

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JERRY ELLEN,	)	
Employee,	)	INTERLOCUTORY
Claimant,	)	DECISION AND ORDER
	)	
v.	)	AWCB Case No. 200508739
	)	
DURETTE CONSTRUCTION,	)	AWCB Decision No. 17-0094
Employer,	)	
	)	Filed with AWCB Juneau, Alaska
and	)	on August 8, 2017.
	)	
ALASKA TIMBER INSURANCE	)	
EXCHANGE,	)	
Insurer,	)	
Defendants.	)	

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Durette Construction and Alaska Timber Insurance Exchange's (Employer) March 30, 2017 petition for review of the Reemployment Benefits Administrator (RBA) denial of the August 16, 2016 reemployment plan was heard in Juneau, Alaska on July 11, 2017, a date selected on April 25, 2017. Attorney Nora Barlow appeared telephonically and represented Employer. Jerry Ellen (Employee) appeared telephonically, represented himself and testified. The panel consisted of two members, a quorum under AS 23.30.005(f). The record closed at the conclusion of the hearing.

## ISSUE

Employer contends the RBA abused her discretion in denying the reemployment plan developed by Employee's selected rehabilitation specialist.

Employee contends the RBA properly rejected the proposed plan.

**Was the RBA's denial of the August 16, 2016 reemployment plan correct?**

FINDINGS OF FACT

The following facts and factual conclusions are taken from *Ellen v. Durette Construction*, AWCB Decision No. 08-0171 (September 24, 2008) (*Ellen I*), *Ellen v. Durette Construction*, AWCB Decision No. 17-0025 (March 2, 2017) (*Ellen II*) or established by a preponderance of the evidence:

- 1) On June 1, 2005, Employee injured his lower back after losing control of the dump truck he was driving while working for Employer. (*Ellen I*).
- 2) *Ellen I* was issued on September 24, 2008. It determined Employer was responsible for Employee's past and future, reasonably necessary medical expenses related to his right shoulder and low back conditions and awarded him temporary total disability (TTD) benefits. (*Ellen I*).
- 3) On July 2, 2009, the parties stipulated Employee is eligible for reemployment benefits. (Prehearing Conference Summary, July 2, 2009).
- 4) On February 17, 2010, Paul Schwaegler, M.D. responded to Ms. Van Der Pol's February 5, 2010 letter and stated Employee could not participate in vocational training at this time. (Schwaegler Response, February 17, 2010).
- 5) On February 19, 2010, Ms. Van Der Pol requested suspension in development of the reemployment plan based on Dr. Schwaegler's February 17, 2010 opinion. (Rehabilitation Report, February 19, 2010; Letter, February 17, 2010).
- 6) On March 11, 2010, the RBA stated he was unable to decide the request for suspension without knowing when the plan development might resume. (Letter, March 11, 2010).
- 7) On April 20, 2010, Ms. Van Der Pol filed a status report on Employee's reemployment plan stating she was waiting on a response from Dr. Schwaegler to her letter written March 22, 2010 to predict if "there would be a point of improvement, in time, that would allow him to work." (Status Report, April 20, 2010).
- 8) On May 27, 2010, Dr. Schwaegler opined Employee will remain temporarily totally disabled for at least the next six to twelve months. (Schwaegler Letter, May 27, 2010).
- 9) On May 27, 2010, Ms. Van Der Pol requested plan development suspension based on Dr. Schwaegler's May 27, 2010 letter. (Suspension Request, May 27, 2010).

10) On June 8, 2010, the RBA suspended development of the reemployment plan. (Letter, June 8, 2010).

11) On January 5, 2011, Jeffrey Fernandez, PA-C, opined Employee is expected to remain temporarily totally disabled for at least six to twelve months. (Letter, January 5, 2011).

12) On January 31, 2011, Ms. Van Der Pol requested plan development suspension based on PA-C Fernandez's January 6, 2011 opinion. (Rehabilitation Report, January 31, 2011).

13) On May 20, 2011, Dr. Schwaegler opined in a letter to Employer's adjuster Employee "will not be able to return to gainful employment," "it is a permanent condition" and Employee is "permanently disabled due to his lumbar spine condition." (Schwaegler Letter, May 20, 2011).

14) On May 26, 2011, Ms. Van Der Pol requested Employee's "file be closed for rehabilitation efforts" based on Dr. Schwaegler's May 20, 2011 letter. (Rehabilitation Report, May 26, 2011).

15) On March 15, 2016, Employer requested the rehabilitation specialist re-open the file, develop and submit a reemployment benefits plan for Employee. Employer stated:

[Employee] has continued to receive medical treatment and, in 2015, completed the LifeFit Chronic Pain Program under the supervision of Dr. Robert Friedman, Idaho Physical Medicine & Rehabilitation. Dr. Friedman felt that by the end of the program, [Employee]'s performance was at light to medium duty and [Employee] could return to work full-time.

(Employer Letter, March 15, 2016).

16) On April 5, 2016, the RBA advised Ms. Van Der Pol it would be appropriate to resume reemployment plan development. (Letter, April 5, 2016).

17) On July 26, 2016, the division informed the rehabilitation specialist that over 90 days had passed since case assignment and she must submit a report within 10 days. (Letter, July 16, 2016).

18) On August 16, 2016, Ms. Van Der Pol signed the reemployment plan and submitted it to the RBA for review. The plan's occupational goal is "Fast Food Worker," specifically a crewmember at McDonald's. The plan's "Retraining Option" is "on the job training" (OJT). The plan noted Employee had no transferable skills, he did not wish to acquire computer skills, and he did not intend to participate in a vocational rehabilitation re-training program. Employee reported volunteering at a restaurant and a senior center bussing tables post-injury, delivering food, doing dishes, cleaning, making sandwiches and clam chowder and delivering take-out food. Employee's remunerative wage is \$10.00 per hour and the crewmember job meets the

remunerative wage. The job is light duty, entry level, located where Employee lives, and does not require him to learn any computer, internet or clerical skills. Employee uses marijuana and this job does not perform drug tests. The plan stated Employee was cleared to work at the light to medium physical demand level in a full time capacity by Dr. Friedman. The plan's total cost was \$7,770.00 for one month of intensive work readiness counseling and application and 12 hours of work-readiness job placement adjustment follow up. The one month of intensive work-readiness counseling involves Ms. Van Der Pol teaching Employee to create a resume, write a cover letter, and complete an employment application for McDonald's, and teaching him interviewing skills and techniques for 30 hours. After Employee applies for the McDonald's crewmember position and secures employment, the 12 hours of work-readiness job placement adjustment follow up would take place during Employee's 90-day probation at McDonald's. This work-readiness follow up involves Ms. Van Der Pol ensuring Employee "learns the skills to keep and retain a job and to problem solve relationship interactions in a work setting." (Reemployment Benefits Plan, August 16, 2016).

19) On August 31, 2016, the reemployment benefits informed the parties the plan had only been signed by Ms. Van Der Pol:

The status of the plan is in question because it has not been approved and signed by employee and/or employer/insurer. Please contact the individuals who have not signed the plan and find out if they are in agreement with the plan or if they oppose it. If they agree with the plan, please forward their signatures to my attention. Once all parties agree to and sign the plan, it goes forward as written.

Please let us know within 10 days of the parties' decision regarding plan approval.

(Reemployment Benefit Section Letter, August 31, 2016).

20) On September 7, 2016, Employer's adjuster signed the reemployment plan and submitted it to the RBA. (Employer's Adjuster Letter, September 7, 2016).

21) On October 11, 2016, Employer asked the board, in the absence of an RBA, to review and approve the reemployment plan under AS 23.30.041(j). (Petition, October 11, 2016).

22) *Ellen II* was issued on March 2, 2017. It denied Employer's petition for board approval of the August 16, 2016 reemployment plan and remanded the plan to the RBA for review. (*Ellen II*).

23) On March 8, 2017, the RBA requested an updated physician review of the job analysis. (Letter, March 8, 2017).

24) On March 13, 2017, Dr. Friedman reviewed and approved the job analysis for the crew member position at McDonald's. (Dr. Friedman, Job Analysis Approval, March 13, 2017).

25) On March 21, 2017, the RBA denied the reemployment plan. The RBA concluded the plans "pre-vocational training" failed to fit any reemployment benefits category under AS 23.30.041(i):

While the specialist identifies this plan as an on the job training plan, the intensive training outlined in this plan is more appropriately identified as rehabilitation counseling or prevocational training to predate the actual application for employment. A layman's definition of on the job training can be found in the Merriam-Webster online dictionary. This states 'training that a person is given while doing a job and getting paid;' Wikipedia states '. . . a form of training taking place in a normal work setting.' Businessdictionary.com states '. . . training at the place of work while he or she is doing the actual job.' The plan development guide for the Reemployment Benefits Section of Alaska's Workers' Compensation Division describes a variety of ways to incorporate on the job training into a plan, but, as in all the definitions noted above, on the job training occurs on the job site, with the training specific to the skill set required in the work environment, and provided by the employer. There is no place under the statute for the RBA to approve a plan for one month of pre-vocational skill development, or as the specialist defines it on plan page 9, '1 month of vocational rehabilitation counseling with me to prepare a resume and cover letter for the job application process.'

(RBA Plan Denial, March 21, 2017).

26) On March 26, 2017, Ms. Van Der Pol submitted an addendum to the RBA requesting Employer or Employee request a hearing based on the addendum as the RBA inaccurately analyzed the plan. Ms. Van Der Pol stated the plan involves 30 hours of training spread out over the course of one month, including one-on-one vocational counseling for 1.5 hours per day, five days per week for four weeks as a precursor to three months of OJT with McDonald's as any other trainee to learn how to be a crew member. She contended nothing in the statute prevents the RBA from approving the plan. (Addendum, March 26, 2017).

27) On March 29, 2017, Employer asked the RBA to reconsider her denial of the reemployment plan. Employer stated the RBA's "interpretation of the categories of reemployment benefits places form over substance and unreasonably limits the services available to injured workers in the reemployment process." Employer argued had the plan included classes to teach Employee the same job skills, the plan would have fallen under academic training but due to geographical

limitations in Alaska access to classroom training may be limited. Employer stated the prevocational training is “academic training” and is included under the statute as a means for injured workers to learn new skills in order to return to work. (Letter, March 29, 2017).

28) On March 30, 2017, Employer asked the board to review the RBA’s denial of the reemployment plan. (Petition, March 30, 2017).

29) On April 5, 2017, the RBA responded to the March 26, 2017 addendum. The RBA stated she incorrectly interpreted the plan as she had not considered the plan included a potential direct hire of Employee into an unskilled entry level position as an OJT plan. She stated:

On the job training requires that the employer enters into an agreement to hire and provide more intensive or in depth training to the identified worker, often in exchange for some portion of wage reimbursement during the training period, than they provide for every new hire. The plan does not indicate McDonald’s has agreed to hire or train [Employee].

The RBA stated she was not able to find the plan meets criteria for OJT. She noted Employee has access to an Alaska Job Center and to a vocational rehabilitation counselor with the Alaska Department of Labor and Workforce Development, Vocational Rehabilitation in Ketchikan, Alaska (DVR) and in her experience, some specialists encourage injured workers to access both services for assistance in resume development and interview skills as they are not a part of the reemployment plan. (Letter, April 5, 2017).

30) On April 20, 2017, Nurse Practitioner Tanya Nguyen examined Employee and diagnosed arachnoiditis from L4 to S1. She recommended additional assessments, including an electromyogram of both lower extremities and a lumber CT myelogram. (Nurse Practitioner Nguyen, Medical Report, April 20, 2017).

31) On June 8, 2017, Ms. Van Der Pol submitted a second addendum. She stated the RBA misinterpreted the reemployment benefits statutes, contending: (1) OJT does not require the employer to hire the employee; (2) DVR counselors do not provide services to injured workers receiving workers’ compensation benefits; (3) DVR counselors and rehabilitation specialists serve different populations with different missions and the services required for the two distinctly different populations are at odds and would be a conflict of interest for the DVR counselor; (4) she was told for the past 33 years that DVR counselors will not work with injured workers until they are finished with the workers’ compensation system; and (5) the job center is

less equipped to manage Employee's needs in returning to work as it cannot provide the one-on-one daily training he needs. (Second Addendum, June 8, 2017).

32) At hearing on July 11, 2017, Employee testified he cannot work full time due to chronic pain. He testified he was diagnosed with arachnoiditis and was recommended to undergo additional medical tests. Employee postponed the medical tests because medical benefits are controverted and he must wait until he can afford to pay for them himself. He contended the RBA properly rejected the proposed plan and asked the board to deny Employer's petition. (Employee).

33) At hearing, Ms. Van Der Pol testified about the reemployment plan. She stated Employee does not have skills to fill out an application, generate a resume and successfully interview for a job and the reemployment plan involves teaching Employee to create a resume by matching skills he already has with the McDonald's position description, to fill out the McDonald's job application and to interview for the McDonald's position. She stated such training falls under vocational training. Ms. Van Der Pol testified she would travel to Ketchikan and stay with family while she trains Employee at facilities provided for free at the public library. Ms. Van Der Pol stated OJT follows vocational training under the reemployment plan because McDonald's would train Employee during his 90-day probationary period and she would follow up with Employee and assist him in keeping his job at McDonald's and getting along with coworkers. She stated the vocational rehabilitation counselors have the mission to maximize the person and rehabilitation specialists have the goal to return the injured worker to work in the shortest time period while meeting the remunerative wage under the Act. In her view, those missions can conflict. She testified the job service center does not have the time and services to provide Employee with individualized training he requires and she has written over 100 reemployment plans that included similar resume, interview and application training. Ms. Van Der Pol contended OJT plans do not require the employer to hire the employee. (Ms. Van Der Pol).

34) At hearing, Employer argued there is no need to remand the reemployment plan back to the RBA should the board find the RBA failed to properly apply controlling law. (Employer).

#### PRINCIPLES OF LAW

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

(1) This chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to . . . employers. . . .

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 23.30.041. Rehabilitation and reemployment of injured workers.**

. . . .

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

- (1) on the job training;
- (2) vocational training;
- (3) academic training;
- (4) self-employment; or
- (5) a combination of (1) - (4) of this subsection.

(j) The employee, rehabilitation specialist, and the employer shall sign the reemployment benefits plan. If the employer and employee fail to agree on a reemployment plan, either party may submit a reemployment plan for approval to the administrator; the administrator shall approve or deny a plan within 14 days after the plan is submitted; within 10 days of the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110; the board shall uphold the decision of the administrator unless evidence is submitted supporting an allegation of abuse of discretion on the part of the administrator; the board shall render a decision within 30 days after completion of the hearing.

. . . .

In 1988, AS 23.30.041 was repealed and the current rehabilitation system was enacted. The specific legislative purposes of the reenactment were:

(1) to create a less expensive system with fewer employees participating in it; (2) to reduce the use of vocational rehabilitation as a litigation tool; (3) to encourage the use of vocational rehabilitation services for employee's 'most likely to benefit and who truly desire and need them'; [and] (4) to speed up the vocational process in the expectation of producing more successful outcomes.



*Konecki v. Camco Wireline, Inc.* 920 P.2d 277, 283 (Alaska 1996) (quoting *Rydwell v. Anchorage School District*, AWCB Decision No. 91-0151 (May 17, 1991)).

The purpose of reemployment benefits is to ensure an injured worker unable to return to former jobs or jobs for which he has the relevant training or experience has some skills to return to remunerative employment in the shortest time possible. See e.g., *Vandenberg v. State of Alaska*, 371 P.3d 602, 607 (Alaska 2016); *Rockney v. Boslough Construction Co.*, 115 P.3d 1240, 1242 (Alaska 2005); *Arnesen v. Anchorage Refuse, Inc.*, 925 P.2d 661, 665 (Alaska 1996).

**8 AAC 45.550. Plans.**

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

....

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

(c) If the employee and the employer fail to agree to the reemployment plan written under (a)(8) of this section, either party may request the administrator to review and approve the plan. No later than 14 days after the administrator receives the plan for review, the administrator shall

- (1) approve the plan and notify the parties by first class mail;
- (2) deny the plan and notify the parties by first class mail; or
- (3) notify the parties that the plan is incomplete and request additional information from the parties before making a decision on the plan. . . .

The RBA’s decision must be upheld absent an abuse of discretion on the administrator’s part. AS 23.30.041(j). Several definitions of “abuse of discretion” appear in Alaska law although none appears in the Workers’ Compensation Act (Act). An abuse of discretion occurs where a decision is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive. *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An abuse of discretion will also be found where a decision fails to apply controlling law or regulations, *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1107 (Alaska 1999); or demonstrates a failure to exercise sound, reasonable legal discretion. *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

**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.

Under 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).

Alaska courts apply a sliding-scale approach to statutory interpretation. Under this approach, the plain language of a statute is significant but does not always control; rather, “legislative history can sometimes alter a statute's literal terms.” As a general rule, “the plainer the language of the statute, the more convincing contrary legislative history must be.” *Hillman v. Alaska*, 382 P.3d 1198, 1199 (Alaska 2016). A statute is interpreted according to reason, practicality, and common sense, considering the meaning of the statute’s language, its legislative history, and its purpose. *See Municipality of Anchorage v. Adamson*, 301 P.3d 569, 575 (Alaska 2013). “The goal of statutory construction is to give effect to the legislature’s intent, with due regard for the meaning the . . . language conveys . . . .” *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).

“On the job training” is defined as “training that a person is given while doing a job and getting paid.” Merriam–Webster, Online Dictionary: <https://www.merriamwebster.com/dictionary/on%20the%20job%20training>. Vocational is defined as “of, relating to, or undergoing training in a skill or trade to be pursued as a career.” Merriam-Webster, Online Dictionary, <https://www.merriam-webster.com/dictionary/vocational>. Academic is defined “of, relating to,

or associated with an academy or school especially of higher learning.” Merriam-Webster, Online Dictionary, <https://www.merriam-webster.com/dictionary/academic>.

### ANALYSIS

#### **Was the RBA’s denial of the August 16, 2016 reemployment plan correct?**

The RBA denied the reemployment plan because the plan did not fit any reemployment benefits options under AS 23.30.041(i). The RBA’s decision must be upheld absent an abuse of discretion. AS 23.30.041(j). Employer contended the RBA’s denial of the reemployment plan was an abuse of her discretion because the RBA failed to apply controlling law by interpreting AS 23.30.041(i) in a way that conflicts with the Act’s goals for reemployment benefits.

When interpreting a statute, the language of the statute, the legislative history, and the legislative purpose behind the statute are considered on a sliding scale as the statute’s literal terms can sometimes be altered by the legislative history. *Shehata; Adamson; Hillman*. The phrase “shall be selected from the following” in AS 23.30.041(i) clearly limits the reemployment benefit options the rehabilitation specialist must consider and select from to: OJT, vocational training, academic training, self-employment, or a combination thereof. “The rehabilitation specialist must consider all of the options under AS 23.30.041(i) before selecting the option that will return the employee to remunerative employability in the shortest possible time.” 8 AAC 45.550(a)(7). The legislative history of AS 23.30.041 and the Act demonstrates a legislative interest in promoting a quicker, more efficient, cost effective, successful and less litigated reemployment benefits system. *Konecki*; AS 23.30.001(1). The RBA’s interpretation that the reemployment plan must consist of the reemployment benefits options listed in AS 23.30.041(i) creates a less expensive reemployment benefits system by limiting the training options covered under the Act; speeds up the reemployment benefits process by limiting the reemployment benefit options the rehabilitation specialist must consider before selecting the option that will return the injured worker to remunerative employment in the shortest time; and reduces litigation tool by providing a bright-line rule that will prevent future litigation in cases like this. The RBA’s interpretation of AS 23.30.041(i) is reasonable and consistent with the language and the legislative history of AS 23.30.041(i), the purpose of the Act and of reemployment benefits, and 8 AAC 45.550(a)(7).

The rehabilitation specialist must design a reemployment plan consisting of OJT, vocational training, academic training, self-employment, or a combination of those previously listed options. Therefore, the RBA must deny a reemployment plan that does not consist of OJT, vocational training, academic training, self-employment, or a combination thereof. AS 23.30.041(j); AS 23.30.041(i); 8 AAC 45.550. The reemployment specialist selected OJT as the reemployment plan option on the reemployment benefits plan checklist and the RBA concluded the reemployment plan did not meet the definition of OJT.

The Act does not define the reemployment benefit options listed under AS 23.30.01(i). The RBA referenced the Merriam-Webster online dictionary, Wikipedia and the plan development guide for the Reemployment Benefits Section to define OJT as training which is provided by the employer on the jobsite per an agreement to train or hire the injured worker and is specific to the skill set required in the work environment. At hearing, the rehabilitation specialist testified OJT does not require the OJT employer to hire the injured worker. Employer contended defining the reemployment benefits options using common dictionary terms is narrow and simplistic and is contrary to the purpose of the Act and to the purpose of reemployment benefits.

Common dictionary definitions of reemployment benefits options are relevant to the conveyed meaning of the listed reemployment benefits options. The RBA's determination that OJT requires an agreement with the employer to train or hire the injured worker while working for the employer is reasonable and consistent with the intent of reemployment benefits because an agreement to train or hire the injured worker in the definition of OJT ensures an injured worker receives training to learn some skills to return to remunerative employment. Without the required agreement with the employer, training becomes only a possibility dependent upon the injured worker applying for and securing the job. The RBA's interpretation of OJT is reasonable and consistent with the intent of reemployment benefits and the sliding-scale approach to statutory interpretation. *Shehata; Adamson; Hillman*. There is evidence a reasonable mind might accept as adequate to support the RBA's decision finding the reemployment plan did not fit under the definition of OJT. Specifically, the first segment of training did not occur on the job site, was not provided by McDonald's, and was not specific to the skill set required while

working at McDonald's and the second segment of training did not indicate McDonald's agreed to hire or train Employee. *Miller*.

The rehabilitation specialist testified the training she provides in the reemployment plan falls under "vocational training." Employer contended in its March 29, 2017 letter the same training provided amounts to "academic training." The RBA interpreted "vocational training" and "academic training" to exclude the training provided by the rehabilitation specialist in the reemployment plan where the RBA concluded the first training segment in the reemployment plan failed to fit under any reemployment benefits category listed in AS 23.30.041(i).

The RBA's interpretation of "vocational training" and "academic training" is reasonable and consistent with the intent of reemployment benefits and the approach to statutory interpretation. *Shehata; Adamson; Hillman*. There is evidence a reasonable mind might accept as adequate to support the RBA's decision the reemployment plan did not fit under vocational or academic training because the plan does not provide training in a skill or trade to be pursued as a career, and the training is not provided by a school, college or other institution of learning. *Miller*.

Employer contended the RBA's interpretation of AS 23.30.041(i) conflicts with how the Act implements reemployment benefits. Employer contends it must be provide all reemployment benefits through the workers' compensation system. Employers argument fails because the RBA's interpretation that the reemployment plan must consist of the reemployment benefits options listed in AS 23.30.041(i) is reasonable and consistent with the language and the legislative history of AS 23.30.041(i), the purpose of the Act and of reemployment benefits and 8 AAC 45.550(a)(7).

Employer has not convincingly shown the RBA's denial of the August 16, 2016 was an abuse of discretion. Employer has not shown the RBA's decision was arbitrary, capricious, or promoted by an improper motive, nor has Employer shown the RBA's decision failed to apply a controlling law or failed to exercise sound, reasonable legal discretion. The RBA's denial of the reemployment plan was correct and will not be reversed. AS 23.30.041; AS 44.62.570.

CONCLUSION OF LAW

The RBA's denial of the August 16, 2016 reemployment plan was not an abuse of discretion.

ORDER

Employer's March 30, 2017 petition is denied.

Dated in Juneau, Alaska on August 8, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/

\_\_\_\_\_  
Kathryn Setzer, Designated Chair

/s/

\_\_\_\_\_  
Charles Collins, 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

JERRY ELLEN v. DURETTE CONSTRUCTION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of JERRY ELLEN, employee / claimant; v. DURETTE CONSTRUCTION, employer; ALASKA TIMBER INSURANCE EXCHANGE, insurer / defendants; Case No. 200508739; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 8, 2017.

                  /s/                    
Dani Byers, Workers' Compensation Technician