ALASKA WORKERS' COMPENSATION BOARD

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

LYLE LUDWIG, Employee, Claimant, v. FLOWLINE ALASKA INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201100248 AWCB Decision No. 15-0030 Filed with AWCB Fairbanks, Alaska on March 12, 2015

Lyle Ludwig's (Employee) June 19, 2014 amended petition seeking modification or set aside of his vocational rehabilitation plan and additional permanent partial impairment (PPI) was heard in Fairbanks, Alaska on January 22, 2015, a date selected on December 9, 2014. Employee appeared, represented himself and testified on his own behalf. Jace Brown and Victor Adams, who attended classes with Employee during his job retraining, testified on Employee's behalf, subject to Employer's relevancy objections. Employee's vocational rehabilitation counsellor, Dan Labrosse, also personally appeared and testified on Employee's behalf. Attorney Martha Tansik appeared and represented Flowline Alaska, Inc. (Employer). Employer called no witnesses. The record closed at the hearing's conclusion on January 22, 2015, and was reopened on January 28, 2015 to obtain the Reemployment Benefits Administrator's (RBA) file, and closed again upon receipt of that file on January 29, 2015. The record was next opened again on February 25, 2015 for further deliberations and closed on March 2, 2015 after deliberations concluded.

ISSUES

As a preliminary issue, Employer requested a continuance of Employee's PPI issue. Employer contends, once Employee obtained chart notes from his most recent PPI rating, which was performed by Cary Keller, M.D., it filed a request for cross-examination of Dr. Keller and scheduled Employee for an employer's medical evaluation (EME) on January 27, 2015. Employer further contends its insurer only received Dr. Keller's typewritten report three days before hearing, and its attorney only received Dr. Keller's report two days before hearing. Employer desires an opportunity to conduct discovery on Dr. Keller's recently received report and to perform its scheduled EME.

Employee opposes Employer's request for a continuance. He contended he had to wait for a long time to see Dr. Keller, and now that he is at hearing, would like to "nip it [his PPI issue] in the butt."

The hearing chair granted Employer's oral petition to continue Employee's PPI issue.

1) Was the hearing chair's ruling, continuing Employee's PPI issue, correct?

As a preliminary issue, Employer contends testimony from several of Employee's witnesses, Messrs. Brown, Adams, and Culver, will either be irrelevant or repetitious. Specifically, it contends their proffered testimony about their own experiences, while participating in their own vocational rehabilitation programs, is not relevant to Employee's legal or job retraining issues.

Employee contends, part of the basis for his request for modification or set-aside of his vocational rehabilitation plan is because his rehabilitation specialist engaged in "false advertising" by representing his plan as a two-year plan. He contends his plan could not be completed in two years because he struggled with the coursework. As an offer of proof, Employee contends Messrs. Brown and Adams will testify they, like Employee, each are pursuing a degree in construction management, and they do not think that program can be competed in two years. Employee further contends Messrs. Brown's and Adams' vocational rehabilitation counsellors told them reemployment plans are not successful.

The hearing chair deferred his ruling on Employer's objections until after Employee's opening statement, and then received Messrs. Brown's and Adams' testimony, subject to Employer's objections.

2) Should Employer's objections to the testimony of Messrs. Brown and Adams be sustained or overruled?

Employer's basis for its objection to Mr. Culver's testimony is set forth above. As a preliminary matter, Employer also contends it contacted Mr. Culver prior to hearing and Mr. Culver informed Employer he was not comfortable voluntarily testifying in this matter.

Employee's contentions with respect Mr. Culver's proffered testimony are not specific. He contends he thinks Mr. Culver attempted to complete a vocational rehabilitation plan some time ago, while Mr. Culver was "at Clear." It is unclear whether Mr. Culver was living in Clear, Alaska, or working at Clear Air Force Station. Employee did not know the details of Mr. Culver's vocational rehabilitation plan, nor was he sure how long ago Mr. Culver attempted to complete his plan.

The hearing chair sustained Employer's objection.

3) Was the hearing chair's ruling, excluding the testimony of Mr. Culver, correct?

Employee contends he is litigating his petition to "save the confusion of another older guy" like himself. He clarified the "confusion" he refers to is the construction manager program being offered as a two-year plan when, according to Employee, it cannot be completed in two years. Employee contends his vocational rehabilitation counsellor engaged in "false advertising" when he represented Employee's plan as a two-year plan. He contends he was not prepared to take the required computer classes and he also struggled with the required math courses. Employee seeks modification or set-aside of his reemployment plan.

Employer requests this decision take administrative notice of the low completion rate of vocational rehabilitation plans under the Act, and contends there are legislative efforts underway to come up with better alternatives to the existing reemployment benefit. It acknowledges Employee's express desire to help others with their job re-training programs, but contends this hearing is not the correct venue for Employee to do so. Employer contends the Act places strict time and cost limitations on plan completion, and further contends it even paid Employee three months longer than it was required to under the Act. It contends Employee agreed to his vocational rehabilitation plan, Employee received valuable education under his plan, and just because the plan was more challenging than Employee initially anticipated, is not a sufficient basis to modify or set-aside the plan. Employer requests Employee's petition be denied.

4) Is Employee entitled to modification or set-aside of his vocational rehabilitation plan?

Employee contends he struggles with the required math courses under his plan, and because it will take him another 1 ½ years to complete his degree, he is entitled to the difference between the costs expended on his plan and the maximum plan costs under the Act.

Employer's contends, since the two-year statutory time limit on Employee's plan has expired, Employee is not entitled to an additional award of plan costs.

5) Is Employee entitled to the difference between rehabilitation plan costs expended to date and the maximum costs afforded under the Act?

FINDINGS OF FACT

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

1) On January 7, 2011, Employee injured his left ankle while working for Employer as a pipefitter when he tripped on a rope coil with his right foot, fell and hit his left foot on angle iron. (Eligibility Evaluation, June 16, 2011; First Report of Injury (FROI), June 9, 2014; Incident Claims Expense and Reporting System (ICERS) case information and injuries, undated).

2) Employee was 49 years old at the time of injury. (Report of Occupation Injury or Illness, January 10, 2011).

3) On January 7, 2011, Employee was treated by Terry Conklin, M.D. at the Fairbanks Memorial Hospital Emergency Department. Left ankle x-rays showed a mildly comminuted fracture of the left medial malleolus with mortise disruption. Dr. Conklin consulted with Jimmy Tamai, M.D., who thought Employee would likely require surgery. Employee was splinted, fitted with crutches and discharged with prescriptions for Percocet and Colace. Employee was instructed to call Dr. Tamai the same day to schedule a surgical evaluation. (Conklin report, January 7, 2011; X-ray report, January 7, 2011).

4) Employer accepted Employee's injury as compensable and began paying benefits. (Compensation Report, February 11, 2011).

5) Employee was a high wage earner and his temporary total disability (TTD) rate was established at $1,062.00 per week. (Compensation Report, June 11, 2011; experience, observations and inferences drawn therefrom).

6) On January 11, 2011, Dr. Tamai surgically repaired Employee's left medial malleolus ankle fracture, left ankle syndesmosis disruption and removed loose bodies. (Tamai operative report, January 11, 2011).

7) On February 4, 2011, in response to a telephone call from Employee, who reported a large, swollen vein on the back of his calf, Dr. Tamai referred Employee for an ultrasound, which showed an occlusive blood clot. Deep vein thrombosis (DVT) was diagnosed and Dr. Tamai then referred Employee to the Fairbanks Memorial Hospital Emergency Department to be evaluated for a possible pulmonary embolism. No evidence of pulmonary embolism was found. (Tamai notes, February 4, 2011; Discharge Instructions, February 4, 2011; Emergency Department Report, February 4, 2011).

8) On February 8, 2011, Employee began treating with Pierre Johnson, M.D. for medical management of DVT anticoagulation therapy. (Johnson report, February 8, 2011).

9) On April 13, 2011, because Employee had been off work for 90 days, Employer referred him for a reemployment benefits eligibility evaluation. (Employer's Notice, April 13, 2011).

10) On April 28, 2011, Employee saw Dr. Tamai for a follow-up visit. Dr. Tamai prescribed Employee a cane and scheduled another follow-up visit to discuss a gradual return to work program. (Tamia report, April 28, 2011).

11) On June 16, 2011, Connie Olsen submitted a preliminary eligibility evaluation on Employee's behalf. Her report states Dr. Tamai had predicted Employee would incur a

permanent impairment, but also notes Dr. Tamai had not reviewed Employee's two job descriptions that had been sent to him. (Preliminary Eligibility Evaluation, June 16, 2011).

12) On May 23, 2011, a left lower extremity ultrasound study showed no evidence of venous thrombosis. (Ultrasound report, May 23, 2011).

13) On June 2, 2011, Employee saw Dr. Tamai to discuss his return to work. Dr. Tamai noted Employee was still experiencing considerable difficulty with extended weight bearing and stated it was "unknown" when Employee might be able to return to work. He also thought Employee would have a permanent impairment so he would refer Employee to another provider for a rating. (Tamai report, June 2, 2011).

14) On June 30, 2011, Dr. Tamai predicted Employee would not have the physical capacities to return to positions he had held in the past ten years. (Tamai responses, June 30, 2011).

15) On August 8, 2011, the Reemployment Benefits Administrator found Employee eligible for reemployment benefits based on Dr. Tamai's predictions Employee would not be able to return to jobs previously held. Enclosed with the RBA's letter was an election form to either receive reemployment benefits or a job dislocation benefit. The letter states: "Please read this form carefully. The form requires that you initial each section, [sic] to document you understand the contents. If you have any questions about this form, please call this office at [telephone number provided]." (Eligibility letter, August 8, 2011).

16) The top portion of the first page of Employee's election form states the following:

> **IMPORTANT NOTICE TO INJURED WORKERS:** SELECTING EITHER REEMPLOYMENT BENEFITS OR A JOB DISLOCATION BENEFIT IS AN IMPORTANT CHOICE. . . . **IT IS STRONGLY ADVISED THAT YOU DO NOT COMPLETE THIS FORM UNTIL YOU HAVE DISCUSSED YOUR CHOICE WITH STAFF OF THE WORKERS COMPENSATION DIVISION OR YOUR LEGAL REPRESENTATIVE. MAKE SURE YOU FULLY UNDERSTAND THE NATURE OF THESE BENEFITS AS WELL AS THE RESULTS OF ACCEPTING ONE AND WAIVING (GIVING UP) THE OTHER.**

Another section of the form, titled "Nature and Scope of Reemployment Benefits," states:

> Plan costs are limited to $13,300. . . . If you and your insurer do not agree to accept and sign the completed plan, either of you may ask the RBA to review and approve it. Once the plan is accepted or approved it may not last more than two years.

Employee initialed each section of the election form. The affidavit section of the form, which states "I understand the nature and the scope of these benefits," also bears Employee's signature and was notarized. (Election form, August 29, 2011; observations).

17) On August 25, 2011, Richard Cobden, M.D., evaluated Employee for a permanent partial impairment under the American Medical Association's *Guides to the Evaluation of Permanent Impairments*, Sixth Edition. He considered Employee medically stable and opined Employee's ankle condition would only require conservative medical treatment in the future. Dr. Cobden also opined Employee had incurred a five percent lower extremity rating, which translated into a two percent whole person impairment. (Cobden report, August 25, 2011).

18) On August 29, 2011, Employee elected to receive reemployment benefits and selected Dan LaBrosse to be his rehabilitation specialist. (ICERS event note, August 29, 2011).

19) Employee's reemployment stipend was $930 per week. (Compensation Report, September 30, 2011).

20) On October 8, 2011, Employee saw Dr. Tamai to discuss his PPI rating. Dr. Tamai noted the rating was based on Employee's bimalleolar ankle fracture, but Employee's "most significant clinical residual results [are] from [his] deep venous thrombosis . . . and the need for ongoing warfarin treatment." Dr. Tamai encourage Employee to follow-up with Dr. Cobden on his PPI rating since he thought the PPI rating should include consideration of Employee's DVT. (Tamai report, October 8, 2011).

21) On November 3, 2011, Dr. Cobden issued an addendum report, which stated his previous report "did not note [Employee] is on Coumadin and will require this medication for the rest of his life. [Employee] has a chronic propensity for deep vein thrombosis, and is at risk for additional thrombosis and possibly pulmonary embolus in the future. This is a lifetime condition, and will possibly add to the impairment." Dr. Cobden then opined Employee's condition merited another one percent whole person rating, for a combined value of three percent whole person impairment. (Cobden addendum, November 3, 2011).

22) On January 3, 2012, Mr. LaBrosse submitted a vocational evaluation to the RBA, which indicates Employee was graduated from high school in 1979 and then attended the Plumbers and Pipefitters 4-year apprenticeship program. Employee became Journeyman level in 1988. Incident to the preparation of the evaluation, Mr. LaBrosse conducted a Demonstrated Abilities Profile Assessment, a Vocational Objective Abilities Profile, and administered vocational testing

consisting of the General Aptitude Test Battery. Mr. LaBrosse also referred Employee to the Adult Learning Programs of Alaska (ALPA) so Employee could take the Test of Adult Basic Education (TABE). Employee's TABE results showed he had grade equivalents of 10.1 in applied mathematics, 6.0 in math computation, 10.5 in total reading, and 7.5 in total math. Employee also took the University of Alaska Fairbanks' (UAF) ACCUPLACER test and scored in the 49th percentile for Arithmetic, in the 25th percentile for elementary algebra, in the 43rd percentile in for reading comprehension and in the 59th percentile for sentence structure. These scores resulted in recommendations for him to take "developmental" reading and math courses at UAF. Employee's earnings at the time of injury were reported as $45.87 per hour, and Employee's remunerative wage under the Act was calculated to be $27.52 per hour. Mr. LaBrosse explored career objectives for Employee, such as metal fabricating supervisor, ornamental iron worker, welding inspector, AutoCAD drafter and construction superintendent. Mr. LaBrosse noted Employee's interest "did peak at the possibility of becoming a construction superintendent." After considering Employee's age, transferable skills, the amount of reemployment benefits available, remunerative wage requirements and Employee's interests, Mr. LaBrosse determined vocational training consisting of Associated of Applied Science (AAS) degree in construction management from UAF was Employee's best reemployment option, and based on a preliminary labor market research, would meet Employee's remunerative wage requirements. The "Justification/Summary" section of the evaluation states:

> RS LaBrosse took an inventory of claimant's technical skills, transferrable skills, physical and intellectual capacities, academic achievement. . . . The claimant has demonstrated work skills, and testing results with RS LaBrosse predicting he is capable of performing in the UAF Construction Management AAS Degree program.

The evaluation also states Employee had agreed to take remedial courses with ALPA, which were not part of reemployment plan, before undertaking coursework at UAF. (Vocational Evaluation, December 18, 2011).

23) The December 18, 2011 evaluation indicates Mr. LaBrosse mailed a copy of the evaluation to Employee. (*Id*.).

24) On January 3, 2012, Mr. LaBrosse submitted Employee's reemployment benefits plan to the RBA, which included a two-year Associate of Applied Science (AAS) degree in construction management. The plan states the minimum requirements for the degree were 65 credits, which

would require four to five semesters to complete. It also included a proposed class schedule for six semesters, beginning with spring semester 2012 and ending with fall semester 2013. The proposed class schedule set forth a total of 71 credits, including six credits for developmental courses in Pre-Algebra and Preparatory College English. (Reemployment Benefits Plan, December 14, 2011).

25) Employee's December 14, 2011 plan includes a page that sets forth estimated costs, which include $13,169 in "direct vocational costs." Itemized figures for that total include amounts for 71 credit hours of tuition and numerous university fees. Under another section titled "Textbooks," Employee initialed two lines containing the following text: "By initialing, the claimant acknowledges that he will be responsible for the cost of textbooks and supplies for the duration of the reemployment benefits plan. ($115 X 24 courses = $2,760 estimated);" and "[b]y initialing, the claimant also acknowledges that he will be responsible for fees that exceed $13,300.00, the maximum amount allotted for the reemployment benefits plan per AS 23.30.041(n) (estimated at $442)." (*Id*.)

26) Another document attached to Employee's plan sets forth the parties' responsibilities under AS 23.30.041. Among those, Employee agrees to notify Mr. LaBrosse of any changes in plan scheduling; to report any problems with the plan as they arise; and to notify Mr. LaBrosse if Employee is unable to attend classes for any reason. It further provides: "Claimant understands plan could be revised if unable to meet obligations due to circumstances outside of claimant's control." Meanwhile, the document states Mr. LaBrosse agrees to maintain contact with claimant and UAF; to "initiate corrective action as needed;" and to inform Employer's adjuster of any schedule changes. (*Id*.).

27) Employee and Mr. LaBrosse signed the vocational rehabilitation plan on December 16, 2011. (*Id*.; observations).

28) The December 14, 2011 plan indicates Mr. LaBrosse mailed a copy of the plan to Employee. (*Id*.).

29) The 2014-2015 UAF Catalog states the minimum requirements for an AAS degree in Construction Management is 65 credits, which requires four to five semesters to complete. (2014-2015 UAF Catalogue, http://www.uaf.edu/catalog/current/programs/constmgmt.html, last accessed on February 4, 2015).

30) On January 3, 2012, Mr. LaBrosse submitted the results of a labor survey to the RBA. (Labor Market Survey, December 27, 2011).

31) On January 24, 2012, Mr. LaBrosse prepared a progress report for the RBA. Employee was having difficulty with the remedial math classes at ALPA and "would usually have to go over it two or three times to figure out the word problems." However, Employee wanted to start classes at UAF "sooner rather than later." The reports notes Dr. Tamai had also approved the job description for construction superintendent. Mr. LaBrosse had met with Employee at UAF to review the plan, but Employee was "somewhat intimidated about the prospects of attending university classes." (Progress report, January 24, 2012).

32) The January 24, 2012 report indicates Employee would start his vocational retraining on May 29, 2012, and would complete it by May 15, 2014. It also shows Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

33) On March 1, 2012, Employer's adjuster signed Employee's December 14, 2011 reemployment plan. (Progress report, April 7, 2012).

34) On April 7, 2012, Mr. LaBrosse prepared a progress report, which informed the RBA the parties had agreed to retrain employee as a Construction Superintendent. Mr. LaBrosse reviewed the plan with Employee, and based on a labor market survey, thought an entry level wage in this position would meet Employee's remunerative wage goal of $27.52 per hour. The plan called for Employee to complete a two-year associate degree in construction management through the University of Alaska Fairbanks (UAF), Community and Technical College. During plan development and approval, Mr. LaBrosse reported he had followed up with Employee on several occasions and Employee reported he was working with the ALPA to improve his algebra skills. Mr. LaBrosse encouraged Employee to obtain as much advanced tutoring as he could in order to improve his math skills prior to beginning classes at UAF. The adjuster, Employee and Mr. LaBrosse agreed to postpone commencement of the plan so Employee could start classes at the beginning of UAF's summer session. Mr. LaBrosse concluded his report by stating Employee "seems eager to get started and has worked hard so far to make this plan a successful training venture." (*Id*.).

35) The April 7, 2012 report indicates Employee would start his vocational retraining on May 29, 2012, and would complete it by May 15, 2014. It also shows Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

36) On May 30, 2012, Mr. LaBrosse prepared a progress report for the RBA. Employee's academic advisor suggested Employee re-take at least the English portion of the ACCUPLACER test, because if he did not, Employee would require two developmental English courses, instead of just one. On May 24, 2012, Employee still needed textbooks and his first class was starting on Tuesday. "[Employee] indicated he should be getting his time loss check on Tuesday, but he has recently had car repairs done and still needed to pay for this." The report states the "reemployment benefits plan shows the claimant will pay for his own textbooks, because the cost of tuition and fees are right at maximum." Mr. LaBrosse priced text books for Employee at Amazon, the UAF bookstore and Barnes & Noble. Employee continued to experience difficulty in procuring the textbook for his pre-algebra class. The textbook from Amazon was the cheapest, but after it had been ordered, Mr. LaBrosse was informed by Amazon that it was unavailable. Mr. LaBrosse contacted the bookstore, but the bookstore was unable to take a credit card payment over the phone, and referred Mr. LaBrosse to the billing office. The billing office informed Mr. LaBrosse Employee could order a book from his university account online, but the book would not be available for 24 hours, and Employee's first class was that evening. The billing office then suggested Employee could use his "Polar Express" card, but that would require an updated billing authorization. An updated billing authorization was obtained and Employee picked-up his book on his way to class. The report also shows Employee's course registrations, which included Pre-algebra (3 credits) for fall semester 2012, and Elementary Algebra (3 credits) for fall semester 2012. (Progress report, May 30, 2012).

37) The May 30, 2012 report indicates Mr. LaBrosse contacted Employee several times on May 29, 2012, which was Employee's first day of class. It also shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. The report indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id.*).

38) On July 31, 2012, Mr. LaBrosse prepared a progress report for the RBA. The summary portion of the report states: "claimant has had some difficulty with math class for the summer session per the agreed upon reemployment benefits plan but he has managed to maintain a solid 'B' average so far." (Progress report, July 30, 2012).

39) The July 30, 2012 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id.*).

40) On September 10, 2012, Mr. LaBrosse prepared a progress report for the RBA. The report indicates Employee had earned a "B" in his Pre-algebra course, and was registered in Algebra and Preparatory College Writing for fall semester. Employee continued to experience billing issues and was worried about incurring late fees. (Progress report, September 10, 2012).

41) The September 10, 2012 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

42) On November 4, 2012, Mr. LaBrosse prepared a progress report for the RBA, which states Employee "decided that four classes was too heavy a load, particularly because one class was in math and he didn't feel he was ready for that class along with the other assigned class work." The report also indicated Employee did not want to have his GPA "negatively impacted," and shows Employee had dropped the Algebra course from his class registration. After Employee dropped his Algebra course, the report states: "RS LaBrosse explained that the time line and costs as outlined in the claimant's plan would be off track. RS LaBrosse has suggested submitting a federal student aid, FAFSA, as a possible alternative funding resource." (Progress report, November 4, 2012).

43) The November 4, 2012 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

44) On December 20, 2012, Mr. LaBrosse prepared a progress report for the RBA. His report states:

> As previously reported, the claimant's coursework has strayed from the original agreed upon time line; due to his enrolling in only three classes instead of the assigned/designated four. He was concerned that he wouldn't be able to keep his GPA up if he took the four courses. He states that being in school has been stressful and he is trying to be cautious with how much he takes on.

Mr. LaBrosse met with Employee to discuss the "course work/date discrepancy," and suggested Federal Student Aid as a possible alternative funding source. He concluded the report, "[Employee] is behind in his proposed plan course outline however he still may finish his degree program on time if he can make up a class or two in the up [sic] coming semesters." (Progress report, December 20, 2012).

45) The December 20, 2012 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

46) On January 17, 2013, Mr. LaBrosse prepared a progress report for the RBA. His report states:

> The claimant is progressing through his reemployment benefits plan, but is currently a little off the plan timeline track as initially established. There will be opportunities for the claimant to catch up the couple of classes, although he may run past the time allotted in the initial reemployment benefits plan due to dropping a class to maintain his GPA. . . . The claimant is aware that by dropping a class to maintain his GPA has put him outside of the initial . . . plan timeline. He states that he is aware of this and will continue to apply for additional funding resources for the remainder of earning his A.A.S. to assist with funding costs.

Mr. LaBrosse pointed out Employee could still finish his degree on time if he could make up "a class or two" in the upcoming semesters. The report also notes Employee shared his concerns with Mr. LaBrosse about exceeding plan costs because of items such as books. Employee's GPA was reported as 3.42. (Progress report, January 17, 2013).

47) The January 17, 2013 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

48) On March 1, 2013, Mr. LaBrosse prepared a progress report for the RBA. The report states:

> There have been several contacts with the claimant stating that he was struggling in his computer and math classes. The claimant reported that he was feeling very frustrated at not being able to get this stuff down very well after working so hard at the classes and going to the labs all the time. [Employee] has been quite concerned in regards to his programs [sic] required math class. . . . [Employee] continues to state that although his grades are good he feels that he is still struggling quite a bit. He expressed a lot of frustration with his computer class, as the instructor was moving right along and he was having a hard time following it.

Mr. LaBrosse offered Employee encouragement and pointed out Employee could still finish his degree on time if he could make up "a class or two" in the upcoming semesters. Employee's GPA was reported as 3.0. (Progress report, March 1, 2013).

49) The March 1, 2013 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

50) On May 13, 2013, Dr. Tamai x-rayed Employee's left ankle. The implants appeared stable in position and alignment. Syndesmosis relationships appeared within normal limits. Employee's ankle mortise was anatomic, but degenerative changes were evident. (X-ray report, May 13, 2013).

51) On July 28, 2013, Employee was transported to the Fairbanks Memorial Emergency Department following a motorcycle accident where he was hit by a car. He was diagnosed and discharged with a broken pelvis. (Emergency Department record, July 28, 2013).

52) On July 30, 2013, in response to a letter from Employer's insurer, Dr. Tamai indicated he had not seen Employee since May 13, 2013, and also indicated he had not prescribed and medications for Employee since April 4, 2011. (Employer letter, July 30, 2013).

53) On September 24, 2013, Mr. LaBrosse prepared a progress report for the RBA, which indicated Employee had dropped the two classes he had registered in for summer semester 2013. The dropped courses were Algebra and Introduction to Academic Writing. The report states:

> Due to the claimant dropping his summer 2013 classes he will be behind schedule in completing his . . . plan within the agreed upon timeline. However, the claimant is aware of this and will do his best in the classes he is currently enrolled in. The claimant is aware that he may have to take the last of his classes on his own.

(Progress report, September 24, 2013).

54) The September 24, 2013 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

55) On October 23, 2013, Mr. LaBrosse prepared a progress report for the RBA, which concludes:

> As reported in the September 27, 2013 report, due to the claimant dropping his summer 2013 classes, he will be behind schedule in completing his . . . plan within the agreed upon timeline. The claimant is aware of this timeframe conflict. As reported [sic] he had decided to focus on what is in front of him. By doing his best in classes he is currently enrolled in. The claimant is aware he may have to take the last of his classes on his own. . . .

(Progress report, October 23, 2013).

56) The October 23, 2013 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

57) On December 22, 2013, Mr. LaBrosse prepared a progress report for the RBA, which pointed out Employee "has one semester left to complete his . . . plan." It concludes:

> As reported in the October 23, 2013 report, due to the claimant dropping his summer 2013 classes, it appears as if he will be behind schedule in completing his AAS degree requirements within the agreed upon timeline. As stated, the claimant is aware of this timeframe conflict and had decided to focus on each semester and doing his best in the classes he is currently enrolled in. He stated that he will complete the classes he may be missing on his own. The claimant is currently enrolled for spring semester 2014 in four classes: . . . and Functions of Calculus. The claimant has stated that this load, particularly the Math class, may be too much for him, especially since he needs to keep his grades above a "C" average. . . .

(Progress report, December 22, 2013).

58) The December 22, 2013 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

59) On March 4, 2014, Mr. LaBrosse prepared a progress report for the RBA. The introduction to the report states: "This Spring semester 2014 is the claimant's final semester of his Reemployment Plan." Employee had also dropped the Functions of Calculus course. The report concludes:

> As stated, his overall retraining program has been thrown off schedule due to his dropping the summer classes in 2013 and now another math class . . . . The claimant understands that he will be expected to make up those classes on his own when his funding from his Reemployment Benefits training is complete.

(Progress report, March 4, 2014).

60) The March 4, 2014 report shows a May 29, 2012 start date for Employee's plan, and a May 15, 2014 completion date. It also indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

61) On March 31, 2014, Dr. Tamai evaluated Employee's left ankle. He prescribed orthotics for Employee and thought Employee was "best suited to resume a sedentary/supervisory role at

work." Dr. Tamai also thought Employee could continue weight bearing as tolerated with the orthotics. (Tamai report, March 31, 2014).

62) On June 5, 2014, Mr. LaBrosse prepared a "closing status" report for the RBA, which points out Employee started taking classes at UAF on May 29, 2012. Mr. LaBrosse attached a degree audit report, which shows Employee had earned 36 credits towards the 65 credits required for an AAS degree in construction management, and had earned a cumulative GPA of 3.2. At Employee's request, Mr. LaBrosse conducted vocational research on Employee becoming a welding inspector, but found that program would require math courses equivalent to those for Employee's construction management degree. Mr. LaBrosse again discussed funding options for Employee to complete his degree, including student loans, scholarships, federal Pell grants and State of Alaska, Division of Vocational Rehabilitation educational funds. Mr. LaBrosse explained Employee's failure to complete the plan on-time involved numerous factors, such as Employee dropping "several classes along the way," and having to take developmental courses. Mr. LaBrosse did not contemplate submitting Employee as non-compliant under the Act when Employee dropped his classes, because Employee "continued working hard and earning good grades," and because "there was hope" Employee would be able to "get back on track in terms of his time-line." With respect to Employee completing his degree, Mr. LaBrosse remarked: "It will just take him a little longer than we had anticipated." The report concludes:

> [Employee] has worked very hard on his vocational goal, unfortunately he did not attend classes at the frequency that was proposed in the agreed upon reemployment plan, stating that some of the classes were too hard, which took a toll on his credits earned. . . . [w]e are closing the claimant's file at this time per AS 23.30.041K [sic] statutes regarding the maximum amount of time allotted for reemployment training.

(Closing status report, June 5, 2014).

63) The June 5, 2014 report indicates Mr. LaBrosse mailed a copy of the report to Employee. (*Id*.).

64) On June 19, 2014, Employee filed his instant petition, which states: "PETITION FOR FAILED RE-HAB PLAN UNDER 8 AAC 45.550." (Employee's Petition, June 19, 2014).

65) At a July 28, 2014 prehearing conference, Employee stated he was changing his treating physician to Cary Keller, M.D. He also contended his reemployment plan, as written, did not allow him to obtain a degree since many of his courses were "preparatory" and did not count

toward his degree. Employer contended Employee's petition was without basis. (Prehearing Conference Summary, July 28, 2014).

66) On July 24, 2014, Employer controverted all reemployment benefits after May 20, 2014 on the basis Employee's plan had exceeded the time allowed under AS 23.30.041(k). (Controversion, July 24, 2014).

67) On September 23, 2014, a computed tomography (CT) scan of Employee's left ankle showed operative, degenerative and old posttraumatic changes without clear evidence of talar osteochondral defect. Fixation hardware was intact and bony alignment was approximately normal. (CT report, September 23, 2014).

68) At a November 13, 2014 prehearing conference, the designee clarified what specific relief Employee was seeking with his June 19, 2014 petition. She determined Employee was seeking a modification or set-aside of his rehabilitation plan as well as payment from Employer for the difference between his actual plan costs and the maximum amount of plan costs under the Act. Employee was also seeking additional PPI. Employee's attorney stated she would file an affidavit of readiness for hearing (ARH), but the parties agreed to set Employee's petition for hearing on January 22, 2015. The summary advised the parties:

> **Discussions:**
> . . . .
>
> The issues for hearing are listed above. The hearing is scheduled for **January 22, 2015**. Written hearing briefs and witness lists are due on **January 15, 2015**. All evidence must be filed by **January 5, 2015**.
>
> **Action:**
> Issues listed above are set for hearing on **January 22, 2015**. Briefs and witness lists must be filed no later than **January 15, 2015**. The evidence must be filed by **January 5, 2015**. Written briefs should be e-mailed to melody.kokrine@alaska.gov with hard copies to follow by mail.

(Prehearing Conference Summary November 13, 2014) (emphasis in original).

69) On November 17, 2014, Employer filed an ARH on Employee's June 19, 2014 petition. (Employer's ARH, November 13, 2014).

70) At a December 9, 2014 prehearing conference, the designee again confirmed the issues Employee wanted heard. (Prehearing Conference Summary, December 9, 2014).

71) On December 15, 2014, Employee filed his witness list, which included Jace Brown, Victor Adams and Kirk Culver. Employee's list set forth the witnesses' addresses and telephone numbers, but did not set forth the substance of their anticipated testimony. (Employee's witness list, December 15, 2014).

72) On January 22, 2015, Employee filed a December 31, 2014 report authored by Dr. Keller that he wished to be considered at hearing. The report states: "The patient presents requesting a 2nd opinion about his ankle. He has specific questions about his work capacity at this time and whether medical release to work is appropriate. He inquires about future medical costs associated with the treatment of his ankle." Dr. Keller discussed treatment options and treatments costs with Employee and determined he was capable of working with restrictions. Dr. Keller also wrote: "The patient stated he has a 3% rating and inquired whether this seemed appropriate. Without performing a formal rating, I explained . . . . This would translate to a 10% impairment of the whole person." (Keller report, December 31, 2014; observations and inferences drawn from therefrom; ICERS event entry, January 22, 2015).

73) On January 22, 2015 Employer filed a request for cross-examination of Dr. Keller regarding his December 31, 2014 report. (Employer's Request for Cross-Examination, January 22, 2014).

74) The difference between a three percent whole person impairment rating and a ten percent whole person impairment rating is significant. (Experience).

75) At hearing, Employee had a very difficult time maintaining his concentration. He struggled to articulate his theory of the case and answer questions from the panel. Although Employee readily engaged in oral communication during the hearing, the content of his speech rapidly and frequently strayed from the issues being discussed or the questions being asked. (Record; experience).

76) The hearing chair facilitated elicitation of Messrs. Brown's and Adam's proffered testimony. (Record).

77) At hearing, Mr. Brown testified he is pursuing a degree in construction management under a Veterans' Administration (VA) vocational rehabilitation plan. He was also told by his rehabilitation counsellor the degree could be completed in two years, but "it takes longer if you are not up to college level." On cross-examination, Mr. Brown testified he was not familiar with vocational rehabilitation under the Alaska Workers' Compensation Act; he had never

participated in a vocational rehabilitation plan under the Alaska Workers' Compensation Act; he had never supervised a plan under the Alaska Workers' Compensation Act; and he had never developed a plan under the Alaska Workers' Compensation Act. (Brown).

78) At hearing, Mr. Adams testified he can no longer operate earthmoving equipment so he is seeking a degree in construction management under a VA vocational rehabilitation plan. His counsellor told him the construction manager program could be completed in two years, but he has to "redo it, redo it, redo it" because he has "not been in a classroom for years." Mr. Adams had a stroke and has short term memory problems. On cross-examination, Mr. Adams testified he was not familiar with vocational rehabilitation under the Alaska Workers' Compensation Act; he had never participated in a vocational rehabilitation plan under the Alaska Workers' Compensation Act; he had never supervised a plan under the Alaska Workers' Compensation Act; and he had never developed a plan under the Alaska Workers' Compensation Act. (Adams).

79) Messrs. Brown and Adams were credible with respect to their academic struggles while enrolled in the construction manager program. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

80) Both Messrs. Brown and Adams appeared to be considerably older than 18 to 22 years old. (Observations).

81) At hearing, Employee testified he struggled with his math and computer courses and he "ended-up" dropping courses he had enrolled in at UAF. He thought taking four classes at a time was too many; and taking three classes was "on the hump." Employee had difficulty understanding required projects that were assigned to him. At one point, he also had the flu and fell behind on his classes. On cross-examination, when asked to explain his thought process in dropping courses, Employee stated he would drop the courses first; then, call Mr. LaBrosse later. Employee acknowledged reviewing Mr. LaBrosse's progress reports. He understood dropping courses would delay completion of his reemployment plan. Employer asked Employee, if he knew he was not going to complete his plan on time, why did he wait until later to file his petition for a "failed" retraining program? Employee answered: "Because everyone involved knew it was a four-year plan." Employer also asked Employee why he did not approach the RBA or the Board to ask for a change to his plan. Employee replied he did not understand what Employer was asking and added he "did not do anything out of spite." Employee acknowledged

he understood his plan was to last to last two years when he signed it, but explained he did not "fully understand" at the time, and it was not until he "walked down that road" later, did he "truly understand" he could not complete his plan in two years. When Employee was asked if he thought Mr. LaBrosse intentionally designed his plan to fail, Employee stated he did not know. In response to a question from the panel regarding whether or not Employee thought Mr. LaBrosse designed his plan to fail, Employee replied he does not think Mr. LaBrosse "shystered him." In response to another panel question inquiring whether Employee thought Mr. LaBrosse misrepresented the plan to him, Employee replied, "no, in a sense, but how can an older guy make 17 credits in a semester?" In response to a question whether Employee recalled Mr. LaBrosse suggesting he try to settle his reemployment benefits, Employee stated he "didn't really think about that" because he thought he only needed one or two more classes at the end of the plan, but then his academic advisor told him differently. (Employee).

82) Employee was credible regarding his academic struggles with math and computer classes, but was not credible regarding his alleged lack of awareness until the end of his plan on how far he had fallen behind on the plan. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

83) At hearing, Mr. LaBrosse testified it was a "big change" for Employee to go from being a shop manager to attending academic classes. When questioned whether he designed Employee's plan to fail, Mr. LaBrosse answered he "takes issue" with the question because he wants his vocational rehabilitation plans to succeed, but he had to meet Employee's remunerative wage requirements and Employee "pulled out" of classes because of his desire to keep his grades up. Typically, Mr. LaBrosse, explained, if the pace of a plan is too fast for an employee, they seek to "settle out" with employers so they can complete their plan on their own. He also testified Employee has a good GPA and is in good standing with the University. Mr. LaBrosse discussed applying for other financial resources with Employee, such as Pell grants and student loans. Employee also experienced parking permit problems at UAF because of a "disconnect" at the Registrar's office. On cross-examination, Mr. LaBrosse testified regarding his qualifications as a vocational rehabilitation specialist. He formerly worked for non-profit organizations for the deaf for ten years, worked for the State of Alaska as a vocational rehabilitation counsellor for four years and has been developing plans in the workers' compensation system for nearly fifteen years. Overall, he has been developing vocational rehabilitation plans in Alaska since 1996. Mr.

LaBrosse had developed over 500 plans. He develops a plan by asking the client what it is they want to do because he wants them to have a career and not just a job. Mr. LaBrosse works with clients' interests and abilities. He performs academic achievement testing and then sees what transferable skills they might have. In Employee's case, Mr. LaBrosse performed about four hours in testing and over three hours in career exploration with Employee, which included the "nuts and bolts" of how to get Employee to his goal. Plan development is the "nuts and bolts," such as what classes are required, etc. He uses the University catalogue for this purpose. Next, Employee applied to gain admission to the University, and then applied to be admitted to the construction management program. If an employee is uncomfortable with a plan, then that means they are "shooting too high," and perhaps the employee should try a one-year program, but then "you run into remunerative wage concerns." This is a "trade-off." Mr. LaBrosse is always responsive to an employee's desires, because motivation is a key factor in the success of a plan. He also monitors plan progress, and informed Employee of the statutory timeline. Almost all of Mr. LaBrosse's plans cost more than $13,300, and if a person is capable of investing in a plan themselves, he is "all for it." Mr. LaBrosse also makes it clear to his clients if plans cost more than the statutory maximum. He does not force his clients into a more expensive plan. Upon academic testing, Employee scored "25 percent" in math and had a 10.5 grade level in math computation. Mr. LaBrosse did not think "that was bad." Employee told Mr. LaBrosse he was not academically inclined, but Employee was also "really motivated." Mr. LaBrosse reviewed Employee's test scores with him. The construction management program appealed to Employee because he already knew a lot about the field. Then, Mr. LaBrosse decided which courses were required for a degree. Employee required a high remunerative wage, so the plan's objective had to be high, which meant at least a two-year degree. Mr. LaBrosse explained the statutory timeline and plan costs to Employee. Employee understood his financial responsibility under the plan. Mr. LaBrosse reviewed Employee's plan with him, and Employee's plan met plan requirements under the Act. He did not misrepresent the plan, plan costs, the time it would take to complete the plan, Employee's tested skills, or commit fraud. During the plan, Employee would select his classes he would do well in and would drop classes he did not think he would do well in. But, Employee ran into timeline problems because he wanted to keep his GPA high. Mr. LaBrosse warned Employee of plan timeline problems, both in his October 2013 status report and directly to Employee. In response to questioning by the panel, Mr. LaBrosse testified

Employee's difficulty walking to classes were more of a parking problem than a medical problem. Employee did not tell Mr. LaBrosse he could not make classes because of a medical problem.

84) Mr. LaBrosse was credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

85) Administrative notice is taken of the low completion rate for workers' compensation vocational rehabilitation plans. (Experience).

86) A spreadsheet compiled by the Workers' Compensation Division's Director shows, over the last ten fiscal years for which data is available, the percentage of eligible employees completing their plans ranges from a low of 0 percent to a high of 15.8 percent. During fiscal year 2013, the last year data is available, 8 percent of eligible employees completed their plans. (*Workers' Compensation Reemployment Benefits Statistics*, February 20, 2015).

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 the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to … employers ….
>
> (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 … to be fairly considered.

The crux of due process is the opportunity to be heard and the right to adequately represent one's interest. *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192 (Alaska 1980). While the actual content of the notice is not dispositive in administrative proceedings, the parties must have adequate notice so they can prepare their cases: "[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings." *Groom v. State, Department of Transportation*, 169 P.3d 626, 635 (Alaska 2007) (quoting *North State Tel. Co. v. Alaska Pub. Util. Comm'n.*, 522 P.2d 711, 714 (Alaska 1974). Defects in administrative notice may be cured by other evidence that the parties knew what the proceedings would entail. *North State Tel. Co.*

The board's authority to hear and determine questions with respect to a claim is limited to the questions raised by the parties or the agency upon notice given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981). The board has discretion to raise questions *sua sponte* with sufficient notice to the parties. *Summers v. Korobkin Const.*, 814 P.2d 1369, 1372 n.6 (Alaska 1991). The board has statutory authority to modify earlier factual determinations, but doing so requires notice to the parties. *Dresser Industries, Inc., Atlas Div. v. Hiestand*, 702 P.2d 244, 248 (Alaska 1985). Absent findings of "unusual or extenuating circumstances," the board is limited to deciding the issues delineated in the prehearing conference, and, when such "unusual or extenuating circumstances" require the board to address other issues, sufficient notice must be given the parties that the board will address these issues. *Alcan Electrical & Engineering, Inc. v. Redi Electric, Inc.*, AWCAC Decision 112 (July 1, 2009). However, it is entirely appropriate for a tribunal to cite a statute that controls a disputed issue even though the parties' did not. *Barlow v. Thompson*, 221 P.3d 998; 1004 (Alaska 2009).

> **Sec. 23.30.041. Rehabilitation and reemployment of injured workers.** (a) The director shall select and employ a reemployment benefits administrator. . . .
>
> (b) The administrator shall
>
> (1) enforce regulations adopted by the board to implement this section;
>
> (2) recommend regulations for adoption by the board that establish performance and reporting criteria for rehabilitation specialists;
>
> (3) enforce the quality and effectiveness of reemployment benefits provided for under this section;
>
> (4) review on an annual basis the performance of rehabilitation specialists to determine continued eligibility for delivery of rehabilitation services;
> . . . .
>
> (h) Within 90 days after the rehabilitation specialist's selection under (g) of this section, the reemployment plan must be formulated and approved. The reemployment plan must require continuous participation by the employee and must maximize the usage of the employee's transferrable skills. The reemployment plan must include at least the following:
>
> (1) a determination of the occupational goal in the labor market;

(2) an inventory of the employee's technical skills, transferrable skills, physical and intellectual capacities, academic achievement, emotional condition, and family support;

(3) a plan to acquire the occupational skills to be employable;

(4) the cost estimate of the reemployment plan, including provider fees; and the cost of tuition, books, tools, and supplies, transportation, temporary lodging, or job modification devices;

(5) the estimated length of time that the plan will take;

(6) the date that the plan will commence;

(7) the estimated time of medical stability as predicted by a treating physician or by a physician who has examined the employee at the request of the employer or the board, or by referral of the treating physician;

(8) a detailed description and plan schedule;

(9) a finding by the rehabilitation specialist that the inventory under (2) of this subsection indicates that the employee can be reasonably expected to satisfactorily complete the plan and perform in a new occupation within the time and cost limitations of the plan; and

(10) a provision requiring that, after a person has been assigned to perform medical management services for an injured employee, the person shall send written notice to the employee, the employer, and the employee's physician explaining in what capacity the person is employed, whom the person represents, and the scope of the services to be provided.

(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.
>
> (k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. . . .
>
> (l) The cost of the reemployment plan incurred under this section shall be the responsibility of the employer, shall be paid on an expense incurred basis, and may not exceed $13,300.
> . . . .
>
> (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 . . . .

In *Binder v. Fairbanks Historical Preservation Foundation*, 880 P.2d 117 (Alaska 1994), the Alaska Supreme Court was asked to decide whether an employer was required to pay for a second reemployment plan after the first plan failed to meet the parties' expectations. The Court rejected employee's contentions the term "reemployment plan" only included a successful plan, and employers bear the financial risks associated with failed plans. It noted Binder's plan met the procedural requirements of the statute; Binder had agreed to his plan; if Binder had disagreed with his plan, he could have submitted it to the RBA for approval; and Binder could have sought board review of his plan, as well. *Id*. at 121 (citations omitted). The Court further found Binder's argument was counter to sound public policy because his interpretation would encourage "hindsight challenges" to reemployment plans and was contrary to the legislative intent of controlling the cost of reemployment plans and returning injured workers to the workforce as expeditiously as possible. *Id*. at 122.

"Employers are not the insurers of reemployment plans and they have no obligation to insure their ultimate success or every expectation associated with a plan." *Id*. at 121. An employee's misconception of his own skills and interests, or his misconception of the labor market, are not alone sufficient to invalidate a plan. *Id*. at 121-22. Stipulated reemployment plans may only "be altered for limited reasons, such as a showing of fraud, misrepresentation, or a failure to meaningfully or substantially comply with the statutory requirements." *Id*. at 121. Although it may be possible to modify or terminate an unsuitable plan, the unambiguous language of the statute states an employer's total exposure for any number of reemployment plans an employee might pursue must be capped at the statutory dollar amount and two years in time. *Id*. at 122. Any time or money spent on implementation of a reemployment plan must be counted toward the statutory maximums set forth in AS 23.30.041(k) and (l). *Id*. at 123. In *Griffith's v. Andy's Auto Body & Frame*, AWCAC Decision No. 119 (October 27, 2009), the Commission re-enforced, the first sentence of AS 23.30.041(k) caps *all* benefits related to an reemployment plan, not just stipend. (Emphasis in original).

In another case, *Rockney v. Boslough Const. Co.*, 115 P.3d 1240 (Alaska 2005), the RBA approved a plan to retrain Rockney as a drafter through the Architectural Engineering Technology program at the University of Alaska Anchorage (UAA). Rockney appealed and started classes at UAA while his appeal was pending. Rockney's vocational rehabilitation specialist had concluded he had the skills and aptitude to complete the program; however, Rockney dropped his summer math course at the suggestion of his professor so he could take "slower-paced" courses. At the time he took his appeal, Rockney had already dropped his summer math class and was three credits behind on his scheduled plan. Even though the board acknowledged Rockney's plan should be modified, it concluded the plan still remained viable. The Court decided there was not substantial evidence to support the conclusion Rockney could have rearranged his schedule to accommodate the slower-paced classes without exceeding the two-year time limitation and it reversed and remanded the board's decision. *Id*. at 1243-44.

In *Kirk Mosier v. State of Alaska*, AWCB Decision No. 13-0029 (March 26, 2013), the employee's rehabilitation counsellor had developed a plan to retrain employee as a Registered Nurse (RN) Case Manager, which was subsequently agreed to by the employer and approved by

the RBA. However, the employee refused to sign the RN Case Manager plan because he wanted to pursue a more costly and time consuming Bachelor of Science in Nursing (BSN) degree instead. Employee submitted his own alternative plan to pursue a BSN, which the RBA denied because its costs exceeded the statutory maximum under the Act. Even though employee offered to self-fund part of his plan by providing his own tools and supplies, which would bring the plan costs below the statutory maximum, *Mosier* held the RBA did not abuse his discretion in denying employee's proposed plan because AS 23.30.041(h)(4) expressly requires the cost of those items be included in the costs of the plan.

> **AS 23.30.095. Medical treatments, services, and examinations.**
> . . . .
>
> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer.
> . . . .
>
> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
> . . . .
>
> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> (b) All testimony given during a hearing before the board shall be recorded, but need not be transcribed unless further review is initiated. Hearings before the board shall be open to the public.

The Alaska Supreme Court has held that *pro se* litigants are held to a lesser standard than attorneys. *Dougan v. Aurora Electric, Inc.*, 50 P.3d 789; 795 (2002). A judge must inform a *pro se* litigant "of the proper procedure for the action he or she is obviously attempting to accomplish." (*Id.*) (citation omitted). Specifically, a judge must notify a *pro se* litigant of defects in his or her brief and give the party an opportunity to remedy those defects. (*Id.*). It is an abuse of discretion to not allow a claimant to amend his witness list at subsequent hearings when significant developments raise new factual issues. *Schmidt v. Beeson Plumbing and Heating, Inc.*, 869 P.2d 1170; 1180 (1994). The board owes a duty to every claimant to fully advise him of "all the real facts" that bear upon his right to compensation, and to instruct him on how to pursue that right under law. *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska, 1963). In *Bohlman v. Alaska Const. & Engineering*, 205 P.3d 316 (Alaska, 2009), the Court applied *Richards* and held the board has a specific duty to inform a *pro se* claimant how to preserve his claim under one of the Act's statute of limitations.

The board has broad statutory authority in conducting its investigations. *Tolson v. City of Petersburg*, AWCB Decision No. 08-0149 (August 22, 2008). The board has broad statutory authority in conducting its hearings. *De Rosario v. Chenega Lodging*, AWCB Decision No. 10-0123 (July 16, 2010). The statute gives the workers' compensation board wide latitude in making its investigations and in conducting its hearings; and authorizes it to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. *Cook v. Alaska Workmen's Compensation Board*, 476 P.2d 29 (Alaska 1970). The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as

otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.

8 AAC 45.052. Medical summary. (a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim or petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.

(c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.

. . . .

(3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,

(A) all updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary; and

(B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary.

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.

. . . .

8 AAC 45.065. Prehearings. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on

. . . .

(4) limiting the number of witnesses, identifying those witnesses, or requiring a witness list in accordance with 8 AAC 45.112;

. . . .

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

. . . .

(j) If the hearing is not completed on the scheduled hearing date and the board determines that good cause exists to continue the hearing for further evidence, legal memoranda, or oral arguments, the board will set a date for the completion of the hearing.

8 AAC 45.074. Continuances and cancellations.

. . . .

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

(1) good cause exists only when

. . . .

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

8 AAC 45.112. Witness list. A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. If a witness list is required under 8 AAC 45.065, the witness list must be filed with the board and served upon all parties at least five working days before the hearing. If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing, except that the board will admit and consider

(1) the testimony of a party, and

> (2) deposition testimony completed, though not necessarily transcribed, before the time for filing a witness list.
>
> **8 AAC 45.120. Evidence** (a) Witnesses at a hearing shall testify under oath or affirmation. The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . . .
>
> (b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.
>
> (c) Each party has the following rights at hearing:
>
> (1) to call and examine witnesses;
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs . . . . Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . . Irrelevant or unduly repetitious evidence may be excluded on those grounds.
>
> (f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.
>
> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

"Relevant" evidence means evidence having ***any tendency*** to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would

be without the evidence. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999) (emphasis in original) (citing Alaska Evid. R. 401).

The Alaska worker's compensation system favors the production of medical evidence in the form of written reports and this preference serves a legitimate purpose. *Employers Commercial Union Insurance Group v. Schoen*, 519 P.2d 819; 822 (Alaska 1974). However, "the statutory right to cross-examination is absolute and applicable to the Board." *Id*. at 824 (re-affirmed in *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976)).

A party that authorizes a medical report vouches for the credibility and competence of its physician. *Frazier v. H.C. Price/Ciri Construction JV*, 794 P.2d 103; 105 (Alaska 1990). Cross-examination is only required when the written medical report is hearsay. *Id.* at 106. Since medical records kept by hospitals and doctors are business records, they are hearsay exceptions and an opportunity to cross-examine the author the document's author need not be given. *Geister v. Kid's Corps, Inc.*, AWCAC Decision No. 045 (June 6, 2007) at 8 (citing *Dobos v. Ingersoll*, 9 P.3d 1020 (Alaska 2000) and *Loncar v. Gray*, 28 P.3d 928 (Alaska 2001)). However, letters written by a physician to a party to express an expert medical opinion on an issue before a tribunal are not admissible absent a requisite foundation for admission. *Id.* (citing *Liimatta v. Vest*, 45. P.2d 310 (Alaska 2002).

> **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:
>
> (1) acting as the primary contact for the employee . . . .
> . . . .
>
> (10) selecting the occupational goal, method of training, and specific training provider for a reemployment benefits plan;
>
> (11) providing vocational guidance and counseling;
> . . . .

ANALYSIS

1) Was the hearing chair's ruling, continuing Employee's PPI issue, correct?

Employee had formerly been given a two percent whole person impairment rating by Dr. Cobden, who later amended that rating to three percent. On hearing day, over three years after Dr. Cobden's ratings, Employee filed a recent report by Dr. Keller, which indicates Employee may have a ten percent rating. In response, Employer filed a request for cross-examination of Dr. Keller and now desires an opportunity to conduct discovery on his recently received report and to perform a scheduled EME.

Although certain medical records may be considered to fall under the business records exception to the hearsay rule, *Geister* (citing *Dobos* and *Loncar*), and although the regulations provide for consideration of medical records filed less than 20 days before hearing if they fall under an exception to the rule, 8 AAC 45.052(c)(4), the Alaska Supreme Court has recognized there is a difference between medical records prepared during the ordinary course of business and medical records prepared for litigation purposes, *Geister* (citing *Liimatta*). The language of Dr. Keller's December 31, 2014 report strongly suggests it falls into the latter category, such that Employer should be given an opportunity to investigate further. Additionally, it also appears the report is not a "formal rating." This merits clarification, as well. Furthermore, the difference between a three percent rating and a ten percent rating is significant, and Employer wishes to exercise its right to perform an EME. AS 23.30.095(e).

By regulation, a hearing may be adjourned, postponed or continued from time to time at the discretion of the board. 8 AAC 45.070(a). If good cause exists to continue a hearing for further evidence, a future date may be selected. 8 AAC 45.070(j). The regulations set forth instances that constitute good cause, and include occasions where evidence was obtained by the opposing party after the request for hearing was filed, which is offered at the hearing, and due process requires the party requesting the hearing be given an opportunity to obtain rebuttal evidence. 8 AAC 45.074(b)(1)(K). For the reasons set forth above, granting Employer its requested continuance not only safeguards its due process rights, AS 23.30.001(4), but is also the best method to ascertain the parties' rights with respect to Employee's claimed PPI benefit.

AS 23.30.135. Therefore, the hearing chair's ruling, granting Employer its requested continuance, was correct.

2) Should Employer's objections to the testimony of Messrs. Brown and Adams be sustained or overruled?

In his opening statement, Employee contended part of the basis for his request for modification or set-aside of his reemployment plan is because his rehabilitation specialist engaged in "false advertising" by advising him the construction manager degree could be earned in two years, while Employee contends the degree cannot be earned in that period of time. As offers of proof for Messrs. Brown's and Adam's testimony, Employee contended they would testify the construction manager degree cannot be competed in two years.

Relevant evidence is generally admissible in workers' compensation hearings. AS 23.30.107(a); 8 AAC 45.120(e). Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Granus*. As will be analyzed below, stipulated reemployment plans may only "be altered for limited reasons, such as a showing of fraud, misrepresentation, or a failure to meaningfully or substantially comply with the statutory requirements." *Binder*. Thus, given Employee's contentions, it is possible his petition is based on either misrepresentation, or lack of statutory compliance, or both.

Employee further contends the purpose of his petition is to "save the confusion of another older guy like himself" from thinking the construction management program can be completed in two years. Both Messrs. Brown and Adams were observed to be considerably older than 18 to 22 years old, the ages of so-called "traditional" college students. Since both Messrs. Brown and Adams were attending college under vocational rehabilitation plans, albeit VA plans and not workers' compensation plans, both were returning to school after being in the work force for periods of time. Just as Employee, Messrs. Brown and Adams credibly testified regarding their own academic struggles while they were enrolled in the construction manager program.

Even though Messrs. Brown and Adams did not directly testify to any misrepresentations Mr. LaBrosse made to Employee, or directly to any statutory deficiencies of Employee's plan, that is not to say their testimony might not lend inferential support to other issues of potential consequence in this case involving Mr. LaBrosse's vocational guidance and counselling. Given the analysis and conclusions that follow, it remains undetermined whether Messrs. Brown's and Adams' testimony will "throw light" on Employee's petition. *Cook*. Therefore, this decision will again defer a ruling on Employer's objection pending further clarification of the issues. AS 23.30.135(a); 8 AAC 45.120(e).

3) Was the hearing chair's ruling, excluding the testimony of Mr. Culver, correct?

The board has broad statutory authority in conducting its hearings. *Cook*; *De Rosario*. Parties to a hearing are required to set forth the substance of their witnesses' testimony in advance, 8 AAC 45.112, and irrelevant testimony may be excluded, 8 AAC 45.120(e).

Here, Employee was almost completely unable to articulate the anticipated substance of Mr. Culver's testimony so that any meaningful evaluation of its relevancy could not be undertaken. Therefore, the hearing chair's ruling, excluding Mr. Culver's testimony, was correct. AS 23.30.135(a); 8 AAC 45.120(e). Furthermore, Mr. Culver was reportedly uncomfortable voluntarily testifying in this matter, and even if he were willing to testify, from what little information Employee provided regarding Mr. Culver's anticipated testimony, his testimony would have duplicated Messrs. Brown's and Adams' testimony, and therefore was properly excluded as repetitious. *Id*.

4) Is Employee entitled to modification or set-aside of his vocational rehabilitation plan?

As mentioned above, stipulated reemployment plans may only be altered for limited reasons, such as a showing of fraud, misrepresentation, or a failure to meaningfully or substantially comply with the statutory requirements. *Binder*. Employee's theory of his case is not clear. At hearing, Employee had a very difficult time maintaining his concentration. He struggled to articulate his theory of the case and answer questions from the panel. Although Employee readily engaged in oral communication, the content of his speech rapidly and frequently strayed

from the issues being discussed or the questions being asked. Employee labored to such an extent, the hearing chair even decided to facilitate elicitation of Messrs. Brown's and Adam's proffered testimony.

At the commencement of the hearing, Employee contended Mr. LaBrosse had engaged in "false advertising," and also generally contended the degree in construction management cannot be completed in two years. However, during the course of the hearing, Employee seemed to retreat from his initial contention Mr. LaBrosse had engaged in false advertising. On cross-examination, when Employee was asked if he thought Mr. LaBrosse had designed his plan to fail, Employee replied he did not know. Later, when asked an almost identical question by a panel member, Employee stated he did not think Mr. LaBrosse "shystered" him. When asked if Mr. LaBrosse misrepresented the plan to him, Employee answered, "no, in a sense, but how can an older guy make 17 credits in a semester?" Nevertheless, it remains unclear whether Employee contends his reemployment plan should be modified or set aside on the basis of Mr. LaBrosse misrepresenting the degree in construction management as a two-year degree, or on the basis of the plan not complying with the statutory requirement for it to be completed in two years, or both. Consequently, this decision will analyze Employee's petition under both theories.

Aside from Employee's general allegation of false advertising, he failed to point to any specific evidence of misrepresentation that might serve as a basis for modification on that basis. Neither is such evidence immediately apparent upon an independent review of the record. Employee's December 14, 2011 reemployment plan, along with the attachments to Mr. LaBrosse's April 7, 2012 progress report, indicates Employee was fully informed on the details of his reemployment plan, including the timeline and costs for its completion. Employee's plan accurately set forth the 65 credits required for the agreed upon degree, and while the UAF catalogue states the degree can be earned in four or five semesters, Employee's plan generously provided him with six semesters for him to earn the degree.

Contrary to Employee's purported understanding his plan required him to complete 17 credits per semester, in fact it only required him to complete less than 11 or 12 credits per semester (65 credits / 6 semesters = 10.8 credits; 71 credits / 6 semesters = 11.8 credits). Additionally,

Employee also dropped all of his classes during summer semester 2013, a significant fact Employee failed to explain even at hearing. Moreover, Mr. LaBrosse repeatedly warned Employee in his progress reports that avoiding the required courses was putting him behind in his plan. Mr. LaBrosse also consistently reminded Employee of the starting and completion dates of his plan. In fact, as Employer points out, the statute provides plans shall not extend past two years *from the date of approval*. AS 23.30.041(k) (emphasis added). Employer was the last party to approve the plan, and it did so on March 1, 2012. Therefore, by statute, Employee's legal entitlement to reemployment benefits potentially expired on March 1, 2014. *Id*. Yet, Employer did not controvert benefits until July 24, 2014, and then it only controverted reemployment benefits past May 20, 2014.

Even though evidence Mr. LaBrosse misrepresented specific plan details is not immediately apparent upon an independent review of the record, such a review does raise additional questions and concerns concerning other potential misrepresentations. The evidence in this case conclusively establishes the reason Employee was unable to complete his plan within the time allotted by statute was because he repeatedly dropped and avoided courses required for the degree in general; however, what is not clear is specifically why Employee dropped those courses. According to Mr. LaBrosse's testimony and his progress reports, it was because Employee wanted to maintain a high GPA. According to Employee, as best his testimony is understood, it was because the coursework was simply too difficult for him. Meanwhile, it also remains unclear why Employee or Mr. LaBrosse did not seek an earlier modification of the plan.

Mr. LaBrosse testified, since Employee was a high wage earner, any plan developed for Employee was required to retrain him to earn a correspondingly high remunerative wage. As Mr. LaBrosse explained, this requirement necessitated Employee "shooting . . . high," which he understood as a necessity for the plan to include a two year degree. Mr. LaBrosse further explained, lowering the plan objective to include a one year program would be a "trade-off," and "you run into remunerative wage concerns." Although this decision acknowledges the challenges presented by the Act's remunerative wage requirements, there are indications Mr. LaBrosse might have been "shooting too high" in this case.

For examples, Mr. LaBrosse testified Employee tested at 25 percent in math and at a 10.5 grade level in math computation, which he did not think was "bad." Although probably an inadvertent error on Mr. LaBrosse's part, Employee's highest score in the UAF ACCUPLACER testing was a 10.5 in the total reading portion of the test, not in math computation. Employee actually scored at a 6th grade equivalent level in math computation. Nevertheless, Employee's math scores were sufficiently concerning for Mr. LaBrosse to recommend proactive measures, such as advising Employee to undertake remedial math instruction with ALPA, delaying commencement of Employee's plan and building additional credits into Employee's plan for "developmental" instruction.

When Employee did begin the remedial math classes with ALPA, he had difficulty and "would usually have to go over it two or three times to figure out the word problems." Additionally, Mr. LaBrosse knew Employee was "somewhat intimidated at the prospects of attending university classes," and acknowledged it was a "big change" for Employee to go from being a shop manager to attending academic classes. Then, prior to registering for classes, Employee's academic advisor suggested he re-take at least the English portion of the ACCUPLACER test, because if he did not, Employee would require two developmental English courses, instead of just one. Here, it seems there were plenty of indications Employee's plan should have been modified even before it began. *Rockney*. Yet, for whatever reasons, it was not, and after Employee began to undertake college coursework, his plan began to fail almost immediately.

During the first semester, Mr. LaBrosse reported to the RBA Employee was having difficulty with his math class. Three months later, during the second semester, Mr. LaBrosse informed the RBA, Employee "didn't feel he was ready" for his math class that semester and had dropped it. Just as in *Rockney*, Mr. LaBrosse immediately recognized the dropped class would put Employee's plan "off track," but instead of advising Employee to seek modification of his plan, he instead advised Employee to apply for financial aid.

On one hand, Employer cannot be held liable for Employee's decision making or his own misconception of his academic potential. *Binder*. On the other hand, Employee's repeated low academic achievement test scores, and his continued efforts, semester after semester, to work

towards a college degree, even as he was dropping classes, certainly seem to suggest Employee's academic potential or his ability to complete the degree program could have been misrepresented to him. Perhaps Employee's misconception was the result of misrepresentation by Mr. LaBrosse, or perhaps Mr. LaBrosse just incorrectly concluded Employee's eagerness would overcome his measured academic potential. Or, perhaps there is some other explanation for Employee continuing to take and drop courses over the entire course of his plan without seeking a modification.

Another problem in determining the parties' rights in this matter lies in Employee's disjointed, oftentimes non-responsive, testimony. For examples, when Employer asked Employee why he did not approach the RBA or the Board to ask for a change to his plan, Employee replied he did not understand what Employer was asking and added he "did not do anything out of spite." Employee acknowledged he understood his plan was to last to last two years when he signed it, but then explained he did not "fully understand" at the time, and it was not until he "walked down that road" later, did he "truly understand," he could not complete his plan in two years. This latter testimony, in particular, could again suggest Employee's academic potential or his ability to complete the degree program were misrepresented to him, or it could simply be indicative of a "hindsight" challenge as in *Binder*, which would also distinguish this case from *Rockney* since Employee did not object to his plan until after it had expired.

Employee's previously mentioned difficulties at hearing, such as maintaining his concentration, articulating his theory of the case, answering questions and squarely addressing issues raise further concerns. *Richards*. Not only might Employee's observed behavior at hearing cast further doubt on the appropriateness of his reemployment plan to begin with - a plan that required him to obtain a college degree, but it also reinforces the degree to which Employee, who is not represented by an attorney, was dependent on Mr. LaBrosse to advise him on matters involving his plan. *Id*. As pointed out above, significant questions have emerged regarding Employee's understanding of his academic potential and his ability to complete the degree program, as well as why neither Employee nor Mr. LaBrosse sought an earlier modification to the plan. In short, there is not a preponderance of reliable evidence in the record to conclude

whether or not Employee's vocational rehabilitation plan should be modified on the grounds of misrepresentation. 8 AAC 45.120(e).

Turning to the issue of whether the plan complied with statutory requirements, as the Court noted in *Binder*, the requirements for plan development are set forth at AS 23.30.041(h). They are considerable, and include such activities as determining an occupational goal in the labor market and conducting inventories of Employee's technical skills, transferable skills, academic achievement and physical and intellectual abilities. §041(h)(1)-(2). The statute requires a plan that includes a detailed description of the plan, including a commencement date, a schedule and the plan's estimated length of time. §041(h)(3), (h)(5)-(6), (h)(8). Plan development must include a cost estimate for the plan, which includes items such as fees; tuition, books, tools, and supplies, §041(h)(4), as well as a "finding the by the rehabilitation specialist that the employee can be reasonably expected to satisfactorily complete the plan and perform in a new occupation *within the time and cost limitations of the plan*." AS 23.30.041(h)(9) (emphasis added). Most importantly for purposes of this decision, the Act required Mr. LaBrosse to develop a plan for Employee that would not exceed two years duration, and not cost more than $13,300. AS 23.30.041(k)-(l).

Mr. LaBrosse testified almost all of his plans cost more than $13,300, and if employees are capable of investing in a plan themselves, then he is "all for it." His testimony is problematic. The Act expressly provides the cost of the reemployment plan "shall be the responsibility of the employer . . . and may not exceed $13,300. AS 23.30.041(l). Employee's December 14, 2011 plan includes a page that sets forth the estimated costs of the plan, which called for him to assume $2,760 in books and supplies, and another $442 in unspecified fees, for a total estimated contribution of $3,202 in plan costs. When this amount is combined with the $13,169 in "direct vocational costs," Employee's total estimated plan costs were $16,371.

Prior to signing a reemployment plan, an employer's obligation is to review it for statutory compliance. *Binder* at 121. Had the parties in this case not agreed to Employee's plan, either party could have submitted a plan to the RBA for approval, and either party could have sought further review of the RBA's decision by the board. *Id.* (citing AS 23.30.041(j)). However, here

the parties did agree to the plan, which acts as an adjudication. *Id*. In this case, if the parties had submitted Employee's plan to the RBA for approval, it is quite possible the plan would not have been approved, either because it required Employee to pay costs, or because it exceeded the statutory maximum costs, or both. *Mosier*; AS 23.30.041(l).

In fact, *Mosier* discussed some of the potential difficulties with partially "self-funded" plans:

> Employee's notion he could have purchased some supplies himself was too speculative and non-specific. Books and other supplies are expensive, and an integral and crucial to academic training. If Employee's unspecified, partial self-funding fell through, he would have been left without the necessary materials to succeed in his … plan.

Id. at 7. In this case, Employee experienced the very difficulties *Mosier* anticipated. Employee worried about exceeding plan costs because of the cost of his textbooks. He experienced billing issues with the University, payment problems at the bookstore and as a result was worried about late fees. Employee was also apparently planning on using his time loss check to pay for his pre-algebra textbook, but the check was not expected until his first day of class, and in the meantime he had incurred car repair expenses. Employee finally did get his pre-algebra book, literally, on his way to class the first day of school.

Here, both parties potentially failed in their respective responsibilities. For whatever reasons, Employee failed to maintain his agreed upon class schedule, and Employer apparently failed to adequately review Employee's plan for statutory compliance. Employee's plan may not have meaningfully and substantially complied with statutory requirements because it required Employee to pay plan costs and because it exceeded the maximum plan cost. AS 23.30.041(l). Since both parties approved Employee's plan under the potentially mistaken belief it complied with statutory requirements, it remains possible the plan should be modified or set aside. AS 23.30.130(a).

In support of his petition, Employee apparently contends Mr. LaBrosse misrepresented the degree in construction as a two-year degree. This decision rejects that contention, but *sua sponte* raises the issue of whether Employee's academic potential or his ability to complete the degree program was misrepresented to him. *Summers*. Also in support of his petition, Employee

apparently contends his plan failed to comply with the Act's requirements because it somehow could not be completed in two years. This decision also rejects that contention, but *sua sponte* raises the issue of potential non-compliance with the cost mandates of AS 23.30.041(l). *Id.; Barlow*. Therefore, Employer should be provided sufficient notice of these issues so it can be given an opportunity to adequately represent its interest. AS 23.30.001(4); *Groom*; *Matanuska Maid*.

It is concluded additional evidence and legal briefing are required in order to ascertain the parties' rights. AS 23.30.135(a). Therefore, the record will be reopened to receive additional evidence and legal memoranda. 8 AAC 45.120(m). Additional evidence to be received will include further testimony from Employee and Mr. LaBrosse regarding their contacts, the selection of Employee's occupational goal and methods of training, as well as Mr. LaBrosse's vocational guidance and counselling. 8 AAC 45.445(1), (10), (11). Additional legal memoranda will include argument on whether or not Employee's December 14, 2011 reemployment plan, which called for him to assume $2,760 in books and supplies, and another $442 in unspecified fees, violated AS 23.30.041(l) such that the plan failed to "meaningfully or substantially" comply with statutory requirements as articulated in *Binder*. The parties may call additional witnesses, or submit other evidence and argument, as they see fit.

Finally, it is recognized these additional procedural requirements might pose challenges to Employee, who is unrepresented. Therefore, an attorney list will be provided to Employee along with a copy of this decision and order. *Richards*; *Bohlman*. Employee is encouraged to seek the assistance of counsel. *Id*. In the event he is either unable, or chooses not to retain counsel, Employee is encouraged to seek the assistance of a workers' compensation technician in the Division's Fairbanks office. *Id*.; *Dougan*.

5) Is Employee entitled to the difference between rehabilitation plan costs expended to date and the maximum costs afforded under the Act?

Given that the record will be reopened to receive additional evidence and legal memoranda, this issue will be held in abeyance until the record is next closed.

CONCLUSIONS OF LAW

1) The hearing chair's ruling, continuing the issue of Employee's PPI, was correct.

2) Employer's objections to the testimony of Messrs. Brown and Adams will be held in abeyance pending further clarification of the issues.

3) The hearing chair's ruling, excluding the testimony of Mr. Culver, was correct.

4) The issue of whether Employee is entitled to modification or set-aside of his vocational rehabilitation plan cannot be decided on the existing record. The record should be reopened to receive additional evidence and legal memoranda.

5) The issue of whether Employee is entitled to the difference between rehabilitation plan costs expended to date and the maximum costs afforded under the Act will be held in abeyance until the record is next closed.

ORDER

1) Employee's amended petition seeking additional PPI is continued.

2) The record is reopened on Employee's June 19, 2014 petition to receive additional evidence and legal memoranda as set forth above.

3) The parties are instructed to contact the Division's Fairbanks office within 30 days of this decision and order to request a prehearing conference. The purpose of the conference will be to discuss filing deadlines and other scheduling matters.

Dated in Fairbanks, Alaska on March 12, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Sarah Lefebvre, Member

/s/_____
Mark Talbert, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of 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 LYLE LUDWIG, employee / claimant; v. FLOWLINE ALASKA INC., employer; LIBERTY NORTHWEST INSURANCE CORP., insurer / defendants; Case No.

201100248; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on March 12, 2015.

/s/_____
Darren R. Lawson, Office Assistant II