ALASKA WORKERS' COMPENSATION BOARD

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

ANN M. MCCARTHY, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201503887
BEAN'S CAFÉ, INC. Employer, and OHIO CASUALTY INSURANCE COMPANY, Insurer, Defendants.	)	AWCB Decision No. 17-0003 Filed with AWCB Anchorage, Alaska on January 9, 2017

Bean's Cafe's petition to review the reemployment benefits administrator's designee's (RBA designee) decision finding Ann M. McCarthy eligible for reemployment benefits and Bean's Cafe's petition for a continuance were heard on December 14, 2016 in Anchorage, Alaska. This hearing date was selected on November 3, 2016. Attorney Robert Bredesen appeared and represented Ms. McCarthy (Employee), who appeared and testified. Attorney Rebecca Holdiman Miller appeared and represented Bean's Cafe, Inc., and Ohio Casualty Insurance Company (Employer). Alizon White appeared and testified as a witness. The record closed at the hearing's conclusion on December 14, 2016.

ISSUES

As a preliminary issue, Employer's petition for a continuance was heard and orally denied. This decision examines that denial.

Was the oral decision denying Employer's petition for a continuance correct?

Employer contends the RBA designee abused her discretion in finding Employee eligible for reemployment benefits. Employee contends the RBA designee did not abuse her discretion and correctly found her eligible.

Did the RBA designee abuse her discretion in finding Employee eligible for reemployment benefits?

FINDINGS OF FACT

A review of the entire record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

1. On March 3, 2015, Employee was carrying a box of bowls at work when she tripped over another box lying on the floor, injuring her left arm and shoulder. (Employee; First Report of Injury, March 5, 2015). Employee continued working that day, but the pain increased. (Employee).
2. On March 5, 2015, Employee was seen by PA-C Richard Miller at Anchorage Fracture and Orthopedic Clinic (AFOC). PA-C Miller ordered an MRI, prescribed pain medication, and released Employee to work with no lifting. (AFOC Chart Notes, March 5, 2015).
3. The MRI was done on March 12, 2015, and Employee returned to AFOC on March 17, 2015 where she was seen by Bradley Sparks, M.D. After reviewing the MRI, Dr. Sparks diagnosed a left shoulder biceps subluxation with a small superior labrum anterior and posterior (SLAP) tear and a partial thickness rotator cuff tear. Dr. Sparks prescribed physical therapy, but noted surgery might be necessary. Employee was released to light-duty work with no lifting with her left arm. (AFOC, Chart Note, March 17, 2015).
4. On May 1, 2015, Employee was again seen by Dr. Sparks. Dr. Sparks determined conservative care had failed and recommended surgery. (AFOC, Chart Note, May 1, 2015).
5. Employee continued physical therapy and returned to Dr. Sparks on November 18, 2015. Dr. Sparks again discussed surgery, and Employee elected to proceed. (Physical Therapy Notes; AFOC Chart Note, November 18, 2015).
6. On November 19, 2015, Employee underwent arthroscopic shoulder surgery. (AFOC, Surgical Notes, November 19, 2015).
7. Employee was terminated while off work after the surgery. (Employee).

8. Employee developed adhesive capsulitis in her left shoulder. Dr. Sparks recommended additional physical therapy and massage therapy. He explained that if the therapy was not successful a closed manipulation may be needed. (AFOC, Chart Note, February 10, 2016).
9. On April 19, 2016, Employee was seen by Michael R. Fraser, Jr., M.D., for an employer's medical evaluation (EME). Dr. Fraser concluded the injury with Employer was the substantial cause of need for medical treatment, and Employee was not yet medically stable. Further treatment could include manipulation under anesthesia plus additional physical therapy. (Dr. Fraser, EME Report, April 19, 2016).
10. On May 4, 2016, Employee was seen by PA-C Gregg Zaporzan at AFOC. PA-C Zaporzan recommended Employee continue with therapy, but schedule manipulation as soon as Dr. Sparks could perform it. (AFOC, Chart Note, May 4, 2016).
11. On June 30, 2016 after reviewing additional medical records, Dr. Fraser issued an addendum to his April 19, 2016 EME report, stating he did not recommend chiropractic treatment or laser therapy in lieu of the manipulation recommended by Dr. Sparks. (Dr. Fraser, EME Addendum, June 30, 2016).
12. On June 16, 2016, Employer reported to the reemployment benefits administrator (RBA) that Employee had been unable to return to her job at the time of injury for 90 consecutive days. Employer stated the 90 consecutive days began on February 19, 2016. (Notice of 90 Day Time Loss, June 16, 2016.).
13. On July 1, 2016, reemployment specialist Alizon White was assigned to complete Employee's eligibility evaluation. (Referral Letter, July 1, 2016).
14. On July 22, 2016, Ms. White sent Dr. Sparks a letter asking if he predicted Employee would have a permanent partial impairment (PPI) rating greater than zero as a result of the work injury. Additionally, Ms. White asked that Dr. Sparks review several SCODRDOT (The U.S. Department of Labor's Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles) job descriptions and occupational requirements and opine as to whether Employee would have the permanent physical capacities to meet the demands of the job. The job descriptions included Administrative Assistant, Internal Auditor, Fund Raiser I, Fund Raiser II, and Occupational Safety and Health Inspector. A copy of the letter was sent to Employer's adjuster. (A. White, Letter to Dr. Sparks, July 22, 2016).

15. On July 29, 2016, Ms. White filed a reemployment benefits eligibility evaluation report. A copy of the report was sent to Employer's adjuster. Because she had not yet received a response to her letter to Dr. Sparks, Ms. White was unable to make a recommendation as to Employee's eligibility. Ms. White stated that she had met with employee, had several telephone conversations, and had exchanged several emails with Employee regarding her ten-year work history and the choice of job titles to describe those jobs. Employee's jobs, the DOT titles describing those jobs, the strength requirements, and whether Employee had worked at the jobs long enough to meet the specific vocational preparation (SVP) time are as follows:

Job at the time of injury:
Bean's Cafe – Administrative Officer. May 19, 2014 to July 2015
Job Titles/SVP Met:
Administrative Assistant, sedentary, SVP not met
Auditor, Internal, light, SVP not met
Fund Raiser I, light, SVP Met
Fund Raiser II, light, SVP Met

Jobs held after the date of injury:
Bean's Cafe – Human Resources Manager. July 2015 through December 2015
Job Title/SVP Met:
Human Resources Advisor, light, SVP not met

Jobs held in the ten years before the work injury:
Friend – Housecleaning Crew Leader. January 2014 to April 2014
Job Titles/SVP Met:
Supervisor, Janitorial Services, medium, SVP not met

TDX Power – Executive Environmental, Health and Safety Manager, August 2012 to November 2013
Job Titles/SVP Met:
Industrial Engineering Technician, light, SVP not met
Personnel Quality Assurance Auditor, light, SVP not met
Occupational Safety and Health Inspector, light, SVP met
Fund Raiser I, light, SVP met
Fund Raiser II, light, SVP met

Idaho National Laboratory – Senior Consulting Analyst, 2009 to 2011
Job Titles/SVP Met:
Radiation Monitor, light, SVP not met
Occupational Safety and Health Inspector, light, SVP met
Hazardous Waste Management Specialist, sedentary, SVP mot met
Fund Raiser I, light, SVP met

Fund Raiser II, light, SVP met

Alaska Department of Labor – OSHA Compliance Officer, 2006 to 2009
Job Titles/SVP Met:
Safety Inspector, light, SVP not met
Occupational Safety and Health Inspector, light, SVP met
Fund Raiser I, light, SVP met
Fund Raiser II, light, SVP met

Insulfoam – EHS Manager, March 2005 to 2006
Job Titles/SVP Met:
Quality Control Technician, light, SVP not met
Safety Inspector, light, SVP not met
Fund Raiser I, light, SVP met
Fund Raiser II, light, SVP met

A copy of Ms. White's report was sent to Employer's adjuster. (Reemployment Benefits Eligibility Evaluation Report, July 29, 2016).

16. On August 2, 2016, Dr. Sparks reviewed the job descriptions sent to him by Ms. White on July 22, 2016. Ms. White's cover letter instructed Dr. Sparks he was to "**predict**" (emphasis original) whether Employee would have the permanent physical capacities to perform the jobs as described. Dr. Sparks first predicted Employee would have a PPI rating greater than zero as a result of her injury. He then predicted Employee would have the physical capacities to work as an Administrative Assistant, which was a sedentary position that only required the lifting of ten pounds. Dr. Sparks made a hand-written annotation on the signature page stating "must restrict lifting to 10 pounds." He predicted Employee would not have the physical capacities to work as an Internal Auditor which was a light-duty position requiring the occasional lifting of 20 pounds. On the signature page he hand-wrote "no lifting > 10 pounds." He disapproved the Fund Raiser I and Fund Raiser II positions, both of which were light-duty positions requiring the occasional lifting of 20 pounds. On the signature page for the Fund Raiser I job, he hand-wrote "weight restriction of 10 pounds." On the signature page for the Fund Raiser II job, he hand wrote "10 pound limit." Dr. Sparks also disapproved the Occupational Safety and Health Inspector, a light-duty position that required occasional climbing and lifting of up to 20 pounds. On the signature page he added "Unable to safely climb ladders. 10 pound restriction." (A. White July Letter to Dr. Sparks with Responses, August 2, 2016).

17. On August 15, 2016, Ms. White filed an addendum to her July 29, 2016 report after receiving Dr. Sparks' response to her letter. She noted Dr. Sparks had approved the Administrative Assistant description, but had disapproved the descriptions for Internal Auditor, Fund Raiser I and II, and Occupational Safety and Health Inspector. Ms. White stated the job descriptions and characteristics for the Human Resource Advisor, Industrial Engineering Technician, Personnel Quality Assurance Auditor, Radiation Monitor, Hazardous Waste Management Specialist, Quality Control Technical and Safety Inspector job titles had not been sent to Dr. Sparks for review. Ms. White was still unable to make a recommendation; she had asked Employer if it would offer Employee employment within her predicted physical capacities, but had not yet received a response. A copy of the addendum was sent to Employer's adjuster. (Reemployment Benefits Eligibility Evaluation Addendum, August 15, 2016).
18. On August 31, 2016, Ms. White filed a second addendum. Because Employer had not responded to her inquiry, she assumed alternative employment was not available. Based on her evaluation, Ms. White recommended Employee be found eligible for reemployment benefits. A copy of the addendum was sent to Employer's adjuster. (Reemployment Benefits Eligibility Evaluation Addendum, August 31, 2016).
19. On September 9, 2016, Employer's attorney wrote to the RBA designee pointing out that Dr. Fraser had indicated Employee could do light or sedentary work and questioning whether Dr. Sparks' responses were predictions as required, or were based on Employee's physical condition at the time. Employer's attorney asked that the RBA designee delay an eligibility decision until additional medical opinions could be obtained from the doctors. (Employer Letter, September 9, 2016).
20. On September 9, 2016, Employer's attorney wrote to Dr. Fraser asking him to review the job descriptions for Administrative Assistant, Internal Auditor, Fundraiser I, Fundraiser II, and Occupational Safety and Health Inspector. Dr. Fraser responded on September 15, 2016, and predicted Employee would have the permanent physical capacities to perform each of the jobs. (Dr. Fraser, EME Addendum, September 15, 2016).
21. On September 19, 2016, Employer's attorney wrote to Dr. Sparks asking that he clarify whether his earlier predictions were based on Employee's physical capacities at that time or her predicted physical capacities. (Letter, Employer's Attorney to Dr. Sparks, September 19, 2016).

22. On September 22, 2016 Employer's attorney wrote to the RBA designee, asking her to consider Dr. Fraser's report and again asking that a determination be delayed as Employer was seeking clarification of Dr. Sparks' opinions. (Employer Letter, September 22, 2016).
23. On September 29, 2016, Dr. Sparks performed a closed manipulation on Employee's left shoulder. (Creekside Surgery Center, Operative Report, September 29, 2016).
24. On September 30, 2016, the RBA designee determined Employee was eligible for reemployment benefits. (Eligibility Determination Letter, September 30, 2016).
25. On October 7, 2016, Employer filed a petition seeking review of the RBA designee's eligibility determination as well as an affidavit of readiness for hearing. Employer contended Employee's ten-year work history was inaccurate, and the RBA designee abused her discretion by making a determination after Employer had requested a delay. (Petition and Affidavit of Readiness for Hearing, October 7, 2016).
26. On October 14, 2016, Dr. Sparks responded to the September 19, 2016 letter from Employer's attorney asking that he clarify whether his earlier responses were based on Employee's physical capacities at that time or his prediction Employee's permanent physical capacities. Dr. Sparks did not respond to all of Employer's questions, but he re-reviewed the job descriptions Ms. White had previously sent. Dr. Sparks again found that Employee would have the permanent physical capacities to work as an Administrative Assistant, but would not have the capacities to work as an Internal Auditor, Fundraiser I or II, or as an Occupational Safety and Health Inspector. On the Internal Auditor form, Dr. Sparks added the notation "unable to get files and lift 20 pounds overhead." On the Fundraiser I and II forms he added "Patient states previously she had to lift 35-50 pounds often. Description does not match the practical job requirements in her opinion." And on the Occupational Safety and Health Inspector form he stated: "Patient states gear weighs up to 80 pounds, has to crawl into manholes, has to be able to assist people leaving the building, clime ladders." (Dr. Sparks, Response to Employer's letter, October 14, 2016).
27. On October 10, 2016, Employee elected to receive reemployment benefits, and on October 17, 2016 a rehabilitation specialist was assigned to develop a reemployment plan. (Reemployment Benefits Election, October 10, 2016; Notice of Election, October 17, 2016).

28. On November 3, 2016, Employer's petition for review of the reemployment eligibility determination was set for hearing on December 14, 2016. (Prehearing Conference Summary, November 3, 2016).
29. On November 23, 2016, Employer notified the Reemployment Benefits Administrator that it did not oppose moving forward with plan development during its appeal of the RBA designee's determination. (Employer Attorney, Email, November 23, 3016).
30. Also on November 23, 2016, Employer filed a petition seeking to continue the December 14, 2016 hearing. (Petition, November 23, 3016).
31. On December 5, 2016, Employee was deposed. Employer's attorney asked Employee about her resume, and Employee identified the resume as the one she had provided Employer when she was hired. The resume showed Employee had worked as Assistant Director for Blackfoot Senior Center in Idaho, and Employee stated she had worked there about five months while interviewing with companies in Alaska. Employee also explained that just prior to working for Employer, she had worked two days per week for about two months at a rock shop in Anchorage doing cleaning, sales, and restocking. In response to questions about her work as a janitorial services supervisor, Employee explained she was helping a sick friend who owned the business. She did not receive regular wages, but the owner did give her "a couple hundred dollars". In 2014, she was a member of a partnership that tried to start a biohazard clean-up business, and obtained a business license. The partnership never did any business, however. (Employee Deposition, December 5, 2016).
32. A prehearing conference was held on December 8, 2016 to address Employer's petition for a continuance. At the prehearing, Employer orally amended its petition for review of the RBA designee's decision to include a petition for modification. Noting that AS 23.30.041 required a hearing on a petition for review to be held within 30 days, the board designee denied the continuance. The designee amended the issues for the December 14, 2016 hearing to include Employer's petition for a continuance, but did not add Employer's oral petition for modification. (Prehearing Conference Summary, December 8, 2016).
33. At the December 14, 2016 hearing, Employee testified she had told Ms. White about the work at the rock shop, and talked with her about her work at the Blackfoot Senior Center. She explained that while she, her husband, and a friend had started a biohazard clean-up

business, both her husband and friend obtained other employment, and the business never began operations. (Employee).

34. Ms. White testified that she had asked Employee for her resume, and was aware of the Blackfoot Senior Center job, but she was unsure if she had the information when the job descriptions were sent to Dr. Sparks. (Alizon White).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > 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 . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board**.
> . . .
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> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . .
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> (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.
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> (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:
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> (1) the employee's job at the time of injury; or
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> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles.'. . .

The legislature granted the RBA authority to decide in the first instance issues related to reemployment preparation benefits, including approving a request for an eligibility evaluation and ultimately deciding whether an injured worker is eligible for rehabilitation and reemployment benefits. *Meza v. Alyeska Seafoods, Inc*., AWCB Decision No. 89-0207 (August 14, 1989).

The RBA's decision must be upheld absent "an abuse of discretion on the part of the administrator." Several definitions of "abuse of discretion" appear in Alaska law although none appears in the 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). 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* 25 (4th ed. 1968).

Where the RBA relies on a rehabilitation specialist's report which fails to consider statutorily mandated factors, the RBA fails to exercise sound, legal discretion. *Irvine v. Glacier General Construction,* 984 P.2d 1103, 1107 (Alaska 1999). The rehabilitation specialist and RBA must

consider the designated physician's opinion whether the employee will have the ability to perform the physical demands of jobs in the employee's ten-year work history. *Id*. Failure to consider the treating physician's opinion is an error of law. *Id.* Where the board upholds an RBA decision based on a flawed report, the board commits legal error. *Id.* at 1106-1107. *See also Kinley's Restaurant & Bar v. Gurnett*, AWCAC Decision No. 121 (November 24, 2009) at 21. And where an Employee fails to disclose a significant number of jobs in his ten-year work history, reversal may be appropriate. *Hodge v. Chugach Support Services, Inc.*, AWCB Decision No. 06-0235 (August 28, 2006).

AS 23.30.130. Modification of awards.
(a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175 , a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180 , 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110 . Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

AS 23.30.135. Procedure before the board.
(a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

AS 44.62.570. Scope of Review.
. . .

(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 the findings are not supported by the evidence.

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

(1) the weight of the evidence; or

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

The legislature granted the RBA authority to decide in the first instance issues related to reemployment preparation benefits, including approving a request for an eligibility evaluation and ultimately deciding whether an injured worker is eligible for rehabilitation and reemployment benefits. *Meza v. Alyeska Seafoods, Inc*., AWCB Decision No. 89-0207 (August 14, 1989).

The RBA's decision must be upheld absent "an abuse of discretion on the part of the administrator." Several definitions of "abuse of discretion" appear in Alaska law although none appears in the 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). 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* 25 (4th ed. 1968).

On appeal to the Alaska Worker's Compensation Appeals Commission and the courts, decisions reviewing RBA designee determinations are subject to reversal under the abuse of discretion standard in AS 44.62.570, incorporating the "substantial evidence test." 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., Quirk v. Anchorage School District*, Superior Court Case No. 3AN-90-4509 CIV (August 21, 1991); *Kelley v. Sonic Cable Television*, Superior Court Case No. 3AN 89-6531 CIV (February 2, 1991). When applying a substantial evidence standard, "[i]f, 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*, 367 P.2d 884, 889 (Alaska 1962). If, in light of all the evidence, the RBA's decision is not supported by substantial evidence, the RBA must be found to have abused his discretion and the case remanded for reexamination and further action.

8 AAC 45.070. Hearings

. . . .

(b) Except as provided in this section and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.

(1) A hearing is requested by using the following procedures:

(A) For review of an administrator's decision issued under AS 23.30.041(d), a party shall file a claim or petition asking for review of the administrator's decision and an affidavit of readiness for hearing. The affidavit of readiness for hearing may be filed at the same time as the claim or petition. In reviewing the administrator's decision, the board may not consider evidence that was not available to the administrator at the time of the administrator's decision unless the board determines the evidence is newly discovered and could not with due diligence have been produced for the administrator's consideration.

. . . .

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

8 AAC 45.074. Continuances and cancellations

(a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for

hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection.

8 AAC 45.525. Reemployment benefit eligibility evaluations.

. . .

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

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

> (2) review the appropriate volume listed in (A) or (B) of this paragraph and select the most appropriate job title or titles that describe the jobs held and training received; If the employee's injury occurred
> . . .
>
> > (B) on or after August 30, 1998, the rehabilitation specialist shall use the 1993 edition of the United States Department of Labor's Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT) unless, under AS 23.30.041(p), the board has designated a later revision or version of that volume;
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> (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
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> (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).
> . . . .
>
> (h) Any additional information for the administrator's consideration in the eligibility determination shall be filed with the administrator and served on all parties and the rehabilitation specialist no later than 10 days after the rehabilitation specialist's report is filed.

Recently, in *Vandenberg v. State*, 371 P.3d, 602 (Alaska 2016), the Supreme Court clarified that a rehabilitation specialist may select or combine more than one SCODRDOT job title to describe an employee's actual job.

> **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. . . .

ANALYSIS

Was the oral decision denying Employer's petition for a continuance correct?

Employer contended a continuance was appropriate because it had recently discovered jobs in Employee's ten-year work history that Ms. White had not identified in her reports. Employer also contended that, because Employee was still receiving temporary total disability benefits, medical treatment, and it had agreed to allow the reemployment plan development to move forward, Employee would not be harmed by a continuance. Employee contended AS 23.30.041(d) required a hearing to be held within 30 days of October 7, 2016, when Employer filed its affidavit of readiness for hearing, and the hearing was already well past that time and should not be delayed further.

Under 8 AAC 45.070(b), continuances are not favored and may only be granted for good cause, and 8 AAC 45.070(b)(1) sets several examples of good cause. Here, two of those situations are possibly relevant. First, under 8 AAC 45.070(b)(1)(G), good cause exists when a party has requested a hearing under AS 23.30.041(d), but has not had adequate time to prepare and all parties waive the right to a hearing within 30 days. Here, Employer may not have had adequate time to prepare in that it recently learned of possible jobs that were not considered by Ms. White. However, a continuance under subsection (G) is not appropriate as Employee did not waive her right to a timely hearing. Second, under 8 AAC 45.070(b)(1)(N), good cause exists when despite a party's due diligence, irreparable harm might result from a failure to continue the hearing. Without deciding whether Employer exercised due diligence in discovering the possible jobs, Employer will not suffer irreparable harm if the hearing is continued. A failure by a reemployment specialist to consider all jobs an employee held during the ten years prior to the injury might prove to be grounds for modifying the RBA designee's determination under AS 23.30.130. Employer has already requested the decision be modified. Because it can still request a hearing on its request for modification, Employer would not suffer irreparable harm by proceeding with a hearing only on the issue of whether the RBA designee abused her discretion. The oral decision denying Employer's request for a continuance was correct.

Did the RBA designee abuse her discretion in finding Employee eligible for reemployment benefits?

The RBA designee's decision must be upheld absent an abuse of discretion, which means the decision must be upheld unless it is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.

In its October 7, 2016 petition, Employer contended the RBA designee abused her discretion in two ways. First, Employer contended the RBA designee erred in relying on the rehabilitation specialist's report because Dr. Sparks' predictions as to the various job titles were flawed, and the RBA designee should have relied on Dr. Fraser's predictions. Second, Employer contended the RBA designee erred in making a decision as to eligibility after Employer requested a delay. In its November 23, 2016 petition for a continuance and at hearing, Employer contended the rehabilitation specialist, Ms. White, did not consider all jobs in Employee's ten-year work history. Employee contends Dr. Sparks' predictions were not flawed, and neither Ms. White nor the RBA designee abused their discretion by choosing to rely on Dr. Spark's opinion rather than Dr. Fraser's. Employee also contends that when a party disagrees with a rehabilitation specialist's report, the Act gives the party a limited time to submit additional evidence, and the RBA designee did not abuse her discretion by proceeding when Employer did not provide additional evidence, but only requested a delay.

Employer argues Dr. Spark's handwritten comments indicate he was responding based on Employee's medical condition at that time, rather than on a prediction of Employee's permanent physical capacities. Ms. White's July 22, 2016 letter to Dr. Sparks asking him to review the job descriptions emphasized that he was to approve or disapprove the descriptions based on his prediction of Employee's permanent physical capacities. In every case, the handwritten comments on Dr. Sparks' August 2, 2016 predictions can clearly be read as explaining why he approved of the description or what portion of the job description exceeded Employee's predicted capacities. Dr. Sparks' predictions are not clearly contrary to the law, and under *Irvine*, the rehabilitation specialist and the RBA designee were required to consider them.

Ms. White filed a second addendum recommending Employee be found eligible on August 31, 2016. Under 8 AAC 45.525(h), Employer was required to file any evidence it wished the RBA designee to consider within ten days, or by September 10, 2016. It did not submit Dr. Fraser's

predictions until September 22, 2016. However, as the RBA designee had not yet made a decision, Dr. Fraser's predictions were properly considered. While Dr. Fraser's predictions were properly considered, that does not mean they were entitled to greater weight than Dr. Sparks' predictions. Both doctors' predictions would be substantial evidence upon which the RBA designee could base her decision. The fact that she chose to rely on Dr. Sparks rather than Dr. Fraser is not an abuse of discretion.

Dr. Sparks' October 10, 2016 predictions were not sent to the RBA designee until after the eligibility determination had been made. Under 8 AAC 45.070(b)(1)(A), that evidence cannot be considered unless it is found to be newly discovered, and could not, with due diligence, have been produced for the RBA designee's review. Here, August 15, 2016, Employer received Dr. Sparks' August 2, 2016 predictions when Ms. White's first addendum was sent to Employer's adjuster on August 15, 2016. Employer wrote to Dr. Sparks, enclosing the job descriptions, on September 9, 2016. Employer's request was reasonably diligent, but because Dr. Sparks did not respond until October 10, 2016, Employer could not have produced the evidence for the RBA designee's review. However, the fact the evidence can be considered does not, by itself, require the reversal of the RBA designee's decision; the evidence must also show the designee abused her discretion. Employer's assertion that Dr. Sparks' hand-written comments on the October 10, 2016 predictions suggest he was responding based on Employee's physical capacities at that time rather than her predicted capacities, is conjecture. Again the comments on Dr. Sparks' October 10, 2016 predictions can also be read as explaining what portions of the job description he did not believe Employee could perform or as a comment that Employee had noted the description did not fully describe the actual job. The comments do not suggest Dr. Sparks did not answer the questions as instructed. The handwritten comments on Dr. Sparks' October 10, 2016 predictions fail to show the RBA designee abused her discretion.

Although not raised as an issue until Employer filed its November 23, 2016 petition for a continuance, Employer contended Ms. White failed to exercise due diligence in failing to discover three jobs Employee held during the ten years before the injury. Again, this evidence cannot be considered unless it is found to be newly discovered, and could not, with due diligence, have been produced for the RBA designee's review. Employer first argues Ms. White

failed to consider Employee's job at the Blackfoot Senior Center. While Ms. White testified she knew of the job, she was uncertain as to why it was not included in her report. Nevertheless, the job was listed on the resume Employee gave Employer when she was hired. Not only could the evidence have been discovered with due diligence, Employer actually had the information, and could have produced it for the RBA designee's review. The evidence cannot be considered in determining whether the RBA designee abused her discretion. Employer also contends Ms. White failed to discover Employee's self-employment and her work at the rock shop. However, the preponderance of the evidence is that while Employee may have formed a partnership and obtained a business license, there is no evidence she was ever employed by or received any income from the business. The omission of significant jobs from an employee's work history can be ground for reversal. *Hodge*. The preponderance of the evidence shows Employee's work at the rock shop was *de minimus* in that it was of such short duration that it would not affect her eligibility for reemployment benefits. Certainly, however, the best practice would be for rehabilitation specialists to list all jobs an employee has held, regardless how insignificant, in his or her report. Doing so would reduce the possibility of disputes such as this one. While the rehabilitation specialist's report could have been more thorough, the failure to include a *de minimus* job does not constitute an abuse of discretion.

In light of the record as a whole, the admissible, relevant evidence regarding Employee's job history supports both the rehabilitation specialist's and RBA designee's conclusions, and their conclusions must be upheld.

Employer also contends the RBA designee abused her discretion when she issued her determination despite Employer's request for a delay. Ms. White filed her report recommending Employee be found eligible on August 31, 2016. Under AS 23.30.014(d), the RBA designee was required to notify the parties of Employee's eligibility within 10 days, or by September 10, 2016. On September 9, 2016, Employer sent a letter to the RBA designee questioning Dr. Sparks' predictions and requesting a delay to allow it to obtain additional evidence from the doctors. The letter does not indicate how long Employer wished to delay the decision. Despite the fact the RBA designee's decision was due on September 10, 2016, it was not issued until September 30, 2016, effectively granting Employer a delay of 20 days. If anything, the RBA designee abused

her discretion in granting Employer that delay as it was contrary to established law. It was certainly not an abuse of discretion to grant an indefinite delay.

CONCLUSIONS OF LAW

1. The oral decision denying Employer's petition for a continuance was correct.

2. The RBA designee did not abuse her discretion in finding Employee eligible for reemployment benefits.

ORDER

1. Employer's November 23, 2016 petition for a continuance was properly denied.
2. Employer's October 7, 106 petition for review of the RBA designee's eligibility determination is denied.

Dated in Anchorage, Alaska on January 9, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Mark Talbert, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory 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 ANN M. McCARTHY, employee / claimant; v. BEAN'S CAFE, INC., employer; OHIO CASUALTY INSURANCE COMPANY, insurer / defendants; Case No. 201503887; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on January 9, 2017.

/s/
Nenita Farmer, Office Assistant