ALASKA WORKERS' COMPENSATION BOARD

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

TIM FISH, Employee, Claimant, v. INTERIOR ALASKA ROOFING, INC., Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201605249 AWCB Decision No. 17-0078 Filed with AWCB Fairbanks, Alaska on July 11, 2017.

Interior Alaska Roofing's December 16, 2016 petition seeking review of the Reemployment Benefits Administrator's eligibility determination was heard in Fairbanks, Alaska on May 4, 2017, a date selected on February 6, 2017. Attorney John Franich appeared and represented Tim Fish (Employee). Attorney Adam Sadoski appeared and represented Interior Alaska Roofing (Employer). Witnesses included Jason Clark, owner of Interior Alaska Roofing, who testified on Employer's behalf, and Tommie Hutto, Employee's vocational rehabilitation specialist, who testified on Employee's behalf. The record closed upon receipt of Employee's reply to Employer's supplemental hearing brief on May 15, 2017.

ISSUES

Employer contends the Reemployment Benefits Administrator's (RBA) designee abused her discretion by finding its proposed wage of $25 per hour was insufficient to meet the statutory requirement for a qualifying offer of alternative employment. Although it does not dispute the figures shown on Employee's last paystub immediately preceding the injury, which the RBA designee used to calculate Employee's "remunerative wage," Employer does dispute the RBA designee's calculation method. Employer contends Employee's wages as a roofer, a seasonal occupation, are highly variable throughout the year and his October 16, 2015 paystub shows year-to-date earnings of only $13,564.28. It contends its offered wage of $25 per hour was for year-around work, which would have increased Employee's year-to-date earnings to $41,290 – more than three times what Employee earned as a roofer during the same period. Employer contends Employee's "gross hourly wages at the time of injury," should be based on his earnings throughout the year, as is done in determining gross weekly wages under AS 23.20.220, which accounts for variability in wages over time.

Employee cites 8 AAC 45.490(2), which defines "gross hourly wages," and contends the RBA designee did not abuse her discretion by including his overtime and Davis-Bacon wages in her calculation, which found a $29.90 per hour wage offer would be required to meet the statutory requirement.

1) **Did the RBS designee abuse her discretion in finding Employer's $25 per hour wage offer was insufficient to meet the statutory requirements for a qualifying offer of alternative employment?**

Employer contends, after twice suspending her eligibility determination due to the "misconduct and dilatory behaviors" of Employee's rehabilitation specialists, the RBA designee abused her discretion when she did not grant a requested suspension so Employer's alternative employment offer could be evaluated. According to Employer, the designee's refusal resulted in her "disregarding existing evidence," and "refusing to consider additional evidence submitted by the employer." Employer contends the designee's determination should be remanded for further examination.

Employee contends his rehabilitation specialist did evaluate Employer's alternative employment offer and concluded it did not prepare him for other jobs that exist in the labor market, and further contends Employer's offer also failed to meet the statutory wage requirement, so the designee did not abuse her discretion by finding him eligible for benefits. He alternatively contends *Vandenberg v. State, Dept. of Health & Social Services*, 371 P.3d 602 (Alaska 2016), makes clear it is the rehabilitation specialist's job, and not the parties job, to determine job titles under the Act, but his rehabilitation specialist was never able to perform an on-site job analysis because Employer never responded to the rehabilitation specialist's inquires.

2) **Did the RBA designee abuse her discretion by not suspending her determination so Employee's rehabilitation specialist could evaluate Employer's alternative employment offer?**

Employee contends if he prevails in his defense of Employer's petition, this decision will be a "final" decision on his eligibility for reemployment benefits and he will be entitled to attorney fees and costs.

Employer contends, since Employee should not prevail, no attorney fees should be awarded. It also objects to Employee's fee affidavits because many of the activities set forth in his affidavits were for work unrelated to the hearing issues. Additionally, Employer contends, even if Employee were to prevail in his defense, it is improper to award interim fees for prevailing on issues that do not directly lead to an award of benefits.

3) **Is Employee entitled to an award of attorney fees and costs?**

FINDINGS OF FACT

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

1) On October 5, 2015, Employee reported injuring his left shoulder two days earlier when he slipped and fell on a roof while working for Employer as a roofer. (Report of Occupational Injury or Illness, October 15, 2015).

2) On March 30, 2016, Employee filed a claim seeking temporary total disability (TTD) from October 8, 2015 and continuing, permanent partial impairment (PPI), medical costs, compensation rate adjustment, penalty, interest, attorney's fees and costs. He also alleged

Employer had resisted reemployment benefits by failing to report to the RBA he was totally, unable to return to work for 45 and 90 days. (Claim, March 30, 2017).

3) On March 31, 2016, Employee wrote the RBA, requesting an eligibility evaluation. (Employee letter, March 31, 2016).

4) On April 7, 2016, the RBA designee wrote Employer's adjuster, requesting it to verify Employee had been off work 90 days. It directed the adjuster to respond within ten days of its letter. (Designee letter, April 7, 2016).

5) On April 21, 2016, the RBA designee wrote Employer's adjuster a second time, requesting it to verify Employee had been off work 90 days. (Designee letter, April 21, 2017).

6) On April 25, 2016, Employer filed an affidavit from Jason Clark, owner and president of Interior Alaska Roofing, who attested he became aware of Employee's sedentary work restrictions on October 8, 2015 and verbally extended offers of modified duty to Employee that same day and again on October 15, 2016. The offer involved Employee being "indefinitely employed" in a sedentary position, "foreman/assistant project manager trainee," at a rate of pay of $25 per hour, where Employee would "learn to analyze building plans and estimate the required quantities of building materials and related costs." Employee could perform these duties, either at Employer's place of business, or from home. "All physical restrictions applied by doctors would have been accommodated." "The position would have remained available to [Employee] until he completed the training, at which time, if successful, would have transitioned into a foreman/assistant project manager position." According to Mr. Clark's affidavit, Employee rejected both offers and informed Mr. Clark he was "not an office guy." (Clark affidavit, April 22, 2016).

7) On April 25, 2016, Employer responded to the RBA designee's April 21, 2016 verification letter, denying Employee was entitled to an eligibility evaluation because he had been released to sedentary work by his treating physician and had been offered sedentary work as a "foreman/assistant project manager" by Mr. Clark. "Consequently, [Employee] was *not* unable to return to his employment at the time of injury for the 90 consecutive days required to be entitled to an eligibility evaluation." (Employer letter, April 25, 2017) (emphasis in original).

8) Employer's April 25, 2016 letter contends Employee's treating physician released Employee to sedentary work on October 12, 2016, and Mr. Clark "reiterated" an offer to accommodate Employee's work restrictions on an indefinite basis the following day. (*Id.*).

9) On April 27, 2016, Employee wrote the RBA designee in response to Employer's April 25, 2016 letter, contending Employer is confusing an employee's right to an eligibility evaluation under (c) of AS 23.30.041 with an offer of employer under (f)(1) that would prevent the employee from being found eligible. While Employee agreed his treating physician has released him back to sedentary work on October 12, 2015, his occupation at the time of injury was a "roofer," a medium duty job. He also attached an email Employer's office manager, Amy Breazeale, sent his treating physician, which described the job Employer had offered him:

> We'd like to have [Employee] on light duty and here are some different options from [Mr. Clark] who [sic] I have cc'd:
>
> Level 1) sit in a chair or couch and look at drawings. Look for spelling errors or missing lines in shop drawing. Put paper in paper shredder.
> Level 2) sit in chair and count screws or small parts on a table with one hand on table and do inventory [] visually count rollers, and tools (only one hand needed and no more than 2 lbs being lifted[)]. Run a copier (only one hand needed).
> Level 3) sweep and general clean up. Only one hand is needed and no more than 5 lbs lifted.

Employee contended the described tasks do not constitute a "job" that would qualify as employment that prepares him to be employable in other jobs that exist in the labor market. He stated, "I would challenge any reemployment specialist to find a DOT Job Description that would fit this imaginary work but, of course, that would require first referring the employee for an eligibility evaluation." (Employee letter, April 27, 2016; Breazeale email, October 8, 2015).

10) On May 5, 2016, the RBA designee referred Employee to rehabilitation specialist Dan LaBrosse for an eligibility evaluation. (Designee letter, May 5, 2016).

11) On June 14, 2016, the RBA designee reminded Mr. LaBrosse the Act calls for completion of a reemployment eligibility evaluation within 30 days. She instructed Mr. LaBrosse to submit his evaluation in 10 days. (Designee letter, June 14, 2016).

12) On June 16, 2016, Mr. LaBrosse submitted his eligibility evaluation, which recommended Employee be found eligible for reemployment benefits. His recommendation was based, in part, on the following:

> EMPLOYER CONTACT
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> On May 13, 2016[,] RS LABROSSE spoke with Emily Reazeal [sic], the HR person for the employer. She stated that the claimant was not a supervisor and

> mainly worked as a roofer for them. She also was interested in him working as a cost estimator but acknowledged that it would probably take the claimant six months or longer to acquire those skills including the extensive computer skills needed for that type of work. She also indicated that the claimant might be still getting medical treatments, surgery or what not, so his future physical capacities are not known at this time and they would need a better idea of the claimant's expected physical capacities before they could make an offer of alternative employment. RS LABROSSE noted that they did try to get the claimant back to work as a cost estimator or construction supervisor, prior to the EE referral, in an effort to avoid the EE all together. She did not mention this to RS LABROSSE so it does not appear to be an issue with them at this time. RS LABROSSE stated that he would get back with them regarding Alternate Employment once we had a better idea of the claimant's future capacities, and if and when he has surgery.
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> . . . .
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> RS LABROSSE has made contact with the employer about the possibility of alternative or regular work available for the claimant at this place of employment. The employer stated that he currently does not have any jobs to offer the claimant that would be lighter duty. RS LABROSSE can therefore determine that the claimant is eligible for reemployment benefits under AS 23.30.041 (f) (1) criteria at this time.

(LaBrosse Evaluation, June 9, 2016).

13) On June 17, 2016, Employer sent Mr. LaBrosse Employee's deposition transcript for use in making an eligibility recommendation. (Employer letter, June 17, 2016).

14) At his deposition, Employee testified Employer had given him blueprints of "all the jobs in Hawaii," and asked him to "look over them," an activity for which he would be paid. (Employee depo. at 96). Employer has also advised Employee of other "non-physical work" available to him that he described as "sitting around and, you know, maybe sorting papers or, you know, pushing a broom with one hand or – and taking as many breaks as I want," but Employee did not want to do this because it was "meaningless, menial work." (*Id*. at 98-99). Mr. Clark encouraged Employee to heal, offered to pay Employee 40 hours per week for reviewing the Hawaii blueprints, then Employer would then give Employee a job in either Hawaii or Alaska the following year. (*Id*. at 100). Employer also offered Employee the office and shop work described in Ms. Breazeale's October 8, 2015 email. (*Id*. at 118-124).

15) On June 29, 2016, Employer wrote the RBA to correct what it thought were "material errors" in Mr. LaBrosse's evaluation, including Mr. LaBrosse's representation Employer had informed him light duty work was not available to Employee. Employer contended its position was supported by "multiple sworn statements," including Mr. Clark's affidavit and Employee's

deposition testimony, and thought Mr. LaBrosse's report was, "at a minimum, a blatant display of negligence in considering the evidence in this matter." It also considered Mr. LaBrosse's accounting of its position a "serious breach of [Mr. LaBrosse's] ethical and legal obligations to prepare an honest and true report," and it urged the RBA to appoint a "new, unbiased," rehabilitation specialist to perform Employee's evaluation. Finally, Employer thought Mr. LaBrosse's "fabrication of evidence . . . calls [his] fitness and competence as a Rehabilitation Specialist into serious question, and that his presence on the Reemployment Benefits Administrator's list should be reevaluated." (Employer letter, June 29, 2016).

16) On July 7, 2016, the RBA designee informed Mr. LaBrosse she was suspending her determination because the information contained in his report did not support his eligibility recommendation. She explained her concerns:

> First, I have concerns about how you dealt with the issue of alternative employment. In your report, you wrote: "RS LABROSSE noted that they [the employer] did try to get the claimant back to work as a cost estimator or construction supervisor, prior to the EE referral, in an effort to avoid the EE all together." I am not sure what point you were trying to make with your statement, but if you are trying to say that the employer was trying to avoid an eligibility evaluation, by offering modified work, that is a very unprofessional and inaccurate statement on your part. An offer of modified work does not negate Mr. Fish's entitlement to an evaluation. Mr. Fish is entitled to an evaluation if he is totally unable to return to his job at time of injury (Roofer) for 90 consecutive days. Working in a modified job is not the same as working as a Roofer. Therefore, even if Mr. Fish did work in a modified job during the first 90 days, it would not disqualify him from receiving an evaluation for reemployment benefits.
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> My second concern is that you did not address the issue of alternative employment, other than to tell Ms. Breazeale you would contact her again when you knew what Mr. Fish's physical capacities were going to be. You provided no historical perspective in your report, other than your comment that the employer was trying to avoid an eligibility evaluation; and you did not address whether alternative employment is currently available to Mr. Fish. My understanding of the situation, from reading Mr. Jason Clark's Affidavit of April 22, 2016; Mr. Fish's deposition testimony given on May 25, 2016; and our electronic file documents; is as follows.
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> - On October 8, 2015, Ms. Breazeale sent an email to an individual at "orthofairbanks" notifying the provider that the employer would like to offer Mr. Fish some type of light duty work; such as looking at drawings, shredding paper, counting screws or small parts and

performing inventory, running a copier, and sweeping and general clean-up. Ms. Breazeale further wrote "If the doctor wants further restrictions that is ok also."

- On October 12, 2015, Dr. Cobden indicated that Mr. Fish could perform "… light duty as long as he can sit or stand, not for more than 2 hours at a time, and utilize his right (noninjured) upper extremity for sedentary activities." The doctor did note that if surgery is necessary, the restrictions may change.
- In Mr. Fish's deposition, starting on page 94, Mr. Fish agreed that his employer offered him modified employment (in October 2015), but Mr. Fish said he did not want to go into the office and accept wages for sitting around. Additionally, he felt he was not qualified to perform some of the duties that involved reading blueprints. Mr. Fish reported that he did not want to perform "meaningless, menial work…"
- According to the Affidavit of Jason Clark, the owner and president of Interior Alaska Roofing, Mr. Clark verbally extended an offer of modified employment to Mr. Fish on about October 8, 2015, "… in which he would be indefinitely employed in the sedentary position of foreman/assistant project manager trainee, with a rate of pay of $25.00 per hour." All of Mr. Fish's physical limitations would be accommodated. The position would remain available to Mr. Fish until he completed his training at which time, if successful, Mr. Fish would transition into a foreman/assistant project manager position. Mr. Fish declined the offer. Mr. Clark again extended the offer of modified employment to Mr. Fish on about October 15, 2016, and Mr. Fish again declined the offer.
- On March 30, 2016, Mr. Fish's attorney filed a Workers' Compensation Claim and one of the benefits requested was a reemployment benefits eligibility evaluation.
- On May 4, 2016, this office determined that Mr. Fish had been totally unable to perform the duties of a Roofer for 90 consecutive days, thus he was eligible for an evaluation for reemployment benefits.
- On May 5, 2016, Mr. Fish was referred to you for completion of an evaluation for reemployment benefits.

You provided none of this information in your evaluation report, even though you were provided with the same file materials that were supplied to my office. You recommended that Mr. Fish be found eligible even though you never asked the employer if they were still willing to offer Mr. Fish alternative employment.

The RBA designee noted Employer's offer to have Employee look at drawings, shred paper, make copies, count screws and sweep appeared to be light duty, temporary work for Employee while he recovered, and its offer to train Employee as a foreman/assistant project manager appeared to be an offer of alternative employment. Finally, the RBA designee instructed Mr.

LaBrosse to contact Employer and inquire about the availability of "physically appropriate alternative work," to set a deadline for Employer to respond to his inquiry, and if Employer did not respond by the time of his deadline, to assume alternative employment was not available. (Designee letter, July 7, 2016).

17) On July 13, 2016, Employer emailed the RBA and reiterated its concerns expressed in its June 29, 2016 letter. It also requested an informal conference. (Employer email, July 13, 2016).

18) On July 20, 2016, Ms. Breazeale completed an Offer of Alternative Employment form for a foreman/assistant project manager trainee position at a pay rate of $25 per hour. (Offer of Alternative Employment form, July 20, 2016).

19) On July 21, 2016, Mr. LaBrosse informed the RBA he was still waiting on an Offer of Alternative Employment form from Employer. (LaBrosse email, July 21, 2016).

20) On July 26, 2016, Mr. Breazeale provided Mr. Labrosse an Offer of Alternative Employment form for a "foreman/assistant project manager trainee" job, along with an apology because she thought it was sent the previous week. (Breazeale email, July 26, 2016).

21) At a July 27, 2016 informal rehabilitation conference, the RBA expressed his concurrence with the RBA designee's opinion "that it was improper for [Mr. LaBrosse] to express conjecture that [Employer] was attempting to avoid an eligibility evaluation immediately after the injury," because the "employer would not likely be aware of the eligibility criteria to use as a motive for offering light duty." The RBA also clarified certain "confusion" over offers of alternative employment and light duty assignments, which he thought "likely led to [Mr. LaBrosse] and [Employer] 'speaking different languages.'" The appointment of a new rehabilitation specialist was discussed and the RBA "noted the only task for a new specialist would be to evaluate the offer of alternative employment . . . ." (RBA Conference Summary, July 27, 2016).

22) On July 27, 2016, Ms. Breazeale completed an Offer of Alternative Employment form for the position of foreman/assistant project manager trainee at a pay rate of $25 per hour. (Offer of Alternative Employment form, July 27, 2016).

23) On July 28, 2016, the RBA directed Mr. LaBrosse to stop work on Employee's evaluation. (RBA email, July 28, 2016).

24) On August 1, 2016, Mr. Labrosse submitted his final report, documenting the following contact with Employer:

> EMPLOYER CONTACT
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> On July 13, 2016[,] RS LABROSSE spoke with Ms. Amy Brezeale [sic], the HR person for the employer. She was interested in him working as a cost estimator/ trainee and acknowledged that it would probably take the claimant six months or longer to acquire those skills including the extensive computer skills needed for that type of work. She also indicated that the claimant might be still getting medical treatments, surgery or what not, so his future physical capacities were not known at this time. On July 28, 2016 an Offer of Alternative Employment form was received from the Employer. No further evaluation of this offer was completed as RS LaBrosse was directed to cease any further work on this case by the RBA.

(Labrosse report, July 28, 2016).

25) On August 3, 2016, a new rehabilitation specialist, Tommie Hutto, was assigned to perform Employee's eligibility evaluation. The designee summarized employee's previous rehabilitation specialist's work and informed Mr. Hutto the "only remaining issue . . . was analyzing the employer's offer of alternative employment." She also observed the injury report indicated Employee was paid $25 per hour and provided Mr. Hutto with detailed, step-by-step instructions on how to analyze Employer's offer of alternative employment, which included: 1) meeting with Ms. Breazeale to verify Employer's offer of alternative employment will pay Employee 75 percent of his gross hourly wages at the time of injury, 2) completing an on-site job analysis with Mr. Clark, 3) forwarding the completed job analysis to Employee's physician for an opinion on the physical demands of the alternative employment being offered, and 4) complete a labor market survey for the alternative job offer. (Designee letter, August 8, 2016).

26) On August 31, 2016, Mr. Hutto filed a two paragraph "status report" that concluded Employer's offer of alternative employment would not prepare Employee to compete for similar jobs in the Alaska and national labor markets. Mr. Hutto attached numerous documents to his report, including Employer's Offer of Alternative Employment form, which shows a gross hourly wage of $25 per hour, and written occupational description for Employee's physician that describes the tasks of job being offered as "learn to analyze building plans and estimate the required quantities of building materials and related costs," Employee's paystub from the period October 4, 2016 through October 10, 2016, a two-page labor market survey and a written opinion from Employee's treating physician that Employee would have the permanent physical

capacities to perform the job of "foreman/assistant project manager trainee." (Hutto report, August 27, 2016; Labor Market Survey, August 25, 2016).

27) On August 31, 2016, the division noted Mr. Hutto's report does not meet the requirements of an eligibility evaluation report. (ICERS event note, August 31, 2016).

28) On September 2, 2016, Employee wrote the RBA and contended:

> The pay stub attached to the offer shows that for the 40 hours that [Employee] worked from October 4, 2015 to October 10, 2015, he was paid $800.00 regular pay, $343.60 overtime pay, and $450.80 Davis Bacon premium pay, for a total weekly gross of $1,594.40. Both the overtime pay and Davis Bacon premium pay are included in calculating gross hourly wages at the time of injury under 8 AAC 45.490(2). [Employee's] gross hourly wage is thus $1,594.40 / 40 = $39.86. Seventy-five percent of his gross hourly wage is $39.86 x .75 = $29.90. Therefore, the offer of $25.00 per hour does not satisfy the statutory requirements.
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> Please make that additional finding when determining that Mr. Fish is eligible for reemployment benefits.

(Employee letter, September 2, 2016).

29) The earnings cited by Employee in his September 2, 2016 letter comport with those shown on Employee's October 16, 2015 paystub. (Employee paystub, October 16, 2015).

30) On September 7, 2016, Employer wrote the RBA and contended Mr. Hutto had used the job title of Foreman in evaluating its alternative offer of employment, but it thought a more appropriate job title for the work offered would be Estimator. It explained, although Employer uses the title of "foreman" internally, that title does not represent the actual activities described in Mr. Clarks' April 22, 2016 affidavit. It requested Mr. Hutto evaluate and conduct a labor market survey of its alternative employment offer under the title of Estimator. Employer also enclosed a job description for Estimator, DOT Code 169.267-038, a sedentary job, as well as a copy of Mr. Clark's April 22, 2016 affidavit. Employer's letter indicates a copy of the letter and job description was sent to Mr. Hutto and Employee's attorney. (Employer letter, September 7, 2016).

31) On September 19, 2016, the RBA designee wrote Mr. Hutto, advising him she was suspending her eligibility determination due to multiple concerns with his report:

> First, you did not follow the detailed instructions that I provided to you in my August 3, 2015 report. I asked you to contact Ms. Breazeale to go over the

> Offer of Alternative Employment form. You reported that you met with Ms. Breazeale in "… order to complete an onsite job analysis … and verified that the proposed job wage met statutory guidelines…" With respect to your verification of the proposed job wage, the form still shows [Employee's] gross hourly wage for the alternative job will be $25.00 per hour. However, you wrote on the form that [Employee's] gross hourly wage at the time of injury was $1,143.60. I doubt [Employee] was earning over $1000.00 an hour. According to the pay stub that you attached to your report, [Employee's] gross pay for 40 hours was $1,143.60 plus an additional Davis Bacon wage of $450.80 for a total gross weekly wage of $1,594.40. $1594.40 divided by a 40 hour week = $39.86 per hour. 75% of $39.86 = $29.895. So if the wage information is accurate, the target wage for the alternative job may be $29.90 per hour instead of $25.00 per hour. This is important information to clarify, and this is why I requested that you discuss this issue with Ms. Breazeale and/or Mr. Clark. In your next report, you must provide information that you discussed the wage issue with the employer representative; and the correct wage that needs to be offered for the alternative job.
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> Second, I did not ask you to meet with Ms. Breazeale to complete an on-site job analysis. I specifically asked you to schedule a meeting with Jason Clark to complete the on-site job analysis form, based upon information Mr. Clark provided in his April 22, 2016 Affidavit of Service. You need to verify that the alternative job, as described in the Affidavit, is still the same job that is currently being offered to [Employee]. It appears you never met with Mr. Clark.
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> Third, I asked you to complete an on-site job analysis. You did not do this. You attached an "Occupational Description" for a Foreman/Assistant Project Manager Trainee, with the tasks of "Learn to analyze building plans and estimate the required quantities of building materials and related costs." This document is clearly not an on-site job analysis. If you do not have a Job Analysis form, I am enclosing an example of one. . . .
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> Your labor market survey was not performed correctly. As I explained in my August 3, 2016 letter, your survey must document whether the alternative job exists with other employers (in the labor market) as the job exists with Interior Alaska Roofing, including in terms of physical demands that are within [Employee's] capacities and at the appropriate wage. Once you and Mr. Clark have completed the on-site job analysis, you will have a better understanding of the specific questions to ask employers when you perform your labor market survey.

(Designee letter, September 19, 2016).

32) On October 7, 2016, Employer wrote the RBA designee to "clarify" Employee's earnings at the time of injury. Employer did not dispute the designee's cited figures from Employee's October 16, 2015 paystub, but contended Employee's earnings are highly variable through the

year so his paystub does not fairly represent his gross earnings. It pointed out the seasonal nature of Employee's employment as a roofer, the dependency of Davis-Bacon pay on the worksite location and Employee's year-to-date earnings of $13,564.28 to support its contentions. Employer contended its offered wage of $25 per hour was for year-around work, which would have increased Employee's year-to-date earnings to $41,290 – more than three times what Employee earned as a roofer during the same period, and it would be unreasonable to conclude that its offered wage does not meet the "remunerative wage requirement." It instead contended Employee's wage at the time injury should be based on his earnings throughout the year, as is done in determining gross weekly wages under AS 23.20.220, which accounts for variability in wages over time. Employer concluded, there "is no justification for using a different formula in considering whether alternative employment meets remunerative wage." (Employer letter, October 7, 2016).

33) The year-to-date earnings cited by Employer in its October 7, 2016 letter comport with those shown on Employee's October 16, 2015 paystub. (Employee paystub, October 16, 2015).

34) Employer attached an Offer of Alternative Employment form, completed by Mr. Clark, and dated October 12, 2016, as an exhibit to its hearing brief. The job offered was for an assistant project manager position at a pay rate of $29.90 per hour. (Employer's hearing brief, April 27, 2017; Offer of Alternative Employment form, October 12, 2016).

35) The board's file does not contain Mr. Clark's October 12, 2016 Offer of Alternative Employment form. (Record; observations).

36) On October 15, 2016, Mr. Hutto prepared a summary of his activities, which indicated he called Employer on September 23, 2016, and requested Mr. Clark contact him to discuss Employer's offer of alternative employment. Mr. Hutto was informed Mr. Clark would not be in the office until the first week of October. On October 11, 2016, Mr. Hutto faxed an Offer of Alternative Employment form to Employer, along with a request for Mr. Clark to personally complete the form. That same day, Employer called Mr. Hutto and Mr. Hutto explained his desire to speak with Mr. Clark about Employer's proposed wages for its offer of alternative employment. According to Mr. Hutto, Employer "expressed incredulity" and opined its previous job offer was adequate. Mr. Hutto concluded his summary by stating, as of the date of its writing, Mr. Clark had not contacted him or agreed to increase Employee's wage to $29.90 per hour. (Hutto summary, October 15, 2016).

37) On November 16, 2016, the RBA designee wrote Mr. Hutto and instructed him as follows:

> Per 8 AAC 45.525(f)(1), the rehabilitation specialist shall submit a report of finding, including a recommendation regarding eligibility for reemployment benefits. You have had this case for almost four months and you still have not submitted your final report; or an updated report if your final report cannot be done. I provided you with very specific instructions for how to analyze an offer of alternative employment in my August 3 and September 19, 2016 letters. Please complete your analysis of the offer of alternative employment and submit your final report, with documentation and your recommendation, before the end of November 2016. If you have any questions about how to complete [Employee's] evaluation, please call me as soon as possible.

(Designee letter, November 16, 2016).

38) On November 21, 2016, Mr. Hutto called the RBA designee and inquired about how to complete Employee's evaluation. The designee instructed Mr. Hutto to document all the work he has done on the evaluation and to submit his report. She thought, "[the rehabilitation specialist] has to make a recommendation. [Employee] is either eligible or not eligible. [Mr. Hutto's] report cannot be open ended." (ICERS event entry, November 21, 2016).

39) On November 22, 2016, Employee wrote the RBA designee in response to Employer's October 7, 2016 letter and contended Employer "obfuscates" the issue of Employee's "gross hourly earnings at the time of injury" under AS 23.30.041(f)(1). He pointed out that 8 AAC 45.490(2) states the phrase "gross hourly earnings at the time of injury," means "gross hourly wages are the actual hourly wage at the time of injury including premium time and overtime." (Employee letter, November 22, 2016).

40) On November 28, 2016, Mr. Hutto submitted his eligibility evaluation report recommending Employee be found eligible for benefits. His report recounts his efforts to speak with Mr. Clark on September 23, 2016 and on October 11, 2016, but since he was unable to do so, he concluded Employer had "not made a viable offer of [a]lternative employment as of the date of this report." (Hutto report, November 25, 2016).

41) On December 6, 2016, Employer wrote the RBA designee and explained it had recently provided Mr. Hutto with the completed Offer of Alternative Employment form he had requested and reminded the designee Mr. Hutto's evaluation would be incomplete without this information. It requested the designee to "delay" making her determination until Mr. Hutto had an opportunity

to review its employment offer. Employer's letter indicates copies of its letter were sent to Mr. Hutto and Employee's attorney. (Employer letter, December 6, 2016).

42) On December 9, 2017, the RBA designee found Employee eligible for reemployment benefits. Her eligibility letter contains the following footnote:

> There have been repeated efforts made to try and obtain details from the employer about an offer of alternative employment. Most recently, Mr. Hutto contacted a representative of Interior Alaska Roofing to obtain information about alternative employment and wage details. In Mr. Hutto's November 25, 2016 report, he wrote that he again made contact with the employer, but as of the date of his report, no one called him back. On December 6, 2016, Mr. Sodoski sent me a letter asking that additional time be allowed, so that "Mr. Hutto has an opportunity to review the Alternative Job Offer." Mr. Sodoski did not attach a copy of the Offer to his letter. You have been in the evaluation process for seven months, and the employer has had adequate time to provide details of the offer of alternative employment. Per the statutory requirement that evaluations be completed within 60 days from the date of referral; and this office's multiple suspensions allowing the employer additional time to make the offer, I have determined that no additional suspension should be granted. After 7 months, if the employer had an offer of alternative employment, that met the requirements of AS 23.30l041(f)(1) and 8 AAC 45.525(c)(1-3), the offer should have been made months ago.

(Designee letter, December 9, 2017).

43) On December 16, 2016, Employer filed its instant petition seeking review of the designee's eligibility determination. (Employer petition, December 16, 2016).

44) On April 28, 2017, Employee filed a supplemental memorandum, to which he attached additional paystubs leading up to the work injury. He reiterated his contention that Employer's offered hourly wage of $25 per hour was insufficient under 8 AAC 45.490(2). (Employee memorandum, April 28, 2017).

45) On May 1, 2017, Employee filed affidavits of attorney's fees and paralegal costs, claiming $12,760 in attorney's fees, $4,599 in paralegals costs and $505.23 in other litigation related costs, for a grand total of $17,864.23 in fees and costs. (Employee affidavits, May 1, 2017).

46) At hearing, Jason Clark testified as follows: He has been the owner of Interior Alaska Roofing since 2012, and he manages business operations in Alaska and Hawaii. His work includes making employment offers and establishing company policies. Employee worked as a roofer/assistant foreman and was already employed by Interior Alaska Roofing when Mr. Clark

bought the business. "[Employee] knows hot tar really good." Employee was also very nice toward Mr. Clark and helped him out, something Mr. Clark appreciated as an owner. Roofers do not work year round. They earn three rates of pay: the Davis-Bacon rate of $32-48 per hour, a commercial rate of $25 per hour and a shop rate, which is paid for year around work, but a lower wage. The job owner determines the pay rate, which constantly changes. Mr. Clark was aware Employee's doctor had ordered "no roofing work," so Mr. Clark offered Employee light duty in the shop. However, Employee declined shop work on the basis he was not a "shop guy." Mr. Clark then suggested Employee review plans, which would give Employee greater knowledge in the field and benefit the company as well. He also suggested Employee could watch safety videos. Mr. Clark thought it was time for Employee to apply his mind more because Employee was not going to be on a roof forever and emphasized to Employee these were just steps toward other types of work. He wanted Employee to apply his knowledge at work "from the beginning." Mr. Clark offered Employee a job as project manager or estimator. However, Employee declined on the basis he was not an "office guy." Mr. Clark cited his residential manager as an example, who has no education beyond high school, started off as a shingler, then became a foreman, and then residential manager. Mr. Clark kept his residential manager busy all winter reviewing drawings and writing estimates. Mr. Clark's business is "crazy busy" and he is trying to keep employees. He is lacking in personnel with hot tar experience and he lost a 1.2 million dollar hot tar job last year as a result. The job he calls an "assistant project manager" is the same as an estimator, but he does not call the job an "estimator" because people who have worked in the field get "gun shy" over the title of "estimator" and have a "knee jerk" reaction to office work. Mr. Clark completed an Offer of Alternative Employment form for the position of assistant project manager and transmitted the form to the RBA in November of 2016. The estimator job, or assistant project manager as Mr. Clark calls it, exists elsewhere in the labor market. With the F-35 work coming to the area, every job will have estimators. "There are always people moving up to estimators." Mr. Clark himself was an estimator. "Everyone needs estimators." Good estimators are very hard to keep. He is advertising now on Craig's List for an assistant project manager, who is an estimator, because another company took his employee. Mr. Clark initially offered Employee the commercial rate of $25 per hour, and later increased the pay rate to $29.90 because of the "requirements of the law." Employee's earning potential as an estimator would be $110,000 to $120,000 per year. Employee could work in that position

"forever." Mr. Clark would hire Employee "right now." He was aware Employee has had two rehabilitation specialists but has not interacted with either one. Mr. Clark does not know if anyone from his office spoke to Employee's rehabilitation specialists. (Clark).

47) Mr. Clark is credible, but appears to be mistaken to whom his October 12, 2016 Offer of Alternative Employment form was sent. (Experience, observations, record.).

48) At hearing Mr. Hutto testified as follows: When he was appointed as Employee's rehabilitation specialist, the RBA designee informed him he could rely on Employee's previous rehabilitation specialist's work and the only task for him to do was to evaluate Employer's alternative employment offer. Mr. Hutto was directed to base his on-site job analysis on Mr. Clark's affidavit as opposed to Ms. Breazeale's July 20, 2016 Offer of Alternative Employment form. He met with Ms. Breazeale, and they discussed the physical demands of Employer's alternative job offer, which were "very minimal." The job title on Ms. Breazeale's July 20, 2016 form is "foreman/assistant project manager," and not "estimator." Mr. Hutto had not heard the "estimator" job in connection with this case until today. He was also instructed to perform an on-site job analysis with Mr. Clark and he made "numerous phone calls" "over many months" to complete this task. Mr. Hutto emphasized he attempted to reach Mr. Clark over "many, many months," and Employer's office staff became "a little bit combative." After he submitted his last report, Mr. Hutto was faxed a document where "it seemed like they were offering something, but it was a reaction to his final report." Mr. Hutto was not able to complete an on-site job analysis for estimator. He was "never even informed about that job." During his meeting with Ms. Breazeale, she described a job where Employee "wouldn't have to do anything," he would just pretty much sit behind a chair and look at a computer screen." Mr. Hutto sent that job analysis to Employee's physician, who said "yes," Employee could "just sit there and do nothing." He also performed a labor market survey for the job being described by Ms. Breazeale. He talked with several roofing companies in Fairbanks and was informed they do not have a "position where someone sits there and calculates everything and says what a job is going to cost." No one has contacted Mr. Hutto about updating his final report. He did not receive Employer's December 6, 2016 letter requesting additional time for the RBA's determination and "doesn't know anything about it." (Hutto).

49) On May 4, 2017, Employee filed supplemental attorney fees and paralegal costs affidavits, claiming an additional $3,400 in attorney's fees and $21 in paralegal costs through the hearing date. (Employee affidavits, May 4, 2017).

50) On May 11, 2017, Employee filed a supplemental costs affidavit, claiming an additional $500 for Mr. Hutto's witness fees. (Employee affidavit, May 11, 2017).

51) On May 12, 2017, Employer opposed an award of attorney's fees and costs to Employee on several grounds. It contends, since Employee should not prevail on his opposition to Employer's petition, neither should any fees and costs be awarded. It also objects to Employee's affidavits on grounds that many of the activities set forth were unrelated to the issue litigated at hearing. Employer alternatively contends, even if Employee were to prevail in his defense of Employer's petition, it would not result in an award of benefits, and it is improper to award interim fees for prevailing on issues that do not directly lead to a benefits award. (Employer supplemental brief, May 12, 2017).

52) On May 15, 2017, Employee agreed with Employer that no attorney fees should be awarded unless he prevails in his defense of Employer's petition. However, Employee contends this decision will be a "final" decision on his claim for reemployment benefits, which the parties can appeal as a matter of right. Employee filed a second supplemental affidavit of attorney fees, claiming an additional $400 for reviewing Employer's supplemental brief. (Employee reply, May 15, 2017; Employee affidavit, May 15, 2017).

PRINCIPLES OF LAW

The board may base its decisions not only on 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 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . .

> (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 23.30.007. Workers' Compensation Appeals Commission.** (a) There is established in the Department of Labor and Workforce Development the Workers' Compensation Appeals Commission. The commission has jurisdiction to hear appeals from final decisions and orders of the board under this chapter. . . .

The Alaska Workers' Compensation Appeals Commission (AWCAC) has jurisdiction to hear appeals from final Board decisions. It also has implied jurisdiction to grant discretionary review non-final Board decisions in some circumstances, such as where "delay of review until a final decision on the merits can make review pointless." *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 346 (Alaska 2011). To determine whether a decision is a "final judgment" that triggers the time limit for an appeal, "the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment" *Richard v. Boggs*, 162 P.3d 629, 633 (Alaska 2007) (citation omitted). "A 'final judgment' is one that disposes of the entire case and ends the litigation on the merits." *Id.*

> **AS 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 . . . 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 . . . .
>
> (f) An employee is not eligible for reemployment benefits if
>
> (1) the employer offers employment within the employee's predicted post-injury physical capacities at a wage equivalent to . . . 75 percent of the worker's gross hourly wages at the time of injury . . . and the employment prepares the employee to be employable in other jobs that exist in the labor market;
> . . . .
>
> (i) Reemployment benefits shall be selected from the following in a manner that ensures remunerative employability in the shortest possible time:
> . . . .
>
> (r) In this section
> . . . .
>
> (7) 'remunerative employability' means having the skills that allow a worker to be compensated with wages or other earnings equivalent to at least 60 percent of the worker's gross hourly wages at the time of injury; if the employment is outside the state, the stated 60 percent shall be adjusted to account for the difference between the applicable state average weekly wage and the Alaska average weekly wage.

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 administrator's part. 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); *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to properly apply controlling law, or follow its own regulations, may also be considered an abuse of discretion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1013 (Alaska 2009); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

Abuse of discretion is also established where the findings are not supported by substantial evidence in light of the record as a whole. AS 44.62.570. When applying a substantial evidence standard, a "[reviewer] may not reweigh the evidence or draw its own inferences from the evidence." *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978). "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." *Id.* Whether the quantum of evidence is substantial enough to support a conclusion, in the contemplation of a reasonable mind, is a question of law. *Lynden Transport v. Mauget*, AWCAC Dec. No. 154 at 8 (June 17, 2011); *McGahuey v. Whitestone Logging, Inc.*, AWCAC Dec. No. 054 at 6 (August 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)). If the RBA's decision is not supported by substantial evidence, the RBA designee abused her discretion and the case is remanded for reexamination and further action. *Mauget* at 12 (failure to apply controlling law); *McGuey* at 11 (incomplete decision or record).

Both the RBA designee's eligibility determination and the board's decision on review, must be made on a complete record. Where the board renders a decision on an incomplete record, it commits plain error. *Smith* at 1012-13; *Fred Meyer, Inc. v. Updike*, AWCAC Dec. No. 120, at 10-11, (Oct. 29, 2009) Plain errors are "obvious mistakes that create "a high likelihood that an injustice has resulted," and the matter must be remanded for further evaluation. *Updike* at 11 (citation omitted).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The legislative history of AS 23.30.122 states the intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation Act." *DeRosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013). The Alaska Workers' Compensation Appeals Commission is required to accept the board's credibility determinations. *Id.* The Alaska Supreme Court defers to board's credibility determinations. *Id.*

> **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. . . .
>
> (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 a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are also considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975.

> **AS 23.30.175. Rates of compensation.** (a) The weekly rate of compensation for disability or death may not exceed the maximum compensation rate, may not be less than 22 percent of the maximum compensation rate, and initially may not be less than $110 . . . .
>
> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. . . .
>
> **AS 23.30.220. Determination of spendable weekly wage.** (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
> . . . .

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

AS 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.
. . . .

8 AAC 45.070. Hearings
. . . .

(b) . . . [A] hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed . . . .

(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.
. . . .

8 AAC 45.410. Eligibility of rehabilitation specialist

(a) To be included on the administrator's rehabilitation specialists' list under 8 AAC 45.400, a person must be a

(1) certified insurance rehabilitation specialist as defined in 8 AAC 45.415(1);

(2) certified rehabilitation counselor as defined in 8 AAC 45.415(2); or

(3) person who has equivalent or better qualifications as defined in 8 AAC 45.415(3) .

8 AAC 45.415. Definition of rehabilitation specialist

For purposes of AS 23.30.041 (r)(6), 8 AAC 45.400, and 8 AAC 45.410

(1) a "certified insurance rehabilitation specialist" means a person currently certified by the Certification of Insurance Rehabilitation Specialists Commission; the address of this commission is available upon request from the administrator;

(2) a "certified rehabilitation counselor" means a person currently certified by the Commission on Rehabilitation Counselor Certification; the address of this commission is available upon request from the administrator;

(3) a "person who has equivalent or better qualifications" means

(A) a person in another country who has at least a bachelor's degree from an accredited college and a minimum of four years of full-time, paid employment providing vocational rehabilitation services to disabled persons receiving benefits from a disability compensation system; or

(B) a person currently certified by the Disability Management Specialists Commission as a "certified disability management specialist"; the address of this commission is available upon request from the administrator.

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);
. . . .

(7) evaluating an employer's offer of alternate employment;
. . . .

8 AAC 45.490. Gross hourly wages
For purposes of AS 23.30.041, "gross hourly wages at the time of injury" is determined as follows:

. . . .

(2) For an injury that occurred on or after July 1, 2000, if the employee was paid on an hourly basis at the time of injury, gross hourly wages are the actual hourly wage at the time of injury including premium time and overtime.

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
. . . .

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

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

(2) require the employer to complete an offer of employment on a form prescribed by the administrator, and document that the job offered will pay the employee . . . an amount at least equal to 75 percent of the employee's gross hourly wages at the time of injury . . . ; and

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

Vandenberg v. State, Dept. of Health & Social Services, 371 P.3d 602 (Alaska 2016), involved the question of whether one or two job descriptions were appropriate to describe an injured employee's former employment for purposes of AS 23.30.041(e). The RBA designee determined that one job description was adequate, while the employee contended two were necessary, given the specific nature of her work. The designee found the employee ineligible for reemployment benefits based on the one job description chosen and the employee appealed the designee's determination, which was upheld by the board and the Appeals Commission. The Supreme Court's analysis concentrated heavily on the boards regulations, and it observed in a footnote:

> 8 AAC 45.525 governs reemployment benefits eligibility determinations; 8 AAC 45.445 designates certain activities that "only the certified rehabilitation specialist assigned to a case may perform," including "selecting appropriate job titles in accordance with 8 AAC 45.525(a)(2)." 8 AAC 45.445(3). Under the regulations the Administrator "may not decide" the question of eligibility if the Administrator determines that the eligibility evaluation the rehabilitation specialist prepared "is not in accordance with 8 AAC 45.525." 8 AAC 45.530(b)(1). The regulation gives the Administrator only two options: ask for more information or reassign the employee to another rehabilitation specialist. 8 AAC 45.530(b)(2).

Id. at 605 n.10. In reversing the Commission, the Court held, since AS 23.30.041(e) and the Board's regulations interpreting the statute both mandate inclusion of jobs for which an employee has received training, not just jobs an employee has actually held, two job descriptions should have been employed to describe the employee's former employment. *Id*. at 609.

> **8 AAC 45.530. Determination on eligibility for reemployment benefits**
>
> (a) No later than 14 days after receiving a rehabilitation specialist's eligibility evaluation report for an employee injured on or after July 1, 1988, the administrator shall 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. . . .
>
> (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.

ANALYSIS

1) Did the RBS designee abuse her discretion in finding Employer's $25 per hour wage offer was insufficient to meet the statutory requirements for a qualifying offer of alternative employment?

Employer contends the RBA designee abused her discretion because her calculation of Employee's "remunerative wage" for its alternative job offer did not account for his income variations over time. Here, Employer conflates a remunerative wage under AS 23.30.041(i), with a "spendable weekly wage" under AS 23.30.220(a) and a "gross hourly wage" at AS 23.30.041(f)(1). Each is a unique term of art under the Act, with their own particular meanings and applications.

"Remunerative employability" includes a target wage requirement for a reemployment benefits plan, and what Employer terms a "remunerative wage" would be "equivalent to at least 60 percent of the worker's gross hourly wages at the time of injury," AS 23.30.041(i); AS 23.30.041(r)(7). Meanwhile, a "spendable weekly wage" is used to calculate the various forms of disability compensation under the Act. AS 23.30.175(a). For example, temporary total disability compensation is paid at "80 percent of the injured employee's spendable weekly wages." AS 23.30.185. The wage standard at issue here applies to Employer's alternative employment offer, which must be "75 percent of the worker's gross hourly wages at the time of injury." AS 23.30.041(f)(1). As Employee pointed out in his September 2, 2016 letter, 8 AAC 45.490 explicitly defines "gross hourly wages" in his case as "the actual hourly wage at the time of injury including premium time and overtime." 8 AAC 45.490(2).

In her September 19, 2016 letter, the RBA designee explained her calculation based on Employee's October 16, 2015 paystub:

> According to the pay stub . . . , [Employee's] gross pay for 40 hours was $1,143.60 plus an additional Davis Bacon wage of $450.80 for a total gross weekly wage of $1,594.40. $1594.40 divided by a 40 hour week = $39.86 per hour. 75% of $39.86 = $29.895.

Although an abuse of discretion may occur when an agency fails to apply controlling law, in this case, the RBA designee followed the literal dictates of the regulation, and thus, did not abuse her discretion. *Smith*; *Manthey*. Employee's wage for a qualifying alternative employment offer is $29.90. AS 23.30.041(f).

2) Did the RBA designee abuse her discretion by not suspending her determination so Employee's rehabilitation specialist could evaluate Employer's alternative employment offer?

Employer contends the RBA designee abused her discretion by not granting its requested suspension so Employee's rehabilitation specialist could evaluate an alternative employment offer. Employee alternatively contends Employer's alternative employment offer was evaluated and found not to have met statutory guidelines, *and* his rehabilitation specialist was never able to evaluate Employer's alternative employment offer because Employer never responded to his rehabilitation specialist's inquires. Given Employee's alternative contentions, an initial point of clarification is in order.

The record shows Employer attempted to accommodate Employee's continued employment in two ways. In her July 7, 2016 letter to Employee's former rehabilitation specialist, Mr. Labrosse, the RBA designee pointed out that Employer's offer to have Employee look at drawings, shred paper, make copies, count screws and sweep appeared to be light duty, temporary work for Employee while he recovered. Meanwhile, she thought Employer's offer to train Employee as a foreman/assistant project manager appeared to be an alternative employment offer. Her assessment of the record was also shared by the RBA who, in his July 27, 2016 conference summary, wrote there was "confusion" over offers of alternative employment and light duty assignments, which he thought "likely led to [Mr. LaBrosse] and [Employer] 'speaking different languages.'" This panel shares their assessments. Therefore, the subject of this decision will not be Employer's initial offers of light duty employment, like those described

in Ms. Breazeale's October 8, 2015 email, but rather its latter attempts to offer alternative employment under AS 23.30.041(f)(1), beginning with Mr. Clark's April 22, 2016 affidavit.

Much of the testimony delivered by Employee's current rehabilitation specialist, Mr. Hutto, is both internally inconsistent, and at odds with the facts in this case. AS 23.30.122. He testified he was instructed to base his on-site job analysis on Mr. Clark's April 22, 2016 affidavit, which states Employee had been offered indefinite employment in a sedentary position where he would "learn to analyze building plans and *estimate* the required quantities of building materials and related costs." Mr. Hutto also testified the RBA designee's August 3, 2016 appointment letter informed him he could rely on the work of Employee's former rehabilitation specialist, Mr. Labrosse. On June 9, 2016, Mr. Labrosse prepared a report documenting a May 13, 2016 conversation with Ms. Breazeale, who stated Employer "was interested in [Employee] working as a cost *estimator*." On July 28, 2016, Mr. Labrosse prepared a second report, wherein he documented another conversation with Ms. Breazeale on May 5, 2016, during which Ms. Breazeale again stated Employer "was interested in [Employee] working as a cost *estimator*/trainee." Mr. Hutto himself sent a written occupational description to Employee's physician that describes the tasks of the job offered as "learn to analyze building plans and *estimate* the required quantities of building materials and related costs." Employer's September 7, 2016 letter, which indicates a copy was sent to Mr. Hutto, specifically requested a labor market survey for the job of "estimator." Employer even enclosed the DOT Job Description for "Estimator." Yet, Mr. Hutto testified he had not heard the estimator job in connection with this case until the day of the hearing, and he had "never [been] informed about that job." *Id.* Moreover, Mr. Hutto also testified he had talked with several roofing companies in Fairbanks and was informed they do not have a "position where someone sits there and calculates everything and says what a job is going to cost." A curious statement from a witness who claims he had no knowledge of an estimator position in the first place, and who further testified he was never able to complete a labor market survey for the job of estimator. *Id.*

Additionally, Mr. Hutto testified he made "numerous phone calls," "over many months," "over many, many months," in his attempts to reach Mr. Clark to complete his on-site job analysis, yet his final report, submitted on November 28, 2016, documents just two phone calls, placed two

and one-half weeks apart. *Id.* He testified he did not receive Employer's December 6, 2016 letter requesting additional time for the RBA's determination and he "doesn't know anything about it," even though the letter shows he was copied on that correspondence as well. *Id*. Mr. Hutto testified no one contacted him about updating his final report, yet he also testified Employer faxed him a document where "it seemed like they were offering something" in reaction to his final report. *Id*.

Other concerns arise with respect to both the work Mr. Hutto performed, and that which he did not. At the time of his appointment, the RBA designee gave Mr. Hutto explicit instructions for completing Employee's eligibility evaluation. Mr. Hutto did not perform an on-site job analysis, forward the analysis to Employee's physician for an opinion on Employee's physical capacities or conduct a labor market survey for the job described in Mr. Clark's April 22, 2016 affidavit. Instead, he instead undertook all of these activities, apparently basing them on the duties described in Ms. Breazeale's October 8, 2015 email, for a job where, according to Mr. Hutto, Employee could "just sit there and do nothing." Not surprisingly, he concluded such a job would not prepare Employee for other employment that exists in the labor market. In summary, Mr. Hutto conducted an analysis of the wrong job, work for which he certainly billed Employer.

Mr. Hutto was appointed as Employee's rehabilitation specialist on August 3, 2016, but did not telephone Mr. Clark until September 23, 2016, nearly two months later, and *after* Employer had specifically requested a labor market survey for the estimator job, and *after* the RBA designee suspended her determination on account of her multiple concerns with Mr. Hutto's work. Mr. Hutto did attempt to reach Mr. Clark again on October 11, 2016, but never again after that date, even though the RBA designee reminded him on November 16, 2016 to complete his report, and informed him again on November 21, 2016 that his report "cannot be open ended." Instead, Mr. Hutto simply submitted his final report concluding Employer had "not made a viable offer of [a]lternative employment as of the date of this report." Two phone calls placed over a period of four months, which included a period where Mr. Hutto was informed Mr. Clark was going to be out of the office, represents insufficient effort towards completing the analysis. *Rogers & Babler*.

An abuse of discretion is established if the agency has not proceeded in the manner required by law. AS 44.62.570. When an employer makes an alternative employment offer under AS 23.30.041(f)(1), "the rehabilitation specialist shall" complete a job analysis, including the job's physical requirements, submit the job analysis to the employee's physician for a prediction of whether the job's physical demands are within the employee's post-injury physical capacities, and conduct labor market research to document that the offered employment prepares the employee to be employable at other jobs that exist in the labor market. 8 AAC 45.525(c)(1)-(3). In this case, the rehabilitation specialist completed none of these required activities, so his evaluation remains incomplete. *Id*. Since the RBA designee rendered her determination based on an incomplete evaluation, and since she failed to follow the agency's own regulations, her determination must be must be reversed and remanded for further examination. *Updike*; *McGuey*.

The issue of rendering a decision on an incomplete record provokes yet further analysis. In footnote 1 of her December 9, 2016 eligibility determination letter, the RBA designee acknowledged receipt of Employer's December 6, 2016 letter requesting additional time for consideration of its alternative employment offer, but she also observed Employer had not attached a copy of its Offer of Alternative Employment form to its letter. Although the board's file did not contain Mr. Clark's October 12, 2016 Offer of Alternative Employment form prior to hearing, the letter itself makes clear Employer forwarded the form to Mr. Hutto and reminded the designee Mr. Hutto's evaluation would be incomplete without this information. Clearly, Employer was expressing its desire to have Mr. Clarks' October 12, 2016 Offer of Alternative Employment form, the very information Mr. Hutto requested, considered. Given the contents of Employer's December 6, 2016 letter, as well as Mr. Hutto's testimony that Employer faxed him a document where "it seemed like they were offering something" in reaction to his final report, it is a certainty Mr. Hutto received Employer's December 6, 2016 letter, along with Mr. Clark's October 12, 2016 Offer of Alternative Employment form, notwithstanding his sworn testimony to the contrary. *Rogers & Babler*; AS 23.30.122.

Not only must an agency's decision be based on an examination of the entire record, as set forth above, but decisions in workers' compensation cases shall also be decided on their merits and be

impartial and fair to all parties. AS 23.30.001(2), (4). All parties in workers' compensation cases must be afforded due process, an opportunity to be heard and for their evidence to be fairly considered. AS 23.30.001(4). When an agency's decision is contrary to law, an abuse of discretion has occurred and the case must be remanded for further evaluation. *Smith*; *Manthey*. The designee's refusal to consider Employer's December 6, 2016 letter, along with Mr. Clark's October 12, 2016 Offer of Alternative Employment form, constitutes a second abuse of discretion, and her determination will be remanded in accordance with established law. AS 23.30.001(2), (4); *Updike*; *McGuey*.

Notwithstanding the analysis already presented, it is not yet complete. An abuse of discretion is most commonly defined as "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan*; *Tobeluk*. Returning once again to footnote 1 in the designee's December 9, 2016 determination letter, she writes to Employee:

> You have been in the evaluation process for seven months, and the employer has had adequate time to provide details of the offer of alternative employment. Per the statutory requirement that evaluations be completed within 60 days from the date of referral; and this office's multiple suspensions allowing the employer additional time to make the offer, I have determined that no additional suspension should be granted. After 7 months, if the employer had an offer of alternative employment, that met the requirements of AS 23.30l041(f)(1) and 8 AAC 45.525(c)(1-3), the offer should have been made months ago.

These statements are not only in direct contradiction to the evidence in this case, but also to her own stated reasons for twice suspending her determination previously.

The RBA designee appointed Mr. Labrosse as Employee's rehabilitation specialist on May 5, 2016. In her scathing letter to Mr. Labrosse on July 7, 2016, two months later, the RBA designee first suspended her determination on Employee's eligibility because the information contained in Mr. Labrosse's eligibility recommendation did not support his eligibility recommendation. Her letter is extensively quoted in this decision's factual findings, but her chief complaint was a "very unprofessional and [an] inaccurate statement on [Mr. Labrosse's] part." In that letter, the designee issued explicit instructions to Mr. Labrosse on how to complete

the evaluation. Three weeks later, the RBA designee removed Mr. Labrosse as Employee's rehabilitation specialist and appointed Mr. Hutto. On September 19, 2016, one and half months after Mr. Hutto's appointment, the RBA designee again suspended her determination due to "multiple concerns" with Mr. Hutto's June 16, 2016 report. Again, she transmitted another scathing letter, this time to Mr. Hutto, also quoted extensively in this decision's factual findings, wherein she again provides Mr. Hutto explicit instructions on how to complete the evaluation. Finally, as determined above, on November 28, 2016, Mr. Hutto submitted an incomplete report, recommending Employee be found eligible for reemployment benefits. The RBA designee concurred and made her determination, nearly seven months after first appointing Mr. Labrosse, and notwithstanding her acknowledged receipt of Employer's December 6, 2016 letter requesting a suspension of her determination.

In her December 9, 2016 eligibility letter, the RBA designee, and now Employee, attribute delays in Employee's eligibility determination to Employer's purported delay in forwarding an Offer of Alternative Employment form to Mr. Hutto. However, as early as April 25, 2016, both the RBA designee and Employee were in possession of Mr. Clark's April 22, 2016 affidavit, wherein he described Employer's offer of alternative employment as Employee being indefinitely employed in a sedentary position of "foreman/assistant project manager trainee," where Employee would "learn to analyze building plans and *estimate* the required quantities of building materials and related costs." As previously mentioned, on May 13, 2016, Mr. Labrosse had a conversation with Ms. Breazeale, who stated Employer "was interested in [Employee] working as a cost *estimator*," and on May 5, 2016, he had another conversation with Ms. Breazeale, during which she again stated Employer "was interested in [Employee] working as a cost *estimator*/trainee." Next, in its September 7, 2016 letter, Employer explicitly requested Mr. Hutto conduct an evaluation of its job offer for the position of estimator, and even provided a DOT job description for that position.

Employee cites *Vandenberg* to support his contention that it is the rehabilitation specialist's job, and not the parties' job, to determine job titles under the Act. However, *Vandenberg* is not directly applicable here because it was addressing the issue of a rehabilitation specialist selecting a job *title* that describes an employee's job at the time of injury under 8 AAC 45.525(a)(2), not

developing a job *description* for an employer's alternative employment offer under 8 AAC 45.525(c). Nevertheless, Employee's point is taken, and it is agreed a rehabilitation specialist is the person who is best positioned to develop a job description. 8 AAC 45.445(7); *see also* 8 AAC 45.445(3) (referencing 8 AAC 45.525(a)(2)). In fact, the regulation itself commands as much. 8 AAC 45.525(c)(2).

Therefore, Employee's point again begs the question: Why did Mr. Hutto not conduct an evaluation of Employer's offered position of estimator? Granted, 8 AAC 45.525(c)(2) requires the employer "to complete an offer of employment on a form prescribed by the Administrator," but Ms. Breazeale had completed such a form as early as July 20, 2016, and by July 26, 2016, Employee's former rehabilitation specialist, Mr. Labrosse, possessed it. Furthermore, the previous subsection at (c)(1) provides "the rehabilitation specialist *shall* complete a job analysis, including a *description* of the job's duties, tasks and physical requirements . . . ." Between Mr. Labrosse, or Mr. Hutto, and Ms. Breazeale, the rehabilitation specialist *was* in the best position to select an appropriate job title, in addition to developing the job description, for the job being offered. The RBA even pointed out the disparity of knowledge between the rehabilitation specialist and Employer when it came to reemployment matters under the Act in his July 26, 2016 conference summary. So here, the RBA designee found Employee eligible for reemployment benefits because Ms. Breazeale wrote "Foreman/Assistant Manager Trainee" on her July 20, 2016 form, instead of "Estimator," an exquisite elevation of form over substance.[1]

The RBA designee's scathing letters of July 7, 2016, and September 19, 2016, unmistakably, and in considerable detail, attribute the delays in Employee's eligibility evaluation process to his rehabilitation specialists. Examples of their serial failures to follow instructions, as well as other transgressions, are many. They include, making a "very unprofessional and inaccurate statement," filing a report with information that did not support the recommendation, omitting numerous critical facts pertaining to Employer's multiple employment offers, omitting Employee

[1] Even though the rehabilitation specialist is the expert in this regard, Mr. Clark credibly explained his rationale for using the job title "assistant project manager," instead of "estimator" at hearing. The job he calls an "assistant project manager" is the same as an "estimator," but he does not call the job an "estimator" because people who have worked in the field get "gun shy" over the title of "estimator" and have a "knee jerk" reaction to office work. His rationale proved prescient in Employee's case. When Mr. Clark offered Employee light duty employment in the shop, Employee informed Mr. Clark, he was not a "shop guy." Later, when Mr. Clark offered Employee indefinite employment as a "project manager," Employee informed Mr. Clark, he was not an "office guy," either.

had refused Employer's multiple offers of modified employment, omitting Employee admitted as much at his deposition, omitting critical procedural history in Employee's case, omitting determinative temporal milestones for the eligibility evaluation process, submitting a "report" that does meet an eligibility evaluation report's requirements, misstating Employee's earnings, miscalculating Employee's gross hourly wages at the time of injury, failure to verify Employer's alternative employment offer was still available to Employee, failure to conduct an on-site job analysis, failure to verify Employer's offer would compensate Employee at 75 percent of his gross hourly wages at the time of injury, and failure to perform a labor market survey. Given these facts, it is not understood why the RBA designee would suddenly reverse course and conclude, "After 7 months, if the employer had an offer of alternative employment . . . the offer should have been made months ago." The designee's conclusion in this regard, which served as a basis for both denying Employer's request for a suspension of her determination, as well as a basis for determining Employee was eligible for reemployment benefits, was decidedly "arbitrary, capricious [and] manifestly unreasonable." Therefore, it represents a third abuse of her discretion. *Sheehan*; *Tobeluk*. Employee's eligibility for reemployment benefits will be remanded to the RBA designee.

3) Is Employee entitled to an award of attorney fees and costs?

Post-hearing litigation ensued over the issue of attorney fees. Employee contends this decision should be a "final" decision, entitling him to an attorney fee award. Employer disagrees on numerous basis, including its opposition to an award of "interim" fees. A "final" judgment is one that disposes of the entire case and ends litigation. *Boggs*. This decision does not do that. Given the conclusions reached above, upon remand, the RBA designee may again find Employee eligible for benefits, a determination from which Employer may seek review, or she may find Employee ineligible for benefits, a determination from which Employee may seek review. In either event, this decision does not end all litigation, and thus is not a "final" decision. *Id*. Furthermore, since this decision does not award benefits to Employee, his claim for attorney fees will be decided when his claim's merits are considered. *Bignell*.

CONCLUSIONS OF LAW

1) The RBA designee did not abuse her discretion in finding Employer's $25 per hour wage offer was insufficient to meet the statutory requirements for a qualifying offer of alternative employment.

2) The RBA designee abused her discretion by not suspending her determination so the rehabilitation specialist could evaluate Employer's alternative employment offer.

3) Employee is not entitled to an award of attorney fees and costs at this time.

ORDERS

1) Employer's December 16, 2016 petition, seeking review of the RBA designee's eligibility determination is granted.

2) The designee's December 9, 2017 determination is reversed and remanded for further examination in accordance with this decision.

Dated in Fairbanks, Alaska on July 11, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Jacob Howdeshell, Member

/s/
Togi Letuligasenoa, 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 TIM FISH, employee / claimant; v. INTERIOR ALASKA ROOFING INC, employer; ZURICH AMERICAN INSURANCE COMPANY, insurer / defendants; Case No. 201605249; 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 July 11, 2017.

/s/
Ronald C. Heselton, Office Assistant II