ALASKA WORKERS' COMPENSATION BOARD

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

DANIELLE BARRETT, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201116148
MAT-SU REGIONAL MEDICAL CENTER, Employer,	)	AWCB Decision No. 14-0072
	)	Filed with AWCB Anchorage, Alaska on May 29, 2014
and	)	
AMERICAN ZURICH INSURANCE COMPANY, Insurer, Defendants.	)	

Danielle Barrett's August 28, 2013 claim for temporary total disability (TTD) and March 5, 2014 petition for review of the Reemployment Benefits Administrator (RBA) denial of her proposed reemployment plan, and Mat-Su Regional Medical Center's March 21, 2014 petition for review of the Reemployment Benefits Administrator (RBA) denial of its proposed reemployment plan, were heard on April 29, 2014 in Anchorage, Alaska. This hearing date was selected on October 23. 2013. Attorney Eric Croft appeared and represented Danielle Barrett (Employee). Attorney Randall Weddell appeared and represented Mat-Su Regional Medical Center and American Zurich Insurance Company (Employer). Employee appeared and testified. Robin Wahto, James Martin, D.C., Loretta Cortis, Alizon White, and Thomas Dietrich, M.D., appeared as witnesses. The record closed at the hearing's conclusion on April 29, 2014.

ISSUES

Employee contends she is entitled to TTD after July 1, 2013 because she is totally disabled and not yet medically stable. Employer contends Employee is not disabled as she is employable without retraining.

1. Is Employee entitled to TTD benefits after July 1, 2013?

Employee contends the RBA abused his discretion in denying the reemployment plan developed by her selected rehabilitation specialist. Employer contends the RBA properly rejected the proposed plan.

2. Did the RBA abuse his discretion in denying the reemployment plan developed by Employee's rehabilitation specialist?

Employer contends the RBA abused his discretion in denying the reemployment plan developed by its selected rehabilitation specialist. Employee contends the plan was properly denied.

3. Did the RBA abuse his discretion in denying the reemployment plan developed by Employer's rehabilitation specialist?

Although attorney fees were listed as an issue for the hearing, the parties agreed to defer that issue until the issues identified above have been resolved.

FINDINGS OF FACT

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

1. Employee worked as a certified nursing assistant (CNA) for employer. On October 21, 2011, she was helping a partially paralyzed patient into a sport utility vehicle (SUV). When she lifted the patient, she felt a "pop" in her low back. She informed her supervisor, applied ice, and took a non-prescription pain reliever. She completed her shift and worked the following day, but avoided any lifting. The next morning, she was in extreme pain and couldn't move. She called someone for assistance and went to the emergency room. (Report of Injury, October 25, 2011; Employee).
2. At the emergency room, an MRI revealed a very large extruded disk fragment at the L5-S1 level in her back. She was given a prescription for muscle relaxers and pain medication and

was referred to Timothy Cohen, M.D., a neurosurgeon. (Mat-Su Regional Medical Center, MRI Report, Emergency Room Report, October 24, 2011).

3. On November 7, 2011, Employee saw Dr. Cohen. He noted that an MRI taken before the work injury showed a disk bulge, but the MRI taken after the work injury showed a worsened bulge and a significant large free fragment. Dr. Cohen recommended she undergo a right L5-S1 laminectomy and discectomy. (Cohen, Chart Note, November 7, 2011).
4. While waiting for surgery, Employee periodically received massage therapy from James Martin, D.O. (Martin, Physician Reports).
5. On December 14, 2011, Employee was seen by Dr. Dietrich for an employer's medical evaluation (EME). Dr. Dietrich stated Employee had a sizable preexisting protrusion at L5-S1, but the work injury resulted in the extrusion of a large fragment of the disc material down the spinal canal. He opined Employee was not medically stable, and the work incident was the substantial cause of the worsening of her condition and the need for surgery. (Dietrich, EME Report, December 14, 2011).
6. On February 22, 2012, Dr. Cohen performed a laminotomy and discectomy at the L5-S1 level. (PAMC Procedure Report, February 22, 2012).
7. On March 26, 2012, Employee returned to Dr. Cohen with complaints of headache and swelling near her surgical incision. Dr. Cohen was concerned cerebrospinal fluid had leaked from a tear in her meniscus and collected in nearby tissues. (Cohen, Chart Note, March 26, 2012).
8. On April 4, 2012, Employee underwent surgery to repair the small tear that was causing her cerebrospinal fluid leak and to remove additional disc fragments from the herniation that had recurred. (PMAC, Procedure Report).
9. On May 10, 2012, Employee returned to Dr. Cohen. He stated she was unable to return to work because of her continued lower back pain. He noted degenerative disc disease at the L5-S1 level and said she would make an excellent candidate for disc replacement given her young age, active lifestyle, and single-level disease. (Cohen, Chart Note, May 10, 2012).
10. On June 18, 2012, Employee returned to Dr. Cohen for follow-up. She reported continued back pain and numbness and tingling in both legs. An MRI showed the surgical changes at the L5-S1 level with a small central disc extrusion that was significantly improved from a March 26, 2012 MRI. Dr. Cohen discussed treatment options with Employee. The options

were a discectomy and arthroplasty or a fusion. Employee would require testing for nickel allergy before the choice could be made. Employee elected to wait and follow the course of her recovery. (Cohen, Chart Note, June 18, 2012). Dr. Cohen also gave Employee an updated off-work slip stating she would be disabled from June 18, 2012 until after a PCE (physical capacities evaluation) was done. (Cohen, Leave Slip, June 18, 2012).

11. On July 10, 2012 Employee was seen by Shawn Johnston, M.D. who performed a permanent partial impairment (PPI) rating. Dr. Johnston rated Employee with an eleven percent whole person permanent impairment. (Johnston, PPI Rating, July 10, 2012). Employee was puzzled at the time as she was expecting Dr. Johnston to perform a PCE. (Employee).
12. A PPI rating is properly done only after an employee has reached medical stability. (AMA Guides to the Evaluation of Permanent Impairment, Sixth Ed., §2.3c, 24).
13. On August 22, 2012, an adjuster spoke to Dr. Cohen's office asking if Employee was medically stable. Dr. Cohen stated Employee was to have had a PCE done, not a PPI rating. He stated Employee was not medically stable. (Cohen, Chart Note, August 22, 2012).
14. On January 9, 2013, Employee was seen by John DeCarlo for a PCE. She explained to Mr. DeCarlo that she did not believe she could return to work as a CNA because of the lifting requirements. She said she wished to stay in the medical field and was considering retraining as a certified medical assistant (CMA). Mr. DeCarlo found Employee was capable of only light physical duties, which precluded her return to work as a CNA, a medium duty job. He noted a CMA would be a "very appropriate" job as it was light duty. (DeCarlo, Functional Capacities Evaluation, January 19, 2013).
15. At some point, Employee began taking on-line classes through South University that would benefit her in obtaining another job in the medical field. (Employee).
16. On February 8, 2013, Employee was found eligible for reemployment benefits. (Eligibility Letter, February 8, 2013). She chose rehabilitation specialist Loretta Cortis to develop a reemployment plan. (Reemployment Election Form, February 21, 2013).
17. On March 15, 2013, Dr. Dietrich again examined Employee in an EME. Dr. Dietrich was not optimistic further surgery would benefit Employee. He recommended physical therapy, stating Employee would be medically stable at the completion of the physical therapy and was capable of returning to work in a light-duty job. (Dietrich, Supplemental EME Report, March 15, 2013).

18. On May 24, 2013, Dr. Martin predicted that Employee would have the permanent physical capacities to perform the physical demands of a medical assistant as described in SCODRDOT 079.362-010. The SCODRDOT describes the types of tasks required, indicates it is a light-duty position, and addresses the frequency of various physical demands such as reaching, feeling, talking, etc.
19. On June 14, 2013, Dr. Dietrich again examined Employee. He noted Dr. Cohen had recommended disc replacement surgery and opined there was a significant chance Employee would not benefit from the procedure but noted there were some factors in her favor. He felt she would be better off without the procedure. He believed she was uninformed about the likelihood of success and recommended she investigate further before deciding. He stated Employee was medically stable if she chose not to have the disc replacement surgery. (Dietrich, Supplemental EME Report, June 14, 2013).
20. On June 24, 2013, rehabilitation specialist Loretta Cortis submitted a proposed reemployment plan to the RBA (Employee's plan). The plan had not been signed by Employee or Employer. The goal of the plan was to train Employee as a medical assistant, DOT 079.362-010, the job description approved by Dr. Martin on May 24, 2013. The plan was to take 23.5 months, and the projected cost was $13,037.00. The plan was to be met through academic training at University of Alaska Anchorage (UAA) and Mat-Su College. Because of the classes she had taken on line, Employee would not have to take four of the required courses. Her schedule required three or four classes each semester ranging from nine to eleven credits per semester plus one two credit class the first summer and a five credit externship the second summer. The plan allowed for tuition at $165.00 per credit hour and books and fees of $665.00 per semester. The plan allowed $40.00 per month for transportation, but noted that would not compensate Employee for all of her mileage. The rehabilitation specialist noted that AS 23.30.041(l) required that on-the-job training, vocational training, academic training, and self-employment be considered in developing a plan that returns an employee to remunerative employment in the shortest time. In addition to the goal of CMA, the rehabilitation specialist also investigated pharmacy technician, radiology technician, medical sonography technician, substance abuse counselor, and paralegal as possible occupational goals, but ruled them out for various reasons. (Employee Plan, June 24, 2013).

21. On July 16, 2013, Employer controverted TTD benefits after June 14, 2013 based on Dr. Dietrich's conclusion Employee was medically stable. (Controversion Notice, July 17, 2013). Employee had been paid TTD through June 30, 2013. (Employee).
22. On August 1, 2013, Employee signed the Employee Plan. (Plan Signature Page, August 1, 2013).
23. On August 23, 2013, Employee's attorney wrote to Employer's attorney asking that Employer either agree to or object to Employee's plan. (Letter, E. Croft to R. Weddle, August 23, 2013).
24. On August 28, 2013, Employee requested an emergency conference with the RBA. (Letter, E. Croft to M. Kemberling, August 28, 2013).
25. On September 11, 2013, Dr. Martin disapproved of a receptionist job description. He stated Employee could not sit for more than 20 minutes without having to get up and move around. Prolonged standing also aggravated her back. (Letter, Dr. Martin to M. Wentworth, September 11, 2013).
26. On September 30, 2013, Employee's attorney wrote to the RBA informing him that Employer had refused to sign Employee's plan and asking the RBA to either approve or deny the plan. (Letter, E. Croft to M. Kemberling, September 20, 2013).
27. On October 5, 2013, Dr. Dietrich reviewed the job description for SCODRDOT 237.0138 for a Receptionist (Clerical) and opined Employee was capable of performing the job "based on her permanent modified restrictions." (Letter Dr. Dietrich to M. Wentworth, October 5, 2013).
28. On October 8, 2013, Employer filed a proposed reemployment plan developed by reemployment specialist Alizon White (Employer's Plan). The objective of the plan was to retrain Employee to work as Medical Office Support, a combination of Receptionist (DOT code 237.367-038) and Unit Clerk (DOT Code 245.362-014). The objective would be met through vocational training, a 12 credit online program through the University of Alaska Fairbanks, Community and Technical College. The plan was projected to take 18 weeks, at a cost of $4,897.00. The rehabilitation specialist was unable to identify any goal that could be met through on-the-job training. Self-employment was rejected because Employee expressed no interest in self-employment, and an "option higher on the list of priorities" was selected. Similarly, academic training was rejected because an "option higher on the list of priorities"

was selected. The reemployment specialist contacted ten employers asking about job availability. In seven cases, the employer had not responded to additional questions regarding the physical duties required. One position required adequate computer skills with experience in Word, Excel, and Powerpoint preferred. The employer stated it was primarily a desk job with occasional standing, and someone with Employee's background and training would be qualified, but the employer did not address Employee's physical limitations. Another position required keyboarding skills of 35 words per minute. The employer stated Employee's lifting restriction could be accommodated, but did not address her limitations on standing or sitting. The last position paid $13.00 to $14.00 per hour and required computer and word processing experience. The employer stated the duties included working at a desk on a computer with occasional standing and walking; again, the employer did not address Employee's restrictions. The rehabilitation specialist considered but ruled out medical assistant, phlebotomist, pharmacy technician, medical biller/coder, and medical office support as occupational goals for various reasons. The plan notes that job descriptions had been sent to Dr. Dietrich, but his response was pending. (Employer Plan, October 28, 2013).

29. On October 18, 2013, Dr. Dietrich approved a SCODRDOT job description for "Unit Clerk." Dr. Martin disapproved the job description on October 24, 2013. (SCODRDOT Unit Clerk description, October 18 and 24, 2013).
30. On November 14, 2013, an allergy test showed Employee was allergic to nickel. (Allergy, Asthma & Immunology Center, Report, November 14, 2013).
31. On November 21, 2013, Employee had another MRI which showed a new herniation since the September 2012 MRI. (Imaging Associates of Providence, Imaging Result Report, November 21, 2013).
32. On January 2, 2014, Dr. Cohen saw Employee. He noted the recent MRI revealed a new herniation and reviewed surgical options with Employee. Employee chose to proceed with the disc replacement surgery, but asked to schedule the surgery in May, between semesters at school. (Cohen, Chart Note, January 2, 2014).
33. January 27, 2014, informal rehabilitation conference was held. Both attorneys, Employee, and both rehabilitation specialists participated. (Case Management database, Informal Conference Note, January 27, 2014).

34. On March 3, 2014 the RBA denied Employee's plan. The RBA gave four reasons for his denial. First, the plan did not require full-time continuous participation. The RBA stated that UAA considered full-time to be 12 credits per semester and six credits during summer sessions. He stated the plan might have been proposed for a shorter time frame. Second, the RBA pointed out that Dr. Martin had approved a SCODRDOT job description rather than a job analysis. He believed Dr. Martin's subsequent comments called that approval into question. Third, the RBA stated the plan did not include the actual costs of transportation, and if the actual costs were included, the plan would exceed the statutory limit of $13,300.00. Fourth, the RBA stated the plan focused on academic training and did not address whether on-the-job training or vocational training could return Employee to remunerative employability in a shorter time. (RBA Plan Denial, March 3, 2014).
35. On March 7, 2014, the RBA denied Employer's plan for two reasons. First, the RBA stated no doctor had approved a job analysis for the Unit Clerk occupation. While Dr. Dietrich approved the Receptionist position, his approval was based on an incomplete SCODRDOT description. He noted that Martin's concerns with prolonged sitting and standing could eliminate some clear-cut sedentary and light duty jobs. Second, the RBA stated that the rehabilitation specialist had not shown the proposed program would provide Employee with the skills to be employable at her remunerative wage, and Employee would likely require additional coursework. He noted that documentation matching Employee's credentials following training with the expected wage was lacking. (RBA Plan Denial, March 7, 2014).
36. On March 27, 2014, Employee met with Dr. Cohen. Employee reported that she had been using a TENS unit which provided some relief. He noted that while Employee had previously favored the disc replacement surgery, after further research she wished to proceed with the fusion. (Cohen, Chart Note, March 27, 2014).
37. Employee was earning $22.58 per hour at the time of injury. Although she had previously only worked part-time, she had begun working full-time before the injury due to a divorce. (Employee).
38. Based on the higher of the two calendar years before the injury, Employee's gross weekly earnings were $301.06 resulting in a compensation rate of $234.00 per week. (Compensation Report, August 1, 2012).

39. Robin Wahto, Director of School of Allied Health at UAA, stated she had met with Employee, reviewed the online courses she had taken, and determine which course would transfer for credit toward the CMA course. She explained that the coursework for the CMA program could not be completed faster than scheduled for Employee because several of the classes must be taken in order as some classes are prerequisites for others, and not all classes are offered every semester. The externship was not recommended after only one year of study. She stated Employee had been doing well at her classes. (R. Wahto).
40. Dr. Martin testified he had been treating Employee since October 28, 2011, just after the work injury. He confirmed his opinion that Employee had the physical capacity to work as a CMA, but not as a CNA. His opinions were based not just on the written description, but also how the jobs are performed in the "real world." He explained that extended sitting places more pressure on discs. He was familiar with both jobs, and used assistants in his practice, although in the chiropractic setting they are called certified chiropractic assistants rather than CMAs. (Dr. Martin).
41. Ms. Cortis stated Employee was very interested in continuing in the medical field. Employee had even started taking online classes after the injury, but before she was referred for the reemployment benefits evaluation. She considered other goals, including pharmacy technician, radiology technician and medical sonographer. She briefly considered medical receptionist, but ruled it out because it did not meet the remunerative wage. She spoke with Ms. Wahto at UAA, and expected the CMA course to be less than two years given the classes Employee had already taken. Ms. Wahto explained it would still take two years because of class sequencing. She believed a SCODRDOT job description, as opposed to a job analysis, could be used if the SCODRTDOT was consistent with real world. She had personal experience with both medical receptionists and CMAs and believed the CMA position was more appropriate because CMAs can frequently vary their position. She explained that the allowance for transportation was inadequate, but Employee was working with the Division of Vocational Rehabilitation (DVR), and DVR could reimburse some of Employee's transportation costs, but could not commit to doing so until a reemployment plan was approved. She also pointed out that several of the classes in the plan were offered at Mat-Su College, so Employee would not have to commute to Anchorage for every class. At the rehabilitation conference, the RBA asked for additional information about the online South

University classed Employee had taken. Ms. Cortis sent him the information with an internet link to South University's web site. At the conference, she also brought up the fact that at that time Employee would only need one year and six weeks to complete the plan given the classes she had already take and she would be well within the cost restrictions of the Act. (L. Cortis).

42. Dr. Dietrich testified Employee has had the capability work as a medical receptionist since at least May 2013. He explained that back pain, such as Employee's, is caused by irritation of nerves which send a message to the muscles to tighten, which in turn causes the pain. The pain happens with prolonged standing or sitting, but stretching, massage, or chiropractic can help. Even though a person experiences pain, no further harm is being done. Pain isn't a reason not to take a job if it doesn't cause harm. He noted that if Employee was able to tolerate driving about one and one-half hours commuting to classes, she was capable of being a receptionist. He was not aware that Employee used a TENS during her commute. (Dr. Dietrich).
43. Ms. White explained she prepared her plan at Employer's request. She looked over the medical records, transcripts, the Employee Plan, Employee's work experience, and looked at what jobs were available. She determined the goal of medical office support was appropriate. The position is a combination of the SCODRDOT descriptions for Receptionist and Unit Clerk. Receptionist is a sedentary position, and Unit Clerk is light duty. She asked Dr. Dietrich to review the SCODRDOT job descriptions, and he concluded she was capable of doing both. She did a labor market survey for Medical receptionist, and found a range of wage rates, at least some of which would meet Employee's remunerative wage. Ms. White also did a survey to determine if Employee was TTD since May 2013. She surveyed seven employers and found Employee was currently employable without further retraining at $13.00 to $16.00 per hour. While Employee would benefit from the Employer's plan, she does not need the plan to achieve the remunerative wage. (A. White).
44. CMAs work in a variety of settings, and the duties and physical requirements differ depending on the particular setting. (Observation).

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 . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . subject to . . . this chapter;

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 23.30.005. Alaska Workers' Compensation Board. . . .
. . . .
(h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

AS 23.30.010. Coverage.
(a) . . . compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

AS 23.30.041. Rehabilitation and reemployment of injured workers.
. . . .
(h) Within 90 days after the rehabilitation specialist's selection under (g) of this section, the reemployment plan must be formulated and approved. The reemployment plan must require continuous participation by the employee and must maximize the usage of the employee's transferrable skills. The reemployment plan must include at least the following:

(1) a determination of the occupational goal in the labor market;

(2) an inventory of the employee's technical skills, transferrable skills, physical and intellectual capacities, academic achievement, emotional condition, and family support;

(3) a plan to acquire the occupational skills to be employable;

(4) the cost estimate of the reemployment plan, including provider fees; and the cost of tuition, books, tools, and supplies, transportation, temporary lodging, or job modification devices;

(5) the estimated length of time that the plan will take;

(6) the date that the plan will commence;

(7) the estimated time of medical stability as predicted by a treating physician or by a physician who has examined the employee at the request of the employer or the board, or by referral of the treating physician;

(8) a detailed description and plan schedule;

(9) a finding by the rehabilitation specialist that the inventory under (2) of this subsection indicates that the employee can be reasonably expected to satisfactorily complete the plan and perform in a new occupation within the time and cost limitations of the plan; and

(10) a provision requiring that, after a person has been assigned to perform medical management services for an injured employee, the person shall send written notice to the employee, the employer, and the employee's physician explaining in what capacity the person is employed, whom the person represents, and the scope of the services to be provided.

(i) Reemployment benefits shall be selected from the following in a manner that ensures remunerative employability in the shortest possible time:

(1) on the job training;

(2) vocational training;

(3) academic training;

(4) self-employment; or

(5) a combination of (1) - (4) of this subsection.

(j) The employee, rehabilitation specialist, and the employer shall sign the reemployment benefits plan. If the employer and employee fail to agree on a reemployment plan, either party may submit a reemployment plan for approval to the administrator; the administrator shall approve or deny a plan within 14 days after the plan is submitted; within 10 days of 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.

(k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. . . .

(r) In this section

(1) "administrator" means the reemployment benefits administrator under (a) of this section;

(2) "employability" means possessing the ability but not necessarily the opportunity to engage in employment that is consistent with the employee's physical status imposed by the compensable injury;

. . . .

(4) "physical capacities" means objective and measurable physical traits such as ability to lift and carry, walk, stand or sit, push, pull, climb, balance, stoop, kneel, crouch, crawl, reach, handle, finger, feel, talk, hear, or see;

(5) "physical demands" means the physical requirements of the job such as strength, including positions such as standing, walking, sitting, and movement of objects such as lifting, carrying, pushing, pulling, climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling, fingering, feeling, talking, hearing, or seeing;

(6) "rehabilitation specialist" means a person who is a certified insurance rehabilitation specialist, a certified rehabilitation counselor, or a person who has equivalent or better qualifications as determined under regulations adopted by the department;

(7) "remunerative employability" means having the skills that allow a worker to be compensated with wages or other earnings equivalent to at least 60 percent of the worker's gross hourly wages at the time of injury; if the employment is outside the state, the stated 60 percent shall be adjusted to account for the difference between the applicable state average weekly wage and the Alaska average weekly wage.

> **AS 23.30.120. Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;

An injured employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991). The presumption's application involves a three-step analysis. First, an employee must establish a "preliminary link" between the claim and his employment. An employee need only adduce "some," "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). Credibility is not considered in this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

If the employee establishes the preliminary link, then the employer can rebut the presumption by presenting substantial evidence that demonstrates that a cause other than employment played a greater role in causing the disability or need for medical treatment or by substantial evidence that employment was not the substantial cause. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011) at 7); *Atwater Burns Inc. v. Huit*, AWCAS Decision No. 191 (March 18, 2014). If the board finds the employer's evidence is sufficient to rebut the presumption, the presumption drops out and the employee must prove his case by a preponderance of the evidence. This means the employee must "induce a belief" in the fact finders' minds that the facts being asserted are "probably true." *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). If, however, the employer fails in the second step to rebut the raised presumption, the employee is entitled to the benefits at issue solely on the raised and unrebutted presumption.

In the third step, relevant evidence is weighed and inferences are drawn from the evidence. *Runstrom*, at 7. Credibility is also considered. AS 23.30.122.

> **AS 23.30.122**. **Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and

reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

AS 23.30.185. Compensation for temporary total disability.
In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

AS 23.30.190. Compensation for permanent partial impairment; rating guides. (a) In case of impairment partial in character but permanent in quality . . .

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment. . . .

AS 23.30.220. Determination of spendable weekly wage.
(a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
. . . .

(4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;

AS 23.30.395. Definitions.
In this chapter, ...

(16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment
. . . .

"[P]ain or other symptoms can be as disabling as deterioration of the underlying disease itself" *Hester v. State*, 817 P.2d 472, (Alaska 1991), footnote 7. Once established disability and the need for medical benefits are presumed to continue. *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 672 (Alaska 1991); *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665 (Alaska 1991).

> **AS 44.62.570. Scope of review.**
> . . .
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> (b) . . . 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

RBA- decisions on review 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 the RBA abused his discretion is aided by the practice of allowing additional evidence at the board's review hearing, in appropriate cases where the evidence could not with due diligence have been presented earlier, based on the rationale expressed in several superior court opinions. *See, e.g., Kelley v. Sonic Cable Television*, Superior Court Case No. 3AN 89-6531 Civil (February 2, 1991).

After allowing parties to offer admissible evidence, all 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.

The RBA's decision must be upheld absent "an abuse of discretion." AS 23.30.041(d). Several "abuse of discretion" definitions appear in Alaska law though 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 Alaska Supreme Court stated abuse of discretion exists 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).

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

(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;

8 AAC 45.550. Plans
(a) If an employee is found eligible for development of a reemployment plan, the rehabilitation specialist whose name appears on the referral letter shall

(1) interview the employee, and conduct testing if needed, to complete an inventory in accordance with AS 23.30.041 (h)(2);

(2) document the employee's permanent physical capacities, in accordance with AS 23.30.041 (h)(2), and the estimated date of medical stability in accordance with AS 23.30.041 (h)(7);

(3) compute the employee's remunerative employability wage; the wage computed under this paragraph must meet the standards of compensation set out in the definition of "remunerative employability" under AS 23.20.041(r)(7) and meet the requirements of "gross hourly wages at the time of injury" under 8 AAC 45.490;

(4) determine an occupational goal for the employee;

(5) submit a job analysis of the occupational goal to a physician to predict whether the employee will have the permanent physical capacities to perform the physical demands of the job;

(6) submit research documenting that the

(A) plan will provide the employee the occupational skills necessary to be employable within the plan's occupational goal;

(B) occupational goal exists in the labor market, as defined in AS 23.30.041 (r)(3); and

(C) plan ensures remunerative employability under AS 23.30.041(r)(7);

(7) consider all of the options listed under AS 23.30.041 (i) before selecting the option that will return the employee to remunerative employability in the shortest possible time; and

(8) write a detailed reemployment plan, including
(A) the findings based on the documentation required under (1) - (7) of this subsection;

(B) the time frame for the employee's reemployment plan, to include the date the plan begins and the date the plan ends, with a total time frame not to exceed two years from the date of plan approval or the date of plan acceptance, whichever date occurs first;

(C) the cost of the plan, which may not exceed the statutory amount under AS 23.30.041 (l); and

(D) a finding explaining why the employee can be reasonably expected to satisfactorily complete the plan and perform in the new occupation within the time and cost limits of the plan.

(b) No later than 90 days after the date of the employee's referral to the rehabilitation specialist for development of a reemployment plan, the rehabilitation specialist whose name appears on the referral letter shall submit
(1) the plan
(A) to the employee and the employer for their review and signatures in accordance with AS 23.30.041 (j) indicating that the employee and employer have reviewed the plan and whether the employee and the employer agree or disagree with the plan; and

(B) signed by the specialist, the employee, and the employer, to the administrator in accordance with 8 AAC 45.500; or

(2) a report, together with medical documentation attached, that shows the employee's medical condition has changed since the start of efforts to develop the employee's reemployment plan, and that the employee is currently unable to participate in plan activities; the medical documentation required by this paragraph must also include an estimated date when efforts to develop the employee's reemployment plan can resume.

(c) If the employee and the employer fail to agree to the reemployment plan written under (a)(8) of this section, either party may request the administrator to review and approve the plan. Within 14 days after the administrator receives the plan for review, the administrator will
(1) approve the plan and notify the parties by certified mail;

> (2) deny the plan and notify the parties by certified mail; or
>
> (3) notify the parties that the plan is incomplete and request additional information from the parties before making a decision on the plan.
>
> (d) If the administrator requests additional information, the administrator will make a decision within 14 days after the additional information is received, and notify the parties by certified mail.

ANALYSIS

1. Is Employee entitled to TTD benefits after July 1, 2013?

Employer contends Employee is not disabled both because she is medically stable and is able to work. Whether Employee is medical stable is a question to which the presumption of compensability applies. Without regard for credibility and without weighing the evidence, Employee raised the presumption through Dr. Cohen's May 10, 2012 and August 22, 2012 opinions that she was not medically stable.

Because Employee raised the presumption, Employer was required to present substantial evidence Employee was not medically stable. Even without weighing the evidence or considering credibility, Dr. Dietrich's June 14, 2013 opinion that Employee was medically stable is insufficient to rebut the presumption. Dr. Dietrich's opinion was conditional. He stated Employee was medically stable *if she chose not to have surgery.* Because Employer presented no evidence that Employee had chosen not to have surgery, Dr. Dietrich's opinion is not substantial evidence.

However, without weighing it against other evidence or considering credibility, Dr. Johnston's July 7, 2012 PPI rating is substantial evidence that Employee was medically stable as of that date and is substantial evidence to rebut the presumption.

Because Employer rebutted the presumption Employee was required to prove by a preponderance of the evidence that she was not medically stable after July 1, 2013. Because there is no evidence the condition on which Dr. Dietrich's opinion depended was satisfied, his opinion is given no weight. Similarly, no weight is given to Dr. Johnston's PPI rating. For

whatever reason, Dr. Johnston's PPI rating was done in error. Dr. Cohen expected Employee to get a physical capacities evaluation, not a PPI rating, and he confirmed Employee was not medically stable. Medical stability is a necessary precursor to a PPI evaluation. As her surgeon, Dr. Cohen's May 10, 2012 and August 22, 2012 opinions that Employee was not medically stable are given greater weight. Her disability is presumed to continue. The preponderance of the evidence is that Employee has not been medically stable after July 1, 2013.

Employer contends Employee is not disabled because there are open, available jobs that she is qualified to perform without further training. Because the relevant facts are not disputed, this is a legal question, and the presumption does not apply. According to Employer, the average wage for these positions exceeds both Employee's remunerative wage and her gross weekly wage at the time of injury, so she is not disabled. Employer's position confuses the concepts of disability, compensation rate, and remunerative wage.

"Disability" is defined in AS 23.30.395(16) as "the incapacity because of the injury to earn wages which the employee was receiving at the time of injury." Employee testified she was earning $22.58 per hour and was working full time. The remunerative wage under AS 23.30.041(q) is sixty percent of Employee's gross hourly wage ($22.58), or $13.55 per hour. A remunerative wage is only relevant in determining the adequacy of a reemployment plan; it does not establish "the wages an employee was receiving at the time of injury" for determining disability.

Similarly, Employee's gross weekly wage computed under AS 23.30.220(a)(4) as 1/50th of the total wages Employee earned in the higher of the two calendar years preceding the injury. "Gross weekly wages" under AS 23.30.220(a)(4), is only relevant in determining an employee's compensation rate. It does not establish "the wages an employee was receiving at the time of injury." Depending on an employee's earnings in the two years preceding an injury, his or her gross weekly wages may be higher or lower than his or her actual wages at the time of the injury. The legislature could have incorporated "gross weekly wages" in the definition of disability, but it did not. The wages Employee was earning at the time of injury were $22.58 per hour. So long

as she is not medically stable and is incapable of earning that amount because of the injury, she is disabled.

2. Did the RBA abuse his discretion in denying the reemployment plan developed by Employee's rehabilitation specialist?

The RBA's denial of the Employee Plan is reviewed for an abuse of discretion. The RBA's decision will be upheld unless it is arbitrary, capricious, manifestly unreasonable, stems from an improper motive or the RBA failed to properly apply controlling law. The RBA gave four reasons for denying the Employee Plan.

The RBA's first reason for denying the plan was that it did not require full-time participation. As the RBA noted, UAA considers "full-time" to be 12 credit hours of class each semester. Although AS 23.30.041(h) uses the term "continuous participation," and AS 23.0041(i) uses the phrase "shortest possible time," neither require "full-time" participation. A hypothetical example illustrates the problem with the RBA's interpretation: if an employee had a high remunerative wage and was only 4 credit hours short of college degree, the only feasible plan to return the employee to his remunerative wage may well be to complete the college degree. Under the RBA's interpretation, the plan would be unacceptable as it would not require 12 credit hours per semester. Here, the Employee Plan does not require full-time participation because Employee, on her own, took classes on line. As Ms. Wahto explained, Employee cannot finish the program faster because certain classes must be taken in sequence. The plan to retrain Employee as a CMA requires her continuous participation and will be done in the shortest possible time, given the course offerings at UAA and Mat-Su College. The RBA's denial because the plan did not require "full-time" participation was arbitrary and capricious.

The RBA's second reason for denying the plan is that Dr. Martin approved a SCODRDOT job description rather than a "job analysis." The term "job analysis does not appear in the Act, but 8 AAC 45.550(a)(5) requires that a job analysis of the occupational goal be sent to a doctor for a prediction of whether the employee will have the capacities to perform the job. It is also used in 8 AAC 45.525(c)(1). In that context it requires a physician to approve the analysis of a job that an employer offers to an employee in lieu of reemployment benefits. When an employer offers

an employee a job as an alternative to reemployment benefits, there is a specific job to be analyzed. In contrast, the goal of a reemployment plan is not usually a specific job, but an occupation, and a job analysis of a specific job has little if any probative value. For example, CMAs work in a variety of settings; they may work in a general practitioner's office, a specialist's office, or a hospital, and the physical requirements of each are likely to differ. A job analysis of one of those settings would have little probative value in another setting. When the chosen occupational goal may exist in multiple settings, the SCODRDOT job description, a general job description, will be a better "job analysis" than an analysis limited to a specific position with a specific employer. Here, both Ms. Cortis and Dr. Martin testified the SCODRDOT conforms to the actual duties of a CMA. Requiring that a physician approve a job analysis rather than a SCODRDOT job description, when an employee is not being retrained for a specific job, is arbitrary, capricious, and unreasonable.

The third reason the RBA denied the Employee Plan is that the plan did not show the rehabilitation specialist considered retraining through vocational training, on-the-job training, or self-employment. Ms. Cortis testified that she did consider other goals, including medical receptionist, but rejected them because they did not meet the remunerative wage. Under 8 AAC 45.550(a)(7), a rehabilitation specialist "must consider all of the options listed under AS 23.30.041(i) before selecting the option that will return the employee to remunerative employment in the shortest time." The Employee Plan recites the requirements of AS 23.30.041(i), states that occupations in the medical field were considered, and explains why some were rejected. Nothing in the Act or regulations requires a rehabilitation specialist to document every occupational goal considered and why they were rejected. The RBA's denial because the rehabilitation specialist did not document occupational goals in each category of AS 23.30.041(i) is contrary to law and manifestly unreasonable.

The fourth reason the RBA denied the Employee Plan is that he believed the plan would exceed the cost limitation in the Act if Employee's full transportation costs were included. The cost of the plan must include transportation. AS 23.30.041(h)(4). The RBA may well have been correct, but because of his delay in approving the plan, he based his decision on a cost projection that was outdated and known to be inaccurate. The Employee Plan was filed on June 24, 2013.

Employee's signature was filed August 1, 2013, and on September 11, 2013 Employee's attorney informed the RBA that Employer would not sign the plan and asked the RBA to approve or deny the plan. Under AS 23.30.041(i), the RBA then had 14 days (until September 25, 2013) to approve or deny the plan. That did not happen. The RBA did not deny the plan until March 3, 2014, 159 days late. During that time, the informal rehabilitation conference was held. The RBA was informed that Employee had paid for and taken nine credits of classes the fall semester 2013 that had been listed in the plan. Employee had paid for, and was taking, eleven credits the spring semester2014. According to the costs set out in the plan, Employee had paid for and taken or was taking 20 credit hours at a cost of $165.00 per credit, or $3,300.00. The plan also allowed $400.00 for books and fees of $265.00 per semester, for a total of $1,330.00 for the two semesters. While an employee is not allowed to contribute to the cost of a plan, in this case there was no plan in place. By taking these classes before the plan was approved or denied, Employee reduced the cost of the plan at least $4,630.00. The additional classes should have been considered part of Employee's inventory of academic achievements under AS 23.30.041(h)(2), just as the online courses she took prior to meeting Ms. Cortis.

When a plan is timely reviewed, 8 AAC 45.550(c) gives the RBA the discretion to approve or deny a plan or to request further information. However, when the review of a plan is significantly delayed through no fault of the parties, and the RBA is informed of facts that materially alter the plan, it is manifestly unreasonable, to deny the plan without allowing the parties to update the plan. To deny a plan that is known to be incorrect may well deny an employee due process. The Employee Plan will be remanded to the RBA for reconsideration in light of this decision.

3. Did the RBA abuse his discretion in denying the reemployment plan developed by Employer's rehabilitation specialist?

The RBA's denial of the Employer Plan is also reviewed for an abuse of discretion. The RBA's decision will be upheld unless it is arbitrary, capricious, manifestly unreasonable, stems from an improper motive or the RBA failed to properly apply controlling law. The RBA gave two reasons for denying the Employee Plan.

The RBA's first reason for denying the plan was that no doctor had approved a job analysis for a unit clerk, but notes that Dr. Dietrich approved a partial SCODRDOT job description for a receptionist. The plan states that Dr. Dietrich's review of the job descriptions was pending. It is unclear whether Dr. Dietrich's October 18, 2013 approval of the unit clerk job was part of the record at the time the RBA reviewed the plan; it does not appear in the RBA's file. The RBA does note that Dr. Martin disapproved the receptionist description. It is unclear whether the RBA denied the plan because of the lack of an approved job analysis as opposed to a SCODRDOT job description or whether the RBA gave more weight to Dr. Martin's opinion. If the RBA denied the plan because no "job analysis" was approved as opposed to a SCODRDOT job description, the denial was arbitrary, capricious, and unreasonable. If, the RBA denied the plan because he gave more weight to Dr. Martin's opinion, he did not abuse his discretion.

The RBA's second reason for denying the Employer Plan is there was insufficient evidence that the plan would provide Employee with the necessary skills to meet the remunerative wage. Of the three employers who responded to the rehabilitation specialist, the starting wage for one was only $13.00 to $14.00 per hour. The position required computer and word processing skills, and there was no evidence to show Employee had sufficient computer and word processing skills to start at her remunerative wage of $13.55 per hour. A second employer required keyboarding of at least 35 words per minute, and there was no evidence of Employee's typing speed. The final employer also required computer skills, with Word, Excel, and Powerpoint preferred, and again, there was no evidence Employee possessed those skills. The RBA's denial was not arbitrary, capricious, or manifestly unreasonable; it was not an abuse of his discretion. Because one of the RBA's grounds for denying the Employer Plan was not an abuse of discretion, his denial must be upheld.

Like the Employee Plan, the Employer Plan was not timely reviewed by the RBA. However there is no evidence of any material change in facts during the delay as there was with the Employee Plan.

CONCLUSIONS OF LAW

1. Employee is entitled to TTD benefits after July 1, 2013.
2. The RBA abused his discretion in denying the reemployment plan developed by Employee's rehabilitation specialist.
3. The RBA did not abuse his discretion in denying the reemployment plan developed by Employer's rehabilitation specialist

ORDER

1. Employee's August 28, 2013 claim for TTD after July 10, 2013 is granted.
2. Employer shall pay TTD from July 10, 2013 until Employee is either medically stable or no longer disabled.
3. Employee's March 5, 2014 petition for review of the RBA's denial of the Employee Plan is granted.
4. Employer's March 21, 2014 petition for review of the RBA's denial of the Employer Plan is denied.
5. The matter is remanded to the RBA for reconsideration of the Employee Plan in accordance with this decision.

Dated in Anchorage, Alaska on May 29, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Designated Chair

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Michael O'Connor, Member

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Rick Traini, Member

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

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of DANIELLE BARRETT, employee / claimant; v. MAT SU REGIONAL MEDICAL CENTER, employer; AMERICAN ZURICH INSURANCE COMPANY, insurer / defendants; Case No. 201116148; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on May 29, 2014.

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Kimberly Weaver, Office Assistant