

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

LAURIE E. VANDENBERG,)	
Employee,)	
Claimant,)	FINAL DECISION AND ORDER
)	
v.)	AWCB Case No. 201112729
)	
STATE OF ALASKA,)	AWCB Decision No. 14-0093
Self-Insured)	
Employer,)	Filed with AWCB Anchorage, Alaska
Defendant.)	on July 2, 2014
)	

Laurie E. Vandenberg's March 13, 2014 claim for review of the Reemployment Benefits Administrator (RBA) designee's eligibility decision was heard June 12, 2014. The hearing date was selected on April 3, 2014. Ms. Vandenberg (Employee) was represented by attorney Joseph Kalamarides. The State of Alaska, a self-insured employer, (Employer) was represented by assistant attorney general Daniel Cadra. Employee and rehabilitation specialist, Lulie Williams, appeared and testified. Employee requested the record be left open to file updated information on her attorney fees. Employer did not object, and the record closed when Employee filed the fee information on June 13, 2014.

ISSUES

Employee contends that in finding her ineligible for reemployment benefits the RBA designee made an error of law constituting an abuse of discretion. Employer contends the RBA designee did not err, and the decision finding Employee ineligible was correct.

1. Did the RBA designee abuse her discretion in finding Employee ineligible for reemployment benefits?

Although it was not identified as an issue for hearing, Employee asked that the issue of attorney fees be considered as well. Employee contends that if the RBA designee erred as she contends, then she is entitled to attorney fees. Employer had no objection to including the attorney fee issue, but contends that because the RBA designee did not err, Employee is not entitled to attorney fees.

2. *Is Employee entitled to attorney fees, and, if so, in what amount?*

FINDINGS OF FACT

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

1. Employee worked for Employer as a Nurse II. On August 30, 2011, Employee had driven to a client's home. She reached across the seat of her vehicle to retrieve a laptop computer and some files. She experienced sharp pain in her right shoulder when lifting the items. (Employee; Report of Injury, September 1, 2011).
2. She was diagnosed with a "near full thickness rim rent tear of the distal supraspinatus tendon along with generalized tendinopathy throughout most of the mid and distal supraspinatus and infraspinatus tendons." (Mat-Su Regional Medical Center Radiology Report, September 19, 2011).
3. Employer accepted the injury and paid benefits. (Compensation Reports, October 3, 2012, October 15, 2012, January 8, 2013, June 19, 2013, June 21, 2013, July 30, 2013, and March 26, 2014).
4. On January 2, 2013, Employee underwent surgery to repair the tear. (Alaska Surgery Center Operative Report, January 2, 2013).
5. On May 2, 2013, Employer's adjuster notified the RBA that Employee had lost 90 consecutive days of work. (Notice of Time Loss, May 2, 2013).
6. On May 29, 2013, rehabilitation specialist Lulie Williams was assigned to perform a reemployment benefits eligibility evaluation. (RBA, Rehabilitation Specialist selection letter, May 29, 2013).
7. On June 12, 2013, Larry Levine, M.D., performed a permanent partial impairment (PPI) rating and assessed a four percent whole person impairment. (PPI Rating, June 12, 2013).

8. On July 24, 2013, the rehabilitation specialist submitted an eligibility report. The specialist selected the job titles from the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (SCODRDOT) to represent Employee's job at the time of injury as well as the jobs she had held in the ten years before the injury. The specialist determined Employee's job as a Nurse II at the time of injury was best represented by a combination of SCODRDOT job titles; Nurse, General Duty, DOT #075.364-010, and Examiner, DOT #169.267-014. Three of the positions Employee had held in the ten years before the injury were also Nurse II positions. In each case, the specialist found the Nurse, General title, either alone or in combination with another title represented the actual job. In the ten years before the work injury, Employee had also worked for Employer as a Health Facilities Surveyor for approximately three and one-half years. The specialist determined a combination of two DOT job titles described that position: Inspector, Health Facility, DOT #168.167-042, and Nurse, General Duty, DOT #075.364-010. The specialist had sent Larry Levine, M.D., descriptions for each of the DOT job titles and asked him to predict whether Employee could perform those duties. Relevant to this dispute, Dr. Levine predicted that Employee would have the physical capabilities to perform the duties of an Inspector, Health Care Facilities, DOT #168.167-042, but would not have the physical capacities to work as a Nurse, General Duty, DOT #075.364-010. Because the specialist had determined that the Nurse, General Duty title was, alone or in combination with another title, necessary to describe all of Employee's jobs, and because Employee met all of the other eligibility requirements, the specialist recommended that Employee be found eligible for reemployment benefits. (Williams; Eligibility Report, July 24, 2013).
9. On October 8, 2013, the RBA designee wrote to the reemployment specialist noting that the specialist had not included a description of the duties of Employee's jobs, and as a result it was difficult to understand the need for multiple DOT titles for some positions, particularly the Health Facilities Surveyor position. The designee requested that the job duties be provided. (Letter, P. Helgeson to L. Williams, October 8, 2013).
10. On October 21, 2013, the rehabilitation specialist filed a corrected eligibility report and a letter to the RBA designee explaining the specialist's rationale for combining DOT job titles for the Health Facilities Surveyor position. In the letter, the specialist explained she believed the DOT title for Nurse, General Duty was required as part of the description of the Health

Facilities Surveyor position for two reasons. First, the Health Facilities Surveyor position required occasional lifting of 50 pounds, which exceeded the strength requirements of the Inspector, Health Care Facilities job title, but not that of the Nurse, General Duty. Second, the Health Facilities Surveyor position required certification as a registered nurse. In her report, the specialist again recommended that Employee be found eligible. (Corrected Eligibility Report and letter, October 21, 2013).

11. The RBA designee and the rehabilitation specialist exchanged further correspondence regarding other aspects of the eligibility report, until March 3, 2014. (Record).
12. On March 3, 2014, the RBA Designee determined Employee was ineligible for reemployment benefits. The designee stated “Dr. Larry Levine predicted that you would have the permanent physical capacities to perform the physical demands for Health Care Facilities Inspector, a DOT/SCODRDOT job description selected by the specialist to best represent the duties you performed as a Health Facilities Surveyor.” The designee noted that “the specialist had selected a combination of DOT/SCODRDOT job titles to represent your job as a Health Facilities Surveyor; however, I made a determination that the title for Health Care Facilities Inspector was sufficient to describe the duties you performed in this position.” (Eligibility Letter, March 3, 2014).
13. On March 14, 2014, Employee filed a workers’ compensation claim seeking review of the RBA designee’s eligibility decision. (Claim, March 13, 2014).
14. Neither party contends there is a DOT job title other than Health Care Facilities Inspector, either alone or in combination with the Nurse, General Duty job title, that would better describe the duties of a Health Facilities Surveyor, (Record; Observation).
15. The job duties of a Health Facilities Surveyor I are:

Health Facilities Surveyors I perform professional on-site inspections and reviews of health care facilities. As members of a survey team, incumbents apply professional knowledge and expertise in a specialty area, such as nursing, medical technology, dietetics, sanitation, social work, or health administration, to analyze and assess the activities in the facility. Inspections cover all areas in a facility such as medical staff by-laws; surgical, obstetrical, emergency, pharmaceutical and rehabilitation services; nursing services; infection control practices and surveillance methodology; administrative services including personnel, financial and clinical records; physical plant structures; dietary, housekeeping, and laundry services; and risk management. Incumbents survey a variety of facilities including hospitals, nursing homes, home health agencies, rural health clinics, birthing centers, ambulatory surgery centers, independent laboratories, outpatient

physical therapy services, and so on. Incumbents may lead a survey team when certified for the specific type of facility.

The minimum qualifications depend on the particular specialty needed; for a nurse, licensure as a Registered Nurse and three years of professional experience are required. (Workplace Alaska, Health Facilities Surveyor I job description, PCN 06-4021)

16. The job description for DOT # 168.167-042 Inspector, Health Care Facilities Inspector states:

Inspects health care facilities, such as hospitals, nursing homes, sheltered care homes, maternity homes, and day care centers, to enforce public health laws and to investigate complaints: Inspects physical facilities, equipment, accommodations, and operating procedures to ensure compliance with laws governing standards of sanitation, acceptability of facilities, record keeping, staff competence qualifications, and ethical practices. Reviews reports concerning staffing, personal references, floor plans, fire inspections, and sanitation. Recommends changes in facilities, standard, and administrative methods in order to improve services and efficiency, utilizing knowledge of good practices and legal requirements. Advises applicants for approval of health care facilities on license application and rules governing operation of such facilities. May testify at hearings or in court. May compile data on conditions of health care facilities, for use in determining construction needs in community or region.

The DOT description states the strength requirement is sedentary, and the position requires GED (general educational development) levels of four for reasoning, three for math, and four for language. The SVP (specific vocational preparation) is six. (SCODRDOT #168.167-042).

17. The DOT #075.364-010 Nurse, General Duty job description states:

Provides general nursing care to patients in hospital, nursing home, infirmary, or other similar health care facility: Administers prescribed medications and treatments in accordance with approved nursing techniques. Prepares equipment and aids physician during treatments and examination of patients. Observes patient, records significant conditions and reactions, and notifies supervisor or physician or patient's condition and reaction to drugs, treatments, and significant incidents. Takes temperature, pulse, blood pressure and other vital signs to detect deviations from normal and assess condition of patient. May rotate among various clinical services of institution, such as obstetrics, surgery, orthopedics, outpatient and admitting, pediatrics, and psychiatry. May prepare rooms, sterile instruments, equipment and supplies and hand items to surgeon . . . obstetrician . . . or other medical practitioner. May make beds, bathe, and feed patients. May serve as leader for a group of personnel rendering nursing care to a number of patients.

The DOT description states the strength requirement is medium and the position requires GED levels of five for reasoning, four for math, and five for language. The SVP is seven. (SCODRDOT #075.364-010).

18. SCODRDOT was published in 1993. (AS 23.30.041(e); Observation).
19. Ms. Williams stated that at the time she was performing the eligibility evaluation, Employer was advertising for a Health Facilities Surveyor I. She reviewed the job requirements and contacted the individual listed in the job posting. That person explained it was necessary to lift up to 50 pounds to perform in the position. Ms. Williams explained the SCODRDOT often does not have an exact match to the actual job description; while the SCORDOT itself is old, the Inspector, Health Care Facilities description was last updated in 1977. Because the DOT description did not require either certification as an RN or the ability to lift 50 pounds, she determined a combination of DOT descriptions was necessary, and selected the Nurse, General Duty description. Additionally, the Inspector, Health Care Facilities description requires an SVP of six, which means one to two years' experience while the Health Facilities Surveyor was described as a "journey-level" position equating to an SVP of seven. Similarly, the GED requirement for an Inspector, Health Care Facilities is lower than the requirements for a Health Facilities Surveyor I. Both the SVP and GED requirements for a Nurse, General Duty are consistent with the requirements for a Health Facilities Surveyor I. Employee met the SVP and GED requirements for the DOT description for Inspector, Health Care Facilities. (Williams).
20. Employee explained that Health Facilities Surveyors work as a team, at least one of whom must be a registered nurse as there are parts of a survey that only a nurse can do. She believed the Health Care Surveyor position required her to meet the physical requirements for a nurse. If the survey team found conditions that placed patients in immediate jeopardy, they would be required to shut down the facility and assume care of the patients. Employee knew of only one case where that had occurred, and she was not part of that survey team. (Employee).
21. The only disputed fact in the case is the appropriateness of the RBA designee's decision to use the Inspector, Health Care Facilities job title alone, rather than in combination with the Nurse, General Duty title. There are no other factual disputes regarding eligibility. (Parties' representations).

22. On June 13, 2014, Employee filed an affidavit reflecting attorney and paralegal fees of \$5,320.00 and costs of \$6.35 for a total of \$5,326.35. (Affidavit of Counsel, June 13, 2014).

PRINCIPLES OF LAW

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

- 1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
- 2) Worker's compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

Sec. 23.30.005. Alaska Workers' Compensation Board.

. . .

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

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

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

the next specialist in the employee's senate district, but this was harmless procedural error because it did not outweigh "the public interest in prompt rehabilitation and reemployment").

Sec. 23.30.041. Rehabilitation and reemployment of injured workers.

....

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

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

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

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

....

(r) In this section

....

(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;

AS 23.30.145. Attorney fees.

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

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

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150-51 (Alaska 2007), the Supreme Court explained fee awards under AS 23.30.145(a) and (b):

Subsection (a) authorizes the Board to award attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim. . . . In contrast, subsection (b) requires an employer to pay reasonable attorney's fees when the employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim.

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990).

8 AAC 45.445. Activities to be performed only by the certified rehabilitation specialist. For purposes of AS 23.30.041(m), only the certified rehabilitation specialist assigned to a case may perform the following activities:

. . . .

(3) selecting appropriate job titles in accordance with 8 AAC 45.525(a)(2);

(4) determining whether specific vocational preparation has been met and which job titles are submitted to a physician;

. . . .

(9) making a recommendation regarding the employee's eligibility;

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

(A) on or after July 2, 1998 but before August 30, 1998, the rehabilitation specialist shall use the United States Department of Labor's Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles (1981) (SCODDOT);

(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

(A) on or after July 2, 1988 but before August 30, 1998, the rehabilitation specialist shall use the United States Department of Labor's Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles (1981) (SCODDOT);

(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).

8 AAC 45.530. Determination on eligibility for reemployment benefits

(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.

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

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

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

Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence in the light of the whole record.

Determining whether an abuse of discretion has taken place is aided by the practice of allowing additional evidence at the review hearing, based on the rationale expressed in several superior court opinions addressing board decisions. *See, e.g., Kelley v. Sonic Cable Television*, Superior Court Case No. 3AN 89-6531 CIV (February 2, 1991); *Quirk v. Anchorage School District*, Superior Court Case No. 3AN-90-4509 CIV (August 21, 1991).

The Alaska Supreme Court held in an eligibility case where there was no dispute over the correct job “title”:

The language of AS 23.30.041(e) is clear -- the Board must compare the physical demands of a specific job as found in SCODRDOT with the employee’s physical capacities. . . .

Under the express language of AS 23.30.041(e), medical evidence of eligibility must satisfy three requirements: First, the evidence must take the form of a prediction. Second, the person making the prediction must be a physician. Third, the prediction must compare the physical demands of the employee’s job, as the U.S. Department of Labor describes them, with the employee’s physical capacities.

Konecky v. Camco Wireline, Inc., 920 P.2d 277, 281 and n. 9 *quoting Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 73 (Alaska 1996)(emphasis added).

In *Konecky*, the employee a “hoistman,” argued the board’s interpretation of AS 23.30.041(e) ignored the true physical requirements of his position, which were undisputed to exceed the SCODDOT medium strength category. *Konecky* noted the SCODDOT did not list a “hoistman” position, but did list a “hoist operator” position, and the board's decision used both terms throughout. *Konecky* further noted: “The Board implicitly found that these terms describe the same position, and Konecky does not argue on appeal that he was a ‘hoistman’ (the title Camco gave his position) and not a ‘hoist operator.’” (*Id.* at 279, n. 7). Mr. Konecky contended strict application of a SCODDOT description which does not coincide with the job actually performed frustrates the legislature’s intention to award benefits to employee unable to return to the job held at the time of injury. Mr. Konecky asserted the Court should consider and apply the SCODDOT’s introduction disclaimer stating descriptions of occupations as they may typically occur may not coincide with a specific job as actually performed in a particular establishment or

in a given industry. Additionally, he argued the Court should view the disclaimer as an acknowledgement of the possibility the definitions may not reflect the actual physical demands of a specific job. 920 P.2d at 281-282. The Court said if it were to accept the employee's argument, the accuracy of the SCODDOT descriptions would consistently be challenged, resulting in a substantial reduction in the predictability, objectivity, and cost reduction that the legislature intended. *Id.* at 283.

Employees are eligible for reemployment benefits if their physical capacities are less than the physical demands for their job title as described in the SCODRDOT. *Konecky* at 281; *Yahara* at 73; *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 529 (Alaska 1993). It is irrelevant if the actual work demands in a particular employment situation are more or less than those defined in the SCODRDOT, or if a SCODRDOT description does not reflect the actual physical demands of a specific job. *Konecky* at 282. Enforcement of the statute's plain language promotes the legislative intent to ensure a prompt, efficient, more cost-effective, successful, and less litigated rehabilitation system. *Id.* at 282-283.

ANALYSIS

1. Did the RBA designee abuse her discretion in finding Employee ineligible for reemployment benefits?

Employee contends the RBA designee abused her discretion by failing to apply controlling law. Specifically, Employee contends the law does not allow the RBA designee to disregard a job title selected by the reemployment specialist. Under 8 AAC 45.525(b)(2), a rehabilitation specialist is to review the jobs an employee has held in the ten years before an injury and select the most appropriate job title or titles from the SCODRDOT. The selection of the appropriate job title can only be done by a rehabilitation specialist. 8 AAC 45.445(3). Under the Act and the regulations, it is the responsibility of the rehabilitation specialist to select the appropriate job title or titles, not the RBA or the RBA designee. If the RBA designee believes the specialist erred in selecting of a job title, 8 AAC 45.530(b) states the designee may not decide the employee's eligibility, but must take one of two actions: either request additional information or assign a new reemployment specialist. Here, contrary to 8 AAC 45.530(b), the RBA designee disregarded one of the job titles selected by the specialist and decided Employee was not eligible. The RBA

designee failed to apply controlling law, which constitutes an abuse of discretion, but, given the particular fact of this case, the error is harmless.

The RBA designee's error is harmless because the rehabilitation specialist erred in including the Nurse, General Duty job title to describe the Health Facility Surveyor position. The specialist testified that she included the Nurse title for two reasons. First, the actual strength requirement of the Health Facilities Surveyor position exceeded the strength requirements of the Inspector, Health Care Facilities DOT job description. Second, the GED and SVP for the Nurse job title more closely matched the education and experience required for the Health Facilities Surveyor than did the GED and SVP for the Inspector, Health Care Facilities job title.

Rehabilitation specialists typically combine SCODRDOT job titles when an employee works at "combined" job; that is to say, where an employee works part of the time doing one type of work and part of the time doing another. An example would be an employee who worked as a truck driver/warehouseman – two distinctly different jobs. While there may be cases where a combination of DOT job titles is needed to properly describe a single job, this is not such a case.

The rehabilitation specialist is correct that many of the SCODRDOT job titles are outdated and do not exactly match current jobs. However, the job duties for an Inspector, Health Care Facilities closely tracks the job duties of a Health Facility Surveyor. Both inspect a variety of health care facilities. The Inspector Health Care Facilities:

Inspects physical facilities, equipment, accommodations, and operating procedures to ensure compliance with laws governing standards of sanitation, acceptability of facilities, record keeping, staff competence qualifications, and ethical practices. Reviews reports concerning staffing, personal references, floor plans, fire inspections, and sanitation. Recommends changes in facilities, standard, and administrative methods in order to improve services and efficiency, utilizing knowledge of good practices and legal requirements."

A Health Facilities Surveyor:

Perform[s] professional on-site inspections and reviews of health care facilities. As members of a survey team, incumbents apply professional knowledge and expertise in a specialty area, such as nursing, medical technology, dietetics, sanitation, social work, or health administration, to analyze and assess the activities in the facility. Inspections cover all areas in a facility such as medical staff by-laws; surgical,

obstetrical, emergency, pharmaceutical and rehabilitation services; nursing services; infection control practices and surveillance methodology; administrative services including personnel, financial and clinical records; physical plant structures; dietary, housekeeping, and laundry services; and risk management.

On the other hand, a Nurse, General Duty:

Provides general nursing care to patients Administers prescribed medications and treatments Prepares equipment and aids physician during treatments and examination of patients. Observes patient, records significant conditions and reactions, and notifies supervisor or physician or patient's condition and reaction to drugs, treatments, and significant incidents. Takes temperature, pulse, blood pressure and other vital signs to detect deviations from normal and assess condition of patient. . . . May prepare rooms, sterile instruments, equipment and supplies and hand items to surgeon . . . obstetrician . . . or other medical practitioner. May make beds, bathe, and feed patients.

A Health Facilities Surveyor has none of the duties of a Nurse, General Duty. The DOT job description for Nurse, General Duty does not, as required by 8 AAC 45.525(b)(2), describe the job held by Employee. The possibility that in rare cases a Health Facilities Surveyor might have to assume care of patients does not change the fact that the job title of Inspector, Health Care Facilities reasonably reflects Employee's job as a Health Facilities Surveyor.

The rehabilitation specialist's inclusion of the Nurse job title because the strength requirement of a Health Facilities Surveyor exceeds the strength requirement of an Inspector, Health Care Facilities, is contrary to *Konecky*. *Konecky* held that an employee's physical capacities must be compared to the physical demands of the DOT job description, not the employee's actual job. Here, Dr. Levine predicted Employee would have the physical capacities to perform as an Inspector, Health Care Facilities; whether she can meet the physical demands of a Health Facilities Surveyor is irrelevant. While that result may seem harsh, as the court stated in *Konecky*, that is the approach the legislature has chosen.

The rehabilitation specialist's inclusion of the Nurse job title because the education and experience required for a Health Facilities Surveyor exceeds the GED and SVP for an Inspector, Health Care Facilities is also incorrect. The SVP is not used to determine whether the duties in a DOT job description match an employee's actual job. Instead, under AS 23.30.041(e)(2), the SVP is only relevant to determine if an employee held a job "long enough to obtain the skills to

compete in the labor market.” The SVP for an Inspector, Health Care Facilities is six, meaning one to two years’ experience. As the specialist testified, Employee was a Health Facilities Surveyor long enough to meet the SVP in the SCODRDOT description for Inspector, Health Care Facilities. It was error to include another job title because Employee had more experience than required by the SVP for an Inspector, Health Care Facilities.

The error in including the Nurse, General Duty job title based on the GED for an Inspector, Health Care Facilities is similar. Neither the Act nor the regulations explicitly require consideration of a job title’s GED. Here, Employee not only met the GED for an Inspector, Health Care Facilities, but she also met the educational and experience requirements for a Health Facilities Surveyor. Because Employee’s GED levels exceeded those needed for an Inspector, Health Care Facilities, it was unnecessary to include another job title.

In short, under the scheme chosen by the legislature in AS 23.30.041(e), the focus in comparing an employee’s jobs with SCODRDOT job titles is on the employee’s physical capacities. Experience only enters the calculation to the limited extent that an employee must have held a job long enough to obtain the skills necessary to compete in the labor market. Here the reemployment specialist erred by trying to “update” or “fix” an outdated or inadequate DOT job title by combining it with another job title. Until the legislature updates AS 23.30.041, the job titles found in SCODRDOT are what must be used to determine eligibility for reemployment benefits, even though it results in what may be perceived as an unfair result.

Normally, a finding the RBA designee abused her discretion would require remand, and the RBA designee would in turn have to request further information from the rehabilitation specialist or select a new specialist. The specialist would then have to submit a new or revised eligibility recommendation to the RBA designee, who would again have to make the determination as to eligibility. In this case, the specialist’s rationale for including the Nurse, General Duty job title with the Inspector, Health Care Facilities job title does not hold up. No one has suggested a DOT job title other than Inspector, Health Care Facilities that would appropriately describe Employee’s job as a Health Facilities Surveyor. There is no doubt that a properly done eligibility evaluation, based on the Inspector, Health Care Facilities job title, would result in a

recommendation that Employee was ineligible for reemployment benefits. Although the RBA designee erred procedurally, the error does not affect the outcome of the case, and is therefore harmless. The RBA designee's eligibility determination will not be reversed.

2. *Is Employee entitled to attorney fees, and, if so, in what amount?*

Under AS 23.30.145(a), attorney fees may be awarded based on the amount of compensation awarded. Under AS 23.30.145(b), fees may be awarded when a claimant successfully prosecutes a claim. Here, Employee was not awarded any compensation, and she was not successful in prosecuting her claim. There is no basis upon which attorney fees may be awarded.

CONCLUSIONS OF LAW

1. The RBA designee abused her discretion in finding Employee ineligible for reemployment benefits, but the error was harmless.
2. Employee is not entitled to attorney fees.

ORDER

1. Employee's March 13, 2014 claim is denied.

LAURIE E VANDENBERG v. STATE OF ALASKA

Dated in Anchorage, Alaska on July 2, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Ronald P. Ringel, Designated Chair

Linda Hutchings, Member

Mark Talbert, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of LAURIE E. VANDENBERG, employee / claimant; v. STATE OF ALASKA, a self insured employer / defendant; Case No. 201112729; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on July 2, 2014.

Sertram Harris Office Assistant II