

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

LAUTARO RUBKE,)	
)	
Employee,)	FINAL DECISION AND ORDER
Claimant,)	
)	AWCB Case No. 201406900
v.)	
)	AWCB Decision No. 17-0027
RISK ENTERPRISE MANAGEMENT,)	
)	Filed with AWCB Fairbanks, Alaska
Employer, Insurer,)	on March 13, 2017.
Defendants.)	
)	

Lautaro Rubke's (Employee) November 2, 2016 Petition for Review of the Reemployment Benefits Administrator's Designee's (RBA Designee) determination finding him ineligible for reemployment benefits was heard on February 9, 2017, in Fairbanks, Alaska, a date selected on December 5, 2016. The panel consisted of two members, which is a quorum under AS 23.20.005(f). Employee did not appear. Attorney Robert Griffin appeared and represented Risk Enterprise Management (Employer). There were no witnesses. The record closed at the hearing's conclusion on February 9, 2017.

As a preliminary matter, the panel found Employee was properly served with notice of the February 9, 2017 hearing, and issued an oral order to proceed in Employee's absence. This decision examines the oral order and decides Employee's petition on its merits.

ISSUES

Employer contended the hearing should go forward in Employee's absence, so it can receive a decision on the petition.

Employee did not appear at hearing. His position is therefore unknown.

1) Was it proper to conduct the hearing in Employee's absence?

Employer contends the RBA Designee's decision is based on the finding of Douglas Hanel, MD, opining Employee can return to work in two jobs held in his previous ten-year work history, specifically Material Handler, Construction Worker No. 1 and Flagger.

Employee's position is unknown as he failed to attend the hearing, submit a brief, or provide any reasoning in his petition.

2) Did the RBA Designee abuse her discretion by finding Employee ineligible for reemployment benefits under AS 23.30.041?

FINDINGS OF FACT

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

- 1) On March 8, 2014, Employee injured his left wrist while working as a laborer for Employer. (Report of Occupational Illness or Injury, April 15, 2014).
- 2) On March 24, 2014, Employee saw Gregory Gootee, PA-C who assessed a sprain of the left wrist with concern for a scapholunate ligament rupture. (Orthopedic Physicians Anchorage Medical Record, March 24, 2014).
- 3) On June 25, 2014, Nicole Hendrix, PA-C referred Employee to Michael McNamara, MD, a hand surgeon at Alaska Hand-Elbow-Shoulder Surgical Specialist (AKHES). (AKHES Referral Form, June 25, 2014).
- 4) On October 10, 2014, Dr. McNamara performed a left wrist fusion on Employee. (AKHES Medical Record, October 10, 2014).

- 5) On April 7, 2015, Dr. McNamara found Employee medically stable and released him to work with no restrictions effective May 18, 2015. (AKHES Medical Record, April 7, 2015).
- 6) On August 28, 2015, Employee changed physicians to Dr. Cobden. (Notice of Change of Treating Physician, August 28, 2015).
- 7) On October 8, 2015, Dr. Cobden stated although the position of Employee's wrist and hand is not ideal and renders him disabled from doing construction laborer work in the future, he is hesitant to recommend an operation. Dr. Cobden ultimately referred Employee to a hand surgeon more skilled in revision at the University of Washington Hand Center. (Steese Orthopedic Associates Medical Record, October 8, 2015; Consultation Request, November 23, 2015).
- 8) On April 20, 2016, Dr. Hanel at the University of Washington Hand Center opined that Employee's wrist was in an appropriate position with a solid fusion and recommended no more surgical interventions. Dr. Hanel later found Employee could return to work at two jobs in his ten-year history, specifically Material Handler, Construction Worker No. 1 and Flagger. (University of Washington Medical Records, April 18, 2016; Physician's Review Form, July 18, 2016).
- 9) On July 23, 2016, rehabilitation specialist Tommie Hutto issued an evaluation report finding Employee not eligible for reemployment benefits based on Dr. Hanel's opinions. (Mr. Hutto's Evaluation Report, July 23, 2016).
- 10) On August 24, 2016, the RBA Designee found Employee ineligible for reemployment benefits based on Mr. Hutto's July 23, 2016 evaluation. (Letter from RBA Designee, August 24, 2016).
- 11) On November 2, 2016, Employee petitioned for review of the reemployment benefit decision. The petition checks two boxes: review of reemployment benefits decision under AS 23.30.041 and the "other" box, wherein Employee wrote "retraining." However, Employee did not explain his reasoning behind his petition for reemployment benefits and discussed other issues he has with his case, stating, "This company has not addressed any of my grievance from issues such as penalties for non-payment to actual disability amounts." (Petition, November 2, 2016).
- 12) On November 8, 2016, Employee filed an affidavit of readiness (ARH) on his petition. (ARH, November 8, 2016).
- 13) On November 28, 2016, Dr. Cobden wrote a letter stating the following: "After reviewing his records and clinical findings, imaging studies and related material, I think he has now reached medical stability and can be given a PPI rating. I have told him that pursuing the vocational

rehabilitation and retraining is a good idea and should be done at this time. He will not be going back to heavy labor or concrete work. No further surgery is contemplated at this time.” Dr. Cobden also filled out a November 28, 2016 work and school recommendation form. The form states Employee should not lift overhead, should lift a maximum of 15 pounds and should push and pull a maximum of 10 pounds. Dr. Cobden also wrote, “will need vocational rehabilitation.” (Dr. Cobden’s Letter and Form, November 28, 2016).

14) On December 5, 2016, a prehearing conference (PHC) was held and Employee attended. The designee scheduled a hearing on Employee’s November 2, 2016 petition for February 9, 2017, and sent a prehearing conference summary to Employee’s address of record, including the hearing date. (PHC Summary, December 5, 2016).

15) On December 8, 2016, Employee filed certain medical documents already in the record as evidence. (Evidence, December 8, 2016).

16) On January 18, 2017, the division served a hearing notice to Employee’s address of record. (Hearing Notice, January 18, 2017).

17) On February 1, 2017, the Board received verification that the United States Postal Service delivered the hearing notice on January 27, 2017. (Return Receipt, February 1, 2017).

18) On February 2, 2017, Employer filed a hearing brief. (Hearing Brief, February 2, 2017).

19) On February 7, 2017, Employer filed a supplemental hearing brief. (Supplemental Hearing Brief, February 7, 2017).

20) Employee did not file a hearing brief. (Observations; Record).

21) On February 8, 2017, Employee advised the Fairbanks workers’ compensation office that he was incarcerated but made arrangements to call in for the hearing. (Record; ICERS Case Notes, February 8, 2017).

22) At hearing on February 9, 2017, Employer’s counsel stated he had spoken to Employee’s father and Employee was going to be released from incarceration and would attend the hearing in person. (Hearing Record, February 9, 2017).

23) Employee did not appear at hearing or call in. Office staff attempted to contact Employee at his phone number of record. Office staff also attempted to reach Employee through his parents, wife and probation officer with no success. (Hearing Record, February 9, 2017).

PRINCIPLES OF LAW

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

(1) this chapter be interpreted 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) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

....

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

AS 23.30.005. Alaska Workers' Compensation Board.

....

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

The board may base its decision on not only direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.110. Procedure on Claims

....

(c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . .

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 by 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 23.30.155. Payment of compensation.

. . . .

(h) The board may upon its own initiative at any time in a case in which . . . right to compensation is controverted . . . make the investigations . . . and take the further action which it considers will properly protect the rights of all parties. Under

AS 23.30.135(a) and AS 23.30.155(h) the board has the responsibility to ascertain the parties' rights in administering and adjudicating claims under the Act.

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AS 23.30.041. Rehabilitation and reemployment of injured workers.

. . . .

(c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.

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

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

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

Pursuant to AS 23.30.041(e)'s express language, 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 it, with the employee's physical capacities. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 73 (Alaska 1993).

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.

The RBA-Designee's decision must be upheld absent "an abuse of discretion." Several definitions of "abuse of discretion" appear in Alaska law although none appear in the Alaska Workers' Compensation Act. The Alaska Supreme Court describes abuse of discretion as "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). *See also Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962); *Black's Law Dictionary* 8 (7th ed. 2000).

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

AS 44.62.570. Scope of review.

. . . .

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

. . . .

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

- (1) the weight of the evidence; or
- (2) substantial evidence in the light of the whole record.

When applying a substantial evidence standard of review, a "[reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order . . . must be upheld." *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978).

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter

. . . .

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

- (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;
- (2) dismiss the case without prejudice; or
- (3) adjourn, postpone, or continue the hearing.

8 AAC 45.150. Rehearings and modifications of board orders. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.

(b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

- (1) the facts upon which the original award was based;
- (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
- (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

(f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

In *Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 960-61 (Alaska 1998), the Alaska Supreme Court held a petition for modification under AS 23.30.130(a) is timely, and the board may consider modification, if the petitioner files the request within one year of the last payment of compensation, or of the filing of the challenged decision and order. The Alaska Supreme Court discussed subsection 130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 164 (Alaska 1974): “The plain import of this amendment (adding “mistake in a determination of fact’ as a ground for review) was to vest a deputy commissioner with broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” *Interior Paint Co.*, 522 P.2d at 168 (citations omitted). The board applies AS 23.30.130 to changes in condition, including those affecting reemployment benefits and vocational status (*see, e.g., Imhof v. Eagle River Refuse*, AWCB Decision No. 94-0330 (December 29, 1994)).

ANALYSIS

1) Was it proper to conduct the hearing in Employee’s absence?

Where a party does not appear at a hearing, but was served with notice of the hearing, the first option in order of priority under 8 AAC 45.070(f) is to proceed with the hearing in the party’s absence. Here, the Employee attended the December 5, 2016 prehearing conference in person in which the hearing was scheduled. The prehearing conference summary and notice of the hearing were served on Employee’s address of record. On February 1, 2017, the United States Postal Service verified the hearing notice was delivered on January 27, 2017. Employee was properly notified of the hearing.

Additionally, Employee contacted the division the day before the hearing, advising he intended to participate by phone. Employee’s father later contacted Employer’s counsel and informed him Employee would be attending in person. When Employee did not attend the hearing, attempts to contact Employee by telephone were ultimately unsuccessful. Employee never attempted to cancel

or continue the hearing. Employee clearly was aware of the hearing, but did not appear. The decision to proceed with the hearing in Employee's absence was proper under 8AAC 45.070(f).

2) Did the RBA Designee abuse her discretion by finding Employee ineligible for reemployment benefits under AS 23.30.041?

In a proceeding to review the RBA Designee's reemployment benefits eligibility determination, the decision may be overturned if the designee abused her discretion. AS 23.30.041(d). This is a high standard to meet. A determination Employee is not eligible must be supported by substantial evidence. The RBA Designee relied upon Dr. Hanel's opinion that Employee could perform two jobs in his ten-year work history, that of Material Handler, Construction Worker No. 1 and Flagger. The record at the time of the RBA Designee's decision lacked an opinion from a physician that Employee would lack the permanent physical capacities to perform the physical demands of all of the jobs he held at the time of injury and jobs he held in the prior ten years. AS 23.30.041(e). The RBA Designee's decision Employee is not eligible for reemployment benefits is supported by substantial evidence, and is not an abuse of discretion. Employee's petition will be denied.

There is now a subsequent opinion by Dr. Cobden regarding reemployment benefits that was not available to the RBA Designee at the time of her decision. Employee is advised that if new medical evidence is obtained to support his claim for reemployment benefits, he may request modification of the RBA Designee's decision under AS 23.30.130 within one year of its issuance by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050. Employee is also advised that he may move for modification regarding any factual findings that led to the decision to proceed with the hearing in Employee's absence.

CONCLUSIONS OF LAW

- 1) The oral decision to proceed without Employee was correct.
- 2) The RBA Designee did not abuse her discretion by finding Employee ineligible for reemployment benefits under AS 23.30.041(e), based on the evidence before her.

ORDER

LAUTARO RUBKE v. RISK ENTERPRISE MANAGEMENT

- 1) Employee's November 2, 2016 Petition for Review of Reemployment Eligibility is DENIED.
- 2) The RBA Designee's August 24, 2016 determination remains in full force and effect.
- 3) Employee is not eligible for reemployment benefits under AS 23.30.041.

Dated in Fairbanks, Alaska on March 13, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kelly McNabb, Designated Chair

/s/
Robert Weel, Board 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 Lautaro Rubke, employee / claimant v. Risk Enterprise Management, employer, insurer / defendants; Case No. 201406900; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on March 14 , 2017.

A handwritten signature in cursive script, reading "Jennifer Desrosiers".

Jennifer Desrosiers, Workers' Compensation Technician