy. He developed the menu of fresh foods that were prepared as well as the other food and beverage items sold there. His wife was the day-to-day manager of the facility. Hired, trained and supervised a small staff of employees.

Based on the work history Employee presented to him, the rehabilitation specialist selected the following SCODRDOT job descriptions to represent Employee’s ten-year work history:

153.224-010 – ATHLETIC TRAINER (MEDIUM DUTY POSITION) – Evaluates physical condition and advises and treats professional and amateur athletes to maintain maximum physical fitness for participation in athletic competition: Prescribes routing and corrective exercises to strengthen muscles. Recommends special diets to build up health and reduce overweight athletes. Massages parts of players' bodies to relieve soreness, strains, and bruises. Renders first aid to injured players, such as giving artificial respiration, cleaning and bandaging wounds, and applying heat and cold to promote healing. Calls physician for injured persons as required. Wraps ankles, fingers, or wrists of athletes in synthetic skin, protective gauze, and adhesive tape to support muscles and ligaments. Treats chronic minor injuries and related disabilities to maintain athletes' performance. May give heat and diathermy treatments as prescribed by health services. Workers are identified according to type of sport.

187.167-046 – MANAGER, RETAIL STORE (LIGHT DUTY POSITION) – Manages retail store engaged in selling specific line of merchandise, such as groceries, meat, liquor, apparel, jewelry or furniture; related lines of merchandise, such as radios, televisions, or household appliances; or general line of merchandise, performing following duties personally or supervising employees performing duties: Plans and prepares work schedules and assigns employees to specific duties. Formulates pricing policies on merchandise according to requirements for profitability of store operations. Coordinates sales promotion activities and prepares, or directs works preparing, merchandise displays and advertising copy. Supervises employees engaged in sales work, taking of inventories, reconciling cash with sales receipts, keeping operating records, or preparing daily record of transactions for ACCOUNTANT (profess & kin.) 160.162-018, or performs work of subordinates, as needed....

299.367-014 STOCK CLERK. . . .

153.227-014 INSTRUCTOR, PHYSICAL (LIGHT DUTY POSITION) – Teaches individuals or groups beginning or advanced calisthenics, gymnastics, and reducing or corrective exercises, in private health club or gymnasium, evaluating abilities of individual to determine suitable training program: Teaches and demonstrates use of gymnastic apparatus, such as trampolines, corrective weights, and mechanical exercisers. Demonstrates and teaches body movements and skills used in sports. Advises clients in use of heat or ultraviolet treatments and hot baths. Lubricates mechanical equipment and reports malfunctioning equipment to maintenance personnel.

The rehabilitation specialist reported Dr. Wade's April 17, 2013 prediction Employee would incur a ratable permanent impairment as a result of the work injury, would not have the permanent physical capacities to perform the job duties of the employee's job at the time of injury (stock clerk), but would have the permanent physical capacities to perform the job duties of athletic

trainer, small business manager, and physical instructor. The rehabilitation specialist noted he had not yet completed a labor market survey for the approved jobs, and so could not make an eligibility recommendation at that time. (Reemployment Benefits Eligibility Evaluation, April 24, 2013).

6) In his April 24, 2013 reemployment benefits eligibility evaluation, Hintz indicated he had contacted Employer's human resources department on March 12, 2013 regarding physically appropriate alternative employment. Hintz noted: "No response has been received, thus CRC must conclude physically appropriate alternative employment cannot be made available to Mr. Groves. This condition was not met. Thus, Mr. Groves presents as eligible under this criterion." (*Id.*)

7) In his April 24, 2013 eligibility evaluation, Hintz noted "[past] medical history of cardio myopathy requiring an echocardiogram prior to his shoulder surgery of this injury. He had a heart attack in 2010." (*Id.*)

8) On June 14, 2013, Hintz submitted a revised reemployment benefits eligibility evaluation to the RBA, which included a completed labor market survey. Based on the findings in the labor market survey, the rehabilitation specialist found "the position of Athletic/Physical Trainers and Retail Mangers (sic) do exist in the local labor market with current and/or anticipated openings." In addition, the rehabilitation specialist noted Employee reported a prior work injury in which "he severely injured a leg in a work related accident at age 18 and was retrained to be a sign painter." Based on this finding and reiterating Dr. Wade's predictions about Employee's permanent physical capacities, the rehabilitation specialist recommended Employee be found not eligible for reemployment benefits. (Reemployment Benefits Eligibility Evaluation, June 14, 2013).

9) On August 27, 2013, RBA designee Deborah Torgerson notified Employee he was not eligible for reemployment benefits, based on Dr. Wade's April 17, 2013 prediction Employee would have the permanent physical capacities to perform the physical demands of athletic trainer, physical instructor and retail manager. (RBA Designee's letter to Employee, August 27, 2013).

10) On September 9, 2013, Employee filed a workers' compensation claim seeking review of the RBA Designee's determination Employee is ineligible for reemployment benefits.

Employee seeks appeal of Deborah Torgerson, RBA Designee's 08/27/2013 determination that he is not eligible for retraining benefits based upon a 04/17/2013 prediction made by Dr. Mark Wade that he would have the physical capacities to perform the physical demands of previous jobs as Athletic Trainer, Physical Instructor, and Small Business Owner. The 04/17/13 prediction is out of date as Employee has not been released to work and has continued to treat with Dr. Wade

in regard to his left shoulder and, therefore, this is an abuse of discretion by RBA Designee, Torgerson. Employee also seeks attorney fees, interests & costs. (Employee's Claim, September 5, 2013).

11) On September 12, 2013, Dr. Wade released Employee to "light duty with no lifting over 15 to 20 pounds" with the left arm. (Dr. Wade report, September 12, 2013).

12) On October 8, 2013, the parties agreed to set a hearing on Employee's RBA appeal on December 5, 2013 on the basis of the written record. (Prehearing Conference Summary, October 8, 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 indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . subject to . . . this chapter. . . .

**AS 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, 533-34 (Alaska 1987).

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

. . .

(c) . . . If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. . . .

(d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. The administrator may grant up to an additional 30 days for performance of the eligibility evaluation upon notification of unusual and extenuating circumstances and the rehabilitation specialist's request. Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.

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

(1) the employee's job at the time of injury; or

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."

(f) An employee is not eligible for reemployment benefits if

...

(1) the employer offers employment within the employee's predicted post-injury physical capacities at a wage equivalent to at least the state minimum wage under AS 23.10.065 or 75 percent of the worker's gross hourly wages at the time of injury, whichever is greater, and the employment prepares the employee to be employable in other jobs that exist in the labor market;

(2) the employee previously declined the development of a reemployment benefits plan under (g) of this section, received a job dislocation benefit under (g)(2) of this section, and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury;

(3) the employee has been previously rehabilitated in a former worker's compensation claim and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury; or

(4) at the time of medical stability, no permanent impairment is identified or expected. . . .

**AS 44.62.570. Scope of review.**

...

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

...

(c) . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by

(1) the weight of the evidence; or

(2) substantial evidence in the light of the whole record.

**8 AAC 45.525. Reemployment benefit eligibility evaluations.**

(a) If an employee is found eligible for an eligibility evaluation for reemployment benefits under AS 23.30.041 (c), the rehabilitation specialist whose name appears on the referral letter shall

(1) interview the employee and the employer and review all written job descriptions existing at the time of injury that describe the employee's job at the time of injury;

(2) review the appropriate volume listed in (A) or (B) of this paragraph and, based on the description obtained under (1) of this subsection, select the most appropriate job title or titles that describe the employee's job; if the employee's injury occurred

...



(B) on or after August 30, 1998, the rehabilitation specialist shall use the 1993 edition of the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT)* unless, under AS 23.30.041 (p), the board has designated a later revision or version of that volume; and

(3) submit all job titles selected under (2) of this subsection to the employee's physician, the employee, the employer, and the administrator.

(b) When interviewing the employee the rehabilitation specialist whose name appears on the referral letter shall obtain descriptions of the tasks and duties for other jobs the employee held or for which the employee received training within 10 years before the injury, and any jobs held after the injury. The rehabilitation specialist shall

(1) exercise due diligence to verify the employee's jobs in the 10 years before the injury and any jobs held after the injury;

(2) review the appropriate volume listed in (A) or (B) of this paragraph and select the most appropriate job title or titles that describe the jobs held and training received; if the employee's injury occurred

...

(B) on or after August 30, 1998, the rehabilitation specialist shall use the 1993 edition of the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT)* unless, under AS 23.30.041 (p), the board has designated a later revision or version of that volume;

(3) identify all job titles identified under (2) of this subsection for which the employee meets the specific vocational preparation codes as described in the volume; and

(4) submit all job titles identified under (3) of this subsection to the employee's physician, the employee, the employer and the administrator; if the physician predicts the employee will have permanent physical capacities equal to or greater than the physical demands of a job or jobs submitted under this paragraph, the rehabilitation specialist shall conduct labor market research to determine whether the job or jobs exist in the labor market as defined in AS 23.30.041(r)(3).

(c) The rehabilitation specialist whose name appears on the referral letter shall contact the employee's employer at the time of injury about employment in accordance with AS 23.30.041(f)(1). If the employer offers employment, the rehabilitation specialist shall

(1) complete a job analysis, including a description of the job duties, tasks, and physical requirements, and submit the job analysis to the employee's physician, with a copy to the employee, the employer, and the administrator, to predict whether the job's physical demands are within the employee's post-injury physical capacities;

(2) require the employer to complete an offer of employment on a form prescribed by the administrator, and document that the job offered will pay the employee at least the state minimum wage under AS 23.10.065 or an amount at least equal to 75 percent of the employee's gross hourly wages at the time of injury, whichever is greater; and

(3) submit labor market research if the offer of employment meets the requirements of AS 23.30.041(f)(1); the research must document that the offered employment prepares the employee to be employable in other jobs that exist in the labor market at a level consistent with employee's predicted post-injury physical capacities and at a wage equivalent to at least the state minimum wage under AS 23.10.065 or 75 percent of the worker's gross hourly wages at the time of injury, whichever is greater.

(d) The rehabilitation specialist whose name appears on the referral letter shall determine whether the employee has previously declined reemployment benefits under AS 23.30.041(f)(2) or has been previously rehabilitated under AS 23.30.041(f)(3).

(e) If the employee has received a job dislocation benefit or has been previously rehabilitated in a former workers' compensation claim, the rehabilitation specialist shall obtain documentation of the previous job dislocation benefit or rehabilitation for purposes of AS 23.30.041 (f)(2) and (3).

(f) The rehabilitation specialist whose name appears on the referral letter shall document whether a permanent impairment is identified or expected at the time of medical stability. This documentation may be either a physician's rating according to the appropriate edition of the *American Medical Association's*

*Guides to the Evaluation of Permanent Impairment* under AS 23.30.190 or a physician's statement that an impairment rating is or is not expected.

(g) In accordance with 8 AAC 45.500, and no later than 30 days after being selected, the rehabilitation specialist whose name appears on the referral letter shall submit to the administrator, with simultaneous copies to the employee and employer,

(1) a report of findings, including a recommendation regarding eligibility for reemployment benefits, together with

(A) copies of all predictions by any physician along with job titles identified under (a)(3) and (b)(4) of this section and job analyses identified under (c)(1) of this section;

(B) the completed offer of employment form, if employment has been offered;

(C) labor market research, if necessary;

(D) documentation of any previous job dislocation benefit or rehabilitation, or evidence of efforts to obtain the information if not received; and

(E) all physicians' rating or statement regarding permanent impairment; or

(2) a written request for a 30-day extension explaining the unusual and extenuating circumstances, in accordance with AS 23.30.041 (d), that prevented the rehabilitation specialist from completing the evaluation within 30 days after selection, documenting that the employee, employer, and the employee's physician were contacted within the first 30 days and that the rehabilitation specialist is awaiting a response from one or more of the contacts; if the administrator grants an extension requested under this paragraph, the rehabilitation specialist shall prepare and submit a report of findings in accordance with (1) of this subsection within a total of 60 days from the date the rehabilitation specialist was selected.

**8 AAC 45.530. Determination on eligibility for reemployment benefits.**

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(a) Within 14 days after receiving a rehabilitation specialist's eligibility evaluation report for an employee injured on or after July 1, 1988, the administrator will determine whether the employee is eligible or ineligible for reemployment benefits, or that insufficient information exists to make a determination on the employee's eligibility for reemployment benefits. The administrator will give the parties written notice by certified mail of the determination, the reason for the determination, and how to request review by the board of the determination.

(b) If the administrator determines the eligibility evaluation is not in accordance with 8 AAC 45.525, or the information in the board's case file is insufficient or does not support the eligibility recommendation, the administrator

(1) may not decide the employee's eligibility for reemployment benefits; and

(2) shall notify the employee, the employer, or the rehabilitation specialist

(A) what additional information is needed, who must submit the information, and the date by which the information must be submitted so eligibility can be determined; or

(B) that the administrator shall reassign the employee to a new rehabilitation specialist in accordance with 8 AAC 45.430.

On appeals to the Alaska Workers' Compensation Appeals Commission or the courts, decisions reviewing Board designee determinations are subject to reversal under the "abuse of discretion" standard in AS 44.62.570, incorporating the "substantial evidence test." 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., Kin v. Norcon*, AWCB Decision No. 99-0041 (March 1, 1999); *Lemoire v. B&R Construction*, AWCB Decision No. 99-0019 (January 28, 1999); *Buxton v. Cameron Corporation*, AWCB Decision No. 99-0005 (January 8, 1999).

After allowing parties to offer admissible evidence, all the evidence is reviewed to assess whether the RBA designee'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 designee's decision is not supported by substantial evidence, the RBA designee abused her discretion and the case is remanded for reexamination and further action.

The RBA designee's decision must be upheld absent "an abuse of discretion." Several definitions of "abuse of discretion" appear in Alaska law although none appear in the Alaska Workers' Compensation Act. The Alaska Supreme Court describes abuse of discretion as "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). *See also Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962); *Black's Law Dictionary* 8 (7th ed. 2000). The Court has also stated that abuse of discretion exists only when the Court is "left with the definite and firm conviction on the whole record that the trial judge has made a mistake." *Brown v. State*, 563 P.2d 275, 279 (Alaska 1977).

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

#### ANALYSIS

***Should the designee's August 27, 2013 determination finding Employee not eligible for reemployment benefits be upheld?***

AS 23.30.041 states an employee is eligible for reemployment benefits if a physician predicts the employee will have permanent physical capacities less than the physical demands of the

employee's job at the time of injury or in the ten years prior to the injury. The statute further states an employee is not eligible for reemployment benefits if, at the time of medical stability, it is predicted he will not have a PPI greater than zero. In the present case, at the time of the eligibility determination, Dr. Wade opined Employee have a PPI rating greater than zero. Employee alleges the rehabilitation specialist and RBA designee made several errors which demonstrate the RBA designee abused her discretion in finding Employee ineligible for reemployment benefits. This decision will address each allegation in turn.

*Employee contends the designee's determination was untimely, and she should have requested updated information from the reemployment specialist.*

8 AAC 45.530 states a determination on eligibility for reemployment benefits will be made within 14 days of receipt of the rehabilitation specialist's eligibility evaluation report. Here, the rehabilitation specialist submitted his revised report on June 14, 2013. Under the regulation, the RBA designee should have issued a determination on eligibility for reemployment benefits by June 24, 2013. She did not issue a determination until August 27, 2013, roughly sixty days late. Employee contends sufficient time had elapsed between the receipt of the eligibility report and the determination "that the Board record should have been reviewed to make sure that all information presented in the eligibility evaluation report was current and accurate." However, there is no indication in the record Dr. Wade would have made different predictions in August 2013 as to whether Employee would incur a permanent partial impairment above zero or would have the physical capacities to perform the job duties of retail manager, athletic trainer, or physical instructor than he did in April 2013. In fact, on September 12, 2013, Dr. Wade released Employee to light duty work, which supported his earlier predictions Employee would have the permanent physical capacities to perform the job duties of retail manager and physical instructor, both light duty positions. The RBA designee's failure to make an eligibility determination within the timeline of the regulation is harmless error.

*Employee contends the rehabilitation specialist used the incorrect SCODRDOT descriptions.*

Employee contends "retail store manager" is not an accurate description of a job he held in the ten years prior to his injury, as he owned a gym, not a retail store, and his wife was responsible for the day-to-day management of the store, while he worked as a personal trainer. However, in his

interview with the reemployment specialist Employee described the position as a co-owner of Jungle Gym, where he sold memberships, demonstrated how to use equipment, served as a fitness trainer and dietary coach and ran a small café selling food and beverage items. Review of the SCODRDOT job description of “retail store manager” shows it matches Employee’s description of his job duties when read in conjunction with the job description for “physical instructor.”

Employee also contends the reemployment specialist should have included the “stock clerk” position description, as it is a necessary subordinate position of retail store manager. However, Employee made no indication in his work history interview he had subordinates at Jungle Gym or that his position required any heavy lifting. In any event, even if retail store manager was not an accurate job description or if the designee erred in not including stock clerk as included in the position of retail store manager, there was substantial evidence supporting her determination. Employee does not dispute the reemployment specialist’s inclusion of the “physical instructor” job description, which Dr. Wade approved.

*Employee contends the designee should have required the reemployment specialist to obtain additional medical information regarding Employee’s heart condition.*

As noted in the reemployment specialist’s eligibility evaluation, Employee had a heart attack in 2010 which required an echocardiogram prior to his shoulder surgery. Employee contends the designee erred in obtaining additional medical information related to Employee’s heart condition. However, at the time of the injury in 2012, Employee was employed with Employer as a produce clerk, which is in the “heavy” physical demand category, with presumably no cardiac difficulties. The three job descriptions Dr. Wade approved were in the medium duty (athletic trainer) and light duty (retail manager and physical instructor) categories. There was no indication in the record before the designee Employee’s cardiac condition may hinder his ability to obtain future employment.

*Employee contends the designee should have required the reemployment specialist to contact Employer again to determine if alternative employment was available for Employee.*

AS 23.30.041(f) states an employee is not eligible for reemployment benefits if the employer offers employment within the employee’s predicted post-injury physical capacities at certain wage levels.

Employee contends the RBA designee erred in failing to require the reemployment specialist to make another attempt to contact Employer's human resources department to determine if alternative employment was available to Employee. The reemployment specialist contacted the human resources department on March 12, 2013, and received no response. He noted "thus CRC must conclude physically appropriate alternative employment cannot be made available to Mr. Groves," and found Employee was eligible for reemployment benefits as to that statutory criterion. As this factor falls in Employee's favor, it is unclear why Employee contends the designee should have sought additional evidence upon which she could have found Employee ineligible for benefits. Nonetheless, The RBA designee's determination Employee was ineligible for reemployment benefits was not based on the reemployment specialist's contact or lack of contact with Employer, and any failure to follow-up on this issue was harmless error.

After reviewing the submitted SCODRDOT descriptions, Dr. Wade further opined Employee would not have the permanent physical capacities to perform the job of stock clerk, but would have the permanent physical capacities to perform the job duties of retail manager, athletic trainer and physical instructor. At the time of the eligibility determination, there were no contradictory opinions before the RBA designee, and her determination was supported by substantial evidence. Her reliance on this evidence in finding Employee not eligible for reemployment benefits was not an abuse of discretion and will be upheld. *Miller*.

#### CONCLUSION OF LAW

The designee's August 27, 2013 determination finding Employee not eligible for reemployment benefits will be upheld.

#### ORDER

Employee's September 5, 2013 petition for review of the RBA Designee's August 27, 2013 determination Employee is ineligible for reemployment benefits is denied.



Dated this 13<sup>th</sup> day of January, 2014, in Fairbanks, Alaska.

ALASKA WORKERS' COMPENSATION BOARD

/s/ \_\_\_\_\_  
Amanda K. Eklund, Designated Chair

/s/ \_\_\_\_\_  
Zeb Woodman, 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 JAMES GROVES Employee / petitioner; v. FRED MEYER, INC., Self-Insured Employer, and Sedgwick, Adjuster / respondents; Case No. 201214445; dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, and served upon the parties this 13<sup>th</sup> day of January, 2014.

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Darren Lawson  
Office Assistant II